

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.)
10 - - - - -
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.
25

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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 --

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 what 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 --

11 JUSTICE KAVANAUGH: Well, and that's
12 what 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 take
11 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: I -- 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's fair. And,
8 obviously, we raised the question presented, we
9 briefed it, both sides have briefed it, so
10 it's -- it's ripe for your review. I think
11 it's just this Court tends to say if it's not
12 necessary to decide something, it's necessary
13 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 -- only if we decided it wasn't final
12 just yet.

13 JUSTICE SOTOMAYOR: Right, right.

14 JUSTICE BARRETT: Yeah.

15 JUSTICE SOTOMAYOR: Exactly.

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

24 JUSTICE SOTOMAYOR: Can -- can I --

25 MR. JOSHI: But you --

1 JUSTICE SOTOMAYOR: -- ask one
2 fundamental question in this case?

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

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

13 JUSTICE SOTOMAYOR: So read me the
14 statute. What does the statute say now?

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

20 And we view that as saying it doesn't
21 say expressly excluded; it just says excluded.
22 And the general-specific canon and -- or if you
23 like the term "functional equivalence" was what
24 the lower courts have used, that is a
25 well-established legal basis to say that a

1 highly reticulated, more specific scheme
2 excludes application of the more general
3 scheme.

4 And we do think it --

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

9 MR. JOSHI: No, that --

10 JUSTICE SOTOMAYOR: I -- I --

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

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

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

23 MR. JOSHI: So --

24 JUSTICE SOTOMAYOR: -- irreconcilable.

25 MR. JOSHI: -- again, the -- the

1 irreconcilable or clearly and fundamentally
2 conflict is not the only time in which a more
3 specific statute can displace NEPA. So there
4 are multiple other ways in which that's true.

5 And --

6 JUSTICE GORSUCH: We -- we usually
7 say, though --

8 MR. JOSHI: -- I -- I want to be
9 clear --

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

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

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

1 another provision, right?

2 MR. JOSHI: We're relying on the
3 paragraph before then.

4 JUSTICE GORSUCH: Okay. All right.
5 Got you.

6 MR. JOSHI: The one --

7 JUSTICE GORSUCH: Okay. All right.
8 Fine.

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

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

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

1 out an application, the Air Force has to do
2 some degree of environmental analysis at that
3 stage.

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

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

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

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

20 JUSTICE SOTOMAYOR: I'm sorry, all
21 it -- all it's saying to you is, do them; when
22 you get into RCRA, you've got it done, so just
23 give them the answers. What's the problem with
24 that? That's not an irreconcilable conflict.

25 MR. JOSHI: It is --

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

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

13 JUSTICE SOTOMAYOR: The problem is --

14 MR. JOSHI: That is picking up --

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

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

25 I think 1 and 2 are picking up a

1 regulatory practice that had developed,
2 including under the former CEQ regulation.

3 JUSTICE GORSUCH: Well, can you
4 explain --

5 JUSTICE KAGAN: Mr. Joshi --

6 MR. JOSHI: Three and 4 are --

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

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

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

16 JUSTICE GORSUCH: Oh, okay. All
17 right. Okay. So it's implicitly excluded is
18 your --

19 MR. JOSHI: Correct. Correct.

20 JUSTICE GORSUCH: Okay. And how is it
21 implicitly excluded?

22 MR. JOSHI: Under the specific-general
23 canon. That is a well-known doctrine of law in
24 which a more specific statute --

25 JUSTICE GORSUCH: Okay. But, if I

1 disagree with you about that, the general and
2 specific applies when there's a conflict?

3 MR. JOSHI: Then we -- then we lose on
4 the --

5 JUSTICE GORSUCH: Then you lose.
6 Okay. All right. Thank you.

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

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

20 Is that just not, you know, because
21 it's contingent on regulatory approvals,
22 there's no way to challenge what appears to be
23 the agency decision to go ahead with this,
24 let's call it, massive construction project?

25 MR. JOSHI: That -- that's -- our

1 argument doesn't go that far here. I think our
2 argument --

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

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

13 There may even be -- and I don't -- I
14 don't know, I haven't canvassed --

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

22 But, here, just because it's a single
23 regulatory approval, you're saying there's no
24 such thing as the decision, putting aside the
25 contingency of the approval. And why should

1 that be, really, as a conceptual matter?

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

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

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

20 JUSTICE JACKSON: So this is -- so
21 it's -- it's the nature of this particular
22 permitting scheme that is leading us to the
23 result that you want? I mean, this is just
24 piggybacking on --

25 MR. JOSHI: I -- I think any -- any

1 permit application under this kind of scheme or
2 a similar scheme is not going to be final
3 agency action. I mean, you could look at the
4 definition of agency action in the APA.

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

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

16 JUSTICE KAGAN: Which one? That
17 was --

18 MR. JOSHI: -- the -- the --

19 JUSTICE KAGAN: -- that was not a
20 "yes."

21 (Laughter.)

22 JUSTICE KAGAN: That was a -- the
23 first or the second?

24 MR. JOSHI: The second. I was saying,
25 yes, I understood the question. It's -- it's

1 more the second and also because the APA
2 doesn't really authorize review of internal
3 decisions. It's final agency action. "Agency
4 action" is a defined term. This Court has case
5 law on finality.

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

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

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

22 MR. JOSHI: I think because the -- the
23 only thing happening here is requesting
24 permission to do something that is covered by a
25 different regulatory agency, and it is that

1 regulatory agency that takes the regulatory
2 action that, if it were a federal agency, would
3 be subject to judicial review under the APA's
4 final agency action.

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

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

14 MR. JOSHI: I --

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

20 But could the Guam EPA actually have
21 to comply with NEPA? Because there is a
22 provision in NEPA that says you can have a
23 state agency designated --

24 MR. JOSHI: Correct.

25 JUSTICE BARRETT: -- as a lead agency.

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

11 JUSTICE BARRETT: But EPA could
12 otherwise be sued under the APA?

13 MR. JOSHI: EPA could be sued under
14 the APA review provisions --

15 JUSTICE BARRETT: Yeah.

16 MR. JOSHI: -- for their final
17 actions, but, yes, and EPA --

18 JUSTICE BARRETT: Yeah. And the
19 problem here is Guam can't -- that Guam isn't
20 subject to the APA?

21 MR. JOSHI: Correct, but Guam has its
22 own judicial review --

23 JUSTICE BARRETT: Right.

24 MR. JOSHI: -- proceedings. And EPA
25 does not authorize any state or territory to

1 administer RCRA without that state or territory
2 having judicial review provisions as part of
3 the RCRA process.

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

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

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

20 JUSTICE BARRETT: Right.

21 MR. JOSHI: -- that's not final agency
22 action. If it's what Judge VanDyke called
23 "application plus," which is the internal
24 decision to submit the application, we think
25 that's sort of ephemeral, and Biden against

1 Texas says you can't do that either.

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

10 JUSTICE KAGAN: Well, what if that's
11 not true, Mr. Joshi? What if, in fact, the --
12 the Air Force treats this as a kind of -- you
13 know, it made the initial decision, but then
14 it's going to keep making decisions, whether
15 it's every three years or every 10 years or
16 whatever it is. I mean, no decision is just
17 thought, or very few, to -- to be eternal.

