

IN THE SUPREME COURT OF THE UNITED STATES

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 DEPARTMENT OF THE AIR FORCE,)

4 ET AL.,)

5 Petitioners,)

6 v.) No. 25-579

7 PRUTEHI GUAHAN, FKA)

8 PRUTEHI LITEKYAN,)

9 Respondent.)

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11

12 Washington, D.C.

13 Wednesday, October 7, 2026

14

15 The above-entitled matter came on for oral
16 argument before the Supreme Court of the United States
17 at 10:04 a.m.

18

19 APPEARANCES:

20 SOPAN JOSHI, Assistant to the Solicitor General,
21 Department of Justice, Washington, D.C.; on behalf
22 of the Petitioners.

23 CAROLINE A. FLYNN, ESQUIRE, Washington, D.C.; on
24 behalf of the Respondent.

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument this morning in Case 25-579,
5 Department of the Air Force versus Prutehi
6 Guahan.

7 Mr. Joshi.

8 ORAL ARGUMENT OF SOPAN JOSHI

9 ON BEHALF OF THE PETITIONERS

10 MR. JOSHI: Mr. Chief Justice, and may
11 it please the Court:

12 A permit application is not final
13 agency action. It's a request to someone else
14 to take action. Filing a permit application
15 triggers a back-and-forth process whose outcome
16 is, by definition, a moving target until a
17 decision on the permit is issued. Treating an
18 application as final would just lead to a
19 multiplicity of suits throughout a permitting
20 process, which I think defeats the whole point
21 of the finality requirement.

22 Now Respondent says that the
23 application reflects some internal Air Force
24 decision to continue these activities for the
25 next three years if Guam issues a permit. But

1 the "if" is precisely the kind of contingency
2 that makes this not final.

3 Respondent also points out that the
4 application enabled the old permit's expiration
5 date to be tolled or extended. But that is, at
6 most, an incidental or indirect effect of the
7 application, really, of Guam EPA's failure to
8 rule on the application. The direct and
9 appreciable legal consequences of that
10 extension flow from the terms of the old
11 permit, which Respondent has not challenged.

12 Now Respondent's claim also fails on
13 the merits. RCRA is a comprehensive statute
14 specifically targeting hazardous waste and
15 specifically specifying which environmental
16 review must occur at each step of a reticulated
17 permit process. Respondent's attempt to take
18 all of NEPA and just shove it into the
19 application stage is not only duplicative of
20 RCRA's requirements, which are the functional
21 equivalent, but inconsistent with RCRA's
22 specification of when each of those
23 requirements should occur through the
24 permitting process.

25 All of that said, I don't think you

1 need to actually address the interaction of
2 NEPA and RCRA in this case because NEPA, by its
3 terms, does not apply to non-final agency
4 actions. And so, if you agree with us, as I
5 think you should, that the application is not
6 final agency action, that would not only
7 resolve the threshold issue in the case; it
8 would also have the effect of resolving
9 Respondent's claim on the merits here.

10 I welcome the Court's questions.

11 JUSTICE THOMAS: Is there any point in
12 this process at which the Air Force has made a
13 final -- engaged in a final action?

14 MR. JOSHI: No, I don't think so. An
15 application itself is not agency action, it's
16 not final agency action, and it doesn't --

17 JUSTICE THOMAS: Well, what -- when
18 the permit is actually granted.

19 MR. JOSHI: The -- the permit, of
20 course, would be a final action of Guam EPA.
21 Now that's not an agency under the APA, but
22 there is a -- a separate judicial review scheme
23 to challenge Guam EPA's issuance of a permit,
24 and Respondent, if it meets the criteria for
25 bringing such a claim, is welcome to bring such

1 a claim if and when Guam EPA issues a final
2 decision on the permit.

3 CHIEF JUSTICE ROBERTS: So are you --

4 JUSTICE SOTOMAYOR: Let's --

5 CHIEF JUSTICE ROBERTS: -- saying that
6 there's no point at which the Air Force's
7 decision can be challenged? Because even if
8 the -- the -- the -- Guam goes ahead and says,
9 okay, you know, granted, you're saying you
10 don't have to go forward with it? You could
11 always change your mind? You could say, oh,
12 okay, now we're going to do something
13 different?

14 Your -- the -- the Air Force's action
15 is never final and, therefore, never
16 reviewable?

17 MR. JOSHI: The application is never
18 going to become final agency action. And there
19 is no cause of action under NEPA itself.
20 Congress didn't provide one. So any review
21 would have to go through the APA, and I don't
22 think the APA provides a cause of action for
23 this application at any point in time.

24 If Respondent wants to try to bring an
25 ultra vires claim, it can try and do that if it

1 meets the high bar for it. But that is the
2 option that Congress has specified for this
3 kind of claim.

4 JUSTICE KAVANAUGH: Even at --

5 JUSTICE SOTOMAYOR: Well, do they have
6 a cause of action against -- under Guam law
7 against the Guam EPA for its failure to demand
8 a NEPA?

9 MR. JOSHI: Yes, they would have --
10 well, let me be clear. Guam E -- there is
11 judicial review of a Guam EPA permit decision,
12 and if they satisfy the requirements for
13 that -- and the reason I'm hedging is
14 because --

15 JUSTICE SOTOMAYOR: Yes, that's why I
16 want to know in your --

17 MR. JOSHI: Yeah. I think -- I think
18 Guam EPA, under their regulations and rules,
19 they require -- they offer judicial review of
20 the permit only if you actually took part in
21 the permitting process beforehand, the public
22 comment, et cetera. And I believe -- I'm not
23 sure; Ms. Flynn can correct me if I'm wrong --
24 I believe Respondent attempted to submit a
25 comment, but it was out of time. It was like a

1 month after the comment period closed. So I
2 don't know if they're eligible to -- to, but --

3 JUSTICE SOTOMAYOR: Assuming --

4 MR. JOSHI: -- but assuming they
5 were --

6 JUSTICE SOTOMAYOR: -- assuming --
7 assuming they were --

8 MR. JOSHI: Yeah. So --

9 JUSTICE SOTOMAYOR: -- eligible, there
10 would be a cause of --

11 MR. JOSHI: -- they could -- they
12 could bring that claim against Guam EPA and say
13 you --

14 JUSTICE SOTOMAYOR: It does seem a
15 little counterintuitive for us to say we have
16 no jurisdiction but for you -- assuming that
17 they're eligible, for you to have to redo this
18 entire process if, at the end, a decision is
19 made that NEPA was required.

20 MR. JOSHI: Yes. We --

21 JUSTICE SOTOMAYOR: You're inviting --
22 you are inviting litigation to unravel perhaps
23 years of work.

24 MR. JOSHI: That is what the final
25 agency action rule is meant to implement. You

1 save all the challenges and -- and channel them
2 into one proceeding when everything's done.
3 And, yes, that means sometimes interlocutory
4 things are done and you proceed on that basis
5 until you get to a final decision and you have
6 to unwind it.

7 JUSTICE KAVANAUGH: But -- but --

8 MR. JOSHI: That's a formal feature --

9 JUSTICE KAVANAUGH: -- I guess I'm not
10 seeing how it would make any sense to say that
11 it's not final but then that NEPA still
12 applies, which is a possible outcome here,
13 because then you go, as Justice Sotomayor
14 correctly says, through the whole RCRA
15 permitting process and then you get done and
16 you go through the NEPA process. And that's
17 just completely counterintuitive and extends
18 everything and contrary to everything about
19 trying to get these things done expeditiously.

20 So what sense would it make to resolve
21 only the first question without the second
22 question or to resolve the first question to
23 say not final and the second question to say,
24 yeah, NEPA applies?

25 MR. JOSHI: Well, certainly, I don't

1 think you could do that last thing you said
2 because NEPA says it doesn't apply to a
3 non-final action, so --

4 JUSTICE KAVANAUGH: And if we don't
5 address it, some courts will probably say NEPA
6 applies.

7 MR. JOSHI: Yeah. And we have no
8 objection to your addressing it. I was just
9 pointing out that, as a matter of prudence,
10 there would -- there are --

11 JUSTICE KAVANAUGH: Well, that's what
12 I'm challenging, the prudence point --

13 MR. JOSHI: Yeah.

14 JUSTICE KAVANAUGH: -- because we're
15 leaving great uncertainty then whether, as
16 Justice Sotomayor raises the possibility of, of
17 two processes back to back, which seems like
18 the least sensible of all the options on the
19 table here at least as I see it.

20 MR. JOSHI: That's fair. I don't
21 think their claim would have merit if they ever
22 were able to bring it. But you're -- you're
23 absolutely right. That's precise -- that's one
24 of the reasons why we don't think the NEPA
25 process would apply to actions that are

1 entirely covered by the RCRA permitting
2 process. RCRA --

3 JUSTICE GORSUCH: But that's a --
4 that -- that -- that's a risk you're willing to
5 take. I mean, you're rolling the dice here and
6 the government is well-advised and chooses its
7 course of action with the input of scores of
8 lawyers, some of whom are before us, and if
9 you -- if you want to do the NEPA process, you
10 can, and if you don't, you don't, and you --
11 you take your chances, right?

12 MR. JOSHI: I'm not sure I understood
13 the question.

14 (Laughter.)

15 MR. JOSHI: We are certainly -- an
16 agency is -- can certainly --

17 JUSTICE KAVANAUGH: Well, you're
18 rolling the dice -- I'll -- the -- can I jump
19 in?

20 JUSTICE GORSUCH: Please.

21 JUSTICE KAVANAUGH: You're roll --
22 you're rolling the dice --

23 JUSTICE GORSUCH: If you can -- I
24 thought it was a clear question --

25 JUSTICE KAVANAUGH: You're --

1 JUSTICE GORSUCH: -- but I'm sure it
2 can be improved.

3 JUSTICE KAVANAUGH: No, it's not --
4 you're rolling the dice on the idea that you're
5 going to end up with two processes required
6 instead of one at the end of the day, I think.

7 MR. JOSHI: That -- that -- that's
8 fair. And, obviously, we raised the question
9 presented, we briefed it, both sides have
10 briefed it, so it's -- it's ripe for your
11 review. I think it's just this Court tends to
12 say if it's not necessary to decide something,
13 it's necessary to --

14 JUSTICE SOTOMAYOR: Well, how can --

15 MR. JOSHI: -- decide it, and --

16 JUSTICE SOTOMAYOR: -- we decide it if
17 we have no jurisdiction?

18 MR. JOSHI: Oh.

19 JUSTICE SOTOMAYOR: If there's no
20 final agency action, how are we deciding a
21 question over which we have no jurisdiction?

