No. 08-1052

In the Supreme Court of the United States

FAIRBANKS NORTH STAR BOROUGH, PETITIONER

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Army Corps of Engineers' determination that petitioner's property contains "waters of the United States" protected by the Clean Water Act constitutes "final agency action" subject to judicial review under the Administrative Procedure Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A20) is reported at 543 F.3d 586. The opinion of the district court (Pet. App. B1-B8) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 2008. A petition for rehearing was denied on November 20, 2008 (Pet. App. C1). The petition for a writ of certiorari was filed on February 13, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 301(a) of the Clean Water Act (CWA) prohibits the "discharge of any pollutant"—defined as the addition of any pollutant to the "waters of the United

States" from any point source—except "as in compliance with" specified provision of the CWA. 33 U.S.C. 1311(a), 1362(7), 1362(12). The CWA allows discharges under two complementary permitting provisions. Section 404 authorizes the Army Corps of Engineers (Corps) to issue a permit "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. 1344(a) and (d). Section 402 authorizes the Environmental Protection Agency (EPA) to issue a permit for the discharge of any pollutant other than dredged or fill material. 33 U.S.C. 1342.

The Corps' regulations authorize (but do not require) the Corps, upon a landowner's written request, to provide the agency's view on whether particular property contains "waters of the United States" within the agency's regulatory jurisdiction under Section 404 of the CWA. See 33 C.F.R. 320.1(a)(6), 331.2; 33 C.F.R. Pt. 331 App. C. After the Corps issues an "approved" jurisdictional determination, the landowner may pursue an administrative appeal of that determination within the Corps. See 33 C.F.R. Pt. 331. Such jurisdictional determinations "do not include determinations that a particular activity requires a * * * permit." 33 C.F.R. 331.2.

Neither the CWA nor its implementing regulations require that a landowner obtain a jurisdictional determination. Whether or not it obtains such a determination, a landowner planning to discharge dredged or fill material has two options. First, the landowner may apply for a Section 404 permit from the Corps. See 33 U.S.C. 1344; 40 C.F.R. Pt. 230; 33 C.F.R. Pts. 323, 325. The agency's final permitting decision, including the Corps' determination whether the property at issue contains waters protected by the CWA, is then subject to judicial review under the Administrative Procedure Act (APA),

5 U.S.C. 701 *et seq.* See, *e.g.*, *Carabell* v. *United States Army Corps of Eng'rs*, 391 F.3d 704, 706-707 (6th Cir. 2004), vacated on other grounds, 547 U.S. 715 (2006).

Alternatively, the landowner may proceed with its discharge without a Section 404 permit and risk enforcement proceedings. If the government determines that a completed or ongoing discharge violates the CWA, it may take administrative action, including issuance of a "cease-and-desist" order, a compliance order, or both. See 33 U.S.C. 1319(a), 1344(s); 33 C.F.R. 326.3(c). In addition, the government may bring an enforcement action in district court to obtain injunctive and other relief. 33 U.S.C. 1319(b); 33 C.F.R. 326.5. At that time, the discharger may raise any applicable defenses, including the contention that its conduct did not violate the CWA because it did not involve a discharge into "waters of the United States." See, *e.g.*, *United States* v. *Deaton*, 332 F.3d 698, 701-702 (4th Cir. 2003), cert. denied, 541 U.S. 972 (2004).

2. Petitioner owns and wishes to develop approximately 2.1 acres of property in Fairbanks, Alaska. Pet. App. A3. In October 2005, petitioner asked the Corps for the agency's determination of whether that property contains waters protected by the CWA. *Id.* at A3-A4. The Corps issued a "preliminary" jurisdictional determination concluding that the property contains "waters of the United States" subject to the Corps' regulatory authority under the CWA. *Id.* at A4. Petitioner then requested an "approved" jurisdictional determination from the Corps. In response, the Corps explained that, based on its review of the information available to it, the entire parcel contained "waters of the United States." *Ibid.* Petitioner then filed an administrative appeal of the ju-

risdictional determination, which the Corps denied on the merits. *Ibid.*

Petitioner has never applied for a permit from the Corps to develop its property, nor is there any indication in the record that it has engaged in discharges without a permit based on its view that the property does not contain waters protected by the CWA. Instead, petitioner brought suit in federal district court seeking vacatur of the Corps' jurisdictional determination. Pet. App. A4-A5.