18 So why wouldn't it be, well, there's
19 been a decision to re-up these operations, sort
20 of putting aside the formal application
21 process?

22 MR. JOSHI: I -- I still think the
23 decision to re-up for another three years is a
24 kind of internal decision that the APA simply
25 doesn't cover. What the APA covers are final

1 agency action. "Agency action" is a defined
2 term.

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

12 These are all things that agencies do
13 as regulators. And seeking a permit and
14 permission to do something is not an agency
15 acting in that capacity covered by the APA.
16 The permitting agency is acting in that
17 capacity, and there may be judicial review for
18 that kind of action if it's a federal agency,
19 in this case, under the Guam scheme. But
20 that's how we view the world.

21 JUSTICE JACKSON: How much of your --

22 JUSTICE KAVANAUGH: So --

23 JUSTICE JACKSON: Go ahead.

24 JUSTICE KAVANAUGH: Go ahead.

25 JUSTICE JACKSON: I was just going to

1 say how much of your argument depends on the
2 fact that, in this particular circumstance,
3 Guam EPA retains or has the capacity to change
4 all of the terms and conditions?

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

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

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

15 JUSTICE JACKSON: But, if he didn't, I
16 guess that would change the initial ask to some
17 extent because then they would say we don't
18 want to do it anymore. In other words, I --
19 Justice Kagan points out a very interesting
20 line-drawing problem depending upon how you set
21 this up.

22 And I suppose one response that
23 distinguishes the two categories that she laid
24 out is that in a world like this one, the one
25 that we have, the Air Force is really making a

1 proposal insofar as everything it says it would
2 like to do in its permit application is subject
3 to the permitting agency saying, no, you can't
4 do X, Y, and Z. So there isn't this sort of
5 big project out there independent of anything
6 the Guam EPA would say about it.

7 MR. JOSHI: I don't disagree with
8 that. But -- and, as I say, I think it's
9 helpful to us that the regulatory scheme
10 contemplates this back-and-forth and amendment.
11 But I don't think it's actually necessary, but
12 it's certainly helpful to us.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Justice Thomas, anything further?

16 Justice Alito?

17 Justice Sotomayor?

18 JUSTICE SOTOMAYOR: I'm reading the
19 question. I think the question presented
20 answers what position Respondent has taken. It
21 depends on whether the federal government's
22 submission to a state or territorial regulator
23 of an application to renew a previously issued
24 RCRA permit is final agency action.

25 So they've sort of disavowed Judge

1 VanDyke's view that what they were challenging
2 was the decision qua decision, not the
3 submission, correct?

4 MR. JOSHI: Sure. All the better for
5 us.

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

14 MR. JOSHI: In this case --

15 JUSTICE SOTOMAYOR: In this case.
16 You're happy to live with just the question
17 presented?

18 MR. JOSHI: This case is a RCRA permit
19 renewal that involves only --

20 JUSTICE SOTOMAYOR: The submission.
21 Okay.

22 MR. JOSHI: Yeah.

23 JUSTICE SOTOMAYOR: That's the only
24 issue before us in this?

25 MR. JOSHI: Correct.

1 CHIEF JUSTICE ROBERTS: Justice
2 Gorsuch?

3 JUSTICE GORSUCH: It's not like the
4 Navy could go ahead and continue dumping things
5 without a permit, right?

6 MR. JOSHI: Correct.

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

11 MR. JOSHI: Correct.

12 JUSTICE GORSUCH: All right. On -- on
13 the extension, could that be challenged as
14 agency action by EPA, by Guam EPA, and allowing
15 you to continue to do it while the application
16 is pending?

17 MR. JOSHI: I -- I've thought about
18 this. I -- I suppose the only way you could do
19 it is if you thought -- because the only way
20 the extension kicks in is if Guam EPA doesn't
21 reach a decision on the permit by the
22 expiration date.

23 JUSTICE GORSUCH: But --

24 MR. JOSHI: And --

25 JUSTICE GORSUCH: -- but it operates

1 by rule, doesn't it, under --

2 MR. JOSHI: It operates by rule, but
3 it's -- it's only because Guam EPA didn't reach
4 a decision by the old permit's expiration
5 that --

6 JUSTICE GORSUCH: Is -- is Guam --

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

16 And then they --

17 JUSTICE GORSUCH: I get the action
18 withheld, but I'm wondering about action
19 itself. Is -- is it -- is it effectively an
20 action because they have a rule that -- I mean,
21 so what if they didn't do it in an individual
22 adjudication, they did it by rule?

23 MR. JOSHI: I -- I -- I don't -- I
24 don't -- I don't think so. And -- and if you
25 go down that route, it's really going to blow

1 up administrative law because this extension is
2 in the APA itself. It's in 558.

3 And so now every permitting regime
4 known to man, every single time there's a
5 pending application, just an application to
6 renew, you're going to have final agency
7 action, and plaintiffs are going to rush to
8 court. That can't possibly be what Congress
9 intended.

10 CHIEF JUSTICE ROBERTS: Justice
11 Kavanaugh?

12 JUSTICE KAVANAUGH: Just so I clarify,
13 following up on the Chief Justice's initial
14 questions, if it's not final, as you say, and
15 if the permitting agency is not a federal
16 agency, your position is that you can never
17 bring a challenge saying that NEPA was not
18 complied with, correct?

19 MR. JOSHI: Not quite. As I say, as a
20 practical matter, EPA requires every
21 non-federal permitting agency that's operating
22 the federal RCRA scheme, which includes 49
23 states and Guam and some other territories,
24 to have judicial review of the RCRA permit.

25 And so Respondent couldn't bring its

1 current claim about the application, but -- but
2 a different plaintiff, if a different plaintiff
3 thought that a RCRA permit should not issue
4 without an agency applicant's having completed
5 a full-blown NEPA analysis as a precondition
6 for getting that permit, they could bring that
7 claim and say, Guam EPA --

8 JUSTICE KAVANAUGH: Where? Where do
9 they bring that claim?

10 MR. JOSHI: They could either go to --
11 sue Guam EPA under the -- the judicial review
12 provisions of -- of Guam RCRA and say, Guam
13 EPA --

14 JUSTICE KAVANAUGH: Which are similar
15 to the state ones or --

16 MR. JOSHI: Yeah. Yeah.

17 JUSTICE KAVANAUGH: Mm-hmm.

18 MR. JOSHI: And they'll say, Guam EPA,
19 you shouldn't have issued the permit because
20 this applicant was required to do NEPA, and it
21 didn't do NEPA, and, therefore, you need to --

22 JUSTICE KAVANAUGH: Is that a matter
23 of federal law or Guam law at that point or --

24 MR. JOSHI: Well, Guam would --

25 JUSTICE KAVANAUGH: -- or state law?

1 MR. JOSHI: Yeah, Guam would provide
2 the cause of action. Whether NEPA is required
3 would be a matter of RCRA federal law. So that
4 would be one way to bring that kind of --

5 JUSTICE KAVANAUGH: So it still would
6 be the open question?

7 MR. JOSHI: It would be different from
8 Respondent's question. Respondent's question
9 is: Does NEPA need to be done as a
10 precondition just for submitting the
11 application? I'm in -- and -- and that would
12 lose because of the non-finality, but --

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

20 MR. JOSHI: That would be how it could
21 be raised. I don't think that claim would have
22 merit, but that's a way that you could get a
23 hearing for that claim.