22 MR. JOSHI: Well -- well, this Court
23 has jurisdiction.

24 And I want to be very careful here:
25 Whether final agency action is a jurisdictional

1 requirement is a subject of a circuit conflict.
2 The Ninth Circuit says it is. The D.C. Circuit
3 says it isn't. I think the Fifth says it is.
4 So I don't want to weigh in on that. You
5 shouldn't either.

6 JUSTICE SOTOMAYOR: So, if it's part
7 of a circuit conflict, we have to address that
8 before we reach the second question.

9 MR. JOSHI: No.

10 JUSTICE BARRETT: Only if we
11 decided --

12 MR. JOSHI: So I want --

13 JUSTICE BARRETT: -- only if we
14 decided it wasn't final agency action.

15 JUSTICE SOTOMAYOR: Right, right.

16 JUSTICE BARRETT: Yeah.

17 JUSTICE SOTOMAYOR: Exactly.

18 MR. JOSHI: Right. If you do decide
19 that it's final agency action, that is not only
20 a threshold issue that would make it
21 potentially unnecessary to resolve the second
22 question presented, but, in fact, this case has
23 an oddity where that sort of ruling would
24 actually resolve QP 2 on the merits because
25 NEPA doesn't apply to non-final actions.

1 JUSTICE SOTOMAYOR: Can -- can I --

2 MR. JOSHI: But you --

3 JUSTICE SOTOMAYOR: -- ask one
4 fundamental question in this case?

5 How is -- how are RCRA and NEPA
6 irreconcilably conflicting? I mean, they may
7 cover some of the same ground, but NEPA starts
8 before a decision is made. RCRA occurs during
9 the decision. So how are they irreconcilably
10 conflicting?

11 MR. JOSHI: So we are not relying
12 on the "irreconcilable or clearly and
13 fundamentally conflict" line from Flint Ridge
14 or -- or the new NEPA amendment. We --

15 JUSTICE SOTOMAYOR: So read me the
16 statute. What does the statute say now?

17 MR. JOSHI: The statute now says that
18 a agency is not required to -- to prepare a
19 document under NEPA if ... the agency action is
20 excluded pursuant to ... another provision of
21 law.

22 And we view that as saying -- it
23 doesn't say expressly excluded; it just says
24 excluded. And the general-specific canon
25 and -- or if you like the term "functional

1 equivalence," which is what the lower courts
2 have used, that is a well-established legal
3 basis to say that a highly reticulated, more
4 specific scheme excludes application of the
5 more general scheme.

6 And we do think it -- it --

7 JUSTICE SOTOMAYOR: I'm sorry,
8 counsel. This -- these words,
9 "irreconcilable," "functional equivalent,"
10 where is it in any of our cases?

11 MR. JOSHI: No, that --

12 JUSTICE SOTOMAYOR: I -- I --

13 MR. JOSHI: -- that's why I said
14 the lower courts use the term "functional
15 equivalence."

16 JUSTICE SOTOMAYOR: I know, but I'm
17 not even sure where they got it. We know that
18 Congress explicitly does away with NEPA in a
19 bunch of different ways, and they know how to
20 do it because they do it frequently. But they
21 haven't done it in this context.

22 So tell me why we're looking for
23 functional equivalency when our conflict law
24 basically says it has to be irreconcilably --

25 MR. JOSHI: So --

1 JUSTICE SOTOMAYOR: -- irreconcilable.

2 MR. JOSHI: -- again, the -- the
3 irreconcilable or clearly and fundamentally
4 conflict is not the only time in which a more
5 specific statute can displace NEPA. So there
6 are multiple other ways in which that's true.

7 And --

8 JUSTICE GORSUCH: We -- we usually
9 say, though --

10 MR. JOSHI: -- I -- I want to be
11 clear --

12 JUSTICE GORSUCH: -- don't we usually
13 say that if you can do both, if you can comply
14 with both of Congress's commands, you should do
15 so?

16 MR. JOSHI: No, I don't think it's
17 that absolute. I think where a more specific
18 statute is just inconsistent with the general
19 one --

20 JUSTICE GORSUCH: Yeah, I didn't say
21 "inconsistent," counsel. I said, if you can do
22 both, there's no conflict. And we try to
23 reconcile and obey all of Congress's commands
24 normally. And I -- I thought the new NEPA, the
25 new statute, says you don't have to do it when

1 preparing such a document would clearly and
2 fundamentally conflict with the requirements of
3 another provision, right?

4 MR. JOSHI: We're relying on the
5 paragraph before then.

6 JUSTICE GORSUCH: Okay. All right.
7 Got you.

8 MR. JOSHI: The -- the one --

9 JUSTICE GORSUCH: Okay. All right.
10 Fine.

11 Either way, there's some sense that,
12 you know, you don't do it when there's a
13 conflict. And -- and that -- and that was a
14 response to me just a moment ago, conflict.

15 And I'm saying, let's say there's no
16 conflict. Let's say -- let's say you can do
17 both. There's some duplication maybe, but
18 there's no conflict.

19 MR. JOSHI: So I would view this as
20 being a conflict, and maybe we just differ on
21 how we're defining conflict. But I think, when
22 RCRA says: Here is a -- a -- a very
23 reticulated set of procedures for a permit, and
24 there are varying levels of environmental
25 analysis that take place at each step, so the

1 application has certain requirements in it
2 that -- by statute and by the regulations, and
3 in order to fill out an application, the Air
4 Force has to do some degree of environmental
5 analysis at that stage.

6 Then there's a review by the
7 permitting agency, here, Guam EPA. Then
8 there's public notice and comment. Then
9 there's a public hearing. Then there's written
10 responses to the comments.

11 So the environmental analysis under
12 RCRA, Congress has said and the regulations
13 say, is broken up into each discrete step of
14 the process.

15 What Respondent would have us do is
16 say: You have to do basically all of that work
17 before you even file the application.

18 I view that as an inconsistency. If
19 Statute 1 says here is the order in which you
20 do things and Statute 2 says, actually, do them
21 all right at once before you even start that --

22 JUSTICE SOTOMAYOR: I'm sorry, all
23 it -- all it's saying to you is, do them; when
24 you get into RCRA, you've got it done, so just
25 give them the answers. What's the problem with

1 that? That's not an irreconcilable conflict.

2 MR. JOSHI: It is --

3 JUSTICE SOTOMAYOR: I'm sorry, you
4 didn't use -- I'm looking at the provision of
5 the law now, and it says the preparation of
6 such document "would clearly and fundamentally
7 conflict with the requirements of another
8 provision of law." That's the current law,
9 "would clearly and fundamentally conflict."

10 MR. JOSHI: Yes, that's paragraph 3.
11 But I -- I think I would refer Your Honor to
12 paragraph 2, "The proposed agency action is
13 excluded pursuant to ... another provision
14 of law."

15 JUSTICE SOTOMAYOR: The problem is --

16 MR. JOSHI: That is picking up --

17 JUSTICE SOTOMAYOR: -- the --
18 you're -- you're tying 2 away from 3, but 3
19 tells you what the other provision of law has
20 to be.

21 MR. JOSHI: Oh, I don't -- I don't
22 think that's correct. I think 1, 2, 3, and 4,
23 Congress was clearly -- and I think the Seven
24 County footnote makes clear that Congress was
25 just trying to incorporate and codify what NEPA

1 was already understood to mean in the lower
2 courts.

3 I think 1 and 2 are picking up a
4 regulatory practice that had developed,
5 including under the former CEQ regulation.

6 JUSTICE GORSUCH: Well, can you
7 explain --

8 JUSTICE KAGAN: Mr. Joshi --

9 MR. JOSHI: Three and 4 are --

10 JUSTICE GORSUCH: Let me say I agree
11 with that. I'll just spot you that for the
12 moment. And I -- I'm sorry, I don't -- I don't
13 want to occupy too much time here.

14 But, under 2, which is what you're
15 relying on, it's -- it has to be excluded by
16 another provision of law.

17 MR. JOSHI: It doesn't say "expressly
18 excluded," and that's our argument.

19 JUSTICE GORSUCH: Oh, okay. All
20 right. Okay. So it's implicitly excluded is
21 your --

22 MR. JOSHI: Correct. Correct.

23 JUSTICE GORSUCH: Okay. And how is it
24 implicitly excluded?

25 MR. JOSHI: Under the specific-general

1 canon. That is a well-known doctrine of law in
2 which a more specific statute --

3 JUSTICE GORSUCH: Okay. But, if I
4 disagree with you about that, the general and
5 specific applies when there's a conflict?

6 MR. JOSHI: Then we -- then we lose on
7 the --

8 JUSTICE GORSUCH: Then you lose.
9 Okay. All right. Thank you.

10 JUSTICE KAGAN: So sorry to toss you
11 around, Mr. Joshi, but if we could return to
12 the final agency action question, which, as you
13 say, if you win on that, the whole thing is
14 over.

15 Does that mean that any agency action
16 that's subject to regulatory approvals is
17 non-final? I mean, you can imagine, for
18 example, a project, a big construction project
19 or a massive cleanup project or, you know,
20 you name it, that requires not just one but
21 multiple regulatory approvals: state, federal,
22 territorial in this case.

23 Is that just not, you know, because
24 it's contingent on regulatory approvals,
25 there's no way to challenge what appears to be

1 the agency decision to go ahead with this,
2 let's call it, massive construction project?

3 MR. JOSHI: That -- that's -- our
4 argument doesn't go that far here. I think our
5 argument --

6 JUSTICE KAGAN: Well, why doesn't it?
7 Like, how would you draw the line?

8 MR. JOSHI: Typically, the way these
9 things progress, if there's a large project
10 that requires multiple permits and other things
11 beside, is that the -- the permitting process
12 addresses only the stuff covered by that
13 particular permitting scheme. The overall
14 project itself might well be challengeable as
15 a final agency action in that circumstance.

16 There may even be -- and I don't -- I
17 don't know, I haven't canvassed --

18 JUSTICE KAGAN: Well, that seems a
19 little bit more -- a little bit fortuitous. I
20 mean, if I understand what you just said -- I
21 don't want to put words in your mouth -- but
22 it's like, then, if it's multiple regulatory
23 approvals, you're separating out the decision
24 from any given approval.

25 But, here, just because it's a single

1 regulatory approval, you're saying there's no
2 such thing as the decision putting aside the
3 contingency of the approval. And why should
4 that be, really, as a conceptual matter?

