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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.)

23

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