24 The other way, as I mentioned at the
25 outset, would be because the APA doesn't

1 provide review, because there's no final agency
2 action here, I suppose a plaintiff in
3 Respondent's shoes could attempt an ultra vires
4 claim, a Hail Mary pass --

5 JUSTICE KAVANAUGH: Yeah.

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

7 But, look, if they think it's that
8 unlawful, what we're doing, then they should
9 take their chances there.

10 JUSTICE KAVANAUGH: And -- and you
11 aren't worried about that litigation down the
12 road, that litigation uncertainty about the --
13 the permitting?

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

17 JUSTICE KAVANAUGH: No, I'm talking
18 about in a state -- the review of the state
19 permitting process.

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

22 JUSTICE KAVANAUGH: Okay.

23 MR. JOSHI: And -- and we -- and we
24 think NEPA does not apply to things covered
25 solely by a RCRA permit, but we acknowledge

1 that if you don't reach that issue here today,
2 that that would be an available --

3 JUSTICE KAVANAUGH: That's the way
4 it'll transpire. Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Barrett?

7 JUSTICE BARRETT: Mr. Joshi, I want
8 to clarify one of your answers to Justice
9 Kavanaugh.

10 So you said EPA requires each of the
11 states and territories to have their own RCRA
12 review process. Is that by EPA rule, or is
13 that by statute?

14 MR. JOSHI: It is by rule. EPA's
15 rules for what a state or territory need to
16 show to demonstrate that their RCRA scheme is
17 at least the federal equivalent, at least as
18 protective as the federal scheme, one of it is
19 that it has judicial review provisions
20 available to -- to challenge.

21 And if you think about it, as we note
22 in our brief, we, the federal government and
23 our agencies, hold thousands and thousands of
24 these permits. So we don't really want to be
25 in a scheme where our permit is denied by a

1 state regulator and we have no judicial review
2 either. So it's in -- it's in our interest as
3 well to make sure that there is full judicial
4 review available in each of these states and
5 territories.

6 JUSTICE BARRETT: And does each state
7 and territory get to design its own judicial
8 review scheme, or is that dictated by EPA or
9 otherwise?

10 MR. JOSHI: I believe each state
11 and -- and territory will design it themselves.
12 I think, in most cases, it's got some
13 preconditions for when you can file, but,
14 otherwise, it just proceeds through the -- the
15 normal court system in those states.

16 JUSTICE BARRETT: So it's difficult
17 for you to imagine or identify a situation in
18 which a decision, say, not to do -- not to
19 comply with NEPA, not to file an EIS, would not
20 be subject to challenge -- I understand you
21 think the challenge would lose -- but would not
22 be subject to challenge in the state judicial
23 review process?

24 MR. JOSHI: They could bring that
25 claim in the state judicial review process.

1 As I say, I think it's meritless, but they
2 could bring it.

3 JUSTICE BARRETT: They could.

4 CHIEF JUSTICE ROBERTS: Justice
5 Jackson?

6 JUSTICE JACKSON: Yeah. On
7 displacement, I just want to be clear.

8 Are you relying on the functional
9 equivalence doctrine and not a textual basis,
10 or where -- where are we getting this?

11 MR. JOSHI: We are -- we are relying
12 on the standard principle of statutory
13 interpretation that the specific governs the
14 general.

15 Now my understanding is that lower
16 courts --

17 JUSTICE JACKSON: But doesn't that --
18 doesn't that necessarily assume those two are
19 actually covering the same thing?

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

21 JUSTICE JACKSON: You're just assuming
22 that. There's nothing about the text that
23 tells us that RCRA -- RCRA was designed to be a
24 more specific NEPA, or which one is the more
25 specific?

1 MR. JOSHI: We're -- we're looking at
2 the text of NEPA and the text of RCRA and we
3 are saying both of these cover similar areas.
4 Indeed, by hypothesis, Respondent's whole claim
5 is that NEPA covers this area that is also
6 covered by RCRA. But RCRA --

7 JUSTICE JACKSON: And so you only have
8 to do the more specific one in your view.

9 MR. JOSHI: You do the more specific
10 one under a standard application of that
11 principle.

12 Now my understanding is that the lower
13 courts that have done this analysis for the
14 last 50 years have put the label of functional
15 equivalence on it. We don't have any
16 problem --

17 JUSTICE JACKSON: Because it means
18 something, right? I mean, it means something.
19 I mean, we have two different statutes of
20 Congress.

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

22 JUSTICE JACKSON: And as Justice
23 Gorsuch points out, we ordinarily say that if
24 you can do both, you need to do both.

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

1 JUSTICE JACKSON: So, if we're
2 suddenly coming up with a principle that says,
3 no, you can -- you -- you need only do the more
4 specific one, there has to be some basis for --
5 for that determination, right?

6 MR. JOSHI: I think that's just
7 standard law. I mean, Home Builders,
8 Association of Home Builders against Defenders
9 of Wildlife, this Court encountered two
10 environ --

11 JUSTICE JACKSON: How do you
12 explain -- how do you explain then the kind of
13 other thrust of our case law that suggests that
14 as long as those two different requirements of
15 Congress don't conflict, you have to do both of
16 them? But you don't get to pick and choose,
17 I'm only going to do the more specific one
18 because it is more specific.

19 MR. JOSHI: And I think -- I think
20 Home Builders illustrates what the word
21 "conflict" or "conflict of these two statutes"
22 actually means. It doesn't mean it's a
23 metaphysical impossibility to comply with both.
24 It can be practical difficulties, or it can
25 also be just inconsistency in the scheme.

1 Here, the inconsistency is in the
2 timing of the scheme. Both review schemes, if
3 you just look at the text of the statutes, seem
4 to require largely identical stuff, like
5 environmental considerations, alternatives,
6 public notice and comment, public hearing,
7 response to comments.

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

12 JUSTICE JACKSON: And as Justice
13 Sotomayor says, if you have to do it all before
14 you embark on it, then you've already done it.
15 And why can't you just use that in your
16 subsequent RCRA --

17 MR. JOSHI: Because it's an entirely
18 different set of comments and procedures.
19 Under the statute and the regulations --

20 JUSTICE JACKSON: So it's not the
21 same. So it's -- you said they were the same.
22 It's duplicative.

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

24 JUSTICE JACKSON: It's either not the
25 same or it is the same.

1 MR. JOSHI: No, no, no. I'm saying,
2 substantively, they cover the same ground.
3 They are equivalent.

4 But, as a procedural matter, the fact
5 that you went through an entire NEPA process --
6 and, by the way, it's not just the NEPA
7 process, it's then three years of litigation
8 after it before you can even start to get your
9 permit.