5 MR. JOSHI: As a conceptual matter, I
6 think it goes back to -- we pointed this out in
7 our brief -- when an agency -- I mean, most of
8 these permits, the applicants are private
9 entities, right? When an agency applies for a
10 permit, permission from someone else, the
11 agency isn't really acting as a sovereign
12 regulator. And the APA is all about being able
13 to review regulatory actions by agencies.

14 The agency is acting more in a
15 proprietary capacity. And so that piece of the
16 agency's action, it shouldn't be surprising
17 that it wouldn't qualify as final agency action
18 under the APA.

19 But a larger project, which the agency
20 is undertaking in its regulatory capacity, you
21 can see how you'd reach the opposite conclusion
22 there. And --

23 JUSTICE JACKSON: So this is -- so
24 it's -- it's the nature of this particular
25 permitting scheme that is leading us to the

1 result that you want? I mean, this is just
2 piggybacking on --

3 MR. JOSHI: I -- I think any -- any
4 permit application under this kind of scheme or
5 a similar scheme is not going to be final
6 agency action. I mean, you could look at the
7 definition of "agency action" in the APA.

8 JUSTICE KAGAN: But, when you say
9 that, is it that you're saying this is a
10 pleading problem, that they challenged the
11 permit application as opposed to the decision?
12 Or are you saying that it's a more fundamental
13 problem that even if they had pleaded it by
14 challenging the decision to -- to -- to -- to
15 continue operations, that that would be no good
16 because it's subject to some kind of
17 contingency?

18 MR. JOSHI: Yes. The -- the --

19 JUSTICE KAGAN: Which one? That
20 was --

21 MR. JOSHI: -- the -- the --

22 JUSTICE KAGAN: -- that was not a
23 "yes."

24 (Laughter.)

25 JUSTICE KAGAN: That was a -- the

1 first or the second?

2 MR. JOSHI: The second. I was saying,
3 yes, I understood the question. It's -- it's
4 more the second and also because the APA
5 doesn't really authorize review of internal
6 decisions. It's final agency action. "Agency
7 action" is a defined term. This Court has case
8 law on finality.

9 JUSTICE KAGAN: Well, I guess, in --
10 in my hypotheticals, it does seem to be final
11 agency action. In other words, the agency has
12 done everything it can do. It's deliberated to
13 the full extent that it wants to. It knows
14 what it wants to do. It's ready to do it.

15 Now it turns out that in life, the
16 agency is just not, in many circumstances, an
17 independent actor and needs certain things to
18 happen before the agency can actually follow
19 through on its commitment. But it is a
20 commitment.

21 And I guess the question is: If
22 you're willing to spot me that on the multiple
23 approvals kind of project, why isn't this the
24 same?

25 MR. JOSHI: I think because the -- the

1 only thing happening here is requesting
2 permission to do something that is covered by a
3 different regulatory agency, and it is that
4 regulatory agency that takes the regulatory
5 action that, if it were a federal agency, would
6 be subject to judicial review under the APA's
7 final agency action.

8 When an agency acts in a capacity no
9 different from that of a private individual,
10 that's just not going to be final agency action
11 under the APA. But if --

12 JUSTICE BARRETT: Would it be possible
13 for the Guam EPA to be designated as a lead
14 agency under NEPA? And then, if that happened,
15 what would the consequence be? I just don't
16 know how that would play out --

17 MR. JOSHI: Yeah. I --

18 JUSTICE BARRETT: -- because it seems
19 like, I mean, our intuition here is that,
20 really, the final action would be the approval
21 or disapproval of the application, which is on
22 the Guam EPA.

23 But could the Guam EPA actually have
24 to comply with NEPA? Because there is a
25 provision in NEPA that says you can have a

1 state agency designated --

2 MR. JOSHI: Correct.

3 JUSTICE BARRETT: -- as a lead agency.

4 MR. JOSHI: As a -- I suppose it's
5 theoretically possible. As it turns out, EPA,
6 since very shortly after RCRA was enacted in
7 the -- in the '70s, has a regulation that says,
8 when EPA is the permitting authority under
9 RCRA, which is still true, I think, in Iowa,
10 might be the only state where federal EPA still
11 does it, EPA will not prepare a NEPA analysis
12 if it's already doing the RCRA permitting
13 process because it's basically duplicative.

14 JUSTICE BARRETT: But EPA could
15 otherwise be sued under the APA?

16 MR. JOSHI: EPA could be sued under
17 the APA review provisions --

18 JUSTICE BARRETT: Yeah.

19 MR. JOSHI: -- for their final
20 actions, but, yes, and EPA --

21 JUSTICE BARRETT: Yeah. And the
22 problem here is Guam can't -- that Guam isn't
23 subject to the APA?

24 MR. JOSHI: Correct, but Guam has its
25 own judicial review --

1 JUSTICE BARRETT: Right.

2 MR. JOSHI: -- proceedings. And EPA
3 does not authorize any state or territory to
4 administer RCRA without that state or territory
5 having judicial review provisions as part of
6 the RCRA process.

7 JUSTICE BARRETT: One other question.
8 Are you -- is the government now conceding,
9 Mr. Joshi, that the application is the final
10 agency action that the Respondents are
11 challenging here? Because Judge VanDyke's
12 dissent raised the possibility that it was,
13 said, like, oh, that's been a moving target,
14 and maybe the final agency action they're
15 really complaining about is the decision not to
16 submit or do an EA or submit an EIS.

17 MR. JOSHI: So I will leave to
18 Ms. Flynn to describe what her client's actual
19 challenge is. It has been a moving target
20 throughout this litigation.

21 If it's the application, which is how
22 I read the briefing in this Court to be --

23 JUSTICE BARRETT: Right.

24 MR. JOSHI: -- that's not final agency
25 action. If it's what Judge VanDyke called

1 "application plus," which is the internal
2 decision to submit the application, we think
3 that's sort of ephemeral, and Biden against
4 Texas says you can't do that either.

5 If it's just the decision to conduct
6 these activities writ large, then I think
7 VanDyke -- Judge VanDyke has a point, which is
8 that decision was made in the '80s, when the
9 Air Force said, we need to dispose of these
10 waste munitions on the island and we're going
11 to do it as long as Air -- Andersen Air Force
12 Base is in operation.

13 JUSTICE KAGAN: Well, what if that's
14 not true, Mr. Joshi?

15 MR. JOSHI: But --

16 JUSTICE KAGAN: What if, in fact,
17 the -- the Air Force treats this as a kind
18 of -- you know, it made the initial decision,
19 but then it's going to keep making decisions,
20 whether it's every three years or every 10
21 years or whatever it is. I mean, no decision
22 is just thought, or very few, to -- to be
23 eternal.

24 So why wouldn't it be, well, there's
25 been a decision to re-up these operations, sort

1 of putting aside the formal application
2 process?

3 MR. JOSHI: I -- I still think the
4 decision to re-up for another three years is a
5 kind of internal decision that the APA simply
6 doesn't cover. What the APA covers are final
7 agency action. "Agency action" is a defined
8 term.

9 And if you look at it, it does use the
10 word "includes," but the things it lists are
11 all things that an agency does as a regulator
12 that directly dictate rights and
13 responsibilities. Rule: This is what the law
14 or policy is. Order: You must do this.
15 License: You have permission to do this.
16 Sanction: I'm punishing you. Relief: I'm
17 rewarding you.

18 These are all things that agencies do
19 as regulators. And seeking a permit and
20 permission to do something is not an agency
21 acting in that capacity covered by the APA.
22 The permitting agency is acting in that
23 capacity, and there may be judicial review for
24 that kind of action if it's a federal agency,
25 in this case, under the Guam scheme. But

1 that's how we view the world.

2 JUSTICE JACKSON: How much of your --

3 JUSTICE KAVANAUGH: So --

4 JUSTICE JACKSON: Go ahead.

5 JUSTICE KAVANAUGH: Go ahead.

6 JUSTICE JACKSON: I was just going to
7 say how much of your argument depends on the
8 fact that, in this particular circumstance,
9 Guam EPA retains or has the capacity to change
10 all of the terms and conditions?

11 MR. JOSHI: That is certainly
12 extremely helpful to us in that there is a
13 back-and-forth contemplated by this process.
14 I'll point out that in Franklin and Dalton,
15 there was no contemplation of a back-and-forth.
16 The President was just going to decide whether
17 to accept the Secretary's report or accept
18 the -- the base closure recommendation.

19 JUSTICE JACKSON: But, if he didn't --

20 MR. JOSHI: And that did not change --

21 JUSTICE JACKSON: -- but, if he
22 didn't, I guess that would change the initial
23 ask to some extent because then they would say
24 we don't want to do it anymore. In other
25 words, I -- Justice Kagan points out a very

1 interesting line-drawing problem depending upon
2 how you set this up.

3 And I suppose one response that
4 distinguishes the two categories that she laid
5 out is that in a world like this one, the one
6 that we have, the Air Force is really making a
7 proposal insofar as everything it says it would
8 like to do in its permit application is subject
9 to the permitting agency saying, no, you can't
10 do X, Y, and Z. So there isn't this sort of
11 big project out there independent of anything
12 the Guam EPA would say about it.

13 MR. JOSHI: I don't disagree with
14 that, but -- and, as I say, I think it's
15 helpful to us that the regulatory scheme
16 contemplates this back-and-forth and amendment.
17 But I don't think it's actually necessary, but
18 it's certainly helpful to us.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Justice Thomas, anything further?

22 Justice Alito?

23 Justice Sotomayor?

24 JUSTICE SOTOMAYOR: I'm reading the
25 question. I think the question presented

1 answers what position Respondent has taken. It
2 depends on whether the federal government's
3 submission to a state or territorial regulator
4 of an application to renew a previously issued
5 RCRA permit is final agency action.

6 So they've sort of disavowed Judge
7 VanDyke's view that what they were challenging
8 was the decision qua decision, not the
9 submission, correct?

10 MR. JOSHI: Sure. All the better for
11 us.

12 JUSTICE SOTOMAYOR: All the better for
13 you. So that question is really an interesting
14 one because you're right. You yourself concede
15 that there are circumstances in which a
16 proprietor could have made decisions even
17 though they're awaiting certain other permits.
18 I fear that you're seemingly suggesting that
19 that's not the case.

