No. 17-1154

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARQUETTE COUNTY ROAD COMMISSION,
Plaintiff-Appellant

v.

UNTED STATES ENVIRONMENTAL PROTECTION AGENCY; ROBERT A. KAPLAN, in his official capacity as Acting Administrator of Region V of the United States Environmental Protection Agency, AND UNITED STATES ARMY CORPS OF ENGINEERS,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

RESPONSE BRIEF FOR THE FEDERAL APPELLEES

Of Counsel:

SIMMA KUPCHAN
Office of General Counsel
U.S. Environmental Protection Agency
Washington, DC

REGINALD A. PALLESEN
Office of Regional Counsel
U.S. Environmental Protection Agency
Chicago, Illinois

JOSEPH L. FALVEY
District Counsel, Detroit District
U.S. Army Corps of Engineers
Detroit, Michigan

JEFFREY H. WOOD
Acting Assistant Attorney General

ERIC GRANT
Deputy Assistant Attorney General

BEN CARLISLE
ROBERT J. LUNDMAN
ELLEN J. DURKEE
Attorneys
Environment and Natural Resources Div.
U.S. Department of Justice
P.O. Box 7415
Washington, D.C. 20044
(202) 514-4426
ellen.durkee@usdoj.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

RULES AND REGULATIONS:

LEGISLATIVE HISTORY:

GLOSSARY

APA	Administrative Procedure Act
Corps	U.S. Army Corps of Engineers
CWA	Clean Water Act
EPA	U.S. Environmental Protection Agency
MDEQ	Michigan Department of Environmental Quality

STATEMENT REGARDING ORAL ARGUMENT

Appellant has requested oral argument. Federal appellees are prepared to participate in oral argument if this Court decides that oral argument will assist it in reaching a decision.

STATEMENT OF JURISDICTION

The district court had jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 (federal question).[1] On May 18, 2016, the district court entered final judgment in favor of federal defendants and dismissed all claims. Judgment, RE 30, Page ID #1986. On June 13, plaintiff, Marquette County Road Commission ("Road Commission" or "Commission"), filed a motion to alter or amend the judgment, which the district court denied on December 14, 2016. Plaintiff's Motion to Alter or Amend Judgment, RE 31, Page ID #1987; Order Denying Motion for Reconsideration, RE 51, Page ID #2139. The Commission timely noticed an appeal on February 5, 2017. Notice of Appeal, RE 52, Page ID #2140; *see* Fed. R. App. P. 4(a)(1)(B), 4(a)(4)(A)(iv). This Court has jurisdiction under 28 U.S.C. § 1291.

[1] In this Court, the absence of final agency action is considered a basis for dismissal for failure to state a claim, rather than a jurisdictional defect. *See Jama v. Dep't of Homeland Sec.*, 760 F.3d 490, 494 (6th Cir. 2014).

STATEMENT OF THE ISSUES

The Clean Water Act ("CWA") requires a Section 404 permit to discharge dredged or fill material into waters of the United States. 33 U.S.C. §§ 1311, 1344. The U.S. Army Corps of Engineers ("Corps") administers the Section 404 permit program, unless a state obtains approval from the U.S. Environmental Protection Agency ("EPA") to administer the permit program subject to EPA oversight. Section 404(j) provides that EPA may object to a permit request made to a state with an approved Section 404 permit program. The state then has a specified time period in which it may issue a permit resolving EPA's objections, deny the permit, or do neither, in which case federal permitting authority passes to the Corps to render a final decision on the permit request. 33 U.S.C. § 1344(j); 40 C.F.R. § 233.50(j).

In this case, EPA objected to the Road Commission's Section 404 permit application submitted to the Michigan Department of Environmental Quality ("MDEQ"). Permitting authority transferred to the Corps when MDEQ did not timely deny or issue a revised permit. Rather than continuing the permit process before the Corps, the Road Commission filed a complaint in federal district court to challenge EPA's objections. The district court dismissed the complaint for failure to state a claim. The Road Commission's appeal presents the following issues:

1. Are EPA objections under CWA Section 404(j) "final agency action for which there is no other adequate remedy in a court," 5 U.S.C. § 704, and therefore

subject to judicial review under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq.*?

2. Is judicial review of the substance of EPA's objections available under *Leedom v. Kyne*, 358 U.S. 184 (1958), and its progeny when the CWA expressly authorizes EPA to object and EPA's objections do not constitute a readily observable usurpation of power in patent violation of EPA's delegated authority?

3. Is there a futility exception to the APA's final agency action predicate for judicial review and, if so, does it apply to the Road Commission's speculative and unsupported assertion that the Corps has already decided that it will not grant any Section 404 permit for the road project?

STATEMENT OF THE CASE

A. Statutory Background

The CWA's objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To that end, the Act prohibits the discharge of any pollutant into waters of the United States except when authorized by a permit or an exception. 33 U.S.C. §§ 1311(a), 1342, 1344, 1362(12). Discharges of dredged or fill material into waters of the United States, including certain wetlands, require a permit under CWA Section 404, 33 U.S.C. § 1344. *See generally United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123-24, 131-39 (1985). The Secretary of the Army, acting through the Corps, is authorized to issue Section 404 permits. 33 U.S.C. § 1344(a). States may, however, seek EPA approval to

administer a Section 404 permit program for the discharge of dredged and fill material into certain waters of the United States. *See* 33 U.S.C. § 1344(g)-(h); 40 C.F.R. § 233.1. Permits issued under an approved state program must, at a minimum, comply with requirements of Section 404 and implementing regulations, including guidelines established under Section 404(b)(1). *See* 33 U.S.C. § 1344(h)(1); 40 C.F.R. § 233.20; 40 C.F.R. § 233.1(d); 40 C.F.R. Part 230.

An approved state Section 404 program remains subject to EPA oversight. *See, e.g.*, 33 U.S.C. § 1344(g), (i), (j); 40 C.F.R. §§ 233.16, 233.20, 233.50, 233.52, 233.53. Section 404(j) and implementing federal regulations prescribe specific procedures and timelines for processing Section 404 permit applications submitted to a state with an approved program. *See* 33 U.S.C. § 1344(j); 40 C.F.R. § 233.50. Among these are that the state must provide copies of permit applications to EPA, which may (but need not) provide comments to the state within 90 days of receiving an application. 33 U.S.C. § 1344(j); 40 C.F.R. § 233.50(d), (e). If EPA's comments object to issuance of the proposed permit, it must provide reasons "and the conditions which such permit would include if it were issued by the Administrator." 33 U.S.C. § 1344(j); *accord* 40 C.F.R. § 233.50(e).

If EPA objects to the issuance of the proposed permit, the state may: (i) issue a revised permit that resolves EPA's objection; (ii) deny a permit; or (iii) request a public hearing. 33 U.S.C. § 1344(j). If the state fails to take any of these actions within 90 days after receiving EPA's objection (and no public hearing is held), CWA Section

404 permitting authority passes to the Corps, and the permitting process continues. If the state requests a public hearing, EPA must conduct the hearing, and then "reaffirm, modify, or withdraw the objection or requirement for a permit condition" after the hearing. 40 C.F.R. § 233.50(h). If EPA does not withdraw its objection, the state has 30 days to issue a permit revised to satisfy EPA's reaffirmed or modified objection or to notify EPA of its intent to deny the permit. 40 C.F.R. § 233.50(f)-(j). If the state fails to take either action within the 30-day time period, permitting authority transfers to the Corps by operation of law. *See* 33 U.S.C. § 1344(j).

A Corps decision to issue or deny the permit completes the permit evaluation. In reaching a decision, the Corps conducts its own analysis of the permit application under its statutory permitting provisions and its decision is not controlled by EPA's objection under Section 404(j). *See* 33 U.S.C. § 1344(j) (providing that after transfer the Corps proceeds under its general statutory permitting provisions, Sections 1344(a) or (e), as applicable); Clean Water Act Section 404(q) Memorandum of Agreement Between the Environmental Protection Agency and the Department of Army ¶ I.1 (available here).

EPA may provide input during the continuing review process before the Corps. *See* 33 C.F.R. § 384.5; Opinion, RE 50, Page ID #2133. EPA also maintains its statutory authority under Section 404(c) to prohibit or restrict discharges of dredged or fill material into defined areas. *See* 33 U.S.C. § 1344(c). *See, e.g., Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 714-15, 717-18 (D.C. Cir. 2016).