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

19 So does that matter in our
20 consideration as to whether or not there's
21 substantial overlap or conflict?

22 MR. JOSHI: I don't -- I don't view
23 them as different. The point of RCRA is to,
24 you know, as Respondent says, to take a hard
25 look at the environment. And I think this

1 Court has said multiple times RCRA incorporates
2 a rule of reason. That is, you should do
3 the -- the environmental analysis that is
4 appropriate to the circumstances.

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

7 JUSTICE JACKSON: But Congress, just
8 to be clear, didn't say this is displacing
9 NEPA, right?

10 MR. JOSHI: No. But we think,
11 under standard principles of statutory
12 interpretation --

13 JUSTICE JACKSON: It does?

14 MR JOSHI: Yes.

15 JUSTICE JACKSON: All right. Thank
16 you.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Ms. Flynn.

20 ORAL ARGUMENT OF CAROLINE A. FLYNN

21 ON BEHALF OF THE RESPONDENT

22 MS. FLYNN: Mr. Chief Justice, and may
23 it please the Court:

24 The Air Force was required to comply
25 with NEPA before choosing to continue open

1 detonation on Tarague Beach. And we can obtain
2 judicial review of that violation now.

3 On the question whether NEPA applies,
4 the government's position is simply atextual.
5 Congress has told us that NEPA is displaced
6 only when it is excluded pursuant to another
7 provision of law or there is a clear and
8 fundamental conflict between NEPA and another
9 law's requirements.

10 That aligns with this Court's
11 precedent, the strong presumption against
12 implied repeals, and Congress's longstanding
13 practice of drafting express exclusions to NEPA
14 when it wants them.

15 The government's response is that RCRA
16 is specifically about hazardous waste. But,
17 because the laws can be harmonized, that
18 observation can't carry the day. Indeed, NEPA
19 is meant to be harmonized with other
20 environmental laws in this way. It is what
21 agencies call an umbrella law. It is meant to
22 consolidate and streamline all required
23 environmental analysis at an early juncture to
24 ensure a better decision and better planning.

25 So, if the Air Force was wrong to

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

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

19 Indeed, this Court has already said in
20 Ohio Forestry Association versus Sierra Club
21 that a litigant with standing can "complain of
22 a NEPA failure at the time it takes place for
23 the claim can never get riper." There is
24 nothing to be gained here by delaying our
25 challenge to the Air Force's own

1 decision-making about its own operations until
2 a non-federal agency has made a different
3 determination under a different law.

4 I welcome the Court's questions.

5 JUSTICE THOMAS: Ms. Flynn, normally,
6 in these administrative cases, we have a
7 regulatory body making a decision, and our
8 determination has to be whether or not that is
9 a final action for APA purposes.

10 In this case, we have a regulated body
11 applying to a regulatory body that you -- your
12 argument is that the application process makes
13 it a final decision.

14 Do you have another example where the
15 regulated body's decision to apply to a
16 regulatory body is a final decision for APA
17 purposes or a final action for APA purposes?

18 MS. FLYNN: Well, I can think of one
19 fact pattern in this Court's cases involving
20 another NEPA case, and that was the Winter
21 versus Natural Resources Defense Council case.
22 And, there, the Navy was continuing a series of
23 training exercises for another two years that
24 they had been doing previously, and they did
25 the NEPA analysis before embarking on another

1 two years of exercises.

2 The Court -- you know, finality -- the
3 Court did not decide finality in this case, but
4 nobody seemed to think that there was any issue
5 with --

6 JUSTICE THOMAS: Was that an --

7 MS. FLYNN: -- being able to review
8 the NEPA analysis in that case.

9 JUSTICE THOMAS: Was that an
10 application for a permit in order to do the
11 training? I'm -- my interest is that this is
12 an odd case because we are not talking about a
13 regulatory body making a decision to do
14 something itself without permission. We are
15 talking about a regulated body asking
16 permission to do something.

17 MS. FLYNN: I understand, and I
18 understand that that creates a contingency, but
19 I guess what I would say is that the
20 contingency -- the fact of the contingency
21 shouldn't be determinative.

22 So say that RCRA required the Air
23 Force to put all of the information it would
24 put in an application and just publish that
25 document. I don't think we would be having a

1 debate about final agency action there, even
2 though it's action about the -- the Air Force's
3 own operations.

4 Here, yes, that has to go and get
5 external sign-off from somebody else. But this
6 Court has found final agency action where there
7 is a contingency. For instance --

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

19 That's why I was focusing on the fact
20 that, in this particular scheme, we have the
21 Air Force making a proposal that is subject to
22 totally being rewritten and redone by the
23 regulator agency. And, in that case, isn't
24 there a finality problem?

25 MS. FLYNN: I don't think so because

1 this Court has been clear that the possibility
2 of revision of the agency's decision, that it
3 might change its mind, is not itself enough to
4 say that a decision where the agency reached
5 the culmination of its decision-making process
6 is non-final.

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

14 JUSTICE JACKSON: But that's that the
15 decision was within the agency's control. I
16 mean, any agency can change its decision, so
17 that would render, you know -- I don't know
18 that that's really the critical point.

19 The point is we don't even know in
20 this situation what the final terms are going
21 to be because it's subject to the other
22 regulator responding. And they're taking a
23 long time, suggesting that they're actually
24 looking at this and are possibly going to come
25 back with significant revisions.

1 And so then we don't really have the
2 terms. What -- what would the Air Force even
3 be evaluating at this point when it hasn't
4 heard from Guam EPA about what this thing is
5 going to look like?

6 MS. FLYNN: Well -- so I think it does
7 matter here, and I think it should matter under
8 this Court's pragmatic approach to finality,
9 the kind of legal claim we're bringing here.
10 So our NEPA claim is attached to the -- the
11 process of decision-making the Air Force used
12 before it decided in NEPA's terms to propose
13 this major federal action --

14 JUSTICE JACKSON: That's not what your
15 QP says. You say submission, right? We're --
16 we're in --

17 MS. FLYNN: Right, but in --

18 JUSTICE JACKSON: -- the action is the
19 submission.

20 MS. FLYNN: So -- but, to be clear,
21 the NEPA violation, it's clear that it happened
22 before resources were committed in this
23 application. And because -- excuse me -- so,
24 because the NEPA claim there is nothing -- or,
25 sorry, I should say, because any revision that

1 happens by Guam EPA with respect to, you know,
2 particular procedures or something like that,
3 that will not affect whether --

4 JUSTICE JACKSON: The prior decision.

5 MS. FLYNN: -- the fundamental
6 decision to carry out these --

7 JUSTICE JACKSON: Yeah.

8 MS. FLYNN: -- open detonations at
9 Tarague Beach.

10 And we know that the Air Force is
11 settled on that decision because it has, in
12 fact, been acting on them past -- you know, by
13 continuing these detonation operations past
14 September 2021, when they otherwise would have
15 ceased.