20 MR. JOSHI: In this case --

21 JUSTICE SOTOMAYOR: In this case,
22 you're happy to live with just the question
23 presented?

24 MR. JOSHI: This case is a RCRA permit
25 renewal that involves only --

1 JUSTICE SOTOMAYOR: The submission.

2 Okay.

3 MR. JOSHI: Yeah.

4 JUSTICE SOTOMAYOR: That's the only
5 issue before us in this?

6 MR. JOSHI: Correct.

7 CHIEF JUSTICE ROBERTS: Justice
8 Gorsuch?

9 JUSTICE GORSUCH: It's not like the
10 Navy could go ahead and continue dumping things
11 without a permit, right?

12 MR. JOSHI: Correct.

13 JUSTICE GORSUCH: Okay. And then, as
14 to the extension, so -- so there's no fact in
15 the world they could continue to do and operate
16 unless Guam's EPA says yes? Yeah?

17 MR. JOSHI: Correct.

18 JUSTICE GORSUCH: All right. On -- on
19 the extension, could that be challenged as
20 agency action by EPA, by Guam EPA, and allowing
21 you to continue to do it while the application
22 is pending?

23 MR. JOSHI: I -- I've thought about
24 this. I -- I suppose the only way you could do
25 it is if you thought -- because the only way

1 the extension kicks in is if Guam EPA doesn't
2 reach a decision on the permit by the
3 expiration date.

4 JUSTICE GORSUCH: But --

5 MR. JOSHI: And --

6 JUSTICE GORSUCH: -- but it operates
7 by rule, doesn't it, under --

8 MR. JOSHI: It operates by rule, but
9 it's -- it's only because Guam EPA didn't reach
10 a decision by the old permit's expiration
11 that --

12 JUSTICE GORSUCH: Is -- is Guam --

13 MR. JOSHI: -- it extends. And so
14 I -- I suppose you could, if Guam EPA allows
15 it, bring a suit for agency action unlawfully
16 withheld, but it seems like an awfully high bar
17 when the reason Guam EPA didn't rule initially
18 was they sent us a letter saying we have
19 received, underlined, significant public
20 comments that we want to take time to respond
21 to. So Guam EPA is doing its job.

22 And then they --

23 JUSTICE GORSUCH: I get the action
24 withheld, but I'm wondering about action
25 itself. Is -- is -- is it -- is it effectively

1 an action because they have a rule that -- I
2 mean, so what if they didn't do it in an
3 individual adjudication, they did it by rule?

4 MR. JOSHI: I -- I -- I don't -- I
5 don't -- I don't think so. And -- and if you
6 go down that route, it's really going to blow
7 up administrative law because this extension is
8 in the APA itself. It's in 558.

9 And so now every permitting regime
10 known to man, every single time there's a
11 pending application, just an application to
12 renew, you're going to have final agency
13 action, and plaintiffs are going to rush to
14 court. That can't possibly be what Congress
15 intended.

16 CHIEF JUSTICE ROBERTS: Justice
17 Kavanaugh?

18 JUSTICE KAVANAUGH: Just so I clarify,
19 following up on the Chief Justice's initial
20 questions, if it's not final, as you say, and
21 if the permitting agency is not a federal
22 agency, your position is that you can never
23 bring a challenge saying that NEPA was not
24 complied with, correct?

25 MR. JOSHI: Not quite. As I say, as a

1 practical matter, EPA requires every
2 non-federal permitting agency that's operating
3 the federal RCRA scheme, which includes 49
4 states and Guam and some other territories,
5 to have judicial review of the RCRA permit.

6 And so Respondent couldn't bring its
7 current claim about the application, but -- but
8 a different plaintiff, if a different plaintiff
9 thought that a RCRA permit should not issue
10 without an agency applicant's having completed
11 a full-blown NEPA analysis as a precondition
12 for getting that permit, they could bring that
13 claim and say, Guam EPA --

14 JUSTICE KAVANAUGH: Where? Where do
15 they bring that claim?

16 MR. JOSHI: They could either go to --
17 sue Guam EPA under the -- the judicial review
18 provisions of -- of Guam RCRA and say, Guam
19 EPA --

20 JUSTICE KAVANAUGH: Which are similar
21 to the state ones or --

22 MR. JOSHI: Yeah. Yeah.

23 JUSTICE KAVANAUGH: Mm-hmm.

24 MR. JOSHI: And they'll say, Guam EPA,
25 you shouldn't have issued the permit because

1 this applicant was required to do NEPA, and it
2 didn't do NEPA, and, therefore, you need to --

3 JUSTICE KAVANAUGH: Is that a matter
4 of federal law or Guam law at that point or --

5 MR. JOSHI: Well, Guam would --

6 JUSTICE KAVANAUGH: -- or state law?

7 MR. JOSHI: Yeah, Guam would provide
8 the cause of action. Whether NEPA is required
9 would be a matter of RCRA federal law. So that
10 would be one way to bring that kind of --

11 JUSTICE KAVANAUGH: So it still would
12 be the open question?

13 MR. JOSHI: It would be different from
14 Respondent's question. Respondent's question
15 is: Does NEPA need to be done as a
16 precondition just for submitting the
17 application? I'm in -- and -- and that would
18 lose because of the non-finality, but --

19 JUSTICE KAVANAUGH: I'm talking about,
20 if we don't answer Question 2, you're saying
21 the NEPA issue will still be alive. It'll come
22 up when you're challenging the state, here,
23 Guam's, issuance of the permit and raising the
24 argument that the permit should not have issued
25 because NEPA was not complied with, correct?

1 MR. JOSHI: That would be how it could
2 be raised. I don't think that claim would have
3 merit, but that's a way that you could get a
4 hearing for that claim.

5 The other way, as I mentioned at the
6 outset, would be, because the APA doesn't
7 provide review because there's no final agency
8 action here, I suppose a plaintiff in
9 Respondent's shoes could attempt an ultra vires
10 claim, a Hail Mary pass --

11 JUSTICE KAVANAUGH: Yeah.

12 MR. JOSHI: -- against the Air Force.

13 But, look, if they think it's that
14 unlawful, what we're doing, then they should
15 take their chances there.

16 JUSTICE KAVANAUGH: And -- and you
17 aren't worried about that litigation down the
18 road, that litigation uncertainty about the --
19 the permitting?

20 MR. JOSHI: We -- we really like the
21 Hail Mary language in NRSC, and we just don't
22 think that that sort of suit would succeed.

23 JUSTICE KAVANAUGH: No, I'm talking
24 about in a state -- the review of the state
25 permitting process.

1 MR. JOSHI: Look, there's a reason
2 we raised the second question presented.

3 JUSTICE KAVANAUGH: Okay.

4 MR. JOSHI: And -- and we -- and we
5 think NEPA does not apply to things covered
6 solely by a RCRA permit, but we acknowledge
7 that if you don't reach that issue here today,
8 that that would be an available --

9 JUSTICE KAVANAUGH: That's the way
10 it'll transpire. Thank you.

11 MR. JOSHI: Yeah.

12 CHIEF JUSTICE ROBERTS: Justice
13 Barrett?

14 JUSTICE BARRETT: Mr. Joshi, I want
15 to clarify one of your answers to Justice
16 Kavanaugh.

17 So you said EPA requires each of the
18 states and territories to have their own RCRA
19 review process. Is that by EPA rule, or is
20 that by statute?

21 MR. JOSHI: It is by rule. EPA's
22 rules for what a state or territory need to
23 show to demonstrate that their RCRA scheme is
24 at least the federal equivalent, at least as
25 protective as the federal scheme, one of it is

1 that it has judicial review provisions
2 available to -- to challenge.

3 And if you think about it, as we note
4 in our brief, we, the federal government and
5 our agencies, hold thousands and thousands of
6 these permits. So we don't really want to be
7 in a scheme where our permit is denied by a
8 state regulator and we have no judicial review
9 either. So it's in -- it's in our interest as
10 well to make sure that there is full judicial
11 review available in each of these states and
12 territories.

13 JUSTICE BARRETT: And does each state
14 and territory get to design its own judicial
15 review scheme, or is that dictated by EPA or
16 otherwise?

17 MR. JOSHI: I believe each state
18 and -- and territory will design it themselves.
19 I think, in most cases, it's got some
20 preconditions for when you can file, but,
21 otherwise, it just proceeds through the -- the
22 normal court system in those states, yeah.

23 JUSTICE BARRETT: So it's difficult
24 for you to imagine or identify a situation in
25 which a decision, say, not to do -- not to

1 comply with NEPA, not to file an EIS, would not
2 be subject to challenge -- I understand you
3 think the challenge would lose -- but would not
4 be subject to challenge in the state judicial
5 review process?

6 MR. JOSHI: They could bring that
7 claim in the state judicial review process.
8 As I say, I think it's meritless, but they
9 could bring it.

10 JUSTICE BARRETT: They could.

11 CHIEF JUSTICE ROBERTS: Justice
12 Jackson?

13 JUSTICE JACKSON: Yeah. On
14 displacement, I just want to be clear.

15 Are you relying on the functional
16 equivalence doctrine and not a textual basis,
17 or where -- where are we getting this?

18 MR. JOSHI: We are -- we are relying
19 on the standard principle of statutory
20 interpretation that the specific governs the
21 general.

22 Now my understanding is that lower
23 courts --

24 JUSTICE JACKSON: But doesn't that --
25 doesn't -- doesn't that necessarily assume

1 those two are actually covering the same thing?

2 MR. JOSHI: In a certain sense, yes.

3 JUSTICE JACKSON: You're just assuming
4 that. There's nothing about the text that
5 tells us that RCRA -- RCRA was designed to be a
6 more specific NEPA, or which one is the more
7 specific?

8 MR. JOSHI: We're -- we're looking at
9 the text of NEPA and the text of RCRA and we
10 are saying both of these cover similar areas.
11 Indeed, by hypothesis, Respondent's whole claim
12 is that NEPA covers this area that is also
13 covered by RCRA. But RCRA --

14 JUSTICE JACKSON: And so you only have
15 to do the more specific one in your view?

16 MR. JOSHI: You do the more specific
17 one under a standard application of that
18 principle.

19 Now my understanding is that the lower
20 courts that have done this analysis for the
21 last 50 years have put the label of functional
22 equivalence on it. We don't have any
23 problem --

24 JUSTICE JACKSON: Because it needs
25 something, right? I mean, it needs something.

1 I mean, we have two different statutes of
2 Congress.

3 MR. JOSHI: Sure. Sure. We have --

4 JUSTICE JACKSON: And as Justice
5 Gorsuch points out, we ordinarily say that if
6 you can do both, you need to do both.

7 MR. JOSHI: I -- I don't think that --

8 JUSTICE JACKSON: So, if we're
9 suddenly coming up with a principle that says,
10 no, you can -- you -- you need only do the more
11 specific one, there has to be some basis for --
12 for that determination, right?

