No. 17-1154

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARQUETTE COUNTY ROAD COMMISSION,

Appellant,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; SUSAN HEDMAN, in her official capacity as Administrator of Region V of the United States Environmental Protection Agency, and UNITED STATES ARMY CORPS OF ENGINEERS,

Appellees.

On Appeal from the United States District Court
for the Western District of Michigan
Honorable Robert Holmes Bell, District Judge

APPELLANT'S PRINCIPAL BRIEF

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

This is a challenge to a United States Environmental Protection Agency (EPA) veto of a state-approved permit under 33 U.S.C. § 404(j) of the Clean Water Act. Appellant Marquette County Road Commission (Road Commission or County) contests this veto as contrary to the Act and Supreme Court precedent and seeks to have the veto overturned under the Administrative Procedure Act (APA). Upon filing of the complaint for declaratory and injunctive relief, the EPA (along with co-Defendants U.S. Army Corps of Engineers and Susan Hedman, in her official capacity as Administrator of Region V of the EPA) filed a motion to dismiss for lack of subject matter jurisdiction claiming the veto was not final agency action under the APA and the case was not ripe. The district court held for the EPA and the other Defendants and dismissed the case for lack of final agency action. This is a case of first impression in the Sixth Circuit and turns on the recent Supreme Court decisions in *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S. Ct. 1807 (2016), and *Sackett v. EPA*, 566 U.S. 120 (2017). For this reason, the Road Commission believes that oral argument will aid this Court in resolving this issue and respectfully requests 20 minutes to state its case.

STATEMENT OF JURISDICTION

This appeal arises from the district court's order of May 18, 2016, granting the EPA's motion to dismiss (Order, RE 29, Page ID #1985), the district court's judgment in favor of the EPA on that same date (Judgment, RE 30, Page ID #1986), and the district court's order denying the Road Commission's timely Motion to Alter or Amend Judgment (Order Denying Motion for Reconsideration, RE 51, Page ID #2139).

The district court had jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 2201 (authorizing declaratory relief); 28 U.S.C. § 2202 (authorizing further "necessary or proper relief"); and 5 U.S.C. § 702 (providing for judicial review of agency action under the APA). The relevant property consists of 25 acres of wetlands in Marquette County, Michigan (Opinion Granting Motion to Dismiss, RE 28, Page ID #1953).

Venue in the district court was proper under 28 U.S.C. § 1931(e)(1) because the property that is the subject of the action is located within that district.

The district court's entry of judgment dismissing the Road Commission's complaint constitutes a final judgment resolving all relevant claims under Rule 54(a) of the Federal Rules of Appellate Procedure. The Road Commission filed a timely Notice of Appeal on February 5, 2017 (Notice of Appeal, RE 52, Page ID #2140-2142), within sixty days of the district court's denial of the Road Commission's

Motion to Alter or Amend the Judgment, making the appeal timely under Federal Rule of Appellate Procedure 4(a)(4)(A). The statutory basis for this Court's appellate jurisdiction is 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the district court erred as a matter of law when it held that it could not review the EPA veto of a Clean Water Act (CWA or Act) permit otherwise approved by the Michigan Department of Environmental Quality (MDEQ) pursuant to the Act, even though *Hawkes*, 136 S. Ct. 1807, as applied would hold that the Road Commission could seek judicial review of the EPA veto on the merits;

2. Whether the APA's finality requirement as a predicate for judicial review does not apply here because the EPA veto of the MDEQ-approved permit violated the express limitations imposed on the EPA by § 404(j) of the Act; and

3. Whether the APA's finality requirement as a predicate for judicial review does not apply here because it would have been futile for the Road Commission to pursue a new permit with the U.S. Army Corps of Engineers (Corps) where the Corps had already determined it would not grant a permit for the road project.

STATEMENT OF THE CASE AND FACTS

A. The Procedural History of the Case

In 2011, the Road Commission decided to construct a road, County Road 595 (CR595), in Marquette County, Michigan. *Marquette County Road Comm'n v. EPA*, 188 F. Supp. 641, 643 (W.D. Mich. 2016). To do so, it needed to fill 25 acres of wetlands. *Id*. To fill the wetlands, the Road Commission needed a permit to pursuant to Section 404 of the Clean Water Act. *Id*.[1]

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[1] The Act establishes two independent permitting systems by which individuals may obtain permits from the appropriate federal agency. *Marquette County Road Comm'n*, 188 F. Supp. at 643-44. The first, known as the National Pollutant Discharge Elimination System (NPDES), governs the discharge of pollutants from specific sites, known as point sources. *See* § 402 of the Act, 33 U.S.C. § 1342. The second permitting scheme regulates the release of dredged and fill matter into waterways, including wetlands. *See* § 404 of the Act, 33 U.S.C. § 1344. This case concerns the latter of these two types of permitting schemes; permits issued pursuant to the latter scheme are called § 404 permits. *Marquette County Road Comm'n*, 188 F. Supp. at 643-44.

States are authorized to approve a § 404 permit if the permit applications meet certain conditions. *Id*. EPA retains limited oversight authority when the state takes on this authority. *Id*. A state must present to EPA copies of all permit applications it receives. *Id*. In addition, the state must notify EPA of any action that it takes with respect to these applications. 33 U.S.C. § 1344(j). Within ten days, the EPA Administrator must provide copies of the application to the Corps, the Department of the Interior, and the U.S. Fish and Wildlife Service (FWS). *Id*. The Administrator must notify the state within thirty days if it intends to comment on the state's handling of the application. *Id*. The Administrator must submit comments within ninety days. *Id*. (citing *Friends of Crystal River v. U.S. E.P.A.*, 35 F.3d 1073, 1075 (6th Cir. 1994)).

(continued...)

The Road Commission sought its permit from the Michigan Department of Environmental Quality, the state agency responsible for implementing Michigan's federally approved CWA wetland permit program, in October 2011, and submitted a revised application on January 23, 2012. *Id*. at 644. The MDEQ sent copies of the application to the EPA, the Corps, and the FWS, per the Act. *Id*. On April 23, 2012, after consulting with the Corps and the FWS, EPA submitted comments on the application and objected to its issuance, asserting that Road Commission's proposal purportedly failed to comply with section 404 because it did not demonstrate that the proposed road was the "least environmentally damaging practical alternative." *Id*.

The Road Commission, the MDEQ, and EPA discussed the application over the next several months and ultimately the Road Commission submitted a revised version of its application twice, the latter on July 24, 2012. *Id*. At the MDEQ's request, pursuant to the Act, EPA held a public hearing on the third revised application on August 28, 2012. *Id*. On September 17, the MDEQ notified EPA that it was in a

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[1] (...continued)

Once EPA notifies a state that it intends to comment on the permit application, the state may not issue the permit until after it receives the comment, or until ninety days have passed. *Id*. If EPA objects to the application, the state "shall not issue such proposed permit" even after the ninety days have elapsed. *Id*. (citing 33 U.S.C. § 1344(j)). The aggrieved state may request a hearing to air its complaints. *Id*. However, if the state does not request a hearing, or if it fails to modify its plan so as to conform to the EPA's objections, authority to issue the permit is transferred to the Corps. *Id*. (citing *Friends of Crystal River*, 35 F.3d at 1075).

position to issue the permit and, in light of the fact that the MDEQ believed the road project was in the best interest of the state, urged EPA to withdraw its objections. *Id*.