B. Factual Background

Michigan is one of only two states that is authorized to administer the CWA Section 404 permitting program. *See* 40 C.F.R. §§ 233.70, 233.71. In October 2011, the Road Commission submitted to the state permitting agency, MDEQ, an initial application seeking a permit to discharge dredged or fill material in conjunction with the proposed construction of a new road, County Road 595. Construction of the 21.4-mile road would directly impact approximately 25 acres of wetlands and require 22 stream crossings. Complaint Ex. 11, RE 3, Page ID #339. After the Road Commission submitted a revised application in January 2012, MDEQ sent copies of the application to EPA, Corps, and U.S. Fish and Wildlife Service. Complaint, RE 1, Page ID #29; Opinion, RE 28, Page ID #1953, 1955.

Both the Corps and Fish and Wildlife Service commented and identified deficiencies in the January 2012 application. Complaint Exs 17-18, RE 6, Page ID #600-15. After considering those agencies' comments, EPA submitted to MDEQ comments objecting to issuance of the proposed permit based on the Road Commission's failure to demonstrate conformance with CWA Section 404(b)(1) guidelines. Complaint Ex. 19, RE 6, Page ID #616-25. Among other reasons, EPA objected because the application materials did not demonstrate that the Road Commission's preferred route was the "least environmentally damaging practical alternative." Complaint Ex. 19, RE 6, Page ID #617-18. EPA also objected because the proposed project would lead to significant degradation of aquatic resources and

the proposed wetland and stream mitigation was not likely to succeed in replacing lost functions and would not adequately compensate for the loss of aquatic function and value. *Id.*, Page ID #622.

Over the next several months, the Road Commission, MDEQ, and EPA discussed the shortcomings in the application and the Road Commission submitted two revisions to its application. Opinion, RE 38, Page ID #1956. At MDEQ's request, EPA held a public hearing in August 2012, after which the Road Commission again revised its application.

On December 4, 2012, EPA notified MDEQ that it was withdrawing its objection regarding the applicant's alternatives assessment, but reaffirming its objection to issuance of the permit because the Road Commission still had not provided "adequate plans to minimize impacts" or a "comprehensive mitigation plan that would sufficiently compensate for unavoidable impacts." Complaint Ex. 39, RE 8, Page ID #1040. EPA detailed requirements for impact minimization and compensatory mitigation (*id.*, Page ID #1042-44) and provided responses to comments (*id.*, Page ID #1045-1087).

On January 3, 2013, MDEQ notified EPA that because of "the short time frame allowed by statute (30 days) and the complexity of the issues remaining" MDEQ would neither issue nor deny the permit. MDEQ recognized that as a result, authority to process the permit "is now transferred to the [Corps]." Complaint Ex. 45, RE 8, Page ID #1183.

The Corps thereafter informed the Road Commission that it needed to submit to the Corps an application and accompanying pertinent materials if it wanted to pursue a permit. Complaint, RE 1, Page ID #73. In the absence of submission or identification of these materials by the Road Commission, the Corps could not be certain it was considering the correct materials, particularly given the several revisions to the initial permit application and the potential for further revisions in response to EPA's objections. *See* Opinion, RE 28, Page ID #1980-1982. The Road Commission chose not to submit an application to the Corps. Complaint, RE 1, Page ID #74. The Corps has therefore made no decision on whether the Commission will receive a Section 404 permit for County Road 595. Opinion, RE 28, Page ID #1982-83.

C. District Court proceeding

More than two years after being informed that it needed to submit materials to the Corps to continue and complete the permitting process, the Road Commission instead filed a five-count complaint in federal district court against EPA (counts one to four) and the Corps (count five). The complaint alleges that EPA's objections were arbitrary and capricious (count one); that EPA exceeded its delegated oversight authority by objecting to issuance of a permit (count two); that EPA failed to list conditions necessary for issuance of the requested permit (count three); and that EPA violated Section 404(j)'s public hearing and temporal requirements (count four). Complaint, RE 1, Page ID #83-91. For relief against EPA, the complaint requests,

inter alia, that the court declare EPA's objections unlawful and restore permitting authority to MDEQ. *Id.*

The complaint's fifth count alleges that the Corps' failure to act on the Road Commission's permit request is arbitrary and capricious and constitutes a constructive denial of the permit. *Id.*, Page ID #91-93. The complaint requests, *inter alia*, that the court declare that the Corps' failure to take action violated the CWA and federal regulations, set aside the Corps' constructive denial of a permit, and direct the Corps to grant a permit. *Id.*

Federal defendants moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). The district court granted the motion, holding that the counts against EPA failed to state a viable cause of action because EPA's objections under Section 404(j) meet neither of the conditions for final agency action as articulated in *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). RE 28, Page ID #1960-73; *see infra* at 13-14 (describing the two *Bennett* finality conditions). The court rejected the Road Commission's argument that even if EPA's objections are not final agency action reviewable under the APA, the district court has jurisdiction to resolve the Road Commission's claims under *Leedom*. *Id.*, Page ID #1974-79. The court held that the narrow *Leedom* exception did not apply because EPA's conduct did not constitute a patent violation of its delegated authority. *Id.*

The court also dismissed the claim against the Corps for failure to state a claim, holding that the Corps lawfully and reasonably requested that the Road Commission

submit a permit application to the Corps in order to proceed and that the Corps had not denied the Road Commission's application. Opinion, RE 28, Page ID #1960-1983. The court rejected the Road Commission's contention that it should be excused from continuing the permitting process before the Corps because it would be futile. *Id.*, Page ID #1982-83.

Following the Supreme Court's decision in *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807 (2016), the Road Commission filed a motion to alter or amend the judgment. The district court denied the motion, holding that *Hawkes* did not require a different disposition in this case. The court reiterated that EPA's objections do not mark the consummation of the administrative decision-making process — a requisite *Bennett* condition that was not contested in *Hawkes*. Opinion, RE 50, Page ID #2132-34. EPA's objections and the state's failure thereafter to issue or deny the permit are intermediate actions that do not resolve the pending request for a Section 404 permit. *Id.* Furthermore, EPA's involvement in the ongoing permit process is not complete when it submits objections to the state. *Id.*

The court further held that *Hawkes*' holding — that a binding determination delineating an area as waters of the United States subject to CWA permitting jurisdiction had legal consequences sufficient to satisfy the second *Bennett* condition — provided no reason to alter the judgment in this case. Opinion, RE 50, Page ID #7-8. The Road Commission had not been denied a permit and there had been no definitive decision by any permitting authority as to whether, or under what

conditions, the Road Commission should receive a permit. *Id.* The need to continue with the administrative process is different in kind and legal effect than the action at issue in *Hawkes*. *Id.*

SUMMARY OF ARGUMENT

EPA's objections under Section 404(j) meet neither of the *Bennett* conditions for final agency action. Under the statutory scheme, EPA's objections are an intermediate or interlocutory step in the evaluation of the Road Commission's Section 404 permit request that results in the continuation of the process. As such, the objections are not the consummation of the decision-making process regarding whether to issue or deny a Section 404 permit. Cases involving Section 404(j) and the parallel provision for evaluation of Section 402 permits, 33 U.S.C. § 1342(d), are in accord that under the statutory permitting system, EPA objections are not tantamount to a permit denial or veto and are not subject to immediate judicial review.

The only consequence of EPA's objections is that the permitting process proceeds and the state has opportunity to issue a permit or to deny a permit. Similarly, the only consequence of the state's failure to take these actions within the time limit is the transfer of permitting authority to the Corps and continuation of the administrative process. That continuation is a consequence different in kind from the legal consequences that satisfy *Bennett*'s second condition. The transfer of permitting authority to the Corps does not impose a legal obligation or deny a statutory right. The Commission's obligation to obtain a Section 404 permit that conforms with

Section 404(b)(1) guidelines is imposed by the CWA, as is the scheme for the continuing process for evaluation of the permit request under Section 404(j).

There is no merit to the Road Commission's argument that even if EPA's objections are not final agency action under the APA, the district court should nonetheless review the merits of EPA's objections under the narrow jurisdiction recognized in *Leedom* and its progeny for exceptional circumstances when an agency's conduct is a readily-observable usurpation of power, in patent violation of delegated authority. The Road Commission's claim alleging that EPA's explanation is inadequate and that EPA failed to list needed permit conditions is not the sort of exceptional claim to which *Leedom* applies and, in any event, is contradicted by EPA's written objections. The Commission's allegation that EPA exceeded its authority by basing its objections on factors that are not required by Section 404(b)(1) guidelines is likewise inaccurate and fails to meet the high bar for review under *Leedom*.

There is no futility exception to the APA's requirement for final agency action. Even if there were, it does not apply here because there is no indication that the Corps has predetermined to deny a Section 404 permit for the road project.