13 MR. JOSHI: I think that's just
14 standard law. I mean, Home Builders,
15 Association of Home Builders against Defenders
16 of Wildlife, this Court encountered two
17 environ --

18 JUSTICE JACKSON: How do you
19 explain -- how do you explain then the kind of
20 other thrust of our case law that suggests
21 that, as long as those two different
22 requirements of Congress don't conflict, you
23 have to do both of them? But you don't get to
24 pick and choose, I'm only going to do the more
25 specific one because it is more specific.

1 MR. JOSHI: And I think -- I think
2 Home Builders illustrates what the word
3 "conflict" or "conflict of these two statutes"
4 actually means. It doesn't mean it's a
5 metaphysical impossibility to comply with both.
6 It can be practical difficulties, or it can
7 also be just inconsistency in the scheme.

8 Here, the inconsistency is in the
9 timing of the scheme. Both review schemes, if
10 you just look at the text of the statutes, seem
11 to require largely identical stuff, like
12 environmental considerations, alternatives,
13 public notice and comment, public hearing,
14 response to comments.

15 But RCRA says you do pieces of it at
16 different stages in the process, whereas NEPA
17 says you have to do it all before you even
18 embark on it. And that's an agency --

19 JUSTICE JACKSON: And as Justice
20 Sotomayor says, if you have to do it all before
21 you embark on it, then you've already done it.
22 And why can't you just use that in your
23 subsequent RCRA --

24 MR. JOSHI: Because it's an entirely
25 different set of comments and procedures.

1 Under the statute and the regulations --

2 JUSTICE JACKSON: So it's not the
3 same. So it's -- you said they were the same.
4 It's duplicative.

5 MR. JOSHI: It's -- it's --

6 JUSTICE JACKSON: It's either not the
7 same or it is the same.

8 MR. JOSHI: No, no, no. I'm saying,
9 substantively, they cover the same ground.
10 They are equivalent. But, as a procedural
11 matter, the fact that you went through an
12 entire NEPA process -- and, by the way, it's
13 not just the NEPA process, it's then three
14 years of litigation after it before you can
15 even start to get your permit.

16 JUSTICE JACKSON: Do they have -- do
17 they have different purposes? I mean, my
18 understanding of the reason why you're doing an
19 environmental review at the outset is because
20 you are informing the agency and others as to
21 whether or not this proposal really has certain
22 environmental impacts. And that seems to me
23 to be quite different than the purposes of the
24 various steps of RCRA.

25 So does that matter in our

1 consideration as to whether or not there's
2 substantial overlap or conflict?

3 MR. JOSHI: I don't -- I don't view
4 them as different. The point of RCRA is to,
5 you know, as Respondent says, to take a hard
6 look at the environment. And I think this
7 Court has said multiple times RCRA incorporates
8 a rule of reason. That is, you should do
9 the -- the environmental analysis that is
10 appropriate to the circumstances.

11 Well, RCRA, in my view, reflects
12 Congress's hard look at hazardous waste, and --

13 JUSTICE JACKSON: But Congress, just
14 to be clear, didn't say this is displacing
15 NEPA, right?

16 MR. JOSHI: No. But we think,
17 under standard principles of statutory
18 interpretation --

19 JUSTICE JACKSON: It does?

20 MR. JOSHI: Yes.

21 JUSTICE JACKSON: All right. Thank
22 you.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Ms. Flynn.

1 ORAL ARGUMENT OF CAROLINE A. FLYNN

2 ON BEHALF OF THE RESPONDENT

3 MS. FLYNN: Mr. Chief Justice, and may
4 it please the Court:

5 The Air Force was required to comply
6 with NEPA before choosing to continue open
7 detonation on Tarague Beach. And we can obtain
8 judicial review of that violation now.

9 On the question whether NEPA applies,
10 the government's position is simply atextual.
11 Congress has told us that NEPA is displaced
12 only when it is excluded pursuant to another
13 provision of law or there is a clear and
14 fundamental conflict between NEPA and another
15 law's requirements.

16 That aligns with this Court's
17 precedent, the strong presumption against
18 implied repeals, and Congress's longstanding
19 practice of drafting express exclusions to NEPA
20 when it wants them.

21 The government's response is that RCRA
22 is specifically about hazardous waste. But,
23 because the laws can be harmonized, that
24 observation can't carry the day. Indeed, NEPA
25 is meant to be harmonized with other

1 environmental laws in this way. It is what
2 agencies call an umbrella law. It is meant to
3 consolidate and streamline all required
4 environmental analysis at an early juncture to
5 ensure a better decision and better planning.

6 So, if the Air Force was wrong to
7 ignore NEPA here, the only question should be
8 when Prutehi Guahan can get judicial review of
9 that violation. The Air Force's decision to
10 continue OD at this location and submitting the
11 renewal application was not tentative, and its
12 application implementing the decision had,
13 among other things, the concrete effect of
14 authorizing open detonation operations past the
15 date when they otherwise would have ended.

16 The government is instead pushing a
17 rule where the fact that the Air Force's
18 decision required external sign-off means that
19 it can't be final as a matter of law, perhaps,
20 apparently, not even after that external
21 sign-off occurs. That does not align with this
22 Court's pragmatic approach to finality, and it
23 is especially senseless when it comes to our
24 claim of a procedural violation here.

25 Indeed, this Court has already said in

1 Ohio Forestry Association versus Sierra Club
2 that a litigant with standing can "complain of
3 a NEPA failure at the time it takes place for
4 the claim can never get riper." There is
5 nothing to be gained here by delaying our
6 challenge to the Air Force's own
7 decision-making about its own operations until
8 a non-federal agency has made a different
9 determination under a different law.

10 I welcome the Court's questions.

11 JUSTICE THOMAS: Ms. Flynn, normally,
12 in these administrative cases, we have a
13 regulatory body making a decision, and our
14 determination has to be whether or not that is
15 a final action for APA purposes.

16 In this case, we have a regulated body
17 applying to a regulatory body that you -- your
18 argument is that the application process makes
19 it a final decision.

20 Do you have another example where the
21 regulated body's decision to apply to a
22 regulatory body is a final decision for APA
23 purposes or a final action for APA purposes?

24 MS. FLYNN: Well, I can think of one
25 fact pattern in this Court's cases involving

1 another NEPA case, and that was the Winter
2 versus Natural Resources Defense Council case.
3 And, there, the Navy was continuing a series of
4 training exercises for another two years that
5 they had been doing previously, and they did
6 the NEPA analysis before embarking on another
7 two years of exercises.

8 The Court -- you know, finality -- the
9 Court did not decide finality in this case, but
10 nobody seemed to think that there was any issue
11 with --

12 JUSTICE THOMAS: Was that an --

13 MS. FLYNN: -- being able to review
14 the NEPA analysis in that case.

15 JUSTICE THOMAS: Was that an
16 application for a permit in order to do the
17 training? I'm -- my interest is that this is
18 an odd case because we are not talking about a
19 regulatory body making a decision to do
20 something itself without permission. We are
21 talking about a regulated body asking
22 permission to do something.

23 MS. FLYNN: I understand, and I
24 understand that that creates a contingency, but
25 I guess what I would say is that the

1 contingency -- the fact of the contingency
2 shouldn't be determinative.

3 So say that RCRA required the Air
4 Force to put all of the information it would
5 put in an application and just publish that
6 document. I don't think we would be having a
7 debate about final agency action there, even
8 though it's action about the -- the Air Force's
9 own operations.

10 Here, yes, that has to go and get
11 external sign-off from somebody else. But this
12 Court has found final agency action where there
13 is a contingency. For instance --

14 JUSTICE JACKSON: But isn't it because
15 your publication hypothetical doesn't
16 contemplate the back-and-forth that I talked
17 about with Mr. Joshi? I mean, it's -- it's --
18 if we had a world in which the requirement was
19 just the Air Force has to publish everything
20 that it was putting in a permit application --
21 that was your hypothetical -- there's nothing
22 to come of that in terms of potential changes,
23 in terms of it -- you know, conditions being
24 placed on it.

25 That's why I was focusing on the fact

1 that, in this particular scheme, we have the
2 Air Force making a proposal that is subject to
3 totally being rewritten and redone by the
4 regulator agency. And, in that case, isn't
5 there a finality problem?

6 MS. FLYNN: I don't think so because
7 this Court has been clear that the possibility
8 of revision of the agency's decision, that it
9 might change its mind, is not itself enough to
10 say that a decision where the agency reached
11 the culmination of its decision-making process
12 is non-final.

13 Here, yes, that possibility of
14 revision might come because it's provoked by an
15 outside entity, but I think that was also true
16 in Biden versus Texas, where this Court found
17 final agency action when there was -- DHS
18 Secretary issued a memo saying: I am
19 terminating immigration --

20 JUSTICE JACKSON: But that's -- but
21 the decision was within the agency's control.
22 I mean, any agency can change its decision, so
23 that would render, you know -- I don't know
24 that -- that that's really the critical point.

25 The point is we don't even know in

1 this situation what the final terms are going
2 to be because it's subject to the other
3 regulator responding. And they're taking a
4 long time, suggesting that they're actually
5 looking at this and are possibly going to come
6 back with significant revisions.

7 And so then we don't really have the
8 terms. What -- what would the Air Force even
9 be evaluating at this point when it hasn't
10 heard from Guam EPA about what this thing is
11 going to look like?

12 MS. FLYNN: Well -- so I think it does
13 matter here, and I think it should matter under
14 this Court's pragmatic approach to finality,
15 the kind of legal claim we're bringing here.
16 So our NEPA claim is attached to the -- the
17 process of decision-making the Air Force used
18 before it decided in NEPA's terms to propose
19 this major federal action and should not be --

20 JUSTICE JACKSON: That's not what your
21 QP says. You say submission, right? We're --
22 we're in --

23 MS. FLYNN: Right, but in --

24 JUSTICE JACKSON: -- the action is the
25 submission.

1 MS. FLYNN: So -- but, to be clear,
2 the NEPA violation, it's clear that it happened
3 before resources were committed in this
4 application. And because -- excuse me -- so,
5 because the NEPA claim there is nothing -- or,
6 sorry, I should say, because any revision that
7 happens by Guam EPA with respect to, you know,
8 particular procedures or something like that,
9 that will not affect whether --

10 JUSTICE JACKSON: The prior decision.

11 MS. FLYNN: -- the fundamental
12 decision to carry out these --

13 JUSTICE JACKSON: Yeah.

14 MS. FLYNN: -- open detonations at
15 Tarague Beach.

16 And we know that the Air Force is
17 settled on that decision because it has, in
18 fact, been acting on them past -- you know, by
19 continuing these detonation operations past
20 September 2021, when they otherwise would have
21 ceased.