EPA refused to do so. *Id*. Instead, on December 4, 2012, EPA notified the MDEQ that it would withdraw some objections, but it continued to object to issuance of the permit because in its estimation the Road Commission had still not provided "adequate plans to minimize impacts" or a "comprehensive mitigation plan that would sufficiently compensate for unavoidable impacts." *Id*. At this point, the MDEQ had 30 days to issue a permit that satisfied those objections or to notify EPA it could not issue the permit because of the EPA's objections, objections purportedly made pursuant to the Act. *See* 40 C.F.R. § 233.50(h)(2).

The Road Commission, having devoted years, and tens of thousands of dollars, to the CR595 road project, repeatedly reached out to EPA between December 4 and December 27, 2012, to obtain more specific information about the objections and the conditions necessary to satisfy them, but EPA refused to offer any other direction as to how its demands could actually ever be met (Complaint, RE 1, Page ID #67, ¶ 271). Instead, EPA told the Road Commission to work with the MDEQ, a pointless suggestion since the MDEQ believed it should issue the permit. (*Id*.).

On January 3, 2013, the MDEQ notified EPA that it could not issue a Section 404 permit because the EPA's objections were too complex. *Marquette County Road Comm'n*, 188 F. Supp. at 645. Without sufficient direction from EPA as to how to

resolve its objections, authority to issue a permit to the Road Commission transferred from the State to the Corps pursuant to Section 404 of the Act. *Id*. Further, the Corps refused to review the pending application and instead demanded an entirely new application. *Id*. Instead, the Corps demanded a new application, an application that would have to meet different requirements that the old application did not and could not meet, since it was designed to meet the MDEQ's strictures, not the Corp's requirements (Complaint, RE 1, Page ID #74, ¶ 304). The Corps demanded the Road Commission start over from the beginning. *Id*. Facing a new permit process that would last up to two years and cost up to $270,000, *see Rapanos v. United States*, 547 U.S. 715, 721 (2006) (plurality opinion), the Road Commission declined the offer (Complaint, RE 1, Page ID #74, ¶ 304).

The Road Commission subsequently brought this five-count declaratory judgment action (*id*.). In Count I of the complaint, it asserted the EPA's objections to its MDEQ permit application were arbitrary and capricious (*id*. Page ID # 75-80, ¶¶ 309-330). In Count II, the Road Commission claimed that EPA exceeded its delegated authority by issuing objections based on requirements not mandated by the CWA (*id*. Page ID #80-83, ¶¶ 331-345). In Count III, the Road Commission claimed that EPA's objections failed to list the conditions necessary for a permit to issue, as required by section 404(j) of the CWA (*id*. Page ID #83-90, ¶¶ 346-376). In Count IV, it claimed that EPA did not follow the procedural requirements of Section 404(j) of

the CWA when it vetoed the MDEQ permit (*id*. Page ID #89-90, ¶¶ 377-384). In Count V, the Road Commission claimed that the Corps improperly denied its permit application by failing to act on it (*id*. Page ID #91-93, ¶¶ 386-398).

Defendants asserted the lower court should dismiss the complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, because the complaint failed to state a claim upon which relief could be granted and because the court lacked subject matter jurisdiction to adjudicate the claims against the federal defendants (Motion to Dismiss and Memorandum of Law, RE 13-14, Page ID #1210-1246).

The Road Commission made three arguments in response: first, that the EPA's veto of the MDEQ-approved Clean Water Act permit was arbitrary and capricious, and the recent precedent, *Sackett*, allowed the federal courts to review the EPA decision to veto the MDEQ permit (Memorandum Opposing Motion to Dismiss, RE 23, Page ID #1285-1302); second, even if *Sackett* did not control, that nevertheless the EPA veto was subject to immediate judicial review because the EPA veto of the MDEQ-approved permit violated the express limitations imposed on the EPA by § 404(j) of the Act (*id*. Page ID #1303-1304); and third, that even if the APA's finality requirement was not met, that the EPA's decision was reviewable, because on the alleged facts, it would have been futile for the Road Commission to pursue a new permit with the Corps where the Corps had already determined it would not grant the

MDEQ permit for the road project and would require a new permit application instead (*id*. Page ID #1307-1308).

The district court dismissed the complaint pursuant to Rule 12(b)(6) (Order and Opinion Dismissing Complaint, RE 28-29, Page ID #1953-1985). After finding it had jurisdiction (Opinion, RE 28, Page ID #1958), the court justified its decision to dismiss by concluding that neither the first prong nor the second prong of the *Bennett v. Spear*[2] test for final agency action allowing for judicial review under the APA was met (*id*. Page ID #1962-1973). The court said that EPA's work was not consummated when it vetoed the MDEQ permit because the EPA could have continued working with the MDEQ (*id*. Page ID #1962-1969), despite the fact that EPA had refused to timely inform the MDEQ what changes could have been made to the permit in order to allow the permit to move forward; and the EPA veto did not impose legal consequences or obligations because "the applicant can seek a permit from the Corps, without being bound by the EPA's objections," (*id*. at #1962), and further explaining that the Corps was not "bound" by the EPA's objections to the prior permit when it reviews the new permit that the EPA's veto requires the Road Commission to pursue, in the absence of judicial review, if it ever wants to build its road project (*id*.)

Thirteen days after the district court dismissed the case, the Supreme Court ruled in *Hawkes* that once the federal government decides it has jurisdiction over a

[2] *Bennett v. Spear*, 520 U.S. 154 (1997).

party's property thus requiring the party to apply for a § 404 permit from the Corps, as the Road Commission has to do here, the landowner could challenge that decision in court. *Hawkes*, 136 S. Ct. at 1814-16. The Court reached this result despite the fact that Hawkes Company was not obligated to pursue the permit; it only had to pursue the permit if it wanted to use its property in the manner it planned to. *Id*. at 1815.

Since the Road Commission is in the same position as Hawkes Company—it has to apply for a § 404 permit from the Corps, and incur the costs and time that go with that, should it wish to use its property—it moved for rehearing premised on the *Hawkes* decision (Motion and Memorandum for Reconsideration RE 31-32, Page ID #1987-2125). Despite the similarities of the two cases, the district court denied the rehearing and held firm to its position that the EPA's veto was not final and that the veto neither had consequences for nor imposed obligations on the Road Commission (Opinion, RE 50, Page ID #2138). From that decision the Road Commission took this timely appeal (Notice of Appeal, RE 52, Page ID #2140-2142).

B. The Facts of the Case

1. EPA Decides To Block CR595 Before Road Commission Files Permit Application

On October 18, 2010, the Road Commission determined in the best interest of its community it should build a county road named CR595 (Complaint, RE 1, Page ID #34-35, ¶¶ 150-58). CR595 promised substantial economic benefits and improved public safety because large trucks hauling minerals through small towns and along college and school campuses could instead use CR595 and avoid these danger zones (Affidavit Opposing Motion to Dismiss, RE 23-1, Page ID #1312-13, ¶¶ 4-5). The community, local governments, key state agencies, and state and federal legislators from both parties supported the plan (*id*. Page ID #1313, ¶ 5). After the Road Commission informed the MDEQ of its plan, the MDEQ notified EPA of the Road Commission's intention to: (1) seek a permit under Michigan's 404 Program; and (2) hold a December 2010 pre-application meeting with state and federal regulators (MDEQ/EPA emails, RE 23-2, Page ID #1331-1335).

EPA official Melanie Haveman attended this December 15, 2010 pre-application meeting (Response to Motion to Dismiss, RE 23, Page ID #1279 at n.3; EPA Email, RE 23-3, Page ID #1336-1337); afterwards Haveman sent an internal email where she stated: "CR-595 doesn't seem to be going away. . . . At the meeting in December, I was careful not to say that EPA opposed CR-595." (*Id*.) A few days

later, another EPA official, Wendy Melgin, sent an internal email where she stated: "*We thought this road project was dead but it doesn't seem to be going away, even though they . . . don't have funding for the road*." (Melgin email, RE 23-4, Page ID #1338) (emphasis added).