3. The district court granted the Corps' motion for judgment on the pleadings and dismissed petitioner's complaint (without prejudice) for lack of jurisdiction. Pet. App. B1-B8.

a. The district court found that the Corps' jurisdictional determination was not subject to judicial review pursuant to the APA because it was not "final agency action" under *Bennett* v. *Spear*, 520 U.S. 154, 177-178 (1997). Pet. App. B5-B6. The court held that the Corps' determination neither marked the consummation of the agency's decisionmaking process nor affected the legal rights or obligations of the parties. *Id.* at B6. The court explained that the determination "merely informed [petitioner] where it stood with respect to potential permitting issues," and that "the legal rights and/or obligations of the parties were the same the day after the jurisdictional determination was issued as they were the day before." *Ibid.* (citation omitted).

b. The district court held, in the alternative, that petitioner's lawsuit was not ripe. Pet. App. B6-B7. The court agreed with the Corps that challenges to the agency's jurisdictional determinations are not ripe for judicial review until the property owner who disagrees with a determination has completed the permitting pro-

cess or is subject to an enforcement action. *Ibid.* The court also explained that both the physical and legal circumstances on which a jurisdictional determination is based can change over time. *Id.* at B7.

c. The district court held that even if the Corps' jurisdictional determination were "final agency action" and ripe for review, the APA does not apply when another statute precludes judicial review. Pet. App. B7-B8. The court concluded that the CWA precludes review of all pre-enforcement actions by the Corps, including jurisdictional determinations. *Id.* at B7-B8 & n.25 (citing, *e.g.*, *Rueth* v. *United States EPA*, 13 F.3d 227, 229 (7th Cir. 1993), and *Child* v. *United States*, 851 F. Supp. 1527, 1533 (D. Utah 1994) (mem.)).

4. The court of appeals affirmed. Pet. App. A1-A20. The court held that the Corps' jurisdictional determination was not "final agency action" subject to judicial review under the APA. *Id.* at A7. In reaching that conclusion, the court applied the two requirements for "final agency action" identified by this Court in *Bennett*. *Ibid.*

The court of appeals agreed with petitioner that the Corps' determination satisfied the first *Bennett* requirement, because "an approved jurisdictional determination upheld in the Corps' administrative appeal process 'mark[s] the consummation of the agency's decisionmaking process' for determining whether the Corps conceives a property as subject to CWA regulatory jurisdiction." Pet. App. A8 (brackets in original) (quoting *Bennett*, 520 U.S. at 178). The court concluded, however, that the Corps' jurisdictional determination did not satisfy *Bennett*'s second requirement because it "is not an 'action . . . by which rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Id.* at A12 (quoting *Bennett*, 520 U.S. at 178).

The court explained that petitioner's "rights and obligations remain unchanged by the approved jurisdictional determination." *Ibid.* The court noted that "[i]n any later enforcement action, [petitioner] would face liability only for noncompliance with the CWA's underlying statutory commands, not for disagreement with the Corps' jurisdictional determination." *Id.* at A13. The court also explained that its holding did not impair petitioner's ability to contest the substance of the Corps' jurisdictional determination at a later time, either by seeking judicial review of a subsequent permitting decision or by asserting the absence of CWA coverage as a defense to any enforcement action. *Id.* at A14-A15 & n.9.[1]

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. As the district court correctly held, moreover, the Corps' jurisdictional determination would not be ripe for judicial review even if it constituted "final agency action." Further review is not warranted.

1. The decision below does not conflict with any decision of this Court or another court of appeals. Two other courts of appeals appear to have considered the issue in unpublished opinions, and both reached the same conclusion as the Ninth Circuit did in this case. Pet. App. A7 n. 3 (citing *Greater Gulfport Props., LLC* v. *United States Army Corps of Eng'rs*, 194 Fed. Appx. 250 (5th Cir. 2006) (per curiam) and *Commissioners of Pub. Works* v. *United States*, 30 F.3d 129 (4th Cir. 1994)

[1] The court of appeals did not reach the district court's alternate grounds—*i.e.*, that petitioner's challenge was not ripe and that the CWA precluded petitioner's suit for pre-enforcement review of the Corps' administrative action—for dismissing petitioner's complaint.

(table)). Petitioner identifies no conflicting decision of this Court or another court of appeals.[2]

2. Petitioner argues (Pet. 13-15) that the Corps' jurisdictional determination constituted "final agency action" that is reviewable under the APA. But petitioner does not dispute the court of appeals' articulation of the governing legal standard, including its reliance on the *Bennett* framework for identifying "final agency action." Rather, petitioner argues only that the court erred in its application of that standard (specifically, *Bennett*'s second requirement) and in its ultimate conclusion that the Corps' jurisdictional determination does not have legal consequences.[3]

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[2] Amicus National Association of Home Builders contends (at 9-12) that the decision below conflicts with court of appeals decisions concerning jurisdictional determinations under the Rivers and Harbors Appropriations Act of 1899, 33 U.S.C. 401 *et seq*. Those decisions are inapposite for at least two reasons. First, those cases deal with a different statute. Second, none of those decisions explicitly addressed the question whether the Corps' determination under the Rivers and Harbors Act constituted "final agency action" within the meaning of the APA. Rather, amicus relies on the fact that the courts in those cases decided the plaintiffs' challenges on the merits. Cf. *Webster* v. *Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.").