STANDARD OF REVIEW

This Court reviews *de novo* a district court order dismissing an action for failure to state a claim. *See, e.g., Berry v. U.S. Dep't of Labor*, 832 F.3d 627, 632 (6th Cir. 2016); *Friends of Crystal River v. EPA,* 35 F.3d 1073, 1077-78 (6th Cir.1994). In reviewing a Rule 12(b)(6) motion, a court must accept all well-pleaded facts in the complaint as

true and view them in the light most favorable to the plaintiff. *Benzon v. Morgan Stanley Distributors, Inc.*, 420 F.3d 598, 605 (6th Cir. 2005). A court is not, however, bound to accept legal conclusions or unwarranted factual inferences as true. *U.S. ex rel. Sheldon v. Kettering Health Network*, 816 F.3d 399, 409 (6th Cir. 2016).

The district court's rejection of the Road Commission's contention that the Corps has predetermined to deny any Section 404 permit, such that the Commission should be excused from continuing and completing the Section 404 permit evaluation process (*see infra* Section II.B), is reviewed for an abuse of discretion. *See Costantino v. TRW, Inc.*, 13 F.3d 969, 974 (6th Cir. 1994); *Shawnee Trail Conservancy v. U.S. Dept. of Agric.*, 222 F.3d 383, 389 (7th Cir. 2000); *Harrow v. Prudential Ins. Co.*, 279 F.3d 244, 248 (3d Cir. 2002).

ARGUMENT

I. EPA's objections under Section 404(j) are not final agency action

The APA authorizes judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. "As a general matter, *two* conditions *must* be satisfied" for agency action to constitute final agency action subject to review under the APA. *Bennett*, 520 U.S. at 177 (emphasis added). "First, the action must mark the consummation of the agency's decisionmaking process – it must not be of a merely tentative or interlocutory nature. *And* second, the action must be one by which rights or obligations have been determined or from which legal

consequences will flow." *Id.* at 177-78 (citations and internal quotation marks omitted) (emphasis added).

The Road Commission incorrectly argues (Br. 25) that it need only demonstrate that EPA's objections meet the first condition of the *Bennett* standard to be entitled to APA review. That contention cannot, however, be squared with *Bennett*'s language (emphasized above) or with decisions applying *Bennett*. *See, e.g., Hawkes,* 136 S. Ct. at 1813 (Corps did not dispute that determination met first *Bennett* condition; decision turned on whether second *Bennett* condition was satisfied); *Sackett v. EPA,* 566 U.S. 120, 126-27 (2012) (addressing both *Bennett* conditions); *Air Brake Sys. v. Mineta*, 357 F.3d 632, 638 641 (6th Cir. 2004) (both *Bennett* conditions must be satisfied). Numerous agency actions may represent the consummation of agency decision-making with respect to a particular issue, but that does not make them reviewable under the APA unless they are *also* actions by which rights or obligations have been determined or from which legal consequences will flow. *See Air Brake Sys.,* 357 F.3d at 644.

As the district court correctly held and for the reasons to which we now turn, EPA's objections satisfy neither of the *Bennett* conditions for final agency action.

A. EPA's objections do not mark the consummation of the relevant decision-making process

1. The objections are an intermediate step within an ongoing permitting process and thus are not the consummation of the decision-making process on the Section 404 permit application

Under the statutory system, an EPA objection to a proposed permit under Section 404(j) is a preliminary or interlocutory step in the Section 404 permitting process. As such, it is not the consummation of agency decision-making and does not meet the first *Bennett* condition. *See, e.g., Industrial Customers of Northwest Utilities v. Bonneville Power Admin.*, 408 F.3d 638, 646 (9th Cir. 2005) (a definitive statement on an interlocutory issue is insufficient to create a final action subject to judicial review). After EPA issues an objection, the permitting process continues. There is opportunity to resolve the objection, and the state retains the authority to deny a permit or to issue a permit. Had MDEQ denied the permit or issued a permit with conditions resolving EPA's objections, the permitting process would have been at an end, and the Road Commission could then have sought review if it was dissatisfied with the result. *See, e.g., Michigan Peat v. EPA*, 175 F.3d 422, 427-28 (6th Cir. 1999) (finding final agency action where EPA "ultimately withdrew [its objections] and agreed to the proposed 1995 permit that [MDEQ] sent to" the applicant). Where, as here, the state is unable or unwilling to reach a final decision to grant or deny a permit within the statutory time frame, the permit evaluation process continues before the Corps. The Corps

then makes a final reviewable determination whether to issue or deny the Section 404 permit, without being bound by EPA's objections under Section 404(j).

The CWA thus distinguishes between a final agency action that resolves the permit application through issuance or denial of the permit and intermediate actions within the permit evaluation process that require the process to continue, such as EPA's objections or the state's failure to issue a revised permit or to deny the permit within the statutory time frame. This distinction reflects a deliberate congressional policy choice, as reflected in Congress's amendments to a parallel permitting scheme under CWA Section 402, 33 U.S.C. § 1342, for discharges of other pollutants from point sources, and the contemporaneous enactment of provisions in Section 404 for approval and oversight of state Section 404 permit programs.

Prior to the 1977 amendments to the CWA, when EPA objected to an application for a Section 402 permit submitted to a state with an approved Section 402 permitting program, EPA's objection functioned as a permit "veto." It did so because the statute at that time simply provided that as a result of an EPA objection, a permit would not issue — there was no authority or mechanism for the federal agency to reassume permitting authority and to render a final decision issuing or denying the permit. *See* Pub. L. No. 92-500, § 402(d)(2), 86 Stat. 816, 882 (1972); *Champion Int'l Corp. v. EPA*, 850 F.2d 185, 188 (4th Cir. 1988). Accordingly, courts held that EPA objections under the pre-1977 scheme were final administrative action reviewable under 33 U.S.C. § 1369(b)(1)(F), which provides for court of appeals review of EPA

actions "issuing or denying any permit." *See Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193, 196 (1980); *Ford Motor Co. v. EPA*, 567 F.2d 661, 668 (6th Cir. 1977); *Champion*, 850 F.2d at 188.

In 1977, however, Congress amended Section 402(d) to provide that when a state fails to issue a Section 402 permit resolving EPA's objections or fails to deny the permit within a specified time frame, EPA assumes permit evaluation authority and continues the permitting process to completion. *See* Clean Water Act of 1977, Pub. L. No. 95-217, § 65, 91 Stat. 1566, 1599 (amending 33 U.S.C. § 1342(d)). "The 1977 Amendments alter[ed] the permit-approval process so that an EPA objection no longer automatically and finally results in the denial of a permit . . . EPA's objections are now part of an ongoing process, not the end of the process." *S. Calif. Alliance of Publicly Owned Treatment Works v. EPA*, 853 F.3d 1076, 1085 (9th Cir. 2017). Thus, as Senator Muskie, the floor manager of the 1977 conference bill, explained: "The Administrator's action in objecting to a [402] permit would generally not be subject to judicial review since it will always be followed by further administrative action." 123 Cong. Rec. S19653 (daily ed.) (Dec. 15, 1977), *reprinted in* "A Legislative History of the Clean Water Act of 1970," vol. 3 at 470.

At the same time it amended Section 402(d), Congress also amended Section 404 to establish, for the first time, a parallel process to allow states to administer a Section 404 permit program for discharges of dredged or fill material into certain waters, subject to EPA oversight. Section 404(j) is the parallel provision to amended

Section 402(d), providing for materially-identical federal oversight of the state permitting process. *See* Clean Water Act of 1977, § 67, 91 Stat. 1603-04.

Since the 1977 amendments, numerous cases have held or indicated that EPA objections under Section 402(d) or 404(j) are not reviewable final action. For example, in *Friends of Crystal River*, this Court held that it could review EPA's untimely decision to withdraw its objections to a Section 404 permit after permitting authority had already transferred to the Corps under Section 404(j). EPA's belated withdrawal decision constituted reviewable final agency action because, if left unreviewed, the decision would "terminate the federal government's role in this case" by re-transferring permitting authority from the Corps back to the state. 35 F.3d at 1079. Pertinent here, *Friends of Crystal River* differentiated between review of EPA's untimely decision to withdraw its objection and review of the substance of EPA's decision to object, noting that cases "stand for the broad proposition than an EPA decision to object *does not constitute final agency action*." *Id.* (emphasis added). The court explained that an EPA decision to object is non-final due to the continuation of the permit evaluation process and the various potential outcomes following EPA's issuance of an objection. *Id.* at 1079 n.11*; see also infra* at 19 n.2.