Eight months later, on August 30, 2011, EPA held a meeting to discuss the future of CR595 (Complaint, RE 1, Page ID #4-5, ¶¶ 3-5; Page ID #38, ¶¶ 166-67; emails from CR595 opponent with attachments, RE 1-1, Page ID #98-100). Individuals opposed to the road, EPA officials, and congressional aides attended this meeting; the Road Commission was neither invited nor informed of the meeting even taking place (*id*.). At this meeting—again, before the Road Commission even submitted its first permit application for CR595—EPA advised those in attendance it would not allow the road to be permitted (*id*.). That position, of course, was consistent with the internal emails sent by Haveman and Melgin (*id*.).

2. EPA Follows Through on Its Promise To Veto CR595

On October 6, 2011, unaware of EPA's intention to oppose the road project, the Road Commission applied to MDEQ for a permit for CR595—a road 21.4 miles in length and which would impact 25.6 acres of jurisdictional and non-jurisdictional wetlands (Complaint, RE 1, Page ID #38, ¶ 168). On January 23, 2012, the Road Commission submitted a revised application completely replacing the previous filing (*Id*.). The application was prepared by King & MacGregor Environmental, Inc.

(KME) in conjunction with dozens of individuals working for several engineering and environmental firms and other private sector companies at significant cost (*id*. ¶ 169). The application contained comprehensive wetland, stream, and flora and fauna assessments, an analysis of nine alternative routes, and detailed plans to minimize and mitigate impacts (*id*. ¶ 170-97). Shortly after receiving the Road Commission's revised application, an EPA official predicted EPA would block CR595, writing to another EPA official that they "may end up in a situation where the state issues a state-only permit over federal objections." (EPA Haveman email RE 23-6, Page ID #1353).

In early 2012, EPA, the Corps, and the FWS objected to the Road Commission's application (Complaint, RE 1, Page ID #47-52, ¶¶ 208-27). The Corps asserted the application was "inadequate" and "deficient" in several discretionary areas, including "the project purpose, reasonable comparison of alternatives, an adequate § 404(b)(1) analysis, and an adequate compensatory mitigation proposal." (*Id*. Page ID #47-48, ¶¶ 209-11; Corps objections to CR595 permit, RE 6-3, Page ID #600-608). EPA objected and asserted the application did not "demonstrate that the County's preferred route is the least environmentally damaging practical alternative," "the projected would lead to the significant degradation of aquatic resources, and the proposed wetland and stream mitigation would not fully compensate for the loss of aquatic function and value." (Complaint, RE 1, Page ID #50-52, ¶¶ 220-27; EPA

objections to CR595 permit, RE 6-5.) The Corps' objections and the EPA objections were not based on any actual requirements of the Clean Water Act or the § 404(b)(1) Guidelines (Complaint, RE 1, Page ID #80-82, ¶¶ 332-39). Furthermore, EPA expressly refused to list the "conditions which such permit would include if it were to be issued by [EPA]." (*Id*. Page ID #52, ¶¶ 227; Page ID #83-89, ¶¶ 347-376).

In response to the objections, the Road Commission submitted revised applications, response documents, and other proposals to MDEQ, EPA, and the Corps; these efforts were expensive and ultimately for naught, since EPA already intended to block the project (*id*. Page ID #52-64, ¶¶ 228-64). With each submission, the Road Commission's revised applications became more detailed, and it increased the compensatory mitigation ratio for the wetlands affected by the road project (*id*.). After each submission, however, EPA signaled that these proposals would not satisfy EPA's objections (*id*.). The Road Commission's fourth wetland mitigation plan offered to preserve in a conservation easement 1,576 acres of high-quality wetlands and upland buffers, 4.3 miles of streams, and two lakes (*id*.).

Unlike EPA, the MDEQ wanted to approve the project. On August 24, 2012, it sent EPA a letter enclosing 53 draft conditions MDEQ would impose on the Road Commission's future permit (*Id*. Page ID #60-61, ¶ 254). Then, MDEQ's Director sent a letter to EPA explaining that "the improvements to the Road Commission's proposal since last April have brought this project to the point that Michigan will soon be in a

position to issue a permit under state authorities." (*Id*. Page ID #62-63, ¶ 262; MDEQ letter to EPA, RE 8-4, Page ID #995-996). MDEQ urged EPA to remove its objection to MDEQ issuing a permit for construction of CR595 (Complaint, RE 1, Page ID #62-63, ¶ 262; MDEQ Letter to EPA, RE 8-4). The MDEQ letter explained that MDEQ had found the Road Commission's alternatives analysis, minimization measures, and mitigation plan more than adequate (MDEQ letter to EPA, RE 8-4).

The MDEQ stood ready to issue the permit but EPA did not intend to stand down. As the CR595 permitting process drew to a close in late November 2012, Laura Farwell, an attendee at the earlier mentioned August 30, 2011, secret EPA meeting, wrote to Lynn Abrahamson of the Office of U.S. Senator Barbara Boxer and Thomas Fox of the Senate Committee for Environment and Public Works and urged them to ensure EPA did not reverse its promised course to nix the road (EPA and opponents' emails, RE 1-1 at 2-4). Farwell stated:

> Tom may remember that during the August 30, 2011[,] meeting at EPA Denise Keehner of EPA's Office of Wetlands, Oceans and Watersheds *definitively reiterated EPA's position and stated that the haul road would not happen*."

(Complaint RE 1, Page ID #38, ¶ 167 (emphasis added), EPA and opponents' emails, RE No. 1-1, Page ID #99).[3]

On December 4, 2012, EPA objected yet again to the latest version of the permit application, but raised different objections than it had previously (Complaint, RE 1, Page ID #64-66, ¶¶ 265-70; EPA Objections, RE 8-7, Page ID #1039-1089). EPA officials knew at this time that the Road Commission had a funding commitment for CR595 but that committed was time-sensitive and was about to expire (*Id.*). In the letter setting out its objections, EPA conceded CR595 was the "least environmentally damaging practical alternative" capable of achieving the project purpose, but, substituting its judgment for that of MDEQ, stated that the Road Commission's plans to minimize and mitigate impacts were inadequate in its estimation (*Id.*). EPA did not base its objections on any requirement set out in the Clean Water Act. (*Id.*) Moreover, EPA did not list the permit conditions necessary for its new objections to be lifted and the MDEQ approval to go forward (*Id.*). Further, EPA gave the Road Commission thirty days to satisfy its new objections, refused to offer a public hearing on its objections, and informed the MDEQ that unless EPA's latest objections were resolved satisfactorily to EPA, no permit should issue (*Id.*).

[3] The term "haul road" meant "CR595." The EPA internal email which included this Farwell letter as an attachment was entitled "EPA decision due on proposed *County Road 595*." (EPA and opponents' emails, RE 1-1, Page ID #198 (emphasis added)).