[3] The court of appeals held that the Corps' jurisdictional determination marks the consummation of the agency's decisionmaking process and therefore satisfies the first prong of *Bennett*'s test for "final agency action." See Pet. App. A8. But while a jurisdictional determination may represent the Corps' concluded view on a particular issue of CWA coverage at a particular time, the agency's determination that specific property is or is not protected by the CWA is subject to reconsideration if, for example, the physical conditions on the site have changed by the time that a permit is sought or a discharge occurs. See 65 Fed. Reg. 16,488 (2000). When a party applies for a permit or the Corps brings an

That argument lacks merit. As the court of appeals correctly recognized, petitioner's "rights and obligations remain unchanged by the approved jurisdictional determination. It does not itself command [petitioner] to do or forbear from anything; as a bare statement of the agency's opinion, it can be neither the subject of 'immediate compliance' nor of defiance." Pet. App. A12. A property does not become more or less subject to the CWA simply because the Corps states its view on the coverage issue at a landowner's request in advance of any permit proceedings.

Petitioner identifies three potential legal consequences of a Corps jurisdictional determination that, in its view, satisfy the second prerequisite to "final agency action" identified by this Court in *Bennett*. First, petitioner contends (Pet. 11, 13) that the Corps' determination that a property does *not* contain waters of the United States could provide the basis of an estoppel defense. The premise of petitioner's argument—that a negative jurisdictional determination provides an estoppel defense against the government—is dubious. This Court has never held that such an estoppel claim could succeed against the government. See *OPM* v. *Richmond*, 496 U.S. 414, 419, 423 (1990). In any event, that is not the sort of legal consequence that *Bennett*'s second prong contemplates. The possibility that "fairness and due process" (Pet. App. A18 n.12) may ultimately prohibit the government from punishing an individual for unlawful conduct where an individual reasonably relied on a statement of a government officer that

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enforcement action, the Corps assesses the issue of CWA coverage based on the conditions at the time of the permit application or the alleged violation.

turns out to be incorrect is not a direct legal consequence of the agency action.

Second, petitioner asserts (Pet. 13-14) that a jurisdictional determination has legal consequences because it "directly and immediately alters a landowner's course of conduct" by requiring it to seek a CWA permit to continue a project. That is incorrect. As the court of appeals correctly explained, although the jurisdictional determination may have put petitioner "on the Corps' radar screen," petitioner retains the ability either to proceed with construction or to apply for a permit, and "it will be no more or less in violation of the CWA than if it had never requested an approved jurisdictional determination." Pet. App. A17-A18. Thus, petitioner may apply for a permit and contest the issue of CWA coverage if the Corps denies the application, or it may engage in pollutant discharges and raise the coverage question as a defense to any enforcement action that the government may bring. To be sure, petitioner will be subject to penalties if it proceeds without a permit and its view of CWA coverage is ultimately rejected by the courts; but that would be equally true if the Corps had never rendered a jurisdictional determination. Petitioner's obligation to obtain a permit before discharging pollutants into the "waters of the United States" is imposed by the CWA and implementing regulations, not by the Corps' jurisdictional determination.

Petitioner's mere desire to avoid the permitting process cannot transform the jurisdictional determination into judicially reviewable agency action. Petitioner does not dispute that it has the option of applying for a permit; it simply prefers not to do so. A non-final agency order, however, is one that "does not of itself adversely affect complainant but only affects his rights adversely

on the contingency of future administrative action." *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125, 130 (1939). This Court has recognized, for example, that an agency's complaint requiring a company to respond in an administrative adjudication was not final agency action. See *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 239-243 (1980). The burden of participating in an administrative process, even where "substantial," is different in kind and legal effect from the burden attending "final agency action." *Id.* at 242. The jurisdictional determination here does not require petitioner to do anything at all and therefore is even less final than the administrative complaint involved in *Standard Oil*.