Cases involving the parallel provision in Section 402(d), 33 U.S.C. § 1342(d)(2), are in accord that an EPA objection is not tantamount to a permit denial or veto and is not subject to immediate review. *See, e.g., Champion Int'l Corp.*, 850 F.2d at 187-88 (review of EPA objections premature when there has been no final determination on

the permit after the transfer of permitting authority to the federal agency); *City of Ames v. Reilly*, 986 F.2d 253, 255-56 (8th Cir. 1993) (dismissing petition seeking review of an EPA objection because an objection is not a decision to issue or deny a permit, judicial review would vitiate the administrative process mandated by the Act, and administrative processes on the permit application remain).[2]

In the district court, the Road Commission suggested that the Section 402 cases are inapposite because under Section 402(d), permitting authority transfers to EPA, rather than to the Corps. But this distinction is immaterial. Under both provisions, the state retains authority to issue a permit after EPA objects; the state's failure to issue or deny a permit within a statutory time-period divests the state of permitting authority and transfers it to the federal permitting agency to continue proceedings on the permit request; and the transfer of permitting authority does not answer the ultimate question whether a permit will issue. In material respects, the permit processes under

[2] *See also S. Calif. Alliance*, 853 F.3d at 1084-86 (complaints about EPA's objections "are premature" because when EPA objects to a permit, the administrative process is not at an end); *Westvaco Corp. v. EPA*, 899 F.2d 1383, 1389 (4th Cir. 1990) (stating that EPA's disapproval of states' submission of an impaired waters list is comparable to an objection under Section 402(d), which "is not immediately reviewable"); *Friends of Crystal River*, 35 F.3d at 1079 n.11 (stating that the Seventh Circuit found in *American Paper Institute v. EPA*, 890 F.2d 869, 85 (7th Cir. 1989), that an EPA objection to a Section 402 permit is not reviewable because it is discretionary, but "a more defensible basis for determining EPA objections to be non-reviewable lies in the fact that such decisions are non-final").

Section 402(d) and 404(j) are the same, and the Court should interpret them alike for purposes of finality.

2. The Road Commission applied for a Section 404 permit under the CWA, and there is as yet no administrative decision granting or denying the Section 404 permit

The Road Commission sets up a straw man argument in contending that EPA's objections are a veto or denial of a state-approved permit. *E.g.*, Br. 23-24, 27-29. The Commission's approach incorrectly assumes that there are two separate and "*different*" Section 404 permits (Br. 29 (emphasis in original)) — a "state permit" and a "Corps permit." *See, e.g.*, Br. 24, 27, 29.

In reality, the Road Commission applied for a permit that authorized discharges of dredged-and-fill activities under CWA Section 404, and the operative question for purposes of the final agency action requirement is whether there has been a final decision issuing or denying a Section 404 permit for the County Road 595 project.[3] There has been no final administrative decision on a Section 404 permit for the road

[3] Similarly, in *Jama,* this Court held that decisions to terminate refugee status and to deny an application for status adjustment were not final agency actions when a different agency had yet to decide an application for asylum status. 760 F.3d at 496. The Court explained that although there were legal and practical differences between refugee status and asylum status, the operative question for purposes of applying *Bennett* was whether there had been a final decision on Jama's immigration status. *Id.*; *see also Cabaccang v. U.S. Citizenship and Immigration Services*, 627 F.3d 1313, 1316 (9th Cir. 2010) (holding that agency's denial of application to adjust immigration status was not final agency action under *Bennett* even though no further review within that agency was available and that it was "immaterial" that further review of immigration status "takes place in a different agency within a different executive department.")

project and the administrative process Congress provided to resolve this issue is incomplete. Section 404(j) provides that if a state with an approved program does not timely deny a permit or issue a permit that resolves EPA objections, "the Secretary [acting through the Corps] may issue *the permit* pursuant to subsection (a) or (e) of this section." 33 U.S.C. § 1344(j) (emphasis added). An EPA objection under Section 404(j) does not amount to a "veto" or denial of "*the permit*." Rather, Section 404(j) establishes a continuing process for one Section 404 permit, the final result of which is the issuance or denial of the permit. Regardless of whether this final permitting decision is made by MDEQ or by the Corps, the Road Commission is still seeking a Section 404 permit authorizing the same discharge of dredged or fill material for the same project. The Road Commission's attempt to recast a request for the permit into two different permits and to bifurcate the continuing statutory permitting system for a Section 404 permit is contrary to the statutory scheme that Congress deliberately designed.

The Road Commission's approach is also at odds with the cases discussed above involving EPA objections under Section 402(d) or 404(j). *See supra* at 19-20. If the Road Commission's purported distinction between a state permit and a Corps permit had any substance, the Section 402 cases would have concluded that the EPA objections were final agency actions: under the Road Commission's theory, the objections would constitute denials of state permits and transfers of permitting

authority away from the state to a federal agency for a decision on a *different* permit. But as discussed above, these cases concluded just the opposite.

The Road Commission's persistent assertion that EPA's objections vetoed a state permit is wrong for the further reason that under the statutory scheme, the state has an opportunity after the objections to issue the permit so long as it resolves EPA's objections and the issuance occurs within the statutory time-frame. That MDEQ was unable or unwilling to do so in this particular case does not transmute EPA's objections into a veto or permit denial. When authority over the permitting process transfers to the Corps, it does so precisely because the state agency has *not* resolved the permit request in a timely fashion, leaving unanswered the question whether a Section 404 permit will issue, and on what terms.

The Corps' direction that the Road Commission submit a "new" permit application if it wanted to pursue the permit does not support the Commission's attempt to bifurcate the ongoing Section 404 permit evaluation process. This application to the Corps is "new" only in the trivial sense that the Road Commission was requested to submit its application *to the Corps* along with the supporting materials it wished the Corps to consider. It is not a "new" application in the sense that the Road Commission is seeking Section 404 authorization for different discharges or for a different project. As the district court held, requiring the Road Commission to submit an application to the Corps to continue the Section 404 permitting process is

consistent with the CWA and Corps regulations, and is reasonable.[4] Opinion, RE 28, Page ID #1979-83. Especially here, where the Commission revised its application multiple times after the Corps had reviewed an earlier version in spring 2012, it is reasonable to expect the Commission to submit the proposal and supporting materials it wishes the Corps to consider. *Id.*

Should it choose to finish the permitting process, the Road Commission may still receive the Section 404 permit it requested in support of the road project. No Section 404 permit has been vetoed or denied.

3. *Sackett v. EPA* does not demonstrate that EPA's objections satisfy the first *Bennett* condition

The Road Commission argues that *Sackett v. EPA*, 566 U.S. 120 (2012), demonstrates that EPA's objections here satisfy the first *Bennett* condition. Br. 24-25. Not so. *Sackett* held that an administrative compliance order issued by EPA under CWA Section 309, 33 U.S.C. § 1319, was reviewable final agency action. 566 U.S. at 131. The compliance order contained Findings and Conclusions that the Sacketts had violated the CWA by discharging fill into waters of the United States without a permit, and it directed the Sacketts to restore the site in accordance with an EPA plan and to give EPA access to the property and various records. *Id.* at 126. Failure to comply with the directive exposed the Sacketts to double penalties in any future

[4] The Road Commission has waived any challenge to this holding because its opening brief contains no argument objecting to this ruling. *See, e.g., Miller v. Admin. Office of Courts*, 448 f.3d 887, 893 (6th Cir. 2006).

enforcement proceedings (for violation of the administrative order, as well as for violation of the CWA itself); the directive "severely limit[ed] the Sacketts' ability to obtain a permit for their fill" because Corps "regulations provide that, once the EPA has issued a compliance order with respect to certain property, the Corps will not process a permit application for that property unless doing so 'is clearly appropriate.'" *Id.* (quoting 33 C.F.R. § 326.3(e)(1)(iv) (2011)); *cf. id.* (holding that because of these consequences, the compliance order satisfied the second *Bennett* condition). The Court held that the compliance order marked the consummation of the agency's decision-making process and thus satisfied *Bennett*'s first condition. The Court explained that there was no entitlement to further EPA review and that the mere possibility that EPA might reconsider its order based on informal discussion did not suffice to turn EPA's otherwise final agency action into non-final action. *Id.* at 127.

Here, the Road Commission seeks review of an intermediate step in an ongoing process involving the same permit. Whether the federal agencies' evaluation will result in permit issuance is still unresolved and the statutory scheme entitles — indeed, requires — the Commission to seek further agency review if it wants to complete the administrative decision-making process on its request for the permit. By contrast, the administrative inquiry into whether the Sacketts violated the CWA ended with the issuance of the compliance order. *See* 33 U.S.C. § 1319(a)(3) (when EPA "finds that any person is in violation of" certain provisions of the Act or CWA permits, EPA "shall issue an order requiring such person to comply"); *Sackett*, 566 U.S. at 129

(concluding that when it issued the compliance order, "EPA's 'deliberation' over whether the Sacketts are in violation of the Act is at an end . . .").