Over the next three weeks, the Road Commission repeatedly contacted EPA by email and phone to ascertain the basis for EPA's new objections and the specific conditions necessary to satisfy EPA (Complaint, RE 1, Page ID #67, ¶ 271). EPA refused to answer any questions directly and instead promised to "check into it and get back to" the Road Commission and also directed the Road Commission to submit its questions to MDEQ (*id*. Page ID #67-70, ¶¶ 271-86). In fact, U.S. Senator Carl Levin of Michigan intervened and asked EPA to clarify its objections in order to allow the MDEQ to respond to them (*id*. Page ID #70, ¶ 286). No clarification from the EPA was forthcoming. Due to the lack of EPA answers, on December 27 the Road Commission responded to EPA's new objections with a detailed letter addressing EPA's concerns on a point-by-point basis (*id*. Page ID #71-72, ¶¶ 287-91). EPA did not respond, its new objections crystalized into a veto, and permitting authority transferred to the Corps (*id*. Page ID #72, ¶ 292).[4]

[4] A month later, EPA Region V Administrator Susan Hedman forwarded to EPA officials Tinka Hyde and Nancy Stoner an editorial written by an environmental activist who had opposed CR595 (Response to Motion to Dismiss RE 23, Page ID #1283 at n.5; Email from EPA to Corps RE 23-7, Page ID #1356-1357). Hedman stated: "I think you might enjoy this letter to the editor. . . . The person writing the letter is very supportive of our role in the review of the County Road 595 project . . . . Thanks again for taking the time to help us resolve the issues with this project." In response, Nancy Stoner wrote: "*All's well that ends well*." (*Id*. emphasis added).

3. Corps Demands That Road Commission File New Application with Corps

Due to the EPA veto of the MDEQ permit, permitting authority transferred to the Corps (*Id*. ¶ 303). The Corps officials responsible for reviewing the Road Commission's application informed the Road Commission it would not grant the last application submitted to MDEQ and that instead the Road Commission needed to file a new permit application (Complaint, RE 1, Page ID #7, ¶¶ 14; Page ID #73-74, ¶¶ 298-301; Page ID #91-93, ¶¶ 386-398; Affidavit Opposing Motion to Dismiss, RE 23-1, Page ID #1314, ¶ 16)). The Corps explained that submission of a new application would start a "whole" new process that would involve responding to the Corps' informational inquiries which could address new topics not raised during the previous review, a new and separate public and inter-agency comment process, and possibly a formal tribal-consultation process that could cause significant delays (Complaint, RE 1, Page ID #73-74, ¶¶ 298-300; Affidavit Opposing Motion to Dismiss, RE 23-1, Page ID #1314-1315, ¶¶ 17-18). The Road Commission estimated that submitting a new application and going through the Corps' process, even in the absence of a National Environmental Policy Act review, would cost $500,000 (Affidavit Opposing Motion to Dismiss, RE 23-1, Page ID #1315, ¶ 19).

Upon learning in September 2013 that the Road Commission might file a new application with the Corps, Sue Elston, one of the EPA officials responsible for the

EPA veto of the state-approved permit, wrote to John Konik, a Corps officials responsible for the Corps' objections, stating it "looks like 'they' want to go to the [Corps] for a permit for 595, EPA is such a job killer . . . hope the [Corps] is more reasonable." (Email from EPA to Corps, RE 1-2, Page ID #102.) The Road Commission never filed that new permit application with the Corps because the Road Commission recognized the Corps would never grant a permit like the permit the MDEQ had approved, and the cost was prohibitive (Affidavit Opposing Motion to Dismiss, RE 23-1, Page ID #1315, ¶¶ 19-20).

SUMMARY OF THE ARGUMENT

A Circuit Court has yet to address judicial review of an EPA veto of a state-approved § 404 permit since the Supreme Court decision in *Hawkes*, 136 S. Ct. 1807 and *Sackett*, 566 U.S. 120. Those cases overturned decades of uniform case law prohibiting judicial review of jurisdictional determinations and compliance orders issued pursuant to the Clean Water Act. The Court held unanimously in both cases that the agency actions taken pursuant to the Act were "final" and subject to judicial review under the APA. Like the jurisdictional determination in *Hawkes* and the compliance order in *Sackett*, the pre-ordained EPA veto of the MDEQ-approved § 404 permit in this case has immediate and direct legal consequences. It is, in fact, a final decision on the state-approved permit that renders that permit a nullity, and requires the Road Commission to submit a new permit to the U.S. Army Corps of Engineers

or abandon its CR595 project. It fixes a legal relationship, which is the *sin qua non* of "final agency action." Therefore, the EPA veto is justiciable and the Road Commission should be allowed to show that the EPA's decision to veto the state-approved permit was arbitrary and capricious.

Moreover, even if the Court disagrees with the Road Commission on the fact that the EPA veto is reviewable as final agency action pursuant to the APA's plain text, *Sackett*, and *Hawkes*, then nevertheless the Court should reverse the lower court's judgment because the EPA and Corps' denial of the state-approved permit, and the Corps' intent to deny any permit for this project, under this Court's precedent allows for judicial review of agency action even in the absence of a final agency decision.

ARGUMENT

An action brought in the federal courts is subject to the requirements of the APA. The APA states: "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. Since this case does not involve an action where a statute expressly makes the action reviewable, the Court must evaluate whether the challenged EPA veto amounts to final agency action.

The test for determining final agency action is two-pronged: "First, the action must mark the 'consummation' of the agency's decisionmaking process." *Bennett*, 520 U.S. at 177-78 (citation omitted). And second, "the action must be one by which

'rights or obligations have been determined'" or from which "'legal consequences will flow.'" *Id*. Even if new "legal consequences" do not flow, the agency action may still be final if it determines "rights or obligations." Likewise, the action may be final if it fixes a "right" but not an "obligation." *See Sackett*, 566 U.S. at 126. The *Bennett* test provides multiple bases for a court to find agency action final. Like the final decision of the EPA in *Sackett*, and like the final Corps decision in *Hawkes*, the EPA veto in the instant case rises to the level of final agency action that allows judicial review of the decision.

And even if this Court were to conclude the EPA veto was not reviewable final agency action, the EPA's veto of the MDEQ permit based on non-§ 404(j) reasons, and the EPA and Corps pre-determination to never grant the Road Commission a § 404 permit, allows the courts to review the case pursuant to exceptions to the general rule requiring finality.

In reviewing the lower court's Rule 12(b)(6) dismissal, the Court reviews each legal issue *de novo*. *See Jama v. Dep't of Homeland Sec.*, 760 F.3d 490, 494 (6th Cir. 2014) (citations omitted). In applying *de novo* review, this Court has recognized that the APA "imposes a presumption in favor of judicial review." *Friends of Crystal River*, 35 F.3d at 1078 (citing *Block v. Community Nutrition Inst.*, 467 U.S. 340, 348-49 (1984)). The government can overcome this presumption only by way of "clear and convincing evidence that Congress intended to preclude such review." *Id*.

(citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967)). Overcoming the presumption of reviewability is a "heavy burden" for the government. *Id*. (quoting *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 671-72 (1986)). Thus, "where substantial doubt about the congressional intent [to preclude review] exists, the general presumption favoring judicial review of administrative action is controlling." *Id*. (quoting *Block*, 467 U.S. at 351).

I

THE EPA VETO IS FINAL AGENCY ACTION FROM WHICH RIGHTS OR OBLIGATIONS HAVE BEEN DETERMINED, AND FROM WHICH LEGAL CONSEQUENCES FLOW

The test for determining final agency action under the APA is generally described as a two-prong analysis: "First, the action must mark the 'consummation' of the agency's decisionmaking process." And second, "the action must be one by which 'rights or obligations have been determined,' " or from which " 'legal consequences will flow.'" *Bennett*, 520 U.S. at 177-78 (citations omitted). The second prong of the *Bennett* test is written in the disjunctive. Even if new "legal consequences" do not flow, the agency action may still be final if it determines "rights" or "obligations."