16 JUSTICE KAGAN: Can you bring your
17 challenge and your demand for a NEPA analysis
18 after the Guam EPA acts?

19 MS. FLYNN: I am not aware of a basis
20 for us to bring this challenge on review of
21 whatever Guam EPA does. I understand that's
22 what my friend said here today, but Guam EPA
23 has no NEPA obligation. It has no obligation
24 to enforce the Air Force's NEPA obligations.

25 So whatever -- if, you know, we have a

1 basis -- if this permit is granted and we have
2 a basis to challenge it before Guam EPA, that
3 is a separate question.

4 JUSTICE KAGAN: Do you think that this
5 is a question that's just specific to Guam? If
6 we -- we were in a state rather than a
7 territory, could the challenge be brought and
8 the demand for a NEPA analysis made after the
9 EPA acted?

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

20 But we do think that there has to be
21 final agency action by the Air Force at some
22 point given that there is a NEPA obligation
23 here and we need to be able to enforce it.

24 We don't think waiting to sue until
25 after the permit issues serves anybody because,

1 if the NEPA, you know, review produces a
2 different application or, in our view, produces
3 a determination not to seek a application from
4 Guam at all because the Air Force decides to
5 treat its waste somewhere else that's not in
6 this location --

7 JUSTICE KAGAN: Well, let me do --

8 MS. FLYNN: -- they would have wasted
9 their time.

10 JUSTICE KAGAN: I'm sorry?

11 MS. FLYNN: They would have -- it
12 would wasted the permitting agency's time to
13 have ruled on that application and have
14 everybody double back at that point.

15 JUSTICE KAGAN: I -- I -- I guess the
16 reason to think it makes better sense to wait
17 is the one that Justice Jackson suggested, that
18 because this is -- there is a gigantic
19 contingency here and the permit might not be
20 issued in the way that the Air Force would like
21 it to be issued, it seems like a big waste of
22 time if you can actually get review in the way,
23 you know, of -- of the NEPA obligation once we
24 know what the permit is going to look like.

25 MS. FLYNN: So that's not the way that

1 the NEPA obligation works. NEPA is very clear
2 that you have to undertake the analysis before
3 proposing a major federal action. And it also
4 talks about bringing entities like Guam EPA to
5 the table as what NEPA calls cooperating
6 agencies, and those are agencies who have
7 jurisdiction by law over some part of the
8 project or some environmental effects involved.

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

18 But this is exact -- I mean, NEPA, the
19 whole point of NEPA is to make sure that these
20 -- this kind of evaluation is happening before
21 resources -- resources are committed, such as
22 resources in the form of teeing up a plan for
23 an application and before the die is cast.

24 So, no, it would not satisfy NEPA for
25 that to all happen after the Air Force bakes

1 its plan, tees it up, and then says: Okay,
2 wait, now we're going to decide whether -- or
3 we're going to evaluate the environmental
4 effects of what we have already -- you know,
5 the ball we've already started rolling.

6 JUSTICE BARRETT: But aren't NEPA
7 challenges often made after the conclusion of
8 the process? I'm just thinking about the
9 posture of Seven County, which we decided in
10 2025.

11 I mean, I agree with you that if the
12 obligation applies, it's something that has to
13 happen at the front end, but it seems to me
14 like NEPA challenges do sometimes happen at the
15 back end.

16 MS. FLYNN: So a NEPA challenge,
17 because the route for challenging a NEPA
18 violation is through the APA, it requires final
19 agency action. And so, yes, it often happens
20 that a NEPA analysis is concluded at the same
21 time a decision is made on the major federal
22 action that is the subject of NEPA.

23 Here, we think that is what happened
24 because the Air Force decided it wanted to
25 continue these operations.

1 JUSTICE BARRETT: But I'm just saying
2 that it wouldn't be unusual. Justice Kagan and
3 Justice Jackson and Justice Kavanaugh too were
4 talking about the waste of time, having the
5 whole process run before a court addressed
6 whether the NEPA obligation was complied with.

7 And I'm just saying it seems to me as
8 I understand it that that is often what
9 happens.

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

18 JUSTICE BARRETT: But I'm glad you
19 raised the extension because Mr. Joshi pointed
20 out that the legal consequence actually
21 didn't -- wasn't triggered by the application
22 itself but, rather, by the Guam EPA's failure
23 to act on the application before the expiration
24 date of the prior permit.

25 What is your response to that?

1 MS. FLYNN: So both are necessary
2 conditions. But I think the fact that the
3 submission of the application is a necessary
4 condition is all that is required for a legal
5 consequence for purposes of Bennett prong 2.

6 I don't think this Court's cases have
7 said it has to be a completely sufficient
8 condition on its own.

9 And I think one case that illustrates
10 this is Dalton versus Specter. So, there, of
11 course, the Court ruled that the Secretary's
12 action recommending certain military bases for
13 closure was not final agency action, but the
14 Court did find that the President's action was
15 final action. It's just that he's not an
16 agency.

17 And, there, the process didn't end
18 with the President. There was also -- the
19 President had to submit the base closures to
20 Congress, and there was a 45-day time built in
21 for Congress to essentially veto what the
22 President wanted to do by joint resolution.

23 So, there, you still had a period
24 of -- there was required inaction by another
25 actor, but this Court still found the

1 President's decision to be final action.

2 If there's one thing that I -- or one
3 aspect of my friend's presentation that I would
4 like to clarify, and that is whether or not a
5 finding that there was no final agency action
6 in this case could address the question of
7 whether or not there was a NEPA violation here.

8 So the relevant language in the
9 amended version of NEPA says that there's no
10 obligation to do an EIS if the proposed agency
11 action is not a final agency action. So that
12 means that if the actual operations themselves,
13 once fully authorized and fully permitted, if
14 those aren't a final agency action, then
15 there's no EIS requirement.

16 But I think -- I think it's hard to
17 dispute that the actual operations themselves,
18 once they're being carried out, is final agency
19 action.

20 And so I don't think that is a route
21 to avoid the text of NEPA, which is very clear
22 that NEPA is not displaced in the absence of
23 something like a clear and fundamental conflict
24 or an express exclusion of the kind that
25 Congress has repeatedly done over the years but

1 did not do for -- for RCRA.

2 JUSTICE KAVANAUGH: Isn't the oddity
3 of this case -- I think Justice Thomas alluded
4 to this -- the oddity of this case is that the
5 permitting agency is not a federal agency.

6 But Mr. Joshi responds to that by
7 saying: Well, even in that, here, territorial
8 permitting process, you can still raise the
9 argument that NEPA wasn't complied with.

