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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES ARMY CORPS :  
OF ENGINEERS, :

Petitioner : No. 15-290

v. :

HAWKES CO., INC., ET AL., :

Respondents. :

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Washington, D.C.

Wednesday, March 30, 2016

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 11:07 a.m.

APPEARANCES:

MALCOLM L. STEWART, ESQ., Deputy Solicitor General,  
Department of Justice, Washington, D.C.; on behalf of  
Petitioner.

M. REED HOPPER, ESQ., Sacramento, Cal.; on behalf of  
Respondents.

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P R O C E E D I N G S

(11:07 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next this morning in Case 15-290, the United States Army Corps of Engineers v. Hawkes Company.

Mr. Stewart.

ORAL ARGUMENT OF MALCOLM L. STEWART

ON BEHALF OF THE PETITIONER

MR. STEWART: Mr. Chief Justice, and may it please the Court:

A jurisdictional determination issued by the Army Corps of Engineers is not final agency action because it does not order any person to do or refrain from doing anything and does not alter anyone's legal rights and obligations. The jurisdictional determination, or JD, expresses the Corps' opinion about whether a particular tract contains waters protected by the Clean Water Act. That stated opinion may affect the recipient's assessment of the options available to it, but it does not affect the actual legal status of those options.

This Court's precedents made clear that the practical effects on which Respondents rely are not a sufficient ground for treating an agency communication as final agency action.

1                   Now, the Respondents primarily emphasize the  
2 practical impact that the Corps' jurisdictional  
3 determination would have upon themselves, the recipients  
4 and the intended audience. And they say the  
5 jurisdictional determination indicating that the Corps  
6 believes there are waters of the United States on the  
7 Property will force them to choose among three  
8 unattractive options: One, would be seeking a permit  
9 which could be an expensive process and wouldn't be by  
10 any means certain to succeed; the second would be  
11 discharging pollutants, discharging fill onto the  
12 Property and taking their chances in a future  
13 enforcement action; and the third would be playing it  
14 safe, forgoing development entirely.

15                   And the problem with Respondents' argument  
16 is that that choice would have existed before the  
17 jurisdictional determination was issued. It would have  
18 existed if the Corps had never adopted its practice of  
19 issuing jurisdictional determinations upon request.  
20 It's simply a choice that is posed by the Clean Water  
21 Act.

22                   JUSTICE ALITO: If there were a provision of  
23 law saying that a jurisdictional determination by the  
24 Corps or by the EPA is binding on the federal government  
25 in future litigation, would that be reviewable?

1 MR. STEWART: I think if the -- if the  
2 statute said that, we would have a very different case,  
3 because in that case we would have something much closer  
4 to Bennett v. Spear.

5 In Bennett v. Spear, the Corps -- the Court  
6 was dealing with a biological opinion issued by one  
7 Federal agency, the Fish and Wildlife Service to another  
8 Federal agency, the Bureau of Reclamation, and it  
9 included an incidental take statement. And the terms  
10 and conditions of the incidental take statement affected  
11 the legal options that were available to the Bureau of  
12 Reclamation.

13 JUSTICE ALITO: Well, it would be a  
14 different case, but are you able to say whether that  
15 would be reviewable under the EPA?

16 MR. STEWART: Yes. I think if the -- if the  
17 Corps' jurisdictional determination were legally binding  
18 upon the EPA, if it foreclosed the possibility of an  
19 enforcement -- of an EPA enforcement action that was  
20 inconsistent with the terms of the jurisdictional  
21 determination, yes, we think that the JD would be  
22 judicially reviewable.

23 But I think it's important to -- to point  
24 out how far removed that is from the actual statute  
25 before us. That is --

1 JUSTICE ALITO: Well, let me just ask about  
2 how far removed it is. There is no such statute, that  
3 certainly is true, but there is a Memorandum of  
4 Understanding between the Army and the EPA, and it says,  
5 quote, "case-specific determinations" -- and I think  
6 that includes jurisdictional determinations -- "made  
7 pursuant to the terms of this Memorandum of  
8 Understanding will be binding on the government and  
9 represent the government's position and any subsequent  
10 Federal action or litigation regarding the case."

11 So is your -- would your argument be that  
12 because this is in a Memorandum of Understanding as  
13 opposed to a statute or a regulation, the situation is  
14 different, and that is insufficient to make the  
15 jurisdictional determination reviewable?

16 MR. STEWART: That would be one argument,  
17 but the other argument, and I think we've made this  
18 point in the reply brief, that particular Memorandum of  
19 Understanding was dealing with what are referred to as  
20 "special case determinations."

21 There are -- situations occasionally arise  
22 where the agencies perceive at the outset that there  
23 could be dicey questions. There could be questions of  
24 coverage on which the Corps and EPA might disagree. And  
25 since 19 --

1 CHIEF JUSTICE ROBERTS: Well, I don't -- I'm  
2 sorry to stop you right there, but I don't think that's  
3 right. I'm looking at the Memorandum as well, and it  
4 says in Section 2 -- no, I'm sorry, (4)(C)(ii), it  
5 describes nonspecial cases. It says, "For those  
6 projects not involving a special case, the DE" -- in  
7 other words, the district engineer, the Army Corps, not  
8 EPA -- "the DE shall make final determinations and  
9 communicate those determinations without a requirement  
10 for prior consultation with EPA."

11 So while it talks about the division of  
12 authority between special cases and the mine-run cases,  
13 it certainly says something about nonspecial cases.  
14 That's what Section 2 is titled "Nonspecial Cases."

15 MR. STEWART: But -- but we understand the  
16 language about the ultimate determination being binding  
17 on the government in subsequent litigation as referring  
18 to special case determinations.

19 CHIEF JUSTICE ROBERTS: Well, but I don't  
20 see how you can do that. I'm looking, you know, at  
21 6(a). It says all final determinations must be in  
22 writing and signed by either the DA -- either the Army  
23 Corps person -- or the regional administrator -- the EPA  
24 person.

25 And it says that those will be binding on

1 the government and represent the government's position  
2 in any subsequent Federal -- Federal action or  
3 litigation concerning that final determination."

4 It is referring to those that are -- it's  
5 referring to all final determinations by either the Army  
6 Corps of Engineers or EPA.

7 MR. STEWART: I -- I take it we're looking  
8 at the 1989 memorandum, Memorandum of Agreement?

9 CHIEF JUSTICE ROBERTS: It's the one --  
10 yeah, the one you cite in footnote 3 of the reply brief,  
11 where you say that it does not address mine-run core  
12 jurisdictional determinations.

13 MR. STEWART: I -- I think we would still  
14 think of the -- the general -- the final determinations  
15 as referring to special case determinations, but even if  
16 the Memorandum of --

17 CHIEF JUSTICE ROBERTS: Well, just to pause  
18 there, how can you do that when it says all final  
19 determinations signed either by the D -- the district  
20 engineer, who does not have authority over special  
21 cases, or the regional administration -- administrator?  
22 How can you read that as applying only to the special  
23 case determinations?