The Road Commission asserts (Br. 24) that EPA's objections mirror the circumstances in *Sackett* because EPA's "veto of the state permit will never be subject to further agency review. The permit denial is final and EPA's work is done as to the MDEQ permit." Br. 24. This argument is wrong for three reasons. First it is based on the premise that EPA's objections constitute a "veto"; as we have just explained, the premise is false. Second, as the district court held, it is not accurate that there is nothing left for EPA to do after it issues objections. EPA works with the state to resolve the objections and can withdraw them (so long as it does so before the time limit for state action expires); and "EPA's involvement in the permitting process continues even after the Corps has permitting authority." Opinion, RE 50, Page ID #2133; *see also* Opinion, RE 28, Page ID #1966-67; *supra* at 5.[5] Third, the Road Commission's argument ignores that even if *EPA*'s work is done, permitting authority reverts to *the Corps*; consequently, EPA objections manifestly do *not* "terminate the federal government's role in this case." *Friends of Crystal River*, 35 F.3d at 1079.

The Road Commission also suggests that as in *Sackett*, the prospect of Corps review and decision on the permit application does not prevent it from bringing an

[5] The Road Commission is thus incorrect in asserting (Br. 34) that no further EPA administrative review of the permit is "even allowed" after permitting authority transfers to the Corps.

immediate challenge to EPA's objections. Br. 24-25. But *Sackett*'s discussion of the Corps' permit process did not relate to whether the compliance order was final agency action. The Court had already concluded that it was and addressed the separate issue (and prerequisite for APA review) of whether the Sacketts had any "other adequate remedy in a court." 566 U.S. at 127-28. The Court held that no such adequate remedy existed because the Sacketts were not required to initiate an entirely separate administrative process to request a Section 404 permit, which they had never sought; complete that separate process, which would include resolving additional, distinct issues, to obtain a second final agency action; and then file a lawsuit challenging that second final agency action in order to obtain a remedy for EPA's already final compliance order. *Id.*

Here, by contrast, the Road Commission sought a Section 404 permit, EPA's objections under Section 404(j) do not prevent the Commission from obtaining the permit, and the unfinished process before the Corps involves that very permit. As the district court explained: "Here, the permit itself is at issue" and is the very thing that the Road Commission sought. Opinion, RE 50, Page ID #2137. *Sackett* does not excuse the Road Commission from finishing the process that it began under Section 404(j) to receive a final administrative determination whether a permit *will* issue for the road project before seeking judicial review of whether a permit *should* issue.

In sum, the Road Commission has failed to demonstrate that the district court erred following *Friends of Crystal River*'s treatment of the non-reviewability of EPA

objections under Section 404(j). See Opinion, RE 28, Page ID #1962. EPA's objections are not the consummation of the decision-making process on the Road Commission's Section 404 permit application and the first *Bennett* condition for final agency action is therefore not satisfied.

B. EPA's objections do not conclusively determine rights or obligations or impose legal consequences

EPA's objections also fail to satisfy the second *Bennett* condition because they do not conclusively determine any of the Road Commission's rights or obligations and do not have legal consequences outside of the permitting process. The only consequence of EPA's objections is that the process proceeds and the state has an opportunity to resolve EPA's objections or to deny a permit. Similarly, the only consequence of the state's failure to take either of these actions within the statutory time limit is the transfer of permitting authority to the Corps and further continuation of the very same process. While these steps may have prolonged the administrative permitting process and thus delayed the issuance of a final reviewable decision on the permit, they do not conclusively determine the Road Commission's entitlement to the permit it seeks.

An intermediate ruling that has the effect of continuing the administrative process and that imposes the corresponding obligation to continue to participate in such process to obtain a decision is different in kind from the rights and obligations or legal consequences that satisfy the second *Bennett* condition. *See, e.g., FTC v. Standard*

Oil Co. of Calif., 449 U.S. 232, 242 (1980); *Aluminum Co. of Am. v. United States*, 790 F.2d 938, 941 (D.C. Cir. 1986) ("It is firmly established that agency action is not final merely because it has the effect of requiring a party to participate in an agency proceeding"), quoted in *CSX Transp. Inc. v. Surface Transportation Bd.*, 774 F.3d 25, 30 (D.C. Cir. 2014). Procedural differences and increased administrative costs arising from a continuation of the administrative proceeding are not legal consequences or obligations of the kind sufficient to satisfy the second *Bennett* condition. *See Home Builders Ass'n of Greater Chicago v. U.S. Army Corps of Eng'rs*, 335 F.3d 607, 616 (7th Cir. 2003) ("The mere presence of increased administrative costs is insufficient to establish the finality required for nonstatutory review under the APA."); *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 242 (1980) (burden of participating in administrative proceeding "is substantial," but it is "different in kind and legal effect" from burdens attending what is considered to be final agency action.); *cf. Aluminum Co. of Am.*, 790 F.2d at 942 ("[I]f the denial of a procedural right constitutes final agency action, then the doctrine of finality is indeed an empty box.").

The Road Commission's flawed attempt to characterize EPA's objections as a final permit denial fatally pervades its argument (Br. 26-32) that EPA's objections satisfy the second *Bennett* condition. As explained in Section I.A.2 above, Section 404(j) sets forth a continuing process for evaluation of a Section 404 permit request. EPA's objections do not veto or deny a Section 404 permit. The Corps' reassumption

of permitting authority results from state inaction within the statutory time limit rather than from EPA's objections.

Furthermore, the transfer of permitting authority to the Corps is not a legal consequence or obligation that satisfies the second *Bennett* condition. Regardless of whether MDEQ or the Corps issues the CWA permit, the Road Commission must comply with substantive CWA requirements, including the CWA Section 404(b)(1) guidelines, and any additional state requirements. *See supra* at 4; Opinion, RE 28, Page ID #1970-1971. In other words, should the Commission submit its materials to the Corps, the Corps would address the same question concerning issuance of a Section 404 permit that was presented to the state, *i.e.*, whether the Road Commission's proposed discharges in conjunction with constructing County Road 595 can be authorized through a Section 404 permit, in conformance with the Section 404(b)(1) guidelines. *See* Opinion, RE 28, Page ID #1971. EPA's prior objections do not bind the Corps in its independent review.

The Road Commission incorrectly contends that *Hawkes* compels the conclusion that it can seek judicial review of EPA's objections on the merits. Br. 3, 26-31. In *Hawkes*, the Supreme Court concluded that an approved final jurisdictional determination, setting forth the Corps' "definitive view" on whether a particular property contains waters of the United States under the CWA satisfied the second *Bennett* condition. 136 S. Ct. at 1811, 1813-15. The Court reasoned that under an agency memorandum of agreement, a negative jurisdictional determination—*i.e.*, a

determination that property does not contain waters of the United States — had legal consequences because it was binding for five years on the Corps and EPA, precluding an enforcement action and "limit[ing] the potential liability a landowner faces for discharging pollutants without a permit." *Id.* at 1814. The Court held that an affirmative jurisdictional determination likewise had legal consequences because it represented the denial of the safe harbor that a negative jurisdictional determination affords. *Id.* Moreover, an affirmative jurisdictional determination warns landowners 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.

The Road Commission contends that the circumstances here mirror *Hawkes* because if EPA had not objected to the permit, the Commission would have received a Section 404 permit from MDEQ and with that permit in hand, it could have gone forward with its project without fear of an enforcement action for violation of the CWA. Br. 27-28. But this argument ignores that the Court's holding in *Hawkes* turned on the negative jurisdictional determination's ability to bind the agencies for five years to a position under which no CWA permit is required. *See id.* at 1814.

That critical circumstance is absent from this case. The Road Commission has never disputed that its proposed road project requires a Section 404 permit. All that happened here is that the authority to issue or deny that permit, which initially rested with MDEQ, transferred to the Corps after the state agency declined to deny a permit or approve a permit resolving EPA objections within the statutory time limit. That the

Road Commission was not issued the permit it seeks at the first opportunity in the process, but must instead continue the process to completion to obtain a final decision, is not a legal consequence comparable to that in *Hawkes*. The Road Commission's sweeping interpretation of *Hawkes* would effectively eliminate the second *Bennett* condition: because every step in a multi-stage process at which a favorable decision *could* issue but does not — and thereby prolongs the administrative process — would result in "legal consequences" or a "legal obligation" to complete the process sufficient to satisfy *Bennett*. Such a result is untenable and unsupported.