In furtherance of the "generous review provisions" of the APA, *id*. at 163, and the Act's strong presumption of reviewability, the Supreme Court decisions take a

pragmatic approach to finding agency action is final under the APA. *See Hawkes*, 136 S. Ct. at 1815; *Abbott Labs.*, 387 U.S. at 148-50; *accord Bell v. New Jersey*, 461 U.S. 773, 779 (1983); and *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 200-01 (1983). Here, the EPA veto of the MDEQ-approved permit was both final agency action and it determined rights and obligations; likewise, legal consequences flowed from the veto.

A. The EPA Veto Is the Final Word on the Road Commission's MDEQ Permit

The lower court concluded in its original order dismissing the case that the EPA veto of the Road Commission's MDEQ-approved permit did not amount to final agency action because the "permit was not granted or denied" (Opinion on Motion to Dismiss, RE 28, Page ID #1966) when the EPA rejected the permit the MDEQ was set to approve. Then, in its order rejecting the Road Commission's request for reconsideration of that decision, it held there was more for EPA to do even after the Corps assumed permitting authority (Opinion on Motion for Reconsideration, RE 50, Page ID #2132-2133). The lower court erred on both scores because it failed to account for the fact that, *as to the MDEQ-approved permit*, the permit was denied by operation of EPA's veto. That permit was denied and the Road Commission had to submit a new permit to the Corps for its consideration. And while EPA may have more work to do as to a *new* permit if the Road Commission had submitted a new one

to the Corps, there was no more work for EPA to do as to the MDEQ-approved permit that EPA vetoed. The agency's decisionmaking process as to the MDEQ-approved permit was consummated. *Sackett* demonstrates as much.

In *Sackett*, EPA issued a compliance order asserting the Sacketts had filled wetlands to build a home on their half-acre lot near Priest Lake, Idaho, without a federal permit in violation of the Clean Water Act. *Sackett*, 566 U.S. 120. Like the Plaintiffs in this case, the Sacketts contested EPA's arbitrary and capricious action and sought review of EPA's final decision in court. *Id*. at 122. The government filed a motion to dismiss for lack of subject matter jurisdiction, which was granted. The government contended, in part, that the adequate remedy the Sacketts had—in lieu of suing in court—was to apply for a Corps permit and then challenge the compliance order. *Id*. at 125. The Ninth Circuit affirmed. *Id*.

Relying on *Bennett*, the Supreme Court had no trouble finding that the compliance order "marks the 'consummation' of the agency's decision making process." *Sackett*, 566 U.S. at 127. The reasoning the Court used is instructive. The Court held the order marked the consummation of the agency's decision making process because "the 'Findings and Conclusions' that the compliance order contained were not subject to further agency review." *Id*. at 127-28. That circumstance mirrors the instant case, where the EPA veto of the state permit will never be subject to further agency review. That permit denial is final and EPA's work is done as to the MDEQ

permit. The Corps—a separate agency—will review a new permit application, just as in *Sackett* the Corps would have reviewed the Sacketts' new permit application under the government's theory of the case. EPA acted arbitrarily and capriciously in *Sackett* when it issued the compliance order, and the EPA acted arbitrarily and capriciously here when it vetoed the MDEQ permit. In *Sackett*, the Supreme Court said the Sacketts could resort to the courts to challenge EPA for its final decision. So it must be here.

Under a plain reading of the APA, this should end the inquiry into the finality question. The APA states in relevant part that "final agency action[s] for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. This language is not ambiguous, and under the standard norms of statutory interpretation, the term "final" should take its ordinary meaning (i.e., conclusive or decisive). *See Harrison v. PPG Indus., Inc.*, 446 U.S. 578 (1980) (holding the phrase "any other final action" in § 307(b)(1) of the Clean Air Act is clear and is to be construed in accordance with its literal meaning so as to reach any action of the Administrator that is final); *see also Sackett*, 566 U.S. at 129 ("[T]he APA provides for judicial review of all final agency actions, not just those that impose a self-executing sanction."). Such a straightforward reading of the APA would give due deference to the presumption of reviewability on which the Act rests. *Id*. Nevertheless, the Road Commission will address the second *Bennett* prong below.

B. Second Prong of *Bennett* Met Because Rights or Obligations and Legal Consequences Flow From the EPA Veto

Under the second *Bennett* prong, "the action must be one by which 'rights or obligations have been determined,'" or from which "'legal consequences will flow.'" *Bennett*, 520 U.S. at 178 (quoting *Port of Boston Marine Terminal Association v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)). Here, rights or obligations have been determined and legal consequences have flowed, although the Court need only find one or the other in order to find the EPA veto final. The lower court held that the EPA veto did not conclusively "determine" the Road Commission's "rights or obligations" or have "legal consequences." (Opinion on Motion to Dismiss, RE 28, Page ID #1969.) Not so, and a close review of *Hawkes* and prior precedent that led to *Hawkes* demonstrates that the lower court erred.

1. EPA Veto Had Legal Consequences for EPA and the Road Commission

In *Hawkes*, to demonstrate that a Corps' affirmative jurisdictional determination has legal consequences, the Supreme Court first looked to a circumstance where the Corps determined that jurisdictional waters were absent (a/k/a a "negative JD") from a property, *Hawkes*, 136 S. Ct. at 1814. Where the Corps issues a negative JD, legal rights and obligations flow—the landowner can use his property without a permit, and the agencies cannot bring an enforcement action for violating the Clean Water Act. *Id*. The Court then looked to the circumstance before it, where the Corps had made an

affirmative jurisdictional determination. *Id*. The Court said that affirmative JDs have legal consequences because "[t]hey represent the denial of the safe harbor that negative JDs afford" and warn applicants "that if they discharge pollutants onto their property without obtaining a permit from the Corps they do so at the risk of significant criminal and civil penalties." *Id*. at 1815.

That situation mirrors the circumstances the Road Commission finds itself in here having had its MDEQ-approved permit vetoed by the EPA. Here, if EPA had not vetoed the permit, then the Road Commission would have received the permit and could have gone forward with its CR595 project without fear of an enforcement action. The permit would have the force and effect of both state and federal law. *See, e.g.*, 33 U.S.C. § 1344(j), (p); 40 C.F.R. § 233.50; 40 C.F.R. § 233.70. The permit would have been binding for a period of five years and, thus, like a negative JD, would have had legal consequences. 40 C.F.R. § 233.23(b). Similarly, an affirmative JD—what the Hawkes Company received—amounts to the veto that the Road Commission received. Just like the legal consequence of an affirmative JD (i.e., denial of the safe harbor and resort to the Corps' permitting process), an EPA veto denied the Road Commission the proposed state permit and warns the Road Commission that if it discharges pollutants onto its property without obtaining a permit from the Corps, it does so at the risk of significant criminal and civil penalties. Therefore, like the affirmative JD in *Hawkes*, which divested the plaintiff of the safe harbor and created

the need for plaintiff to seek a permit from the Corps, the EPA's veto in this case divested the Road Commission of the permit proposed by the state and created the need for the Road Commission to seek a permit from the Corps.

The *Hawkes* Court also cited *Frozen Food Express v. United States*, 351 U.S. 40 (1956), to make this point, and *Frozen Food* applies equally here. In *Frozen Food*, the High Court "considered the finality of an order specifying which commodities the Interstate Commerce Commission believed were exempt by statute from regulation, and which it believed were not." 136 S. Ct. at 1815. Though the agency action in *Frozen Food* "'had no authority except to give notice of how the Commission interpreted' the relevant statute, and 'would have effect only if and when a particular action was brought against a particular carrier'" *id*. (citing *Abbott Labs.*, 387 U.S. at 150), the Court there held the agency action immediately reviewable in court. *Id*. (citing *Frozen Food*, 351 U.S. at 44-45). The Court explained that this action warned every carrier that did not have authority from the Commission to transport those commodities that they did so "at the risk of incurring criminal penalties." *Id*. (citing *Frozen Food*, 351 U.S. at 44).