24 MR. STEWART: Well, we are -- it is saying  
25 final determinations of the DEA or RA made pursuant to



1 this MOA, which is referring to -- which is a MOA -- MOA  
2 that is referring specifically to special case  
3 determinations.

4 CHIEF JUSTICE ROBERTS: Yes, this MOA  
5 decides what's a special case and what's not, and it  
6 tells you what happens when it's not. So I just don't  
7 see how you can say that talks only about special cases.

8 MR. STEWART: I think even if the memorandum  
9 is read -- read that way -- if the memorandum is read  
10 that way, I don't think it reflects current government  
11 policy. It doesn't reflect the current understanding of  
12 the Corps and EPA. And I don't want to --

13 JUSTICE SOTOMAYOR: Well, that's fine. Give  
14 me an example of a case where the government has gone  
15 after someone, absent changed circumstances, who's had a  
16 negative JD in hand, any situation past, pre-memorandum,  
17 post memorandum --

18 MR. STEWART: I don't think --

19 JUSTICE SOTOMAYOR: -- where -- where you've  
20 actually taken the Army Corps' determination and said,  
21 we're going to go after this person anyway.

22 MR. STEWART: I don't know that it's ever  
23 happened, and I certainly don't want to suggest --

24 JUSTICE SOTOMAYOR: The fact that you're  
25 reserving your power is enough, even though by this memo

1 and practice you've never done it? You think that  
2 that's not within Bennett's second prong.

3 MR. STEWART: It's not within Bennett's  
4 second prong in the same way that in Franklin v.  
5 Massachusetts that -- the practice of the President had  
6 always been to transmit the figures and do the  
7 apportionment in accordance with the figures that were  
8 prepared by the Secretary of Commerce. But the Court  
9 said what mattered was there -- there was no legal --  
10 legally binding obligation on the President to do that.

11 I would also say that independent of the  
12 possibility of an EPA enforcement action, there is a  
13 more realistic possibility of a private citizen suit.  
14 The fact that the Corps concludes that jurisdictional  
15 waters are not present wouldn't preclude a citizen suit  
16 from being filed challenging that premise of the  
17 discharge activity --

18 CHIEF JUSTICE ROBERTS: Well, the question  
19 is, I think, whether it's final with respect to the  
20 Corps' determination, not with respect to whether  
21 somebody else might be able to bring a suit, and -- and  
22 I think what Justice Sotomayor is suggesting is that in  
23 practice and, what I was suggesting, in law is it's  
24 final with respect to the Corps.

25 MR. STEWART: And that would be the first

1 prong of Bennett. That is, even with respect to the  
2 Corps, it is still subject to reexamination if somebody  
3 presents new information, if the -- if in the course of  
4 a permitting process the applicant asks the Court to  
5 reconsider its prior jurisdictional determination, the  
6 Corps is not going to reconsider it sua sponte during  
7 the five-year period while it remains in effect.

8 CHIEF JUSTICE ROBERTS: Well, it seems to me  
9 what you are arguing, then, is that there are exceptions  
10 to what is otherwise a safe harbor.

11 MR. STEWART: It's -- it's not intended to  
12 be -- first of all, the jurisdictional determination  
13 that we're talking about here, the one that's actually  
14 being challenged, was one that concluded that  
15 jurisdictional waters were present. And it's clear that  
16 that sort of jurisdictional determination has no binding  
17 effect on anyone. The landowner is still legally free  
18 to disagree and to discharge --

19 CHIEF JUSTICE ROBERTS: Well, a great -- a  
20 great practical risk. I mean, the -- the Corps comes in  
21 and says these are jurisdictional waters. And you say,  
22 yeah, well, you can go ahead. You can still dump and do  
23 everything you want and take your chances that there  
24 will be a different ruling later on down the road.

25 MR. STEWART: And -- and the other -- I

1 agree that it -- it is a legally available alternative,  
2 but I agree a practically difficult one.

3           The other alternative that the -- the  
4 Property owner has is to seek a permit to discharge fill  
5 lawfully. And the permitting process, that really is  
6 the mechanism that Congress designed to allow people to  
7 get an advanced ruling on the legality of their  
8 discharges without subjective --

9           JUSTICE GINSBURG: Well -- well, it's very  
10 arduous and very expensive. So for a landowner who  
11 thinks, I shouldn't be under this Clean Water Act at  
12 all, and now they have to go through this whole process,  
13 it's going to take years and cost me a lot of money.

14           MR. STEWART: And -- and I think the  
15 legal -- our legal system confronts that type of problem  
16 and that type of tradeoff in a lot of different  
17 contexts. For example, that was exactly the argument  
18 that Standard Oil made in *FTC v. Standard Oil*.

19           The FTC has commenced an administrative  
20 proceeding in which Standard Oil was charged with  
21 violating the law. And there was -- I believe the  
22 phrase was reason to -- to believe. There -- there was  
23 a statutory threshold that the FTC had to surmount  
24 before administrative proceedings could be initiated.

25           And Standard Oil's complaint was I should be

1 able to challenge the initiation of the proceedings  
2 because it will put me through great expense to defend  
3 against them, it will impugn my reputation --

4 JUSTICE BREYER: Sometimes it doesn't. But  
5 I joined Bennett, and the reason I joined it is it says  
6 in the second prong, "Or from which legal consequences  
7 flow." So I would assume that nothing in Bennett -- or  
8 I would have dissented -- is intended to overrule what I  
9 think is the great case on the matter, which is Abbott  
10 Labs.

11 And Harlan, in Abbott Labs, explains  
12 completely and thoroughly what this Court has done in  
13 Frozen Food Express, what the Court did in Storer. And  
14 on the point you're now making, what he says  
15 specifically is the ICC order is right for review, even  
16 though it would have no effect until later. Someone  
17 decided to bring a particular action.

18 He says that in Storer, the Commission,  
19 policy determination is ripe, even though it would not  
20 issue a television license -- that's what the policy  
21 said -- even though no specific application was before  
22 the court. So it wouldn't take effect until later.

23 And the same thing is true precisely of the  
24 order in Abbott Labs itself. It was a statement of  
25 interpreting what the Commission would do, and nothing

1 was going to happen. Nothing happened, unless later on  
2 somebody decided to violate it. Much like this. And  
3 even if they violated it, nothing would happen, unless  
4 the Commission decided to prosecute.

5           So what Justice Ginsburg said was, once this  
6 is in effect, okay, now what happens? The person who is  
7 subject to it has to take certain steps because of the  
8 law. One, spend \$150,000 to try to get an exception and  
9 fail, or two, do nothing, violate it, and possibly go to  
10 prison. Those sound like important legal consequences  
11 that flow from an order that, in respect to the Agency,  
12 is final, for it has nothing left to do about that  
13 interpretation.

14           And B, is perfectly suited for review in the  
15 courts.

16           So we have harm flowing from a change in  
17 legal relations, we have an agency that has nothing left  
18 to do on this particular matter, and we have a court  
19 that is perfectly suited to review it. I would say it  
20 flows from Abbott Labs, almost QED. So what is your --  
21 what is your response to that?