22 JUSTICE KAGAN: Can you bring your
23 challenge and your demand for a NEPA analysis
24 after the Guam EPA acts?

25 MS. FLYNN: I am not aware of a basis

1 for us to bring this challenge on review of
2 whatever Guam EPA does. I understand that's
3 what my friend said here today, but Guam EPA
4 has no NEPA obligation. It has no obligation
5 to enforce the Air Force's NEPA obligations.

6 So whatever -- if, you know, we have a
7 basis -- if this permit is granted and we have
8 a basis to challenge it before Guam EPA, that
9 is a separate question.

10 JUSTICE KAGAN: Do you think that this
11 is a question that's just specific to Guam? If
12 we -- we were in a state rather than a
13 territory, could the challenge be brought and
14 the demand for a NEPA analysis made after the
15 EPA acted?

16 MS. FLYNN: No, not against the state
17 permitting agency. Now, you know, it's
18 possible we could just bring the same suit but
19 wait to bring it in federal court against the
20 Air Force until after the permit issues. I
21 think it would be odd to say that that's the
22 point of finality because it would make
23 finality turn on the decision of a non-federal
24 actor. It would somehow make the previous
25 decision by the Air Force non-final.

1 But we do think that there has to be
2 final agency action by the Air Force at some
3 point given that there is a NEPA obligation
4 here and we need to be able to enforce it.

5 We don't think waiting to sue until
6 after the permit issues serves anybody because,
7 if the NEPA, you know, review produces a
8 different application or, in our view, produces
9 a determination not to seek a application from
10 Guam at all because the Air Force decides to
11 treat its waste somewhere else that's not in
12 this location --

13 JUSTICE KAGAN: Well, let me do --

14 MS. FLYNN: -- they would have wasted
15 their time.

16 JUSTICE KAGAN: I'm sorry?

17 MS. FLYNN: They would have -- it
18 would wasted the permitting agency's time to
19 have ruled on that application and have
20 everybody double back at that point.

21 JUSTICE KAGAN: I -- I -- I guess the
22 reason to think it makes better sense to wait
23 is the one that Justice Jackson suggested, that
24 because this is -- there is a gigantic
25 contingency here and the permit might not be

1 issued in the way the Air Force would like it
2 to be issued, that seems like a big waste of
3 time if you can actually get review in the way,
4 you know, of -- of the NEPA obligation once we
5 know what the permit is going to look like.

6 MS. FLYNN: So that's not the way that
7 the NEPA obligation works. NEPA is very clear
8 that you have to undertake the analysis before
9 proposing a major federal action. And it also
10 talks about bringing entities like Guam EPA to
11 the table as what NEPA calls cooperating
12 agencies, and those are agencies who have
13 jurisdiction by law over some part of the
14 project or some environmental effects involved.

15 And so, if this had been done
16 properly, the Air Force would do its NEPA
17 analysis, bring E -- or Guam EPA in on the
18 process, get their views then, and then, if
19 they decided to go forward with a permit for
20 open detonation on Tarague Beach, submit that
21 permit, which, given that Guam EPA had already
22 been involved, I would assume would -- could be
23 approved readily.

24 But this is exact -- I mean, NEPA, the
25 whole point of NEPA is to make sure that

1 these -- this kind of evaluation is happening
2 before resources -- resources are committed,
3 such as resources in the form of teeing up a
4 plan for an application and before the die is
5 cast.

6 So, no, it would not satisfy NEPA for
7 that to all happen after the Air Force bakes
8 its plan, tees it up, and then says: Okay,
9 wait, now we're going to decide whether -- or
10 we're going to evaluate the environmental
11 effects of what we have already -- you know,
12 the ball we've already started rolling.

13 JUSTICE BARRETT: But aren't NEPA
14 challenges often made after the conclusion of
15 the process? I'm just thinking about the
16 posture of Seven County, which we decided in
17 2025.

18 I mean, I agree with you that if the
19 obligation applies, it's something that has to
20 happen at the front end, but it seems to me
21 like NEPA challenges do sometimes happen at the
22 back end.

23 MS. FLYNN: So a NEPA challenge,
24 because the route for challenging a NEPA
25 violation is through the APA, it requires final

1 agency action. And so, yes, it often happens
2 that a NEPA analysis is concluded at the same
3 time a decision is made on the major federal
4 action that is the subject of NEPA.

5 Here, we think that is what happened
6 because the Air Force decided it wanted to
7 continue these operations.

8 JUSTICE BARRETT: But I'm just saying
9 that it wouldn't be unusual. Justice Kagan and
10 Justice Jackson and Justice Kavanaugh too were
11 talking about the waste of time having the
12 whole process run before a court addressed
13 whether the NEPA obligation was complied with.

14 And I'm just saying it seems to me as
15 I understand it that that is often what
16 happens.

17 MS. FLYNN: So -- well, I guess I'm
18 not sure -- I'm not familiar with situations
19 that would happen like this, where a plan is
20 devised and the Air Force decides to put it
21 forward and then acts on that plan by
22 continuing open detonation at the site by
23 virtue of the extension and then doubles back
24 and does a NEPA analysis after the fact.

25 JUSTICE BARRETT: But I'm glad you

1 raised the extension because Mr. Joshi pointed
2 out that the legal consequence actually
3 didn't -- wasn't triggered by the application
4 itself but, rather, by the Guam EPA's failure
5 to act on the application before the expiration
6 date of the prior permit.

7 What is your response to that?

8 MS. FLYNN: So both are necessary
9 conditions. But I think the fact that the
10 submission of the application is a necessary
11 condition is all that is required for a legal
12 consequence for purposes of Bennett prong 2.

13 I don't think this Court's cases have
14 said it has to be a completely sufficient
15 condition on its own.

16 And I think one case that illustrates
17 this is Dalton versus Specter. So, there, of
18 course, the Court ruled that the Secretary's
19 action recommending certain military bases for
20 closure was not final agency action, but the
21 Court did find that the President's action was
22 final action. It's just that he's not an
23 agency.

24 And, there, the process didn't end
25 with the President. There was also -- the

1 President had to submit the base closures to
2 Congress, and there was a 45-day time built in
3 for Congress to essentially veto what the
4 President wanted to do by joint resolution.

5 So, there, you still had a period
6 of -- there was required inaction by another
7 actor, but this Court still found the
8 President's decision to be final action.

9 If there's one thing that I -- or one
10 aspect of my friend's presentation that I would
11 like to clarify, and that is whether or not a
12 finding that there was no final agency action
13 in this case could address the question of
14 whether or not there was a NEPA violation here.

15 So the relevant language in the
16 amended version of NEPA says that there's no
17 obligation to do an EIS if the proposed agency
18 action is not a final agency action. So that
19 means that if the actual operations themselves,
20 once fully authorized and fully permitted, if
21 those aren't a final agency action, then
22 there's no EIS requirement.

23 But I think -- I think it's hard to
24 dispute that the actual operations themselves,
25 once they're being carried out, is final agency

1 action.

2 And so I don't think that is a route
3 to avoid the text of NEPA, which is very clear
4 that NEPA is not displaced in the absence of
5 something like a clear and fundamental conflict
6 or an express exclusion of the kind that
7 Congress has repeatedly done over the years but
8 did not do for -- for RCRA.

9 JUSTICE KAVANAUGH: Isn't the oddity
10 of this case -- I think Justice Thomas alluded
11 to this -- the oddity of this case is that the
12 permitting agency is not a federal agency.

13 But Mr. Joshi responds to that by
14 saying: Well, even in that, here, territorial
15 permitting process, you can still raise the
16 argument that NEPA wasn't complied with.

17 And you came in and said: No, you
18 actually couldn't raise that argument.

19 And I just want you to explain why you
20 think that's the case.

21 MS. FLYNN: Yes. So I don't -- so, if
22 we were to challenge Guam EPA's decision on a
23 permit, whenever that decision happens, that is
24 done under Guam -- the equivalent of Guam
25 administrative law, so like the Guam APA. And

1 I don't see how we could go --

2 JUSTICE KAVANAUGH: Well, I think
3 Mr. Joshi was suggesting -- sorry to interrupt.

4 MS. FLYNN: Yeah.

5 JUSTICE KAVANAUGH: Mr. Joshi was --
6 you could raise a federal issue in that process
7 that would tee up a federal issue, I gather, is
8 what he was saying -- he can correct me if I'm
9 wrong on rebuttal -- but -- and that would be
10 that NEPA was not complied with.

11 MS. FLYNN: The Guam EPA has no
12 obligation to police the Air Force's compliance
13 with NEPA. They don't enforce NEPA. There's
14 nothing in RCRA requiring them to ensure that
15 NEPA was required -- was complied with. So we
16 would have no basis to say that Guam EPA did
17 anything wrong with respect to NEPA.

18 JUSTICE KAGAN: And just to make sure
19 I understood your prior answer to me, you think
20 the same is true of a state EPA?

21 MS. FLYNN: Yes, I think the same is
22 true of a state EPA because they also don't
23 have a NEPA obligation. And they have the --

24 JUSTICE SOTOMAYOR: Well, wait a
25 minute. I -- I'm totally lost here.

1 The Guam EPA has to accept an
2 obligation that complies with RCRA law,
3 correct?

4 MS. FLYNN: They have to --

5 JUSTICE SOTOMAYOR: And if RCRA law
6 requires an NEPA, wouldn't they be acting ultra
7 vires by approving something without NEPA?

8 MS. FLYNN: So they have to fulfill
9 all of RCRA's requirements. And I am just
10 saying that because NEPA's a --

11 JUSTICE SOTOMAYOR: And if that
12 includes -- and if that includes that the
13 application must have a NEPA analysis, why
14 isn't the failure subject to Guam review?

15 MS. FLYNN: Because I don't think
16 there's anything in RCRA that requires -- in
17 RCRA itself -- there's certainly something in
18 NEPA -- but I don't think there's anything in
19 RCRA that requires the NEPA analysis. So I
20 don't think that Guam EPA would have the
21 authority to do anything if the Air Force
22 failed to comply with NEPA.

23 JUSTICE GORSUCH: I certainly want --

24 JUSTICE SOTOMAYOR: There's --

25 JUSTICE GORSUCH: I'm sorry. Please.

1 JUSTICE SOTOMAYOR: No. I was just
2 going to say 16 states plus D.C. and Puerto
3 Rico have passed their own versions of NEPA in
4 their RCRA obligations. Does Guam need to do
5 that?