The *Hawkes* Court then noted how that situation compared to the situation in *Frozen Food*, where, even though no administrative or criminal proceeding could be brought for failure to conform to the jurisdictional determination itself, the final agency determination deprived respondents of a five-year safe harbor from liability

under the Act, and further warned that if Hawkes discharged pollutants onto the property without a permit from the Corps, it did so at the risk of significant criminal and civil penalties. *Id*. at 1816-17.

That decision, and the facts and logic that undergird it, apply with equal force in the facts before the Court today. Here, just as in *Hawkes* and *Frozen Food*, the EPA veto of the MDEQ-approved 404(j) permit as a matter of fact and law deprives the County of that permit forevermore, and warns the County that if it proceeds with the road project without a *different* permit *from the Corps*, it does so at risk of the same significant criminal and civil penalties Hawkes faced if it proceeded without a Corps-approved permit. The EPA veto has legal consequence. Hawkes Company believed it did not need a Corps permit, and successfully sought the right to challenge that arbitrary and capricious agency determination in court. Likewise here, the County cannot proceed without a Corps permit only because the EPA arbitrarily and capriciously refused to allow the County to obtain the permit that the MDEQ stood ready, willing, and able to grant. That is why the County seeks to challenge the EPA's decision today.

In its opinion explaining why it dismissed the case, the district court mistakenly said that the "permit was not granted or denied" (Opinion on Motion to Dismiss RE 28, Page ID #1966) when EPA rejected the permit the MDEQ was set to approve. In fact, the Corps demanded that the County apply for a new permit after EPA rejected

the state permit, a demand which, as a practical matter, is tantamount to a permit denial. Further, that demand left the County in at least as untenable a position as Hawkes—having to spend an indefinite amount of time, and hundreds of thousands of dollars, for a Corps permit or drop the project altogether.[5]

In reality, the EPA veto left the County in an even worse position than Hawkes; at least Hawkes could have applied for the permit and then upon receiving a final decision on that permit application sued the Corps because the predicate jurisdictional determination was arbitrary and capricious. *Not so here*—here, no court will likely *ever* review the EPA's predicate decision to reject the state permit, unless this Court reverses the lower court's decision. If the County must seek a Corps permit, the EPA veto may be deemed moot or outside the scope of the later challenge to the Corps' permit decision.[6] Moreover, the EPA veto will be no more final after a Corps permit decision than it is now. As in *Hawkes*, the Corps permit process does not add anything, legally or factually, to the challenged agency action. The APA specifically provides that agency final decisions that have no other adequate remedy in court are

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[5] For a specialized "individual" permit of the sort at issue in this case, for example, one study found that the average applicant spends 788 days and $271,596 in completing the process, without counting costs of mitigation or design changes. Even more readily available "general" permits took applicants, on average, 313 days and $28,915 to complete. *Hawkes*, 136 S. Ct. at 1812.

[6] *See Sackett*, 566 U.S. at 127 ("[T]he remedy for denial of action that might be sought from one agency does not ordinarily provide an 'adequate remedy' for action already taken by another agency.").

subject to judicial review. 5 U.S.C. § 704. Here, the Road Commission has no way, let alone an adequate way, to challenge the EPA decision to veto the MDEQ permit.

2. The Veto Imposes a Legal Obligation on Plaintiffs

In this case, as in *Sackett* and *Hawkes*, by reason of the agency action at issue, the Road Commission has the obligation to obtain a permit *from the Corps* if they wish to proceed with the road project. The Road Commission had no such obligation prior to the EPA veto. Without filing that new permit application with the Corps, no road project will ever take place. If EPA had not vetoed the state permit, then the road project would already be underway, without the Road Commission ever asking for a permit from the Corps. Like the Sacketts, the Road Commission has "little practical alternative but to dance to the EPA's tune" and apply for the Corps permit. *Sackett*, 566 U.S. at 132 (Alito, J., concurring). "In a nation that values due process, not to mention private property, such treatment is unthinkable." *Id*.

3. The Veto Denies Plaintiffs a Legal Right

This is an appeal from a judgment following a 12(b)(6) dismissal case wherein the facts are taken as asserted. *See Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (In a motion to dismiss, "a court must accept a complaint's allegations as true."). The complaint alleges that EPA based its veto on arbitrary and capricious objections to the state permit. (Complaint, RE 1, Page ID #75-79, ¶¶ 311-25.) On the facts presented in the complaint, EPA should have allowed the MDEQ to issue the 404(j) permit.

Therefore, EPA's implicit demand that the Road Commission pursue a new permit from the Corps flows from the veto, not from the Clean Water Act. But for the veto, the Road Commission would be free to exercise its right to build the road without Corps' approval. The veto changed the legal regime, denying the Road Commission a legal right, and is final agency action under the APA.

C. APA Requirement That There Is No Other Adequate Remedy in Court Is Met

Final agency action is judicially reviewable under the APA if there is "no other adequate remedy in a court." 5 U.S.C. § 704. There is no such remedy for an EPA veto of a state-approved permit like the permit the MDEQ was prepared to issue to the Road Commission. Under the current administrative regime, the Road Commission's only choice is to either give up on the project or start the permit process over with the Corps. There is no remedy in court, let alone an adequate remedy, to address the arbitrary and capricious decision of the EPA to veto the MDEQ-approved permit.

D. The Case Is Ripe for Review

The Government's argument that the case is not ripe is likewise without merit. The case needs no further factual development on the question of the EPA veto, and the hardship to the Road Commission if review is not allowed now is severe.

1. No Further Factual Development Is Necessary

The Road Commission seeks to challenge the EPA veto which requires them *to seek a new, Corps-approved* permit to proceed with their CR595 project. More specifically, it seeks to challenge the EPA's veto of the state-approved permit. There is nothing speculative about that. The factual record, upon which EPA based its veto, is well developed and fit for judicial review. The Road Commission went through a nearly 15-month permitting process with MDEQ and EPA that entailed an administratively complete application, a plethora of supporting studies and reports, countless meetings and conferences, and numerous application revisions aimed at satisfying EPA's vague objections (Complaint, RE 1, Page ID #38-72, ¶¶ 165-292).

The Road Commission's challenge to the EPA veto as a final administrative decision it can appeal to the courts as an arbitrary and capricious decision is a question of law and will turn on summary judgment. *See Iowa League of Cities v. EPA*, 711 F.3d 844, 867 (8th Cir. 2013) ("Fitness rests primarily on whether a case would 'benefit from further factual development,' and therefore cases presenting purely legal questions are more likely to be fit for judicial review. *Pub. Water Supply*, 345 F.3d at

573."). Here, the EPA has unequivocally vetoed the MDEQ permit such that the Road Commission must seek a Corps-approved permit if it wishes to proceed with its project. That is a purely legal question fit for judicial review.