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

12 And I just want you to explain why you
13 think that's the case.

14 MS. FLYNN: Yes. So I don't -- so, if
15 we were to challenge Guam EPA's decision on a
16 permit, whenever that decision happens, that is
17 done under Guam -- the equivalent of Guam
18 administrative law, so like the Guam APA. And
19 I don't see how we could go --

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

22 MS. FLYNN: Yeah.

23 JUSTICE KAVANAUGH: Mr. Joshi was --
24 you could raise a federal issue in that process
25 that would tee up a federal issue, I gather, is

1 what he was saying. He can correct me if I'm
2 wrong on rebuttal. But -- and that would be
3 that NEPA was not complied with.

4 MS. FLYNN: The Guam EPA has no
5 obligation to police the Air Force's compliance
6 with NEPA. They don't enforce NEPA. There's
7 nothing in RCRA requiring them to ensure that
8 NEPA was required -- was complied with. So we
9 would have no basis to say that Guam EPA did
10 anything wrong with respect to NEPA.

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

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

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

19 The Guam EPA has to accept an
20 obligation that complies with RCRA law,
21 correct?

22 MS. FLYNN: They have to --

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

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

4 JUSTICE SOTOMAYOR: And if that
5 includes -- and if that includes that the
6 application must have a NEPA analysis, why
7 isn't the failure subject to Guam review?

8 MS. FLYNN: Because I don't think
9 there's anything in RCRA that requires in RCRA
10 itself -- there's certainly something in
11 NEPA -- but I don't think there's anything in
12 RCRA that requires the NEPA analysis. So I
13 don't think that Guam EPA would have the
14 authority to do anything if the Air Force
15 failed to comply with NEPA.

16 JUSTICE GORSUCH: I certainly want --
17 I'm sorry. Please.

18 JUSTICE SOTOMAYOR: No. I was just
19 going to say 16 states plus D.C. and Puerto
20 Rico have passed their own versions of NEPA in
21 their RCRA obligations. Does Guam need to do
22 that?

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

25 JUSTICE SOTOMAYOR: Yes. Exactly.

1 MS. FLYNN: -- equivalent of NEPA?

2 I'm not aware of any requirement for
3 states and territories to pass their own
4 version of NEPA as part of fulfilling their
5 duty under RCRA.

6 JUSTICE SOTOMAYOR: Okay. Then my
7 research -- my clerk's research I'll have to
8 look at more closely, but I thought there were
9 16 states and D.C. and Puerto Rico who, as part
10 of the RCRA process, require their own version
11 of NEPA.

12 MS. FLYNN: I'm not sure about the
13 states requiring their own version of NEPA. I
14 will say that, as that brief discusses, states
15 find NEPA compliance extremely beneficial to
16 them when they are ruling on RCRA applications
17 because this is a way to, for instance, ensure
18 that the location that is being teed up for
19 RCRA review is the least environmentally
20 destructive because NEPA forces the evaluation
21 of alternatives that we say wasn't -- that
22 didn't happen here, especially with respect to
23 alternative sites.

24 JUSTICE SOTOMAYOR: Thank you.

25 JUSTICE GORSUCH: Ms. Flynn, are you

1 saying that you'll -- I understand your concern
2 about not being able to sue Guam EPA for the
3 NEPA problem of the Navy, and I'm looking
4 forward to hearing Mr. Joshi's response to that
5 in rebuttal.

6 But are you saying you would never --
7 if you should lose here on the question, first
8 question presented, never be able to sue the
9 Navy for a NEPA violation? Are you saying
10 you -- you just don't see any avenue that your
11 client could pursue?

12 MS. FLYNN: I think, if this Court
13 found that there was no finality here because
14 there was still some kind of a contingency, I
15 would -- we would respectfully ask that the
16 Court say that there is final agency action
17 once that contingency is resolved so that we
18 could file our federal APA suit against the Air
19 Force then.

20 JUSTICE GORSUCH: Well, whether we say
21 that or not, I would think you would take that
22 position, that there's final agency action when
23 the Navy goes ahead and starts engaging in the
24 activities that you think require a NEPA
25 without having secured one.

1 MS. FLYNN: We would certainly take
2 that position.

3 I understood my friend to say here
4 today that, no, that's still not federal -- or
5 final agency action by the Air Force, that
6 all -- the only agency action being done here
7 is just by Guam EPA. I think that is strange
8 when you have --

9 JUSTICE GORSUCH: I think he's talking
10 about the RCRA -- during the RCRA application
11 process. Put that aside.

12 I -- I didn't hear him say -- and
13 maybe this is another question for Mr. Joshi on
14 rebuttal -- but I -- I didn't hear him say,
15 I -- I don't think, that there would never be a
16 point at which there could be final agency
17 action by actually engaging in the activity --
18 Navy's activities once -- once it secures a
19 license to do so.

20 MS. FLYNN: If I misunderstood him, I
21 apologize. But we fully agree there has to be
22 final agency action by the Air Force at some
23 point that we can challenge in federal court
24 under the APA. This can't just be -- because,
25 I mean, the Air Force is making a different

1 decision than whatever decision it is that Guam
2 EPA eventually makes under RCRA.

3 And I want to be very clear that our
4 challenge to the Air Force now is about the
5 procedural violation and the Air Force not
6 complying with federal law in reaching the
7 decision to proceed.

8 JUSTICE GORSUCH: Last -- last --

9 MS. FLYNN: We're not --

10 JUSTICE GORSUCH: -- last question.
11 How about agency action withheld? Have you
12 thought about that as an avenue?

13 MS. FLYNN: Because they didn't comply
14 with NEPA? Yeah, I think, you know, it's -- we
15 recognize that it's a broader theory to say
16 that, you know, a failure to comply with law is
17 agency action withheld.

18 JUSTICE GORSUCH: Unlawful.

19 MS. FLYNN: But we -- we -- rely on
20 something that has been litigated in this case
21 because we -- we thought there was -- I mean,
22 there is action here in the form of this
23 application that is --

24 JUSTICE GORSUCH: That -- that
25 question is not before us. So --

1 MS. FLYNN: It's not before you.

2 Correct.

3 JUSTICE GORSUCH: Yeah.

4 JUSTICE KAVANAUGH: I understood

5 Mr. Joshi -- so this will be for him on

6 rebuttal, but I'm asking it through you.

7 (Laughter.)

8 JUSTICE KAVANAUGH: I understood him

9 to say -- my understanding is the same as yours

10 about what he said before, that you that you

11 could never get in with an APA action even

12 after the permit is approved. That was your

13 understanding of what he said?

14 MS. FLYNN: It was. But he can

15 correct me.

16 JUSTICE KAVANAUGH: He -- he -- he can

17 clarify that.

18 On the second question presented,

19 which we may not get to, but if we do, I have

20 two questions.

21 One, what do you do with EPA's

22 interpretation since 1980 that NEPA does not

23 apply in a RCRA circumstance? We've often

24 said, of course, that a consistent

25 long-standing agency interpretation of a

1 statute carries great weight.