22           MR. STEWART: Well, with respect to Abbott  
23 Labs specifically -- excuse me -- Abbott Labs dealt with  
24 a regulation that essentially required that on each  
25 instance where the -- the trade name of the drug

1 appeared, including it on the labeling, the generic name  
2 of the drug had to appear as well.

3 And the regulation, as rules typically do,  
4 was phrased as a -- as a directive. It said  
5 manufacturers shall do this. It was a legal -- legal  
6 command.

7 In Standard Oil, the court dealt with --  
8 said in various contexts, we have held that regulations  
9 are immediately reviewable as final agency action,  
10 although the court engages in a separate ripeness  
11 discussion.

12 The second thing I would say about Bennett  
13 is the Bennett court, I think, was quite careful not to  
14 rest its decision on the practical impact that the order  
15 would have on the recipient. It rested its decision on  
16 the fact that the biological opinion constrained the  
17 legal obligation options available to the Bureau of  
18 Reclamation, because only by complying with the FWS's  
19 terms and conditions could the Bureau of Reclamation get  
20 the immunity from Endangered Species Act liability that  
21 it wanted.

22 The third thing I would say, and to return  
23 to my prior point about FTC v. Standard Oil, it happens  
24 a lot in the law that we are confronted with a situation  
25 like this, where a particular government decision is

1 made. Be it an agency order, a district court order  
2 that denies a motion to dismiss for lack of subject  
3 matter jurisdiction or for failure to State a claim on  
4 the merits, and the losing party, the person who  
5 disagrees with the order, says I should be able to get  
6 immediate review of this because if I don't get  
7 immediate review, then even if I'm vindicated at the end  
8 of the day, I will be put to substantial burden and  
9 expense in the meantime.

10 JUSTICE SOTOMAYOR: Mr. Stewart, may I ask  
11 you, please don't panic by asking this question. And  
12 please don't resist it, because I know all your  
13 arguments resisting it. But assuming we disagree with  
14 you that that should be appealable, what's the narrowest  
15 way to right this that the government would like?

16 MR. STEWART: I guess if the -- if the Court  
17 ruled against us on the ground that it understood the  
18 EPA and the Corps to have entered into a binding  
19 agreement, such that the EPA would be foreclosed from  
20 taking action based on its disagreement with the Corps'  
21 jurisdictional determination, I -- I think if that were  
22 the gravamen of the opinion, it would be one that if the  
23 agencies wanted to fix it, they easily could, simply by  
24 issuing a new MOA clarifying their view of the -- the  
25 JD's effect.



1 JUSTICE KAGAN: Well, on the same lines,  
2 could I ask more generally? I mean, one of the reasons  
3 I find this case very difficult is because all over the  
4 Federal government there are compliance offices of  
5 various kinds whose function is to give advice to  
6 people. And often that advice comes with very specific  
7 recommendations. It says we will not take enforcement  
8 action if, or, we do not consider it a violation of law  
9 on the following facts.

10 And I guess what I want to know is your view  
11 of how this program compares to various other kinds of  
12 programs like this, whether it's the -- whether it's tax  
13 opinion letters, or SEC opinion letters, or FCC or  
14 whatever, how this program compares to those and where  
15 you could draw sensible lines, because mostly we want  
16 government agencies to do these things. We think that  
17 this helps people, to actually know what the government  
18 thinks about particular factual situations. So how do  
19 we draw lines in this area, in your view?

20 MR. STEWART: Well, I mean, it -- I guess  
21 part of the -- the difficulty I have with your question  
22 is -- or I should say I think if you were drawing lines,  
23 the jurisdictional determination at issue here would be  
24 fairly far removed from anything that ought to be  
25 judicially reviewable, because in many of the instances,

1 the informal advice that agencies are giving, it is  
2 specifically advice about the legality -- the perceived  
3 legality or illegality of specific contemplated private  
4 conduct.

5           Somebody may come to the Agency and say I'm  
6 thinking about doing X, would that be legal or illegal?  
7 And the Agency might say we think that that would be one  
8 or the other. We -- the likelihood that an agency would  
9 say to somebody that's legal and subsequently pursue an  
10 enforcement action is --

11           JUSTICE KENNEDY: Well, I think -- I think  
12 underlying Justice Kagan's question is that the Clean  
13 Water Act is unique in both being quite vague in its  
14 reach, arguably unconstitutionally vague, and certainly  
15 harsh in the civil and criminal sanctions it puts into  
16 practice.

17           What's the closest analogous statute that  
18 gives the affected party so little guidance at the front  
19 end?

20           MR. STEWART: Well, I think with respect to  
21 the vast majority of sites in this country, it's readily  
22 apparent whether the Clean Water Act applies; that is --  
23 and this point is somewhat removed from the actual facts  
24 of this case, but it happens all the time that at  
25 construction sites around the country, industrial

1 parties will dig up a lot of dirt and deposit it  
2 somewhere else. And they're doing something that would  
3 be illegal if it occurred in waters of the  
4 United States, but nobody thinks there's a problem,  
5 because in the vast bulk of its -- in the vast bulk of  
6 locations, there really isn't a quandary.

7           And if you imagine a statute that said  
8 before you can do anything like that, you have to come  
9 to the Corps and get advance assurance that these are  
10 not waters of the United States, it would be  
11 exponentially more burdensome.

12           I take your point that there are certainly a  
13 significant range of tracks where the application of the  
14 Act is authentically ambiguous. But the -- the thing I  
15 would say about that is Congress has designed the  
16 permitting process. There are other statutes in which  
17 regulated parties have no statutory mechanism for  
18 getting an advance ruling as to the legality of their  
19 conduct. They have to either do it and take their  
20 chances, or forego it, or perhaps seek informal advice  
21 from the Agency.

22           JUSTICE ALITO: Well, let's -- let's say in  
23 a case where there hasn't been a stand-alone  
24 jurisdictional determination and the landowner applies  
25 for a permit. The first part of the permitting process,

1 as -- as I understand it, would be a jurisdictional  
2 determination; is that right?

3 MR. STEWART: That's correct.

4 JUSTICE ALITO: Okay. And at the end of  
5 that, can the landowner get judicial review if the  
6 determination is that it -- it is subject to the Clean  
7 Water Act; or does the landowner have to go forward, in  
8 your view, with the entire -- all the rest of the  
9 permitting process before there is a possibility of an  
10 administrative appeal and judicial review?

11 MR. STEWART: I think it would still have to  
12 go through the rest of the permitting process. And --  
13 and part of the point for that is it -- it may be that  
14 during the rest of the permitting process, the landowner  
15 will have no prospect, except, perhaps, of an  
16 administrative appeal, of persuading the court to  
17 reexamine its jurisdictional determination. That  
18 becomes --

19 JUSTICE KENNEDY: Why isn't the permitting  
20 process a legal consequence under the -- the second --  
21 the second prong of Bennett?