6 MS. FLYNN: Are you referring to the
7 state laws that are sort of the --

8 JUSTICE SOTOMAYOR: Yes. Exactly.

9 MS. FLYNN: -- equivalent of NEPA?
10 I'm not aware of any requirement for
11 states and territories to pass their own
12 version of NEPA as part of fulfilling their
13 duty under RCRA.

14 JUSTICE SOTOMAYOR: Okay. Then my
15 research -- my clerk's research I'll have to
16 look at more closely, but I thought there were
17 16 states and D.C. and Puerto Rico who, as part
18 of the RCRA process, require their own version
19 of NEPA.

20 MS. FLYNN: I'm not sure about the
21 states requiring their own version of NEPA. I
22 will say that, as that brief discusses, states
23 find NEPA compliance extremely beneficial to
24 them when they are ruling on RCRA applications
25 because this is a way to, for instance, ensure

1 that the location that is being teed up for
2 RCRA review is the least environmentally
3 destructive because NEPA forces the evaluation
4 of alternatives that we say wasn't -- that
5 didn't happen here, especially with respect to
6 alternative sites.

7 JUSTICE SOTOMAYOR: Thank you.

8 JUSTICE GORSUCH: Ms. Flynn, are you
9 saying that you'll -- I understand your concern
10 about not being able to sue Guam EPA for the
11 NEPA problem of the Navy, and I'm looking
12 forward to hearing Mr. Joshi's response to that
13 in rebuttal.

14 But are you saying you would never --
15 if you should lose here on the question, first
16 question presented, never be able to sue the
17 Navy for a NEPA violation? Are you saying
18 you -- you just don't see any avenue that your
19 client could pursue?

20 MS. FLYNN: I think, if this Court
21 found that there was no finality here because
22 there was still some kind of a contingency, I
23 would -- we would respectfully ask that the
24 Court say that there is final agency action
25 once that contingency is resolved so that we

1 could file our federal APA suit against the Air
2 Force then.

3 JUSTICE GORSUCH: Well, whether we say
4 that or not, I would think you would take that
5 position, that there's final agency action when
6 the Navy goes ahead and starts engaging in the
7 activities that you think require a NEPA
8 without having secured one.

9 MS. FLYNN: We would certainly take
10 that position.

11 I understood my friend to say here
12 today that, no, that's still not federal -- or
13 final agency action by the Air Force, that
14 all -- the only agency action being done here
15 is just by Guam EPA. I think that is strange
16 when you have --

17 JUSTICE GORSUCH: I think he's talking
18 about the RCRA -- during the RCRA application
19 process. Put that aside.

20 I -- I didn't hear him say -- and
21 maybe this is another question for Mr. Joshi on
22 rebuttal -- but I -- I didn't hear him say,
23 I -- I don't think, that there would never be a
24 point at which there could be final agency
25 action by actually engaging in the activity --

1 Navy's activities once -- once it secures a --
2 a license to do so.

3 MS. FLYNN: If I misunderstood him, I
4 apologize. But we fully agree there has to be
5 final agency action by the Air Force at some
6 point that we can challenge in federal court
7 under the APA. This can't just be -- because,
8 I mean, the Air Force is making a different
9 decision than whatever decision it is that Guam
10 EPA eventually makes under RCRA.

11 And I want to be very clear that our
12 challenge to the Air Force now is about the
13 procedural violation and the Air Force not
14 complying with federal law in reaching the
15 decision to proceed.

16 JUSTICE GORSUCH: Last -- last --

17 MS. FLYNN: We're not --

18 JUSTICE GORSUCH: -- last question.

19 How about agency action withheld? Have you
20 thought about that as an avenue?

21 MS. FLYNN: Because they didn't comply
22 with NEPA? Yeah, I think, you know, it's -- we
23 recognize that it's a broader theory to say
24 that, you know, a failure to comply with law is
25 agency action withheld.

1 JUSTICE GORSUCH: Unlawful.

2 MS. FLYNN: But we -- you know, that
3 isn't something that's been litigated in this
4 case because we -- we thought there was -- I
5 mean, there is action here in the form of this
6 application that is --

7 JUSTICE GORSUCH: But that -- that
8 question's not before us whether --

9 MS. FLYNN: It's not before you.
10 Correct.

11 JUSTICE GORSUCH: Yeah.

12 JUSTICE KAVANAUGH: I understood
13 Mr. Joshi -- so this will be for him on
14 rebuttal, but I'm asking it through you.

15 (Laughter.)

16 JUSTICE KAVANAUGH: I understood him
17 to say -- my understanding is the same as yours
18 about what he said before, that you could never
19 get in with an APA action even after the
20 permit's approved. That was your understanding
21 of what he said?

22 MS. FLYNN: It was, but he can correct
23 me.

24 JUSTICE KAVANAUGH: He -- he -- he can
25 clarify that.

1 On the second question presented,
2 which we may not get to, but if we do, I have
3 two questions.

4 One, what do you do with EPA's
5 interpretation since 1980 that NEPA does not
6 apply in a RCRA circumstance? We've often
7 said, of course, that a consistent,
8 longstanding agency interpretation of a statute
9 carries great weight.

10 MS. FLYNN: Yes. So that regulation
11 is just talking about EPA as the permitting
12 authority, so it's saying that --

13 JUSTICE KAVANAUGH: It doesn't say
14 that.

15 MS. FLYNN: Well, if you look, I
16 think, in context, that becomes apparent. But
17 you can also just look at the notice --

18 JUSTICE KAVANAUGH: But it doesn't say
19 that, right?

20 MS. FLYNN: It says when EPA is the
21 permitting authority.

22 JUSTICE KAVANAUGH: Mm-hmm.

23 MS. FLYNN: And when you look at
24 the -- the NPRM and the preamble for the final
25 rule, EPA explains where it got this rule from,

1 and it says we got this from the D.C. Circuit's
2 decision in Portland Cement, which is a
3 functional equivalence case.

4 And that case is very, very clear that
5 the rule the D.C. Circuit was devising applies
6 just to environmental agencies enforcing
7 environmental law. And I think there's another
8 Federal Register rulemaking from 2007 -- it's
9 in our brief -- describing the regulation as
10 applicable to certain EPA actions.

11 So we don't think that touches on the
12 question here about the permitter -- the
13 permittee agency, and for that reason, there
14 would be nothing for this Court to give weight
15 to in evaluating the question here.

16 I would also say that this Court said
17 in Epic Systems that the job of reconciling
18 different statutes is a job for courts, not
19 agencies. So I'm not sure this is the kind of
20 topic of how to, you know, interpret NEPA
21 alongside RCRA. That is squarely in the
22 agencies' wheelhouse.

23 JUSTICE KAVANAUGH: And the second
24 question, which is, substantively speaking,
25 what are the few things that would happen under

1 NEPA that don't happen under RCRA?

2 MS. FLYNN: Sure.

3 JUSTICE KAVANAUGH: Substantively.

4 MS. FLYNN: Right. So I think the
5 alternatives analysis that NEPA requires, which
6 is, like, the heart of NEPA analysis, is
7 important. Here, for instance, we think that
8 alternative -- that NEPA would have required
9 the Air Force to consider not just alternative
10 procedures or modes of treatment but also just
11 doing -- carrying out open detonations
12 somewhere that was not on Guam, like shipping
13 this waste to the mainland and carrying out
14 these operations at another base.

15 That is not something that Guam EPA
16 would be required to consider under RCRA, and I
17 don't think they could deny the permit on that
18 basis because it's not something that RCRA
19 authorizes them to do.

20 The other thing I think is timing. I
21 discussed about how NEPA envisions that this is
22 all done before the plan is teed up, including
23 bringing Guam EPA to the table. But also, the
24 public comment happens at that early stage too.
25 And it would be public comment to the Air Force

1 as decision-maker, not just public comment to
2 Guam EPA, which, yes, RCRA provides for, but,
3 here, our client didn't have a route to speak
4 to the Air Force and the military in trying --
5 especially in helping to develop or have them
6 evaluate those alternatives.

7 JUSTICE ALITO: Do you think our case
8 law supports the proposition that a newer
9 statute that deals very extensively with a
10 specific problem cannot displace an older
11 statute that deals with a much broader range of
12 activities, only if it is impossible to comply
13 with both of those statutes?

14 MS. FLYNN: I do. I think this
15 Court's cases have required a conflict. I
16 think the Reading Law treatise says the same
17 thing, that the specific-general principle is
18 only when there is a conflict to be reconciled.

19 I think Epic Systems, again, is a good
20 example of this. There, there was a
21 specific-general argument being made, and the
22 Court said, no, we can harmonize these statutes
23 and that is where our duty lies.

24 JUSTICE ALITO: You think that the
25 duty to harmonize is consistent with a

1 requirement that it must be absolutely
2 impossible to comply with both?

3 MS. FLYNN: Yes, but also certainly
4 here, where Congress has stepped in in NEPA and
5 told us what the ground rules are for
6 displacement and said not just that there has
7 to be a conflict but there has to be a clear
8 and fundamental one.

9 And that comes from this Court's
10 decision in 1976 from Flint Ridge, where the
11 Court said, because NEPA has this language
12 about how agencies must interpret and
13 administer their laws to the fullest extent
14 possible with NEPA, that language was
15 specifically trying to avoid a situation like
16 this, where an agency, as the Court put it,
17 shunts aside the NEPA obligation in the
18 bureaucratic shovel -- shuffle.

19 So, you know, I think, again, NEPA is
20 designed to do this kind of thing. When you
21 look at even the current Department of War NEPA
22 procedures, you can see all the ways in which
23 they say: Integrate review under other
24 environmental laws. Do it all at once. Make
25 sure you don't have duplicative documents.

1 Make sure the documents do cover everything
2 they need to cover and name all the permits
3 that are required and everything like that.

4 But this is -- this is a strength of
5 NEPA, is to make sure that they can cover all
6 the fronts at once and not have duplication
7 because it's just done once.

8 JUSTICE BARRETT: Ms. Flynn, Justice
9 Thomas's interchange with you, I mean, he
10 pointed out that this is kind of an unusual
11 situation. And this situation in which you're
12 arguing that an application is final agency
13 action is perhaps born of the fact that this is
14 the regulated entity, as the government, and
15 Guam, you know, territory or a state EPA, is
16 the decision-maker.

17 If we say that this is final agency
18 action, what ramifications do you think this
19 would have in the more normal situation where
20 you have -- to the extent the government is the
21 one who's the regulated entity seeking a permit
22 appearing before EPA or some other, like, you
23 know, the Surface Transportation Board or
24 something like that, would this have a big
25 impact or no?