The Road Commission's reliance (Br. 28-29) on *Frozen Food Express v. United States*, 351 U.S. 40, 76 (1956), is also unavailing. There, the Court concluded that an order listing which commodities the Interstate Commerce Commission believed to be exempt from certain permitting requirements under the Interstate Commerce Act constituted final agency action. *Id.* at 42. In so holding, the Court reasoned that the order had an immediate and practical impact on regulated parties by "warn[ing] every carrier, who d[id] not have authority from the Commission to transport those commodities, that it d[id] so at the risk of incurring criminal penalties." *Id.* at 44. The difference between this case and *Frozen Food Express* is that there, "the order itself was the source of the [parties'] obligation[s], modifying the applicable legal landscape by interpreting the scope of the agricultural commodities exception." *Golden & Zimmerman, LLC v. Domenech*, 599 F.3d 426, 433 (4th Cir. 2010). In contrast, EPA's objections do not "modify the legal landscape" or create the obligation for a Section

404 permit. The obligation to obtain a permit arises from the CWA and is not disputed in this case.

There is also no merit to the Road Commission's suggestion (Br. 31-32) that EPA's objections deprive it of a "statutory right" to have a permit issued under a state Section 404 program instead of by the Corps. There is no such statutory right. First, it is wholly a matter of the state's discretion to assume permitting authority under Section 404. *See* 33 U.S.C. § 1344(g) ("The Governor of any State *desiring* to administer" a permit program may seek EPA approval to issue permits) (emphasis added). Second, an approved state's authority to issue a permit is subject to the limitations set forth in Section 404(j), among others. Under that provision, EPA may file an objection and the state permitting agency has complete discretion to decline to make a decision on the permit application within the statutory period, as it did here. Because the Road Commission has no statutory right to a state decision on the permit application, it necessarily follows that it has no statutory right to have a Section 404 permit issued by the state.

The Road Commission asserts that the EPA objections left it in an even worse position than the final jurisdictional determination in *Hawkes* because Hawkes could have applied for a permit and then (on receiving a final decision thereon) challenged the Corps' predicate jurisdictional determination as arbitrary and capricious. Br. 30. The Commission states that by contrast, here no court "will likely *ever* review EPA's predicate decision to reject the state permit" because this EPA decision "may be

deemed moot or outside the scope of" a later challenge to the Corps' permit decision. Br. 30. But the reason EPA's objections may be moot or outside the scope of a subsequent challenge is precisely because they do not dictate the ultimate outcome of the permit decision[6] The Road Commission may ultimately receive the permit from the Corps. Thus, the Commission is wrong in asserting that "the Corps permit process does not add anything, legally or factually, to the challenged agency action." Br. 30.[7] Proceeding before the Corps will finish the statutory permit evaluation process, resulting in a final agency action through the issuance or denial of a permit.

---

[6] The final agency action requirement "is predicated upon the perception that litigants as a group are best served by a system which prohibits piecemeal appellate consideration of rulings that may fade into insignificance" by the time administrative proceedings conclude. *CSX Transp., Inc.*, 774 F.3d at 31 (internal quotation marks omitted). "Premature review squanders judicial resources, since the challenging party may ultimately prevail in the adjudication and have no need to appeal." *Id.*

[7] In the context of arguing that the case is ripe, the Road Commission suggests that there would be no benefit from further factual development by continuing the Section 404 permit evaluation process to completion. Br. 33. Yet in its January 2013 letter, MDEQ explained that it did not issue a permit as a result of the "complexity of the remaining issues" and short statutory time frame for the state to act. Complaint Ex. 45, RE 8, Page ID #1183. And the Commission's complaint takes issue with EPA's objections on many fact-intensive issues. Complaint, RE 1, Page ID #38-80. Continuing the permit evaluation process before the Corps allows an opportunity to better develop facts on the issues raised by the Road Commission's permit request. Relatedly, the Road Commission also incorrectly suggests that its claim alleging that the substance of EPA's objections was arbitrary and capricious presents a purely legal question. Br. 33; *see also* Complaint, RE 1. Page ID #75-80. As is often the case for such claims, however, review of EPA's objections under the arbitrary and capricious standard would be focused on factual issues. It makes no sense to conduct review now of allegations disputing the factual bases for EPA's objections when the Corps may reach a different conclusion.

For these reasons, EPA's objections in the distinctive circumstances of the statutory scheme established by Congress in Section 404(j) satisfy neither of the two required *Bennett* conditions for final agency action.

II. There is no exception that would allow immediate judicial review of EPA's non-final agency action

The Road Commission contends that even if EPA's objections are not final agency action under the APA, it is nonetheless entitled to judicial review of the merits of those objections under two exceptions allowing review of non-final agency action. Br. 37, 40. But neither of the Commission's theories provides a basis here for jettisoning the APA's final agency action requirement.

A. The district court correctly held that this case does not meet the criteria for review of non-final action under *Leedom v. Kyne*

The Road Commission first contends that it is entitled to judicial review of the merits of EPA's non-final action based on jurisdiction recognized in *Leedom* and its progeny. Br. 37-39. The district court correctly rejected this argument. Opinion, RE 28, Page ID #1974-1979.

1. The *Leedom* exception is narrow, as is a court's inquiry to determine *Leedom's* applicability.

Leedom involved an action in district court challenging a determination by the National Labor Relations Board that a unit including both professional and nonprofessional employees was appropriate for collective-bargaining purposes — a determination that the Board conceded was in direct conflict with a provision of the

National Labor Relations Act. *Id.*, 358 U.S. at 187. The Act, however, did not expressly authorize any judicial review of such a determination and the Board argued that the Act's provisions establishing exclusive jurisdiction to review final Board orders in the courts of appeals impliedly barred review of the non-final Board action in the district court. *Id.* The Supreme Court rejected that argument and held that the district court could exercise jurisdiction under the circumstances because the Board's order was "made in excess of its delegated powers" and contrary to a "clear and mandatory" statutory prohibition, and there was "no other means, within [the employees'] control" to enforce a right assured to them by Congress. *Id.* at 185.

This Court has repeatedly made clear that district court jurisdiction to review non-final agency action under *Leedom* is a "narrow anomaly reserved for extreme situations." *Shawnee Coal Co. v. Andru*s, 661 F.2d 1083, 1093 (6th Cir. 1981); *see also Detroit Newspaper Agency v. NLRB,* 286 F.3d 391, 396-97 (6th Cir. 2002); *Friends of Crystal Rive*r, 35 F.3d at 1079 n.13. As the D.C. Circuit put it: "This point cannot be overstated, because. . . *Leedom* jurisdiction is extremely narrow in scope." *Nat'l Air Traffic Controllers Ass'n AFL-CIO v. Fed. Serv. Impasses Panel*, 437 F.3d 1256, 1263 (D.C. Cir. 2006). The *Leedom* exception applies only in "exceptional circumstances" where there is a "patent violation of [an agency's] authority" amounting to a "readily observable usurpation of power not granted to the agency by Congress." *Greater Detroit Res. Recovery Auth. v. EPA*, 916 F.2d 317, 323 (6th Cir. 1990); *see also Abercrombie v. Office of Comptroller of Currency*, 833 F.2d 672, 675 (7th Cir. 1987) (*Leedom* "exception

is available only where the agency has exceeded a plain and unambiguous statutory command or prohibition" — that is, the agency action is "blatantly lawless") (internal quotations and citations omitted).

The court's inquiry to determine whether agency conduct may be reviewed under *Leedom* is correspondingly limited "to jurisdictional defects which are apparent on the face of the record in plain contravention of a statutory mandate." *First Nat'l Bank of Grayson v. Conover*, 715 F.2d 234, 236 (6th Cir. 1983). A court should conduct only a cursory review under *Leedom*, and if an agency offers a plausible interpretation of the relevant statute, the court will not find violation of a clear statutory mandate. *Long Term Care Partners, LLC v. United States*, 516 F.3d 225, 234 (4th Cir. 2008); *see also Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1180 (D.C. Cir. 1979) (Leventhal, J., concurring) (the *Leedom* exception may only be applied "in a case . . . not requiring in any way a consideration of interrelated aspects of the merits which can only be done appropriately on review of a final order").

Thus, *Leedom* does not automatically apply "'whenever a challenge to the scope of an agency's authority is raised'" or whenever there is a dispute over statutory or regulatory interpretation and implementation of the agency's authority. *Greater Detroit*, 916 F.2d at 323 (quoting *Shawnee Coal Co.*, 661 F.2d at1093). Claims alleging factual or legal errors are insufficient to bring an order within the narrow boundaries of the *Leedom* exception, which is designed to address extreme legal error where an agency acts "manifestly beyond the realm of its delegated authority," contrary to a plain and

unambiguous statutory prohibition or mandate. *S. Ohio Coal Co. v. Dep't of the Interior*, 20 F.3d 1418, 1424 (6th Cir. 1994); *see also U.S. Dep't of Justice v. Fed. Labor Relations Authority*, 981 F.2d 1339, 1343 (D.C. Cir.1993); *Physicians Nat'l House Staff Ass'n v. Fanning*, 642 F.2d 492, 496 n.4 (D.C. Cir. 1980) ("the mere possibility that the decision being reviewed is erroneous is not sufficient to support jurisdiction.").