22 MR. STEWART: It's not a legal consequence  
23 because the -- the landowner always has the legal option  
24 of discharging without a permit if it feels that --

25 JUSTICE BREYER: Then he goes to jail. I

1 mean, you put in your brief he risks it. In your  
2 brief -- and I think the point raised, of course, you --  
3 it's a good idea to give people advice. Abbott Labs  
4 takes care of that. One of the three important features  
5 of Abbott Labs is you look at it from the point of view  
6 of the Agency. And you say, how formal is it? What was  
7 there left to be done?

8           And in this case, we have a whole set, a  
9 whole part of the CFR which is devoted this, which goes  
10 to varied -- it's called "Jurisdictional Determination  
11 from Instructional Guidebook." The Army Corps of  
12 Engineers is brought in. Once they make a  
13 determination, it's called the Agency's official view.  
14 It's stated it remains in effect for five years, unless  
15 conditions change.

16           And you, in your brief, say that the  
17 issuance of an approved jurisdictional determination  
18 marks the culmination of the distinct process by which  
19 the Corps informs a landowner whether the Corps believes  
20 that covered waters are present.

21           So that doesn't sound like someone giving  
22 informal advice, and there's an appeal process. It  
23 sounds like a formal system of answering a question,  
24 which question is: Are these lands wetlands, Federal or  
25 not?

1                   Now, if you give some kind of informal  
2 advice, fine. You'd come to a different result. But  
3 I've just listed the things here that suggest it isn't  
4 at all formal. It's a five -- informal. It's a  
5 five-year formal, definite procedurally guided CFR  
6 determination.

7                   MR. STEWART: I would agree that the process  
8 that culminates in the approved jurisdictional  
9 determination is much more formal and -- and elaborate  
10 than the process that would usually culminate in the  
11 kind of advice letters that Justice Kagan is talking  
12 about.

13                   JUSTICE BREYER: All right. Well, if that's  
14 so, we have the other part of the problem.

15                   MR. STEWART: But I -- I don't think the  
16 formality of the process really has much to do with the  
17 basis on -- the practical basis on which Respondent  
18 wants to get into court; that is, if this had been a  
19 much less formal document, but it had still manifested  
20 the Corps' view that jurisdictional waters were present,  
21 I think Respondents would say they would be under  
22 exactly the same practical pressure either to go --

23                   JUSTICE BREYER: It isn't just the pressure.

24                   JUSTICE KAGAN: Indeed, that --

25                   JUSTICE BREYER: It's both. And the concern

1 on the other side, beyond the EPA, is this is a vast  
2 Federal government. And this vast Federal government  
3 can operate -- can issue many, many formal  
4 determinations on aspects of the statute. And if people  
5 are -- people are required to follow those, without  
6 court review, on penalty of going to jail if they don't  
7 just follow it, or are paying hundreds of thousands of  
8 dollars, what happens to judicial review? That, I  
9 think, is also a public policy question.

10 MR. STEWART: I agree that it's a public  
11 policy question, but as I was saying about Standard Oil  
12 and the -- and the same principle applies to our -- our  
13 legal system's general resistance to interlocutory  
14 appeals within the judicial system; that is, it happens  
15 all the time that a motion to dismiss is denied. The  
16 party who thinks that the complaint ought to be  
17 dismissed could say to an appellate court, I will have  
18 to pay hundreds of thousands of dollars litigating this  
19 case to its conclusion before I can achieve  
20 potentially --

21 JUSTICE GINSBURG: At least there's an  
22 opportunity to certify the question to say it's  
23 interlocutory, but there's a good reason why it should  
24 go up immediately. So there's nothing like 1292(b)  
25 here.

1 MR. STEWART: There is nothing like 12 -- I  
2 mean, there is the permitting process. There is an  
3 alternative mechanism to get into court, and during  
4 the --

5 JUSTICE GINSBURG: The jurisdictional  
6 determination, you -- you -- well, first, can you  
7 explain to me why the -- under the Clean Water Act, it's  
8 done this way -- it's not, you can request advice, and  
9 we'll give you advice. That's what we think now, but  
10 it's not binding. It's a deliberate attempt to make  
11 this determination formal and binding on the Agency.  
12 This is our position. It's a final adjudication of our  
13 position on the jurisdictional question.

14 MR. STEWART: I think it is formal, and the  
15 Corps doesn't revisit it because it -- sua sponte  
16 because it would usually seem like a waste of time,  
17 unless somebody had presented the Corps a reason --

18 JUSTICE GINSBURG: Why was it done this way,  
19 to make it this formal adjudication, rather than we'll  
20 give you advice?

21 MR. STEWART: I don't know why the -- the  
22 formality including the administrative appeal was  
23 provided. I think it was intended as a service to -- to  
24 landowners, that the Corps wanted to give the best  
25 advice. The only other thing I would say about --



1 JUSTICE GINSBURG: Was there -- was there  
2 anything in it for the EPA or the Corps? I mean, I  
3 understand we -- we want to inform the public of the  
4 Agency's position. But is it all altruism, or is  
5 there -- was there a reason that -- that the EPA or the  
6 Corps wanted it done this way?

7 MR. STEWART: It certainly has benefits to  
8 the enforcement agency in the sense that if landowners  
9 receive what the Corps believes to be accurate  
10 information about their property, the likelihood of  
11 their complying will be greater.

12 As Justice Kennedy, I believe, was pointing  
13 out, the preparation of a jurisdictional determination  
14 would be the first step in the -- the permitting process  
15 if -- if one was --

16 JUSTICE SOTOMAYOR: Mr. Stewart, in regular  
17 litigation, there is an inducement, potentially, for one  
18 or other party to appeal to delay the resolution of the  
19 case.

20 In this situation, I don't see that  
21 inducement as existing, meaning I doubt very much that  
22 landowners are -- who wanted to use their property for a  
23 particular purpose are going to appeal just for the --  
24 just to delay the government's adjudication of an issue  
25 that's going to either permit them or not permit them to

1 go forward.

2 MR. STEWART: I would agree there is less  
3 danger of manipulative appeals. There is still a real  
4 danger of duplicative appeals, because you could have an  
5 appeal on the jurisdictional question. The court says  
6 the court's jurisdictional determination was not  
7 arbitrary and capricious. Now you go through the  
8 permitting process. And there's a separate suit about  
9 whether the terms and conditions were too --

10 JUSTICE SOTOMAYOR: Well, I --

11 MR. STEWART: If I may, I'd like to reserve  
12 the balance of my time.

13 JUSTICE SOTOMAYOR: Yes. Go ahead.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
15 Mr. Hopper.

16 ORAL ARGUMENT OF M. REED HOPPER

17 ON BEHALF OF THE RESPONDENTS

18 MR. HOPPER: Thank you, Mr. Chief Justice,  
19 and may it please the Court:

20 We read the MOA to be binding in every way.  
21 We have found not a single word --

22 JUSTICE SOTOMAYOR: That doesn't help you  
23 for very long, because he just said they'll change it.  
24 So is that the argument that you want to rely on?