2 MS. FLYNN: Yes. So that regulation
3 is just talking about EPA as the permitting
4 authority. So it's saying that --

5 JUSTICE KAVANAUGH: It doesn't say
6 that.

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

10 JUSTICE KAVANAUGH: But it doesn't say
11 that, right?

12 MS. FLYNN: It says when EPA is the
13 permitting authority.

14 JUSTICE KAVANAUGH: Mm-hmm.

15 MS. FLYNN: And when you look at the
16 -- the NPRM and the preamble for the final
17 rule, the EPA explains where it got this rule
18 from. And it says we got this from the D.C.
19 Circuit's decision in Portland Cement, which is
20 a functional equivalents case.

21 And that case is very, very clear that
22 the rule the D.C. Circuit was devising applies
23 just to environmental agencies enforcing
24 environmental law. And I think there's another
25 Federal Register rule-making from 2007 -- it's

1 in our brief -- describing the regulation as
2 applicable to certain EPA actions.

3 So we don't think that touches on the
4 question here about the permitter -- permittee
5 agency, and for that reason there would be
6 nothing for this Court to give weight to in
7 evaluating the question here.

8 I would also say that this Court said
9 in *Epic Systems* that the job of reconciling
10 different statutes is a job for courts, not
11 agencies. So I'm not sure this is the kind of
12 topic of how to, you know, interpret NEPA
13 alongside RCRA that is squarely in the agency's
14 wheelhouse.

15 JUSTICE KAVANAUGH: And then second,
16 question, which is, substantively speaking,
17 what are the few things that would happen under
18 NEPA that don't happen under RCRA?

19 MS. FLYNN: Sure.

20 JUSTICE KAVANAUGH: Substantively.

21 MS. FLYNN: Right. So I think the
22 alternatives analysis that NEPA requires, which
23 is, like, the heart of NEPA analysis, is
24 important. Here, for instance, we think that
25 alternative -- NEPA would have required the Air

1 Force to consider not just alternative
2 procedures or modes of treatment but also just
3 doing -- carrying out open detonations
4 somewhere that was not on Guam, like shipping
5 this waste to the mainland and carrying out
6 these operations at another base.

7 That is not something that Guam EPA
8 would be required to consider under RCRA, and I
9 don't think they could deny the permit on that
10 basis because it's not something that RCRA
11 authorizes them to do.

12 The other thing I think is timing. I
13 discussed about how NEPA envisions that this is
14 all done before the plan is teed up, including
15 bringing Guam EPA to the table. But also the
16 public comment happens at that early stage too.
17 And it would be public comment to the Air Force
18 as decisionmaker, not just public comment to
19 Guam EPA, which, yes, RCRA provides for, but
20 here our client didn't have a route to speak to
21 the Air Force and the military in trying --
22 especially in helping to develop or have them
23 evaluate those alternatives.

24 JUSTICE ALITO: Do you think our case
25 law supports the proposition that a newer

1 statute that deals very extensively with a
2 specific problem cannot displace an older
3 statute that deals with a much broader range of
4 activities, only if it is impossible to comply
5 with both of those statutes?

6 MS. FLYNN: I do. I think this
7 Court's cases have required a conflict. I
8 think the Reading Law treatise says the same
9 thing, that the specific-general principle is
10 only when there is a conflict to be reconciled.

11 I think Epic Systems, again, is a good
12 example of this. There, there was a
13 specific-general argument being made and the
14 Court said, no, we can harmonize these statutes
15 and that is where our duty lies.

16 JUSTICE ALITO: But you think that the
17 duty to harmonize is consistent with a
18 requirement that it must be absolutely
19 impossible to comply with both?

20 MS. FLYNN: Yes, but also certainly
21 here, where Congress has stepped in in NEPA and
22 told us what the ground rules are for
23 displacement and said not just that there has
24 to be a conflict but there has to be a clear
25 and fundamental one.

1 And that comes from this Court's
2 decision in 1976 from Flint Ridge, where the
3 Court said because NEPA has this language about
4 how agencies must interpret and administer
5 their laws to the fullest extent possible with
6 NEPA, that language was specifically trying to
7 avoid a situation like this, where an agency,
8 as the Court put it, shunts aside the NEPA
9 obligation in the bureaucratic shovel --
10 shuffle.

11 So, you know, I think, again, NEPA is
12 designed to do this kind of thing. When you
13 look at even the current Department of War NEPA
14 procedures, you can see all the ways in which
15 they say: Integrate review under other
16 environmental laws. Do it all at once. Make
17 sure you don't have duplicative documents.
18 Make sure the documents do cover everything
19 that they need to cover and name all the
20 permits that are required, and everything like
21 that.

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

1 JUSTICE BARRETT: Ms. Flynn, Justice
2 Thomas's interchange with you -- I mean, he
3 pointed out that this is kind of an unusual
4 situation. And this situation in which you're
5 arguing that an application is final agency
6 action is perhaps born of the fact that this is
7 the regulated entity, as the government, and
8 Guam, you know, territory or a state EPA, is
9 the decisionmaker.

10 If we say that this is final agency
11 action, what ramifications do you think this
12 would have in the more normal situation where
13 you have -- to the extent the government is the
14 one who's the regulated entity seeking a permit
15 appearing before EPA or some other, like, you
16 know, a service transportation board or
17 something like that, would this have a big
18 impact or no?

19 MS. FLYNN: I don't think that this is
20 going to open the floodgates to more attacks on
21 permitting decisions. So the first thing I'd
22 say is that our -- our position -- we -- we
23 fully agree that we can't use this suit as a
24 way to, like, collaterally attack whatever
25 decision Guam EPA makes or to say that this

1 application is deficient under RCRA. So I
2 don't think this is an avenue for suits like
3 that.

4 The other thing I'd say is that our
5 claim is a procedural claim that focuses on the
6 decision-making of the federal entity. So the
7 only kinds of claims that can be brought under
8 a theory like this are ones where there is a
9 law that applies to the decisionmaker of the
10 federal agency as the permittee.

11 The other thing I would say is that if
12 you agree with me that there has to be final
13 agency action at some point by the Air Force in
14 this process, then whatever floodgates there
15 are would already have been opened because that
16 final agency action happens at the point of the
17 permit issuance. So if people wanted to be
18 suing the permittee agency, they could have
19 been doing so at that point.

20 I think the fact that the government
21 hasn't pointed to those suits is because, you
22 know, you really do have to have the confluence
23 of a claim that attaches to the permittee
24 agency's decision-making that's not just a way
25 to, you know, try another way of complaining

1 about whatever it is the permitting agency, the
2 permitting authority does.

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

11 MS. FLYNN: I think there's no
12 difference between the two. And that's why I'm
13 fully comfortable with saying that the final
14 agency action is the submission of the
15 application. I think the application reflects
16 the decision. It's memorialized there. And it
17 also implements it by bringing about the
18 automatic extension but also by binding Air
19 Force personnel to the application's terms upon
20 Guam EPA's approval.

21 JUSTICE JACKSON: And I guess the
22 question is it reflects the decision to do
23 what? Mr. Joshi says, from the very beginning,
24 it reflects the decision to make a proposal to
25 another agency that has the authority to, say

1 yes or no, et cetera, et cetera.