The relevant consideration in determining whether the EPA veto is reviewable is "whether the process of administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined." *Port of Boston*, 400 U.S. at 71. In *Port of Boston*, there was "no possible disruption of the administrative process" because there was "nothing else for the Commission to do." *Id*. So it is in this case. No further EPA administrative review of the MDEQ's permit is required or even allowed. In point of fact, now that the Corps has assumed control of review of the new permit application, the EPA will not revisit that determination—ever. In other words, the veto of the state permit legally binds the State of Michigan and the Road Commission, and the administrative record that was developed, and is recounted above, is fixed. In fact, what the EPA is demanding is that a *new* permitting process begin, which would include a different application, and lead to the creation of an administrative record tied to that new permit—not the permit that was arbitrarily and capriciously vetoed by EPA.

This conclusion is bolstered by the Supreme Court's analysis in *Chicago and Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103 (1948), on

which *Bennett* relied. *Chicago* held that administrative determinations are reviewable if they "impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process." *Id*. at 113. This formulation is helpful in analyzing this case because the EPA veto both imposed an obligation on the County, and denied a right to it forever, with absolutely no procedural way to complain in court about the loss of that right, a violation of due process that Congress intended Section 704 of the APA to remedy. *Cf. Hawkes*, 136 S. Ct. at 1817 (Kennedy, J., concurring) (judicial review of the jurisdictional determination pursuant to the APA protects due process rights of property owners facing wrongful applications of the "notoriously unclear" Clean Water Act).

2. The Hardship to the Road Commission Is Severe

The other factor when considering ripeness is the hardship to the party if review is not allowed. Here, the hardship is severe. The CR595 project will now require a Corps-approved individual § 404 permit. As noted above, the "average applicant for an individual permit spends 788 days and $271,596 in completing the process . . . not counting costs of mitigation or design changes." *Rapanos*, 547 U.S. at 721. The Road Commission cannot afford to pursue this Corps permit that judicial review would demonstrate it does not need, as the complaint states and this Court must accept as true. Denying review now, which flies in the face of this Court's previous recognition that the APA presumptively allows for review of administrative decisions, will cause

undue hardship because the Road Commission cannot afford to pursue that Corps permit. In similar circumstances, the Eighth Circuit recently found such harm to a local government body sufficient to ripen a Clean Water Act challenge. *See Iowa League of Cities*, 711 F.3d at 868. As explained in *Iowa League of Cities*, delaying review on that case's facts regarding the League's challenge to contested letters that imposed duties on the cities that the EPA claimed were not reviewable would require the Iowa cities to spend "millions of dollars" without knowing whether they needed to; here, the hardship is even more severe because the Road Commission simply cannot afford to pursue this worthwhile road project that it decided Marquette County needed.

At bottom, both the *Bennett v. Spear* prongs for finality are met, there is no adequate judicial remedy for the Road Commission to challenge the EPA veto in the absence of review now, and the case is ripe. This Court should reverse the lower court's decision to find the EPA veto unreviewable and reverse so that the lower court can hear the case on the merits.

II

THE APA'S FINALITY REQUIREMENT AS A PREDICATE FOR JUDICIAL REVIEW DOES NOT APPLY HERE BECAUSE THE EPA VETO OF THE MDEQ-APPROVED PERMIT VIOLATED THE EXPRESS LIMITATIONS OF THE CWA

If the Court disagrees with the arguments made above, then the Court would still need to reverse the lower court's decision because EPA acted outside its delegated authority in making its objections to the MDEQ-approved permit. The APA's finality requirement does *not* apply where (1) an agency acts beyond its delegated powers, (2) by denying a statutory right, and (3) the injured party has no other means to protect and enforce that right. *See, e.g.*, *Friends of Crystal River*, 794 F. Supp. 674, 685 (W.D. Mich. 1992) ("where plaintiffs claim that an agency acted beyond its delegable powers by denying a statutorily created right and where plaintiffs have no other means to protect and enforce that right, the statute's 'finality' provision does not apply" (citing *Leedom v. Kyne*, 358 U.S. 184 (1958)); *see also Greater Detroit Res. Recovery Auth. v. EPA*, 916 F.2d 317, 323 (6th Cir. 1990) (citing *Leedom* for the proposition that "a litigant may bypass available administrative procedures where there is a readily observable usurpation of power not granted to the agency by Congress"); *Champion Int'l Corp. v. EPA*, 850 F.2d 182, 185-86 (4th Cir. 1988) (holding that "the district court had subject matter jurisdiction to entertain" whether "EPA had exceeded its

delegated authority" when objecting to a state NPDES permit under § 402(d)"). All three elements are present here.

First, despite the Road Commission's repeated pleas, EPA refused to adequately state the reasons for its objections and failed to list the permit conditions necessary for its objections to be lifted (Complaint RE 1, Page ID #83-89, ¶¶ 346-76). These failures contravened the Clean Water Act, which states that objections to a state-approved permit "shall contain a statement of the reasons for such objection and the conditions which such permit would include if it were issued by the [EPA]." 33 U.S.C. § 1344(j)(2)(B).

Second, EPA's objections were not based on any "requirements" of the 404(b)(1) Guidelines, but rather focused on discretionary matters left to the wisdom of the permitting authority—here, the MDEQ (Complaint, RE 1, Page ID #50-52, ¶¶ 220-27; Page ID #80-83, ¶¶ 331-45). For example, EPA objected on the vague and unsupported basis that "we remain concerned that the magnitude of the proposed impacts to the relatively un-impacted aquatic resources along the route is significant," "the proposed compensatory mitigation will not sufficiently compensate for the loss of aquatic resources," and "EPA has not received adequate plans to minimize impacts or a comprehensive mitigation plan that would sufficiently compensate for unavoidable impacts." (*Id.*; *see also* EPA opposition to permit application, RE 6-5, Page ID #617-625.) The Guidelines place evaluation of these quantitative and

qualitative factors within the discretion *of the state permitting authority*, not EPA. Accordingly, EPA wrongly substituted its judgment for that of MDEQ in violation § 404(j)'s clear mandate.[7]

Third, EPA's *ultra vires* conduct denied the Road Commission its statutory right to learn the reasons for EPA's objections, know what permit conditions were necessary for those objections to be lifted, and have the MDEQ process its application pursuant to Michigan's approved 404 Program. In addition to providing a record for judicial review, the purpose of the "reasons," "conditions," and "requirements" clauses of § 404(j) was to protect applicants and foster cooperative federalism. But if this Court affirms the lower court, then no court will ever review EPA's statutory violations and EPA's conduct will never receive judicial review. Accordingly, this case fits within the narrow exception to the finality requirement.

Lastly, the Road Commission notes that this issue is ripe for judicial review for the reasons articulated earlier. *See also Nat'l Ass'n of Home Builders v. U.S. Army Corps of Engineers*, 417 F.3d 1272, 1280-84 (D.C. Cir. 2005) (finding that the

[7] Congress authorized states to implement § 404 out of a recognition that it is "the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b). With this overarching policy in mind, Congress limited the grounds upon which EPA could object to a proposed state permit. 33 U.S.C. § 1344(j)(2)(B). Congress expressly provided that EPA could only object to a proposed state permit if it was "outside the requirements" of § 404 and the 404(b)(1) guidelines. Because EPA's objections here were purely discretionary, EPA acted beyond its delegated power.

burdens of either modifying projects to conform to the challenged nationwide permits or putting those projects on hold and running "the Corps' individual-permit gauntlet" constituted sufficient hardship to establish ripeness); *Hawkes*, 782 F.3d at 1001 (challenge to agency action ripe where withholding judicial review would force plaintiffs to partake in a "prohibitively expensive and futile" permitting process with the Corps). In the end, "[t]he ripeness doctrine requires a live, focused case of real consequence to the parties. It does not require [plaintiffs] to jump through a series of hoops, the last of which it is certain to find obstructed by a brick wall." *Triple G Landfills, Inc. v. Bd. of Comm'rs*, 977 F.2d 287, 291 (7th Cir. 1992). To hold this case is not ripe is to put a brick wall between the EPA veto and judicial review.