25 MR. HOPPER: I'm sorry?

1 JUSTICE SOTOMAYOR: He just said before that  
2 if we rule that way, they could change it. They'll just  
3 eliminate the MOA.

4 MR. HOPPER: Well, it's -- it's existing  
5 today. And in addition to the MOA, the fact that this  
6 is a site-specific adjudication suggests that this isn't  
7 binding -- that this is a binding determination. In  
8 fact, that's the very purpose of an adjudication. Also,  
9 as has already been mentioned, it represents itself  
10 as -- as being the official view of the Agency, the  
11 final agency action of the Agency, and will be relied on  
12 for five years. Even during the permitting process,  
13 that will not be revisited. All of those things suggest  
14 that this is a binding adjudication and --

15 JUSTICE KAGAN: Mr. Hopper, can I ask, you  
16 know, I was just looking through some other agency's  
17 rules and practices. And I'll just give you a couple of  
18 examples.

19 The FCC put out rules just this past year,  
20 and it says -- with respect to some particular matters,  
21 the FCC rules say, the bureau will not bring an  
22 enforcement action against a requesting party, a  
23 requesting party meaning somebody who requested an  
24 opinion, with respect to any action taken in good faith  
25 reliance upon an advisory opinion if all of the relevant

1 facts were fully, completely, and accurately presented  
2 to the bureau.

3 Now, there's another that I just came  
4 across. It's in just a standard SEC, Securities and  
5 Exchange Commission, opinion letter. And it says, based  
6 on the facts presented, the division will not recommend  
7 enforcement action to the Commission.

8 So I guess my question is, this appears to  
9 happen all over the place around the Federal government,  
10 people setting up offices whose specific purpose is to  
11 say come to us, tell us our problem, and we are going to  
12 give you a view, and not just a view; we're going to  
13 essentially commit that if you have told us the truth,  
14 here is your answer, and you can take it to the bank.

15 And I guess I want to know what's different  
16 about this than any of the other cases in which the  
17 Federal government does that. For good reason. Because  
18 people want to know these things.

19 MR. HOPPER: What you're describing, Your  
20 Honor, is what is -- what we -- would be referred to in  
21 this case as a preliminary jurisdictional determination.  
22 The regulatory process has built into it the option of  
23 an advisory, informational, preliminary jurisdictional  
24 determination to be issued to the applicant that is  
25 nothing more than advisory. It's not binding and can't

1 be appealed.

2 JUSTICE KAGAN: Well, these are -- this is  
3 very strong language that are in these letters. We will  
4 not recommend action. We -- we will not bring an  
5 enforcement action.

6 So, you know, just as you say, this  
7 basically says to us we were in the clear if we passed  
8 this. So do these letters.

9 MR. HOPPER: That is strong language, Your  
10 Honor, but not as strong as an adjudicative  
11 determination, where rights and obligations are actually  
12 decided.

13 In -- in this particular case, the process  
14 is so formalized, and -- and purports to be final, and  
15 purports to be binding, that it -- that's -- that it's  
16 quite distinguishable from the situation that you are  
17 describing.

18 JUSTICE KAGAN: Let me ask you about that,  
19 because that's certainly -- this -- this process does  
20 last a long time, and it's -- even Mr. Stewart, I think,  
21 would say this is a more formal process than many that  
22 are -- that exist around the Federal government.

23 But I guess I'm wondering about the  
24 incentives of the kind of distinction that you would  
25 make. Because it would suggest, you know, that agencies

1 should not -- should draw back, should not give a fully  
2 informed view, should not do the fact-finding that the  
3 board -- that that -- the Corps does here. You know,  
4 should -- should just make their processes less formal,  
5 but in -- in making their processes less formal, also  
6 less accurate and less helpful.

7                   And I guess I wonder who that benefits in  
8 the end.

9                   MR. HOPPER: Well, I think that the Agency  
10 has more to lose than the landowner has to gain by  
11 refraining from issuing these kind of formal  
12 adjudications. They indicate that they issue about  
13 54,000 permits. And most of -- and they -- 54,000  
14 nationwide permits and about 3,100 individual permits,  
15 and of those, only eight have ever been appealed  
16 administratively.

17                   So there's really no incentive for the --  
18 for the government here to draw back on this formal  
19 adjudicative process, because in almost all cases, the  
20 landowner is simply going to defer to the Agency on  
21 jurisdiction. And that -- that would be my response to  
22 you.

23                   JUSTICE KAGAN: Well, I guess I don't quite  
24 understand that, because it seems as though they could  
25 make it less formal, and they could provide less

1 assurance, and -- and still, there would be very few  
2 people who would want to run the gauntlet.

3 And so you wouldn't gain anything. All you  
4 would do was to lose something, and what you lose is  
5 accurate, reliable information provided to people about  
6 whether, in fact, these waters are -- fall within the  
7 Clean Water Act.

8 MR. HOPPER: Well -- well, that's the  
9 problem, because until there has been -- because the --  
10 the Clean Water Act is so difficult to -- because under  
11 the Clean Water Act, it is so difficult to determine,  
12 the reach of the Act, and it can only be done through  
13 expert analysis, you would never get the kind of  
14 detailed, reliable information that would define the  
15 scope of jurisdiction if you didn't have such a formal  
16 process, which would never occur in the type of  
17 generalized ruling that you've suggested, like through  
18 the preliminary JD.

19 The preliminary JD says we think you may  
20 have waters of the United States on your property. The  
21 approved jurisdictional JD says just the opposite:  
22 We've made a definitive determination; you can rely on  
23 that; you're obligated to get a permit, and you have a  
24 right to use property that is not subject to the waters  
25 of the United States.

1 JUSTICE KENNEDY: Tell us -- just -- it's in  
2 the briefs, but what -- what's the cost to get a -- a JD  
3 determination in a case such as yours?

4 Second, can the Agency, if we adopt the sort  
5 of rule that you want, simply decline to give  
6 jurisdictional determinations?

7 MR. HOPPER: All that's required in order to  
8 receive a jurisdictional determination under the  
9 regulatory guideline is to ask. And under the -- the  
10 regulatory guideline, the Agency is required to respond.  
11 The language says the Corps will give a formal approved  
12 jurisdictional determination if one is requested, even  
13 if they don't request it in that specific language.

14 JUSTICE GINSBURG: The --

15 JUSTICE KAGAN: Did Mr. --

16 JUSTICE GINSBURG: The point was made  
17 earlier that in -- that in court proceedings you have a  
18 jurisdictional question; you may think that the court  
19 was very wrong, but apart from 1292(b), you -- you are  
20 stuck there. You may have to go through a lengthy  
21 trial, and that's just too bad. It is a complete  
22 adjudication of the jurisdictional question. The  
23 Court's not going to return to it.

24 Even so, you don't get any kind of appellate  
25 review until there's a final judgment in the whole case.



1 Why should this be any different?

2 MR. HOPPER: I'm not sure that I follow your  
3 question, Your Honor. Would you please repeat that?

4 JUSTICE GINSBURG: Well, you -- you are  
5 urging that you should have -- you should be able to  
6 challenge in court this jurisdictional determination,  
7 right?