Third, petitioner contends (Pet. 14-15) that the jurisdictional determination has legal consequences because it "substantially increases the likelihood that any civil fine assessed against the landowner will be greater than otherwise would be the case." The CWA directs a court in assessing an appropriate civil penalty to consider, *inter alia*, any good-faith efforts to comply with the CWA's requirements. 33 U.S.C. 1319(d). But the CWA's civil-penalty provision does not mention, much less assign any particular evidentiary weight to, the Corps' prior issuance of a jurisdictional determination. "[T]hus, any difficulty [petitioner] might face in establishing good faith flows not from the legal status of the Corps' determination as agency action, but instead from the practical effect of [petitioner] having been placed on notice that construction might require a Section 404 permit." Pet. App. A16. As the court of appeals explained, petitioner would be in essentially the same position if it had obtained a report from a private consultant that

concluded that the property contained waters protected by the CWA. *Id.* at A16-A17.[4]

3. Petitioner also asserts (Pet. 12, 15-18) that the court of appeals' "decision conflicts with the settled rule that CWA permit decisions are judicially reviewable." The distinction between permitting decisions and jurisdictional determinations, however, is readily apparent. The grant or denial of a permit, unlike a jurisdictional determination, determines rights or obligations and has legal consequences. The CWA makes unlawful the "discharge of any pollutant by any person" except as in compliance with other sections of the CWA, including Section 404. 33 U.S.C. 1311(a), 1344. When the Corps grants a Section 404 permit, the permit sets the conditions under which a discharge into waters of the United States may lawfully occur. If the discharger complies with the terms of the permit, it does not violate the CWA. Similarly, the denial of a Section 404 permit by

[4] Amicus State of Alaska argues (at 16-24) that the Corps' jurisdictional determination should be appealable under the collateral order doctrine. That argument was neither pressed nor passed upon below, and it is meritless. The collateral order doctrine permits appellate courts to exercise jurisdiction under 28 U.S.C. 1291 over "'a narrow class of [federal district court] decisions that do not terminate the litigation,' but are sufficiently important and collateral to the merits that they should 'nonetheless be treated as final.'" *Will* v. *Hallock*, 546 U.S. 345, 347 (2006) (quoting *Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994)). Amicus cites no case in which this Court has invoked the doctrine to allow an APA suit in district court challenging an administrative agency decision. In any event, for the reasons explained above, the jurisdictional determination is not sufficiently separate from the ultimate permitting decision, nor is it "effectively unreviewable" at a later time (because petitioner could dispute the question of CWA coverage after a final permitting decision or during a subsequent enforcement action). *Id.* at 349 (quoting *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993)).

the Corps has operative legal consequences because it forecloses that avenue by which an individual can discharge pollutants into "waters of the United States" without violating the CWA. The Corps' issuance of a jurisdictional determination entails no similar binding consequences. Rather, it is in substance an advisory opinion that reflects the agency's current assessment of the manner in which one issue bearing on a future permit application or enforcement action would likely be resolved.

4. Petitioner contends (Pet. 18-21) that the court of appeals rejected *sub silentio* its additional argument that "even if a Jurisdictional Determination would normally not be subject to judicial review, any such bar should be removed given the magnitude of regulatory overreach produced by the Corps' theory justifying regulation of [petitioner's] property." Relying on dicta in a Seventh Circuit case (*Rueth* v. *United States EPA*, 13 F.3d 227 (1993)) and on this Court's decision in *Leedom* v. *Kyne*, 358 U.S. 184 (1958), petitioner asserts (Pet. 19) that judicial review of the Corps' jurisdictional determination is available because the Corps' action "implicates the fundamental right to use and enjoy property." That argument is incorrect.

a. As an initial matter, petitioner's argument in the court of appeals was *not* that the *Rueth* dicta and the so-called *Leedom* doctrine provide an independent basis for judicial review. Instead, petitioner relied on *Rueth* and *Leedom* to assert that the district court's alternative holding—that even if the Corps' jurisdictional determination was "final agency action" for purposes of the APA, the CWA precluded judicial review (Pet. App. B7-B8)—was erroneous. See Pet. C.A. Br. 23-33; Pet. C.A. Reply Br. 21-30. Because the court of appeals rested its

decision solely on the ground that the Corps' jurisdictional determination was not "final agency action," it had no occasion to address petitioner's argument based on *Rueth* and *Leedom*. And because petitioner's current formulation of the argument was neither pressed nor passed on below, it is not properly before this Court. See, *e.g.*, *Auer* v. *Robbins*, 519 U.S. 452, 464 (1997) (declining to consider argument because it "was inadequately preserved in the prior proceedings").

b. In any event, neither the *Rueth* dicta nor the decision in *Leedom* supports petitioner's effort to obtain judicial review of the Corps' jurisdictional determination. The Seventh Circuit in *Rueth* rejected a challenge to pre-enforcement activities (EPA's issuance of a compliance order) under the CWA. 13 F.3d at 229-231. Petitioner relies on the *Rueth* court's statement that "it is not inconceivable that the EPA or the Corps of Engineers might completely overextend their authority. In such a case, we suggest to those agencies that we will not hesitate to intervene in pre-enforcement activity." *Id.* at 231. Nothing in *Rueth* suggests, however, that the Seventh Circuit would regard the Corps' jurisdictional determination in this case as the sort of *ultra vires* conduct that would justify pre-enforcement review.