2 And you said that has no bearing on
3 whether or not we should consider this final
4 agency action?

5 MS. FLYNN: I think it --

6 JUSTICE JACKSON: I mean, you do agree
7 that it's -- it's the decision to make a
8 proposal?

9 MS. FLYNN: May I --

10 CHIEF JUSTICE ROBERTS: Yes, of
11 course.

12 MS. FLYNN: I think it reflects the
13 decision to continue these operations past when
14 they otherwise would have ceased, because the
15 Air Force was forced to a choice: Do we want
16 to stop when our permit would expire, or do we
17 want to keep going? And I think it reflects
18 the decision to keep going.

19 And I think that is fully the Air
20 Force's decision to make. That's not Guam
21 EPA's decision to make.

22 And, yes, it leads to teeing up this
23 other decision by the regulator, but that
24 doesn't change the Air Force made its own
25 decision.

1 JUSTICE JACKSON: Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Oh, Justice Thomas?

5 JUSTICE THOMAS: I'd like to go back
6 to my point.

7 When we had the Seven County case
8 here, the Surface Transportation Board
9 considered the proposal of Seven County to
10 build the railroad spur. And it was the
11 Surface Transportation Board's NEPA report that
12 was being considered.

13 Here we -- you're saying that the
14 regulated body -- and, of course, there was a
15 final agency action there, because they
16 actually submitted that.

17 But here you're saying that the
18 regulated body that submits the proposal
19 actually has engaged in and -- a -- a -- a
20 final agency action. And I asked you for any
21 other examples that you might have of the
22 regulated body's request or application being
23 considered a final agency action.

24 MS. FLYNN: So no other example comes
25 to mind in this Court's case law, but I would

1 say that it's clear that NEPA attaches to
2 the -- to federal agencies' own operation.
3 So their actions about, you know, like the
4 operations here, what they are doing, and not
5 just their actions as a regulator. And so I
6 think the upshot of --

7 JUSTICE THOMAS: No, we're -- we're
8 not -- we're not -- excuse me. I'm sorry. I'm
9 sorry to interrupt you.

10 We're not talking about the NEPA
11 requirement. We're talking about whether or
12 not the APA final agency action applies for
13 the purpose of using APA as an avenue to
14 challenging this.

15 MS. FLYNN: Right. And I was -- what
16 I was getting at is that if it were true that
17 there can never be final agency action when the
18 government's own operations are involved and
19 they are not acting as a regulator, you would
20 never be able to bring an action challenging a
21 NEPA violation for the government's own
22 operations, even though that seems like, you
23 know --

24 JUSTICE THOMAS: That's --

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

1 JUSTICE THOMAS: -- that's -- that's
2 not the point I'm making. It's -- I'm -- the
3 point I'm making is, is there final agency
4 action when the government is the applicant,
5 not whether or not it is taking an action?

6 MS. FLYNN: Yes. Our position is that
7 there is, because they reached the culmination
8 of their decision-making process about their
9 own operations, but about the decision at hand,
10 and it produced legal consequences.

11 JUSTICE THOMAS: Do you have another
12 example of that happening?

13 MS. FLYNN: I would say Biden versus
14 Texas, the agency was deciding its own policy
15 for immigration enforcement. So the DHS
16 Secretary was making a decision about what DHS
17 employees would do.

18 That's what this Court framed it as,
19 was a determination of what its DHS employees
20 would have to do once the injunction in that
21 case -- or if the injunction in that case was
22 lifted.

23 So I do think this Court's finality
24 inquiry is no different when it comes to the
25 federal government's actions, you know, as an

1 entity carrying out its own operations and not
2 just its actions as a regulator.

3 CHIEF JUSTICE ROBERTS: Justice Alito?
4 Justice Sotomayor?
5 Justice Kagan?
6 Justice Gorsuch?

7 JUSTICE GORSUCH: I guess I'm just a
8 little curious.

9 Do you think you could bring -- I am
10 repeating myself for both of you.

11 Do you think you could bring an action
12 for agency action unlawfully withheld, and
13 why -- why didn't you try that avenue?

14 MS. FLYNN: With apologies, I --
15 that's not the action we brought here. And I
16 don't want to make commitments about a question
17 when it arose in a different case.

18 JUSTICE GORSUCH: All right. Thank
19 you.

20 MS. FLYNN: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Kavanaugh?

23 Justice Barrett?

24 JUSTICE BARRETT: No.

25 CHIEF JUSTICE ROBERTS: Justice

1 Jackson? No?

2 Thank you, counsel.

3 Rebuttal, Mr. Joshi.

4 REBUTTAL ARGUMENT OF SOPAN JOSHI

5 ON BEHALF OF THE PETITIONERS

6 MR. JOSHI: Thank you, Mr. Chief

7 Justice. Just a few points.

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

15 We don't think that's final agency
16 action. And, indeed, the submission of the
17 application, our position is, that that is just
18 not agency action at all. It will never become
19 final. It's just an application.

20 The final permit, when it issues,
21 will be final, but it will be final from the
22 regulating entity, Guam EPA, or federal EPA,
23 if it's Iowa.

24 As far as when the Air Force's action
25 becomes final, I mean, if it's the case where,

1 as Justice Thomas was suggesting, if after
2 receiving a permit the agency issued an order
3 saying, now go blow up these waste munitions on
4 Guam, that would be an order. That would be a
5 final agency action.

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

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

19 If you find that submission of a RCRA
20 permit application is final agency action
21 because the applicant happens to be a federal
22 agency, I don't know how you distinguish it
23 from any one of the tens of thousands of permit
24 applications that federal agencies file and
25 hold at the current time.

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

10 And if the application is revised,
11 you're going to have another lawsuit, three
12 years of litigation in between.

13 And then when the final permit issues,
14 I suppose we will have yet another one.

15 So I think the floodgates are real.

16 And, yes, Ms. Flynn is right that once
17 there is some final action, a permit is issued,
18 if the agency issues an order and does
19 something, there will be a lawsuit then.
20 That's unavoidable in our system.

21 But the whole point of the finality
22 rule is to challenge all of the challenges into
23 a single proceeding at the end.

24 Finally, I just want to say, in terms
25 of Justice Alito, you were asking about

1 conflict and impossibility and when do both
2 statutes apply.

3 I don't think it's right that there
4 has to be a metaphysical impossibility of
5 complying with both statutes. I think a
6 conflict can be just inconsistency between
7 the two, with a specific and a general.

8 And, again, the best case for that,
9 I think I would cite, is an environmental case.
10 It's Home Builders, which we cite in our brief.

11 And that was one where the Clean Water
12 Act had, I think, nine criteria that EPA had to
13 look at and see if they were satisfied.

14 And the claim that the plaintiffs
15 brought there was: Well, by its terms, the
16 Endangered Species Act could also apply to this
17 situation.

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

23 Unless the Court has further
24 questions, we would ask to reverse.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel. The case is submitted.

2 (Whereupon, at 11:20 a.m., the case
3 was submitted.)

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