8 MR. HOPPER: Immediate judicial review.

9 JUSTICE GINSBURG: And -- and if you were in  
10 a district court, you would have no immediate right to  
11 challenge a jurisdictional determination.

12 So why should this -- this situation be  
13 different in an agency setting and in a court setting?

14 MR. HOPPER: That's -- that's the whole  
15 question at issue, Your Honor, is whether we can get  
16 district court or -- or judicial review.

17 JUSTICE GINSBURG: But if you were in the  
18 district court and the district court made a  
19 jurisdictional determination, you are in our power, and  
20 you disagree, and you think the case should be -- you  
21 should be allowed to be free to do what you will, and --  
22 but you've lost on the jurisdictional issue, you have to  
23 stay there. The -- the equivalent would be going  
24 through the permitting process.

25 MR. HOPPER: We don't know why we would not

1 be able to appeal that, Your Honor. That would be a  
2 purely legal question on summary judgment. We could  
3 appeal it as --

4 JUSTICE GINSBURG: A summary judgment, you'd  
5 have to take a judgment on the whole case. You can't  
6 appeal an adverse ruling on jurisdiction. You want to  
7 get out of the case?

8 MR. HOPPER: We don't believe that -- we  
9 don't believe that we need to go through the -- the  
10 permit process --

11 JUSTICE BREYER: The question is why.

12 JUSTICE ALITO: The difference between --

13 JUSTICE BREYER: Why. I think -- I think,  
14 if I understand the question, you go into district court  
15 and you say we're from Alaska, and here we are in  
16 Florida and we don't belong here, there's no  
17 jurisdiction. And the court says you're wrong. Now,  
18 that means you have to stay there. You have to go  
19 through the whole proceeding. It's going to cost you  
20 one million dollars. It's going to take a long time,  
21 but you don't get independent review of the  
22 jurisdictional question.

23 So I think the question is, if I may say  
24 it --

25 JUSTICE GINSBURG: Please.

1 JUSTICE BREYER: -- is -- is why doesn't  
2 that apply here, too? Because this is just like one  
3 part of the whole thing.

4 MR. HOPPER: It --

5 JUSTICE BREYER: Nothing --

6 MR. HOPPER: In what --

7 JUSTICE BREYER: -- is like the  
8 jurisdictional question.

9 MR. HOPPER: In what sense is it one part of  
10 the whole thing?

11 JUSTICE BREYER: Well, this says that  
12 nothing's going to happen to you until they decide that  
13 they're not going to give you a permit, which is part of  
14 it.

15 MR. HOPPER: Under -- under Abbott Labs --

16 JUSTICE BREYER: Yeah. I mean, I've made  
17 mine, but I'm going to the question.

18 MR. HOPPER: Yes. And -- and under -- I  
19 understand.

20 Under Abbott Labs this Court made the --  
21 made the determination that if one is in this catch-22  
22 situation, this no-win situation where even no action  
23 results in great loss because you have -- your -- your  
24 option is to only abandon the project at great loss, or  
25 go for a permit at great cost, or subject yourself to an

1 enforcement action at great cost, that that -- that type  
2 of Hobson's choice is sufficient to get you judicial  
3 review.

4 JUSTICE ALITO: Do you see any distinction  
5 between a jurisdictional determination by an Article III  
6 district judge and a jurisdictional determination by an  
7 enforcement Agency?

8 Do you think there might be an argument that  
9 it is tolerable to wait until the end of the case when a  
10 neutral Article III judge makes an adverse judicial --  
11 an adverse jurisdictional determination, but perhaps  
12 less appealing to wait till the end of the adjudication  
13 when the jurisdictional determination is made by an  
14 enforcement Agency?

15 MR. HOPPER: Well, there -- when an  
16 adjudication has already been made, there's no further  
17 adjudication to be made unless you're talking about  
18 requiring a permit prior to judicial review, and that's  
19 what we find objectionable, Your Honor.

20 JUSTICE KAGAN: Mr. Hopper --

21 MR. HOPPER: It's not an adequate remedy in  
22 court.

23 JUSTICE KAGAN: A more general way to ask  
24 this question. I mean, there's no doubt that some  
25 people face themselves in -- in real predicaments when

1 they're looking at the -- when they're trying to figure  
2 out what to do under the Clean Water Act. But of  
3 course, you know, that's true with respect to many  
4 regulatory statutes.

5           And I think what Mr. Stewart's point was,  
6 was that the predicament is the same regardless of the  
7 JD process. If the JD process didn't exist, your client  
8 would be facing the exact same predicament. And indeed,  
9 the JD's -- the JD process's reason for being is that  
10 it's supposed to help people in dealing with this  
11 predicament because it's supposed to provide them with  
12 information that they otherwise wouldn't have.

13           MR. HOPPER: Exactly.

14           JUSTICE KAGAN: Well, that seems to be a  
15 good reason for Mr. Stewart to prevail in this case.  
16 But the predicament is the predicament, and it's a  
17 predicament that comes from the Clean Water Act. The JD  
18 process is -- the only thing it's supposed to do is to  
19 give you more information so that you can make the  
20 choices that the statute puts to you.

21           MR. HOPPER: It does more than that. Under  
22 -- under Bennett, Your Honor, the second prong of  
23 finality is satisfied if any of three requirements are  
24 met.

25           Number one, a right is -- is determined, or

1 an obligation is determined, or legal consequences flow.  
2 By virtue of the adjudicative determination in this  
3 case, an obligation has been established that the --  
4 that Hawkes cannot use 150 acres of their property  
5 without being obliged to get a permit.

6 They also --

7 JUSTICE KAGAN: Well, that's the question,  
8 is whether there's any obligation or whether there's --  
9 it's simply information about what will happen given  
10 different courses of action.

11 MR. HOPPER: The Clean Water Act itself  
12 doesn't say anything about this particular property.  
13 And the -- the Clean Water Act doesn't cover all waters.  
14 And the only way to find out if there are jurisdictional  
15 waters which will trigger the requirement for a permit  
16 is to go through this laborious site-specific  
17 analysis --

18 JUSTICE KAGAN: That seems right. But it's  
19 also why people go to the Treasury Department for tax  
20 letters, and it's also why people go to the SEC for  
21 advice about what they can and cannot do with respect to  
22 securities. And it's also -- I mean --

23 MR. HOPPER: Not --

24 JUSTICE KAGAN: -- at least a hundred  
25 different examples.

1 MR. HOPPER: I'm not aware of them, all --  
2 those examples having an appeals process that results in  
3 a final Agency action, that by treatment and regulation  
4 and practice constitute a binding conclusion.

5 JUSTICE ALITO: Well, the premise of the  
6 question is that the Army Corps of Engineers is doing  
7 this just out of the goodness of its heart; that this is  
8 a lot of work for them but they just want to be nice to  
9 landowners and that's why they've set up this -- this  
10 process.