2. The Road Commission has not demonstrated a readily observable usurpation of power in patent violation of EPA's authority

The district court properly declined the Road Commission's invitation to adjudicate its claims challenging the adequacy and substance of EPA's objections under *Leedom*. EPA has an express statutory grant of authority to object under Section 404(j) based on an application's failure to satisfy Section 404(b)(1) guidelines. EPA simply has not engaged in a "patent violation of its authority" or in a "readily observable usurpation of power." *See Greater Detroit*, 916 F.2d at 323-24 (no "patent violation" of authority because EPA was able to justify its action by reference to applicable statutory and regulatory provisions); *Champion*, 850 F.2d at 190 (having ascertained that EPA acted within its delegated authority in objecting under Section 402(d), the district court should have dismissed the case; court was without authority to address the merits of EPA's objections).

The Road Commission's attempt to couch certain of its claims in the verbiage of *Leedom* is unavailing as they are readily discernable as garden-variety claims to which *Leedom* does not apply. The Commission asserts that EPA's objections did not

"adequately state the reasons for its objections" and failed to "list the permit conditions necessary for its objections to be lifted." Br. 38. But EPA's written submissions, which total over 40 pages, set forth reasons for its objections and provide responses to public comments; moreover, EPA's December 2012 submission includes a bullet point list of conditions to satisfy EPA's objections. Complaint, Ex. 19, RE 6-5, Page ID #616-624; Complaint, Ex. 39, RE 8-7, Page ID #1039-1075; *id.*, Page ID #1042-1044 (list).[8] Thus, as the district court held, the Road Commission's claim is not supported by the record. Opinion, RE 28, Page ID #1975. The Commission's dissatisfaction with EPA's reasons and list provide no legitimate basis for review under *Leedom*. *See supra* at 36-37; *Champion*, 850 F.2d at 190.

[8] In its April 2012 comments, EPA objected to the Road Commission's initial application due in part to the inadequacy of the alternatives assessment and the failure to show that the proposed project was the "least environmentally damaging practicable alternative." Complaint Ex. 19, RE 6, Page ID #617-20. Under the Section 404(b)(1) guidelines, no permit can issue absent such showing. *See* 40 C.F.R. § 230.10(a); *Ctr for Biological Diversity v. FHA*, 290 F. Supp.2d 1175, 1193 (S.D. Cal. 2003). As a result — and consistent with Section 404(j), which provides that EPA is to list "the conditions which such permit would include *if it were issued*," 33 U.S.C. § 1344(j) (emphasis added) — on the showing the Road Commission made at the time, there were no conditions that EPA could have listed that would have allowed a permit to issue. EPA's regulations authoritatively interpreting Section 404(j) support the conclusion that, where an application fails to show a valid permit could issue at all, EPA is not in a position to list permit conditions. In particular, these regulations differentiate between EPA "objection[s] to proposed permits" and EPA "requirement[s] for a permit condition" that may be applied to a valid permit. *See* 40 C.F.R. § 230.50. The Road Commission did not challenge these regulations (and the statute of limitations for challenging the regulations, promulgated in 1988, has long expired).

The Road Commission's claim that EPA exceeded its delegated authority by allegedly basing its objections on factors that are not requirements of the Section 404(b)(1) guidelines both is inaccurate and fails to demonstrate the exceptional conditions for review of non-final action under *Leedom*. RE 28, Page ID #1976-79. The Road Commission incorrectly suggests that EPA cannot object to its permit application on the basis of magnitude of impacts, insufficiency of compensatory mitigation, or inadequacy of minimization and mitigation plans. Br. 38. But all of these factors are elements of the Section 404(b)(1) guidelines and, as such, Section 404(j) expressly authorizes EPA to object on these bases.[9] Indeed, this is the very purpose of federal oversight.

Contrary to the Road Commission's assertion (Br. 38-39), nothing in the statutory language or Section 404(b)(1) guidelines plainly and unambiguously gives exclusive authority or discretion to the state to determine whether a permit application satisfies quantitative and qualitative factors of the guidelines. The Road Commission suggests that Section 404(j)'s language authorizing EPA to object to a permit application "as being outside the requirements of this section, including, but

[9] *See* Opinion, RE 28, Page ID 1976-79. It is "[f]undamental to the [404(b)(1)] Guidelines" that the discharge of dredged or fill material "not have an unacceptable adverse impact." 40 C.F.R. § 230.1; *see also* § 230.5(c), (j) (requiring assessment of alternatives and minimization of impacts); *id.* § 230.10(a), (c)-(d) 40 C.F.R. § 230.1; *see also id.* § 230.11 (requiring determination of impacts); subparts C-E (determining environmental impacts, subpart H (actions to minimize adverse effects); subpart J (mitigation requirements).

not limited to, the guidelines" has the effect of according sole discretion to the state to determine whether quantitative or qualitative guideline factors are met. But this language does not plainly compel such result. Indeed, the more sensible reading is that it has the exact opposite meaning, *i.e.*, that it authorizes EPA to object on the basis of its own evaluation of whether guideline factors are met. *Cf.*, *Champion*, 850 F.2d at 189 (rejecting proposition that EPA cannot lawfully object unless a permit is "clearly outside" Section 402 guidelines).

The Road Commission also relies (Br. 39) on language in the general declaration of purpose and policy in 33 U.S.C. § 1251(b) that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution . . .." But after referring to this very same statement, this Court explained in *Friends of Crystal River*, that "the 1977 amendments make equally clear that Congress also intended to expand federal oversight" of approved state permit programs. *Id.*, 35 F.3d at 1078; *see also* S. Rep. No. 95-370, 95th Cong., 1st Sess., at 78 (1977), reprinted in 1977 U.S.C.C.A.N. 4326, 4403 ("the authority of the [EPA] to assure compliance with guidelines in the issuance and enforcement of permits . . . is in no way diminished" by the amendments allowing states to obtain approval to administer a Section 404 permit program).

In sum, *Leedom* does not apply because the Road Commission cannot demonstrate that EPA acted in patent violation of its delegated authority. *Leedom* does not apply for the independent reason that the Commission has a means for redress by

continuing the permit evaluation process before the Corps and seeking judicial review, if necessary, of the Corps' decision granting or denying the permit. *See Bd. of Governors, Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 43 (1991) (*Leedom* requires plaintiff to show that absent jurisdiction in the district court, it will be "wholly deprive[d]" of a "meaningful and adequate means of vindicating its statutory rights"); *Detroit Newspaper*, 286 F.3d at 401 (because judicial review is available after completion of administrative process, no need to address whether agency exceeded its authority).

B. The Commission is not entitled to judicial review of EPA's objections under a "futility" exception

The Road Commission alternatively argues that an absence of final agency action does not preclude review of EPA's objections because it would have been futile to have continued the permit process before the Corps due to the Corps' alleged predetermination "to reject any permit application" from the Commission. Br. 40-41. The Commission's argument fails first because "there is no futility exception to final agency action." *Naik v. Renaud*, 947 F.Supp.2d 464, 471 (D.N.J. 2013), *aff'd,* 575 F. App'x 88 (3d Cir. 2014); *see also Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n*, 173 F.Supp.2d 4, 51 (D.D.C. 2001) ("[f]utility alone does not excuse the need for final agency action"), *aff'd*, 324 F.3d 726 (D.C. Cir. 2003); *Clear Sky Car Wash, LLC v. City of Chesapeake*, 910 F. Supp. 2d 861, 881-82 (E.D. Va. 2012) (same).

The Road Commission's futility argument conflates the APA's final agency action requirement with a separate requirement for exhaustion of administrative

remedies. Although both requirements relate to availability of judicial review and the policies underlying the two concepts often overlap, they are distinct inquiries. *See Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 193 (1985); *Hammond v. Baldwin*, 866 F.2d 172, 175 (6th Cir. 1989).[10]

Exhaustion of remedies is a common law principle, sometimes codified in statutes, that is not limited in application to APA cases. Exhaustion generally refers to administrative or judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if a decision is found to be unlawful or otherwise inappropriate. *Hammond*, 866 F.2d at 175*; see also McCarthy v. Madigan*, 503 U.S. 140, 145 (1992). Where Congress has not clearly required exhaustion of administrative remedies, a reviewing court may, in limited circumstances, excuse the requirement based on futility. *See, e.g., McCarthy,* 503 U.S. at 144; *Ace Property & Cas. Ins. Co. v. Fed. Crop Ins. Corp.*, 440 F.3d 992, 996 (8th Cir. 2006).