In *Leedom*, this Court indicated that a statutory preclusion of review may be subject to a narrow exception when the plaintiff asserts legal rights for which there is no alternative means of vindication. 358 U.S. at 189-191. *Leedom* involved a National Labor Relations Board (Board) order that included professional and nonprofessional employees in the same collective bargaining unit—notwithstanding the fact that the professionals had not been permitted to vote—in clear contravention of Section 9(b)(1) of the National Labor Relations Act,

29 U.S.C. 159(b)(1) (providing that the Board "shall not" approve a mixed unit for collective bargaining purposes unless a majority of professional employees vote for inclusion). *Leedom*, 358 U.S. at 184-186. The question presented was whether the district court could review the Board's order given this Court's prior ruling that such orders were not subject to judicial review under the Act (except in circumstances inapplicable in *Leedom*). *Id.* at 187. The Court held that the district court had jurisdiction, explaining that a contrary decision "would mean a sacrifice or obliteration of a right which Congress has given professional employees for there is no other means within their control to protect and enforce that right." *Id.* at 190 (internal quotation marks and citation omitted); see *Board of Governors of the Fed. Reserve Sys.* v. *MCorp Fin., Inc.*, 502 U.S. 32, 42-44 (1991) (*Leedom* exception does not apply where plaintiff has meaningful and adequate alternative opportunity for judicial review of his claims).

The *Rueth* dicta and *Leedom*'s narrow exception are inapplicable here. First, the Corps expressed its view, at petitioner's request, as to the scope of the agency's CWA jurisdiction. The Corps has not asserted, let alone overextended, its authority in a binding manner. Second, the lack of judicial review at this stage does not entail "a sacrifice or obliteration" of any statutory right. As explained above (p. 9, *supra*), petitioner may proceed without obtaining a permit and, if the Corps brings an enforcement action, petitioner may then press its argument that the site at issue is not covered by the CWA. Petitioner will also have an opportunity for judicial review of the Corps' jurisdictional determination if it applies for a permit and the Corps denies the application or imposes conditions that petitioner finds unacceptable.

Third, unlike in *Leedom*, petitioner cannot show that the agency acted contrary to an unambiguous statutory provision. The Corps' regulations expressly authorize, but do not require, the Corps to issue jurisdictional determinations. 33 C.F.R. 320.1(a)(6); see C.A. Supp. E.R. 19. And the CWA neither requires nor prohibits such determinations. Although petitioner disagrees with the Corps' conclusion that the relevant property contains waters protected by the CWA, the agency's alleged error in applying the governing legal standards to a particular parcel would not involve the sort of manifest overreaching on which the *Leedom* exception is premised.

5. Even if the Corps' jurisdictional determination constituted "final agency action" under the APA, and assuming the CWA does not preclude judicial review,[5] that determination would not be ripe for judicial review. The ripeness doctrine is intended "to prevent courts * * * from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 148-149 (1967). Determining whether an agency action is ripe for judicial review generally requires a court to evaluate the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. *Id.* at 148-152. Agency action may be final without being ripe. See *National Park Hospitality Ass'n* v. *Department of the Interior*, 538 U.S. 803, 812 (2003).

[5] See, *e.g.*, *Southern Pines Assocs. by Goldmeier* v. *United States*, 912 F.2d 713, 715-717 (4th Cir. 1990); *Hoffman Group, Inc.* v. *EPA*, 902 F.2d 567, 569 (7th Cir. 1990); see also Pet. App. B7-B8.

As the district court explained (Pet. App. B6-B7), the Corps' jurisdictional determination is not ripe for judicial review. The jurisdictional determination noted that petitioner may apply for a permit if it wishes to discharge fill material in developing its property. *Id.* at A4. Petitioner has not yet applied for such a permit, however, nor has it been subject to any enforcement action. Depending on the nature and circumstances of the proposed discharges, it is entirely possible that petitioner could receive a permit entitling it to develop its property without restrictions or that no enforcement action would be initiated. Those uncertainties, in addition to the possibility that changes to the property's condition might affect its status under the CWA (see note 3, *supra*), demonstrate that petitioner's suit is not ripe.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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