11 And maybe that's correct, although I  
12 understood what you were saying earlier to suggest that  
13 that's not quite how you see the process; that they do  
14 this for their own purposes because they -- it expands  
15 their enforcement power, because landowners who have a  
16 question about the status of their land have strong  
17 incentive to ask for a jurisdictional determination.

18 And if -- so that alerts the Corps to the  
19 fact that this is a property that might be subject to  
20 their jurisdiction. And if they issue a negative -- I'm  
21 sorry -- an affirmative jurisdictional determination as  
22 a practical matter, that's going to mean in most  
23 instances that the project is shut down. Is that --

24 MR. HOPPER: Well, if --

25 JUSTICE ALITO: Is that your argument?

1           MR. HOPPER: Yes. And even further than  
2 that, this is really a -- a problem of the Agency's own  
3 making. When Congress passed the Clean Water Act, it --  
4 it prohibited discharges to navigable waters. And as  
5 this Court addressed in *Rapanos*, that -- that's so  
6 broadly interpreted now that it covers virtually any wet  
7 spot in the country.

8           JUSTICE BREYER: It isn't just -- that  
9 isn't -- the issue, I think, is this -- what I thought  
10 your answer would be is that informal advice is not  
11 final Agency action normally.

12           There is a statute. It was passed in 1946.  
13 It's called the Administrative Procedures Act. It tries  
14 to divide such things with that word, "final," as  
15 rulemaking by the Agency, from accomplishing roughly the  
16 same result by never having a rule but just telling  
17 everybody informally what the Agency will do in such  
18 circumstances. It might be that the formal is, other  
19 things being equal, final Agency action in respect to  
20 that matter. It might be that the latter is not.

21           So I think what you're telling me is what I  
22 should do next is go read those Federal rules and  
23 regulations and see, is this more like informal advice,  
24 or is it more like formal rulemaking? And you have the  
25 latter, and they have the former, I guess. I don't



1 know. And I go and make up my mind. I guess that's my  
2 job in this instance.

3 MR. HOPPER: Well, to help you make up your  
4 mind, we would refer you to Frozen Food, which you've  
5 already --

6 JUSTICE BREYER: Yeah, yeah. I mean, if  
7 Frozen Food, Storer and Abbott Labs, and Bennett too,  
8 are examples of what falls on the formal final side of  
9 the line.

10 MR. HOPPER: Right.

11 JUSTICE BREYER: A few other things will be  
12 on the other side of the line.

13 MR. HOPPER: And in fact, if Frozen Food is  
14 virtually indistinguishable from this case, Frozen Food  
15 was essentially a jurisdictional determination case.

16 JUSTICE KAGAN: Well, Mr. Hopper, can I ask,  
17 do you think that this would count as a formal  
18 adjudication under the APA?

19 MR. HOPPER: Yes.

20 JUSTICE KAGAN: A formal adjudication under  
21 the APA.

22 MR. HOPPER: Yes. There was a -- the Agency  
23 applied the law to a specific set of facts, had a formal  
24 hearing, and --

25 JUSTICE KAGAN: Would it be --

1 MR. HOPPER: -- issued a final --

2 JUSTICE BREYER: It's not --

3 JUSTICE KAGAN: Would it then receive  
4 Chevron deference?

5 MR. HOPPER: Oh, I'm sorry. Well, not --  
6 not in that sense, no.

7 JUSTICE KAGAN: Yeah. Not in -- not in that  
8 sense, no. I wouldn't think so in that sense. I  
9 wouldn't think it's formal adjudication, and I wouldn't  
10 think it would receive Chevron deference.

11 And you know, there's a very fine opinion by  
12 Judge Sutton on this question, and he basically says the  
13 kinds of things that are not final, the kinds of  
14 advisory-type rulings that are not final are the ones  
15 where there's no Chevron difference given; that that's  
16 the proper line to draw. Those -- that's when you know  
17 that there's a kind of formality to it that should count  
18 with respect to the -- to the question of finalness.

19 MR. HOPPER: Well, the -- we -- we have met  
20 in every way the -- the finality standards of the  
21 Bennett second prong. We have identified right that has  
22 been determined, an obligation which has been  
23 determined. We've talked about legal consequences  
24 flowing. All of those -- any one of those satisfies the  
25 finality standard, and therefore, under the APA they

1 give us review.

2 JUSTICE KENNEDY: What -- what's the best  
3 example of a legal effect that follows from a  
4 jurisdictional determination as opposed to a practical  
5 effect? It seems to me that the practical effects are  
6 quite -- what's the legal impact?

7 MR. HOPPER: Increased risk of enforcement,  
8 because the very existence of the JD constitutes prima  
9 facie evidence of a violation if one were to discharge  
10 without a permit.

11 JUSTICE KENNEDY: That sounds to me  
12 practical, not legal.

13 MR. HOPPER: I -- I think that is legal,  
14 Your Honor. Also --

15 CHIEF JUSTICE ROBERTS: You --

16 MR. HOPPER: Also, I would suggest, as this  
17 Court recognized in -- in Sackett that this  
18 jurisdictional determination increases the risk of civil  
19 and criminal liability.

20 CHIEF JUSTICE ROBERTS: Does it affect the  
21 determination of willfulness on the part of the  
22 landowner?

23 MR. HOPPER: It does, in two -- in two  
24 respects, Your Honor. When the -- when the court is  
25 looking at an Agency at civil penalties, the Clean Water

1 Act requires that the court look at the good faith  
2 efforts, and -- and by extension, the bad faith efforts.  
3 And now that we have a -- a formal determination that  
4 these are waters of the United States, there's a knowing  
5 violation, which brings in potential criminal sanctions  
6 against the -- the landowner. So --

7 JUSTICE KAGAN: Mr. Hopper -- I'm sorry.  
8 Please.

9 MR. HOPPER: Yes.

10 JUSTICE KAGAN: Isn't that true in every  
11 case of an opinion letter, whether it's from the  
12 government or for -- actually, from a -- a private  
13 party, that, you know, there's always cases in which  
14 people say you had an opinion letter; it said X; you did  
15 Y. Or, conversely, I had an opinion letter; it said X,  
16 I did X. I mean, that happens all over the place in  
17 litigation with respect to every single compliance --  
18 piece of compliance advice that the government gives.

19 MR. HOPPER: Yes, with the -- with the one  
20 exception that -- that the weight that the -- that the  
21 court is going to give to those types of opinions and  
22 suggestions is much different than what the court will  
23 give to a final determination as to jurisdiction after  
24 having gone through a formal appeals process. So the  
25 weight is quite different.

1                   And let me also make a comparison between  
2 this and -- and Sackett, when this Court considered  
3 whether double penalties would apply in that case.

4                   You might recall that during oral argument,  
5 Mr. Stewart said that with respect to double penalties,  
6 that is, there -- there will be \$37,500 a day assessed  
7 because of -- of violation of the statute, and then  
8 \$37,500 a day because of a violation of the compliance  
9 order. He said that -- that that reading of the law was  
10 entirely theoretical, and didn't even know if it  
11 would -- would even fly.