III

THE APA'S FINALITY REQUIREMENT DOES NOT APPLY BECAUSE EPA AND THE CORPS HAD PREDETERMINED THAT NO PERMIT FOR THE ROAD PROJECT WOULD ISSUE

Even if the Court rejects the first two points because it concludes that generally the land owner in the Road Commission's position has to pursue the Corps permit process before resorting to the courts after an EPA veto of a state-approved § 404 permit, nevertheless the Court should reverse here because doing so would have been an exercise in futility. The agencies had predetermined to reject any permit application

from the Road Commission, as the Complaint sets out. (Complaint RE 1, Page ID #7-8, ¶¶ 16-17.) Those facts require this Court to reverse.

This Court has repeatedly held that courts may excuse exhaustion requirements when the agency has "predetermined the issue" or where it would be "pointless" to insist that a party "go through the motions of exhausting the claim." *Herr v. USFS*, 803 F.3d 809, 823 (6th Cir. 2015) ("[T]he law does not force [parties] to take on hopeless causes."); *see also Bannum, Inc. v. Louisville*, 958 F.2d 1354, 1362 (6th Cir. 1992) ("[W]e do not want to put barriers to litigation in front of litigants when it is obvious that the process down the administrative road would be a waste of time and money."); *Mt. Clemens v. EPA*, 917 F.2d 908, 914 (6th Cir. 1990) (exhaustion not required where "pursuit of administrative remedies would be a futile gesture"). On numerous occasions, faced with facts analogous to those here, other courts likewise have excused parties from seeking permits from the Corps under the futility exception.[8]

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[8] *See, e.g.*, *Ellison v. Connor*, 153 F.3d 247, 255 (5th Cir. 1998) ("It would have been futile in this case for [plaintiff] to apply for permits because the Corps sent them a letter . . . stating that it would not permit the construction or placement of any structures on their land."); *Cooley v. United States*, 324 F.3d 1297, 1303-04 (Fed. Cir. 2003) (the Corps' "general invitation" to reapply for a permit that had already been denied "underscored the futility of continuing indefinitely to prosecute the application process"); *Parkview Corp. v. Dep't of the Army*, 490 F. Supp. 1278, 1282 (E.D. Wis. 1980) (application to the Corps was futile where Corps advised plaintiff that because its proposal was "environmentally unacceptable" "it is most probable that an after-the-fact permit would not be granted for the work"); *Cristina Inv. Corp. v.*

(continued...)

This case presents an even more compelling basis upon which to excuse the Road Commission from running the Corps' individual permit gauntlet. As alleged, the Corps voiced its fundamental opposition to the project from the start, reviewed and rejected the Road Commission's application through the issuance of written objections, and even told the Road Commission that it would not further consider the Road Commission's state permit application (Complaint, RE 1, Page ID #7, ¶¶ 14; Page ID #73-74, 298-301; Page ID #91-93, ¶¶ 386-398; Affidavit Opposing Motion to Dismiss, RE 23-1, Page ID #1314, ¶ 16). The Corps' written objections addressed the Road Commission's application on the merits and concluded that the Road Commission's application was purportedly deficient in several vaguely worded respects (Complaint, RE 1, Page ID #47-48, ¶¶ 209-11; Corps' opposition to Road Commission permit, RE 6-3, Page ID #600-608). While the Court need not look beyond the Corps' own written objections, the futility of preparing a new permit application is underscored by the EPA's September 10, 2013, email to the Corps which stated sarcastically that it "looks like 'they' want to go to the [Corps] for a permit for [CR]595, EPA is such a job killer . . . hope the [Corps] is more reasonable."

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[8] (...continued)
United States, 40 Fed. Cl. 571, 580 (1998) (reapplying to the Corps for a wetland-fill permit was futile where the Corps' had denied a previous application on ecological grounds); *City Nat'l Bank of Miami v. United States*, 33 Fed. Cl. 224, 229 (1995) (rejecting Corps' "incomplete complete application" and "denial without prejudice" theories and finding the challenge ripe).

(EPA and opponents emails, RE 1-2, Page ID #102.) *See also Anderson v. Babbitt*, 230 F.3d 1158, 1164 (9th Cir. 2000) ("Objective and undisputed evidence of administrative bias would render pursuit of an administrative remedy futile.") (citing *Joint Bd. of Control v. United States*, 862 F.2d 195, 200 (9th Cir. 1988).

Even after EPA's veto, the Corps told the Road Commission it would *not* consider the Road Commission's application or the draft permit blocked by EPA. The Corps also told the Road Commission it would need to start from "scratch" by filing an entirely new application responding to the Corps' informational inquiries which could address new topics not raised during the previous review, go through a new comment process, and likely go through a formal tribal-consultation process that could cause significant delays (Complaint, RE 1 Page ID #7, ¶¶ 14; Page ID #73-74, 298-301; Page ID #91-93, ¶¶ 386-398; Affidavit Opposing Motion to Dismiss, RE 23-1, Page ID #1314, ¶ 16).

The Corps' statements that it would not issue the permit vetoed by EPA and that the Road Commission would need to file an entirely new permit application with the Corps, constitute a "denial" subject to judicial review under § 706(2) of the APA. *See, e.g.*, *S. Utah Wilderness Alliance v. Office of Surface Mining Reclamation & Enforcement*, 620 F.3d 1227, 1244 (10th Cir. 2010) (holding that the agency letter "stating that it would not issue a new recommendation is properly viewed as a denial" and reviewed under arbitrary and capricious standard); *Norton Constr. Co. v. USACE*,

2006 U.S. Dist. LEXIS 88272, at *16 (N.D. Ohio Dec. 6, 2006) (unpublished) (Corps' decision that plaintiff's "application is considered not pending in this office" was a final action reviewable under § 706(2) of the APA); *U.S. Gypsum Co. v. Muszynski*, 161 F. Supp. 2d 289, 292 (S.D.N.Y. 2001) (Corps' failure to grant or deny application over 10-month period was "tantamount to practical denial of the permit" subject to judicial review).

CONCLUSION

In every relevant sense, the EPA veto in this case is as much of a "final agency action" as the jurisdictional determination in *Hawkes* and the compliance order in *Sackett*. The legal issue here is fit for judicial resolution, and the EPA veto requires an immediate and significant change in the Road Commission's affairs—it must now apply for a § 404 permit from the Corps, or cease forevermore from pursuing the road project that the Upper Peninsula of Michigan needs. In this circumstance, the decisions in *Hawkes* and *Sackett* both demand that the courthouse door be opened for the Road Commission. Therefore, the Court should hold the EPA veto subject to judicial review under the APA and reverse the lower court's decision to grant the EPA's motion to dismiss. And even if the Court disagrees that *Hawkes* and *Sackett* compel that result, then the Court should nevertheless reverse because the EPA acted outside its Clean Water Act authority in stating its reasons for what became the veto of the permit, and in the alternative because the EPA and Corps had both

predetermined, from the outset of this CR595 road project, that no permit would ever issue for the CR595 project. In either circumstance, this Court holds that the Road Commission may proceed to court. So it should be here. The Court should reverse and remand the case for a determination on the merits.

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Respectfully submitted,

By: /s/ Mark Miller

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that the foregoing brief complies with type-volume limitation of Rule 32(a)(7)(B), in that it contains 11,100 words.

/s/ Mark Miller
MARK MILLER

CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Mark Miller
MARK MILLER