1 MS. FLYNN: I don't think that this is
2 going to open the floodgates to more attacks on
3 permitting decisions. So the first thing I'd
4 say is that our -- our position -- we -- we
5 fully agree that we can't use this suit as a
6 way to, like, collaterally attack whatever
7 decision Guam EPA makes or to say that this
8 application is deficient under RCRA. So I
9 don't think this is an avenue for suits like
10 that.

11 The other thing I'd say is that our
12 claim is a procedural claim that focuses on the
13 decision-making of the federal entity. So the
14 only kinds of claims that can be brought under
15 a theory like this are ones where there is a
16 law that applies to the decision-maker of the
17 federal agency as the permittee.

18 The other thing I would say is that,
19 if you agree with me that there has to be final
20 agency action at some point by the Air Force in
21 this process, then whatever floodgates there
22 are would already have been opened because that
23 final agency action happens at the point of the
24 permit issuance. So, if people wanted to be
25 suing the permittee agency, they could have

1 been doing so at that point.

2 I think the fact that the government
3 hasn't pointed to those suits is because, you
4 know, you really do have to have the confluence
5 of a claim that attaches to the permittee
6 agency's decision-making that's not just a way
7 to, you know, try another way of complaining
8 about whatever it is the permitting agency, the
9 permitting authority, does.

10 JUSTICE KAGAN: If I could just make
11 sure that your understanding of your own claim
12 is that the final agency action here is the
13 submission of the application. It's not any
14 kind of preexisting decision or severable
15 decision to go ahead with these operations that
16 the Air Force has made. Or do you think that,
17 in fact, there's no difference between the two?

18 MS. FLYNN: I think there's no
19 difference between the two, and that's why I'm
20 fully comfortable with saying that the final
21 agency action is the submission of the
22 application. I think the application reflects
23 the decision. It's memorialized there. And it
24 also implements it by bringing about the
25 automatic extension but also by binding Air

1 Force personnel to the application's terms upon
2 Guam EPA's approval.

3 JUSTICE JACKSON: And I guess the
4 question is: It reflects the decision to do
5 what? Mr. Joshi says, from the very beginning,
6 it reflects the decision to make a proposal to
7 another agency that has the authority to say
8 yes or no, et cetera, et cetera.

9 And you said that has no bearing on
10 whether or not we should consider this final
11 agency action?

12 MS. FLYNN: I think it --

13 JUSTICE JACKSON: I mean, you do agree
14 that it's -- it's the decision to make a
15 proposal?

16 MS. FLYNN: May I --

17 CHIEF JUSTICE ROBERTS: Yes, of
18 course.

19 MS. FLYNN: I think it reflects the
20 decision to continue these operations past when
21 they otherwise would have ceased because the
22 Air Force was forced to a choice: Do we want
23 to stop when our permit would expire, or do we
24 want to keep going? And I think it reflects
25 the decision to keep going.

1 And I think that is fully the Air
2 Force's decision to make. That's not Guam
3 EPA's decision to make.

4 And, yes, it leads to teeing up this
5 other decision by the regulator, but that
6 doesn't change the Air Force made its own
7 decision.

8 JUSTICE JACKSON: Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Oh, Justice Thomas?

12 JUSTICE THOMAS: I'd like to go back
13 to my point.

14 When we had the Seven County case
15 here, the Surface Transportation Board
16 considered the proposal of Seven County to
17 build the railroad spur, and it was the Surface
18 Transportation Board's NEPA report that was
19 being considered.

20 Here, we -- you're saying that the
21 regulated body -- and, of course, there was a
22 final agency action there because they actually
23 submitted that.

24 But, here, you're saying that the
25 regulated body that submits the proposal

1 actually has engaged in and -- a -- a -- a
2 final agency action. And I asked you for any
3 other examples that you might have of the
4 regulated body's request or application being
5 considered a final agency action.

6 MS. FLYNN: So no other example comes
7 to mind in this Court's case law, but I would
8 say that it's clear that NEPA attaches to
9 the -- to federal agencies' own operations,
10 so their actions about, you know, like the
11 operations here, what they are doing and not
12 just their actions as a regulator. And so I
13 think the upshot of --

14 JUSTICE THOMAS: No, we're -- we're
15 not -- excuse me. I'm sorry. I'm sorry to
16 interrupt you. We're not talking about the
17 NEPA requirement. We're talking about whether
18 or not the APA final agency action applies for
19 the purpose of using APA as an avenue to
20 challenging this.

21 MS. FLYNN: Right. And I was -- what
22 I was getting at is that if it were true that
23 there can never be final agency action when the
24 government's own operations are involved and
25 they're not acting as a regulator, you would

1 never be able to bring an action challenging a
2 NEPA violation for the government's own
3 operations, even though that seems like, you
4 know --

5 JUSTICE THOMAS: That's --

6 MS. FLYNN: -- a pretty clear --

7 JUSTICE THOMAS: -- that's -- that's
8 not the point I'm making. It's -- I'm -- the
9 point I'm making is, is there final agency
10 action when the government is the applicant,
11 not whether or not it's taking an action?

12 MS. FLYNN: Yes. Our position is that
13 there is because they reached the culmination
14 of their decision-making process about their
15 own operations but about the decision at hand
16 and it produced legal consequences.

17 JUSTICE THOMAS: Do you have another
18 example of that happening?

19 MS. FLYNN: I would say Biden versus
20 Texas, the agency was deciding its own policy
21 for immigration enforcement. So the DHS
22 Secretary was making a decision about what DHS
23 employees would do.

24 That's what this Court framed it as,
25 was a determination of what DHS employees would

1 have to do once the injunction in that case --
2 or if the injunction in that case was lifted.

3 So I do think this Court's finality
4 inquiry is no different when it comes to the
5 federal government's actions, you know, as an
6 entity carrying out its own operations and not
7 just its actions as a regulator.

8 CHIEF JUSTICE ROBERTS: Justice Alito?

9 Justice Sotomayor?

10 Justice Kagan?

11 Justice Gorsuch?

12 JUSTICE GORSUCH: I guess I'm just a
13 little curious.

14 Do you think you could bring -- I'm
15 repeating myself for both of you.

16 Do you think you could bring an action
17 for agency action unlawfully withheld, and
18 why -- why didn't you try that avenue?

19 MS. FLYNN: With apologies, I --
20 that's not the action we brought here, and I
21 don't want to make commitments about a question
22 when it arose in a different case.

23 JUSTICE GORSUCH: Okay. All right.
24 Thank you.

25 MS. FLYNN: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Kavanaugh?

3 Justice Barrett?

4 JUSTICE BARRETT: No.

5 CHIEF JUSTICE ROBERTS: Justice
6 Jackson? No?

7 Thank you, counsel.

8 Rebuttal, Mr. Joshi.

9 REBUTTAL ARGUMENT OF SOPAN JOSHI

10 ON BEHALF OF THE PETITIONERS

11 MR. JOSHI: Thank you, Mr. Chief
12 Justice. Just a few points.

13 First, to address the questions that
14 Justice Gorsuch and Justice Kavanaugh had, our
15 position, just to be clear, is that the claim,
16 as we understand it, and I think Ms. Flynn
17 confirmed, was that they are saying the
18 submission of the RCRA application is final
19 agency action.

20 We don't think that's final agency
21 action. And, indeed, the submission of the
22 application, our position is, that that is just
23 not agency action at all. It'll never become
24 final. It's just an application.

25 The final permit, when it issues,

1 will be final, but it'll be final from the
2 regulating entity, Guam EPA, or federal EPA
3 if it's Iowa.

4 As far as when the Air Force's action
5 becomes final, I mean, if it's a case where, as
6 Justice Thomas was suggesting, if after
7 receiving a permit the agency issued an order
8 saying, now go blow up these waste munitions on
9 Guam, that would be an order. That would be a
10 final agency action.

11 If Respondent wants to bring a claim
12 saying, even absent such an order, there is a
13 silent, implicit order, we can have that fight.
14 We'd probably oppose that. I'm sure they would
15 say, no, there really is an order, and that
16 would be a final agency action. But that would
17 have nothing to do with the RCRA permit. It
18 would have nothing to do with the RCRA permit
19 application, which is what we're concerned with
20 here.

21 And that gets me to my second point,
22 which is Ms. Flynn said she wasn't worried
23 about opening the floodgates. I don't see how.

24 If you find that submission of a RCRA
25 permit application is final agency action

1 because the applicant happens to be a federal
2 agency, I don't know how you distinguish it
3 from any one of the tens of thousands of permit
4 applications that federal agencies file and
5 hold at the current time.

6 Every single application would be
7 final action, which could immediately trigger a
8 lawsuit. And it doesn't have to be a
9 procedural lawsuit, as Ms. Flynn said. It
10 could be anything. It could be your
11 application was arbitrary and capricious
12 because you didn't consider X, Y, and Z. You
13 shouldn't have applied for it. You should have
14 decided to do something different.

15 And if the application is revised,
16 you're going to have another lawsuit, three
17 years of litigation in between.

18 And then, when the final permit
19 issues, I suppose we'll have yet another one.

20 So I think the floodgates are real.

21 And, yes, Ms. Flynn is right that once
22 there is some final action, a permit is issued,
23 if the agency issues an order and does
24 something, there will be a lawsuit then.
25 That's unavoidable in our system.

1 But the whole point of the finality
2 rule is to challenge all of the challenges into
3 a single proceeding at the end.

4 Finally, I just want to say, in terms
5 of, Justice Alito, you were asking about
6 conflict and impossibility and when do both
7 statutes apply, I don't think it's right that
8 there has to be a metaphysical impossibility of
9 complying with both statutes. I think a
10 conflict can be just inconsistency between
11 the two, with a specific and a general.

12 And, again, the best case for that
13 I think I'd cite is an environmental case.
14 It's Home Builders, which we cite in our brief.
15 And that was one where the Clean Water Act had,
16 I think, nine criteria that EPA had to look at
17 and see if they were satisfied, and the claim
18 that the plaintiffs brought there was: Well,
19 by its terms, the Endangered Species Act could
20 also apply to this situation.

21 And the Court said we are not going to
22 engraft additional requirements. Given how
23 reticulated the Clean Water Act is with nine
24 requirements, we're not going to engraft a
25 tenth. I think the same would be true here.

1 Unless the Court has further
2 questions, we'd ask to reverse.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 The case is submitted.

6 (Whereupon, at 11:20 a.m., the case
7 was submitted.)

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