12                   Here, we -- we don't have a -- a theoretical  
13 risk. We have an actual risk. The -- the Clean Water  
14 Act says a knowing violation shall result in a -- in a  
15 civil fine of no less -- or a criminal fine of no less  
16 than \$5,000 and no more than \$50,000 a day, and will  
17 increase the -- the prison time from one to three years.

18                   So even though you're right, a simple letter  
19 may put one on notice, it certainly doesn't have the  
20 same weight as a final binding determination.

21                   The main problems we have with the  
22 requirement of going through a permit process before one  
23 can seek judicial review under the APA are fourfold.

24                   First of all, the permit process adds  
25 nothing to the jurisdictional question. It doesn't add

1 any facts which are relevant, and it doesn't clarify the  
2 law. It is simply an idle act which the law abhors.

3 Secondly, it puts the -- the timing of the  
4 judicial review entirely in the hands of the Agency. It  
5 is an open-ended invitation to the Agency to delay  
6 forever the -- the final permit issuance, denying the  
7 landowner a right to ever have judicial review. That  
8 was important to this Court in -- in Sackett, when this  
9 Court was looking at whether an enforcement action -- if  
10 you could instigate an enforcement action -- whether  
11 that would be an appropriate remedy. And this Court  
12 said it wasn't because the -- the -- even though you --  
13 the landowner may be able to commit a -- a violation,  
14 has no control over when the enforcement action would  
15 follow.

16 So the fact that there's no control in the  
17 landowner to -- as to when the -- the judicial review  
18 would occur, we think is violative of the APA. The APA  
19 suggests immediate judicial review is required.  
20 That's -- falls under the presumption of reviewability.  
21 That's -- that's the intent of Congress.

22 Once finality has been established, it seems  
23 to me that -- that the Court should be looking at ways  
24 to facilitate judicial review and not find ways to deter  
25 it or delay it or obviate it.

1 JUSTICE GINSBURG: Suppose the response to  
2 your -- to your argument on the part of the Agency is,  
3 well, we didn't have to get into this in the first  
4 place; there's no statute that required us to hold these  
5 jurisdictional -- to make these jurisdictional  
6 determinations, so forget it. Your client is exposed to  
7 the very same things under the statute, right? So  
8 because the Agency has provided something that at least  
9 is some benefit to the public it served, it becomes  
10 subject to immediate review, where, if it -- if it had  
11 done nothing, all we had was the statute, then your  
12 client is still left with the same choices, right?

13 MR. HOPPER: You might recall, Your Honor,  
14 that this is a 12(b) motion where we take the facts as  
15 asserted in the -- in the complaint as -- as correct.  
16 And the complaint suggests that this jurisdictional  
17 determination should never have been issued; that --  
18 that the waters on this particular property are not  
19 waters of the United States, and a negative  
20 jurisdictional determination should have been issued.

21 CHIEF JUSTICE ROBERTS: I thought your --

22 MR. HOPPER: So that -- that's a unique  
23 result of the -- of the jurisdictional determination,  
24 and does not follow from the -- from the statute.

25 Under the statute, we should be exempt.

1 Under the jurisdictional determination, we have to get a  
2 permit.

3 CHIEF JUSTICE ROBERTS: I thought your  
4 answer might focus on the fact that this is of great  
5 benefit to the Agency, because by issuing the  
6 determinations, they are able to exercise extraordinary  
7 leverage without going through the formal enforcement  
8 process. So it -- it does give them -- it is a way for  
9 them to exercise their authority without effective  
10 judicial review. And that's a significant enforcement  
11 tool for them. So they might be unwilling to give it up  
12 if they had the option.

13 MR. HOPPER: I think there's no question  
14 they're not going to give it up. They have -- they have  
15 nothing to lose. The -- in almost all cases, the -- the  
16 recipient of the jurisdictional determination defers to  
17 the judgment of the Agency. And as you say, it is used  
18 for leverage. In fact, I would even say it -- to extort  
19 mitigation from a -- from an individual that they could  
20 never do if -- if they could establish, through judicial  
21 review, whether there are jurisdictional waters on the  
22 site. So I agree with you. I think that that's one of  
23 the problems.

24 We also think one of the difficulties with  
25 going through the permit process is the cost; not that



1 the cost is definitive, but if the cost is prohibitive,  
2 then it -- then it raises a -- a problem because you  
3 can't -- it raises, I think, a potential due process  
4 problem. I think it raises another problem of  
5 practicality.

6 JUSTICE SOTOMAYOR: How do I determine how  
7 much is too much? I mean, for some people, given their  
8 financial situation, \$3,000 is too much. And for  
9 others -- I don't know your client's financial  
10 wherewithal, but 10,000 would be reasonable. So when do  
11 we decide how much is too much?

12 MR. HOPPER: Well, I -- I don't think it's  
13 a -- a question that needs to be answered generally,  
14 because it can be answered specifically in this case.  
15 In this particular case, the landowner has been asked to  
16 provide over a hundred thousand dollars in -- in  
17 additional studies. You might recall that the -- the  
18 applicant actually started the permit process and was  
19 willing to go through the permit process until it became  
20 unreasonable and too cost prohibitive to proceed. And  
21 that's when they asked for the jurisdictional  
22 determination.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 Mr. Stewart, two minutes.

25 REBUTTAL ARGUMENT OF MALCOLM L. STEWART

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ON BEHALF OF THE PETITIONER

MR. STEWART: Thank you, Mr. Chief Justice.

First, with respect to the costs of the permitting process, there -- there's no basis for assuming that the permit process is systemically unavailable. As Mr. Hopper was referring to, the Corps' statistics indicate that a little over 50,000 general permit authorizations and a little over 3,000 individual permits are granted each year.

The process may be expensive in individual cases, but it is a process that is regularly invoked, and regularly invoked successfully. And in many instances, if the Corps and the landowner come to an agreement, the Corps offers to permit the activity on terms and conditions that the landowner regards as acceptable, that may obviate the need for a court ever to resolve the question of whether these were jurisdictional waters. And that's the kind of consideration that is often invoked as a justification for not submitting interlocutory review, that the issue on which a person seeks immediate review may turn out not to -- to be necessary to resolve after all.

With respect to the analogy to district court litigation, I think in Standard Oil, this Court has already taken the step of saying the same principle

1 applies to administrative adjudication.

2 My -- my point in analogizing to district  
3 court litigation is simply that this is not a quirk of  
4 administrative law. This is a fundamental precept of  
5 our legal system: That on the whole, we are more  
6 worried about piecemeal litigation than about deferred  
7 litigation.

8 Finally, formality is not the key. In  
9 Franklin and in Dalton, the.

10 Agency process at issue were intensely  
11 formal, intensely structured, and they were designed to  
12 have an effect on the President's decision-making. They  
13 were held not to be final Agency action because they  
14 were not legally binding on the President.

15 And the same thing is true here with respect  
16 to the binding effect of the jurisdictional  
17 determination on the recipient.

18 Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 The case is submitted.

21 (Whereupon, at 12:08 p.m., the case in the  
22 above-entitled matter was submitted.)

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