Final agency action, by contrast, is an essential element for a valid cause of action under the APA and cannot be excused based on futility. *See Reliable Automatic Sprinkler Co.*, 173 F. Supp.2d at 52 ("any prudential concern regarding futility cannot

[10] A case cited by the Road Commission (Br. 41), *Herr v. United States Forest Service*, 803 F.3d 809 (6th Cir. 2015), illustrates that they are separate inquiries. In *Herr*, the court recognized both parties' agreement that the challenged Forest Service order constituted final agency action, *id.* at 819, and then addressed the separate disputed question of whether the Herrs' challenge to the order was nonetheless barred by a (non-APA) statutory requirement to exhaust administrative remedies through the agency's appeal process, *id.* at 822-23.

overcome the APA's clear requirement for final agency action"). None of the cases cited by the Road Commission holds that the APA's final agency action requirement may be excused based on alleged futility. The Commission cites non-APA cases or cases where the question of final agency action was not at issue.[11]

Second, even if there were a "futility" exception to the APA's final agency action requirement, the district court did not abuse its discretion in ruling that the exception would not apply here. In considering a motion to dismiss, a district court may not deem administrative review futile "if the plaintiff's allegations of bias are purely speculative." *Anderson v. Babbitt*, 230 F.3d 1158, 1164 (9th Cir. 2000). The Commission points to the Corps' April 2012 comment letter identifying concerns with an early iteration of the permit application as evidence of Corps'

[11] *See Cooley v. United States*, 324 F.3d 1297, 1303-04 (Fed. Cir. 2003) (addressing futility in context of discussing when claim seeking just compensation for a taking accrues); *Cristina Inv. Corp. v. United States*, 40 Fed. Cl. 571, 580 (1998) (same); *City Nat'l Bank of Miami v. United States*, 33 Fed. Cl. 224, 228 (1995) (holding that claim seeking just compensation for a taking was ripe based on court's finding that that "the Corps made a merits-based determination" to deny a permit based on failure to satisfy 404(b)(1) guidelines); *Bannum, Inc. v. City of Louisville, Ky.*, 958 F.2d 1354, 1361-63 (6th Cir. 1992) (constitutional claim against City alleging that City's zoning procedures denied equal protection); *City of Mount Clemens v. EPA*, 917 F.2d 908, 914-915 (6th Cir. 1990) (holding that pursuit of additional *state* administrative remedies was not required); *Ellison v. Connor*, 153 F.3d 247, 251-55 (5th Cir. 1998) (futility considered in the context of establishing standing to assert a constitutional due process claim for damages; court dismissed claim challenging Corps' authority to refuse to permit building of homes in a flowage easement owned by the United States on ground that agency action taken in a proprietary capacity is committed to agency discretion by law and thus unreviewable); *Parkview Corp. v. Dep't of Army Corps of Eng.*, 490 F. Supp. 1278, 1281-82 (E.D. Wis. 1980) (challenge to Corps order directing removal of fill placed in violation of CWA; final agency action not at issue).

predetermination and bias. But this letter does not indicate that the Corps has "predetermined to reject *any* permit application" from the Road Commission. Br. 40-41 (emphasis added). Rather, the Corps merely questioned the adequacy of the Commission's submission at that time. For example, in its April 2012 letter, the Corps disagreed with "the project purpose as *currently stated*" and observed that the "application does not appear to include enough information to support the determination of a preferred alternative." Complaint Ex. 16, RE 6, Page ID #601-02 (emphasis added). As Section 404(j) contemplates, and as occurred here, the Road Commission subsequently made changes to its proposal and provided additional supporting documentation to MDEQ, leading EPA to withdraw its objection based on the alternatives assessment.

The Complaint made no allegations of bias on the part of the Corps. Its allegations of bias pertain solely to EPA. Contrary to the Road Commission's suggestion (Br. 42), a statement in an *EPA* e-mail provides no evidence of bias on the part of the *Corps* or of futility in continuing the permit process with the Corps.

Nor can bias or predetermination be reasonably inferred from the Corps directing the Road Commission to submit the application and supporting materials to the Corps if the Commission wished to proceed. In so directing, the Corps acted

lawfully and reasonably, following procedures applicable to all permit applications. *See* Opinion RE 28, Page ID #1981; *supra* at xx n.xx.[12] The Corps remains willing to conduct its independent review of the Road Commission's Section 404 permit request should the Commission decide to proceed and submit application materials.

[12] The Road Commission's perfunctory assertion (Br. 43) that it is entitled to judicial review of the Corps' purported constructive denial of the permit is insufficient to preserve this argument. *See, e.g., McPherson v. Kelsey*, 125 F.3d 989, 995–96 (6th Cir. 1997) (perfunctory, skeletal argument waived). In any event, the assertion is meritless — the Corps did not constructively deny the permit by directing the Commission to file an application (nor would following other permit evaluation procedures constitute a constructive denial). See Opinion, RE 28, PageID #1979-1983. Moreover, *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 60-63 (2004), forecloses any notion that the Corps' failure to act amounts to a constructive denial. Cases cited by the Commission (Br. 43-44) are inapposite. *See S. Utah Wilderness Alliance v. Office of Surface Mining Reclamation & Enforcement*, 620 F.3d 1227, 144 (10th Cir. 2010) (reviewing and upholding letter that denied environmental plaintiff's request that, due to an alleged modification, the federal agency prepare a new recommendation on a mining plan that had already been approved in a final Secretarial decision); *Norton Constr. Co. v. U.S. Army Corps of Eng'rs*, 2006 WL 352678 *3-5 (N.D. Ohio) (Dec. 6, 2006) (Corps admitted that its decision to not process a permit application submitted to it (due to legislation prohibiting issuance of such a permit) was final agency action); *U.S. Gypsum Co. v. Muszynski*, 161 F.Supp.2d 289, 290 (S.D.N.Y. 2001) (plaintiff submitted permit application to the Corps).

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

Respectfully submitted,

JEFFREY H. WOOD
Acting Assistant Attorney General

ERIC GRANT
Deputy Assistant Attorney General

BEN CARLISLE
ROBERT J. LUNDMAN

/s/ Ellen J. Durkee
ELLEN J. DURKEE
Attorneys
Environment and Natural Resources Div.
U.S. Department of Justice
P.O. Box 7415
Washington, D.C. 20044
(202) 514-4426
ellen.durkee@usdoj.gov

Of Counsel:

SIMMA KUPCHAN
Office of General Counsel
U.S. Environmental Protection Agency
Washington, DC

REGINALD A. PALLESEN
Office of Regional Counsel
U.S. Environmental Protection Agency
Chicago, Illinois

JOSEPH L. FALVEY
District Counsel, Detroit District
U.S. Army Corps of Engineers
Detroit, Michigan

AUGUST 2017
90-5-1-4-20507

CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains **12,123 words**, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ Ellen J. Durkee
ELLEN J. DURKEE

CERTIFICATE OF SERVICE

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

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Ellen J. Durkee
ELLEN J. DURKEE

ADDENDUM

FEDERAL APPELLEES' DESIGNATION OF RELVANT DISTRICT COURT DOCUMENTS
MARQUETTE COUNTY ROAD COMMISSION v. EPA,
6th Cir. No. 17-1154

RECORD ENTRY	DOCUMENT	PAGE ID RANGE
1	Complaint and Complaint Exhibits 1-3	1-239
2	Complaint Exhibits 4-13	240-318
3	Complaint Exhibit 14, Part 1	319-401
4	Complaint Exhibit 14, Part 2	402-480
5	Complaint Exhibit 14, Part 3	481-565
6	Complaint Exhibits 14 Part 4, 15-20	566-689
7	Complaint Exhibits 21-31	690-968
8	Complaint Exhibits 32-46	969-1187
13	Defendants' Motion to Dismiss	1210-1212
14	Defendants' Memorandum in Support of Motion to Dismiss	1213-1246
23	Plaintiff's Response in Opposition to Motion to Dismiss	1266-1390
26	Defendant's Reply to Response to Motion	1843-1870
27	Defendant's Response in Opposition to Motion for Discovery	1871-1952
28	Opinion	1953-1984
29	Order Granting Motion to Dismiss	1985
30	Judgment	1986
31	Plaintiff's Motion for Reconsideration ("Motion to Alter or Amend Judgment")	1987-1996
32	Brief in Support of Plaintiff's Motion for Reconsideration	1997-2025
34	Defendant's Brief in Opposition to Motion for Reconsideration	2027-2060

35	Plaintiff's Response in Support of Motion for Reconsideration	2061-2074
50	Opinion	2129-2138
51	Order Denying Motion for Reconsideration	2139
52	Notice of Appeal	2140-2142