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 REPLY BRIEF

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INTRODUCTION

It is well established that the Administrative Procedure Act (APA) creates a presumption favoring judicial review of administrative action. The presumption applies in this case. Like the Sacketts in *Sackett v. EPA,* 566 U.S. 120 (2012) and Hawkes Company in *United States Army Corps of Engineers v. Hawkes Company*, 136 S. Ct. 1807 (2016), the Marquette County Road Commission (Road Commission) was subjected to agency strong-arming. The Road Commission met all the legal requirements for approval of the County Road 595 road project, and the Michigan Department of Environmental Quality (MDEQ) stood ready to issue a § 404 permit, but the Environmental Protection Agency (EPA) arbitrarily and capriciously vetoed the permit. Because of the EPA veto, the Road Commission had to either give up on the road or seek a *new* permit from the Army Corps of Engineers (Corps), pursuant to a separate permitting application and review process established under the Corps' procedurally and substantively different legal regime. Fairness requires, and the law demands, that the Road Commission receive its day in court to contest the arbitrary and capricious EPA veto. And even if the veto did not meet the requirements of § 704 of the APA for reviewability, the Court would still need to reverse because the EPA acted beyond its authority when it vetoed the MDEQ § 404 permit.

ARGUMENT

I

BOTH PRONGS OF THE *BENNETT* FINALITY TEST HAVE BEEN MET

A. EPA's Veto of MDEQ § 404 Permit Consummated Its Work

The first prong of the finality test is whether the agency action "mark[s] the consummation of the agency's decisionmaking process." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). Both the trial court in this case and the Government in its response brief maintain that the EPA veto of the proposed MDEQ § 404 permit is merely preliminary and entails the possibility of further administrative proceedings, such as through a second permit-application process. *See Marquette County Road Commission v. EPA*, 188 F. Supp. 3d 641, 648-51 (W.D. Mich. 2016) (holding that the first prong of *Bennett* not met on these facts); Appellees' Response Brief, RE 28, Page ID #28-33 (arguing same). In support of this proposition, the Government relies on the arguments it made below that won the day with the lower court, but those arguments were premised on case law pre-dating *Sackett* and *Hawkes*. Moreover, the lower court ruling and Government's argument assume that after the EPA's veto of the proposed MDEQ permit, the *same* permit application considered by the

MDEQ would be reviewed by the Corps of Engineers. But this is factually and legally untrue.

1. MDEQ's Permit Application and Corps' Permit Application are Different Permit Applications Subject to Different Requirements

In its principal brief and below, the Road Commission explained that as a result of the EPA veto, the Road Commission was required to start over and seek a new permit from the Corps of Engineers. *See* Appellant's Principal Br., RE 23, Page ID # 15, 26. The Corps' permit application differed substantially from the MDEQ permit application requirements. *Id.* According to the Corps, the Road Commission was required to submit a *new* permit application, setting in motion a new application process that would address new topics not covered in the prior permit application process, involve a new and separate public and inter-agency comment process, and potentially include a formal tribal consultation process, as well. *Id.*

In its brief, the Government elides the factual differences between the two permit application demands put upon the Road Commission, arguing instead there has been no "final decision issuing or denying a Section 404 permit" because the statute contemplates "a continuing process for *one* Section 404 permit" (Appellees' Response Brief, RE 28, Page ID #34) (emphasis added), and that the EPA agency action is not final because "permitting authority reverts to the Corps" because of the

EPA veto, thus the veto does "not terminate *the federal government's* role in this case." (Appellees' Response Brief, RE 28, Page ID # 38) (emphasis added). The Government may prefer for its version of the facts to be the operative facts, but they are not.

First, the Government's purported facts are incorrect because, regardless of what the statute says *should* happen, the EPA and the Corps demanded the Road Commission pursue a *different* 404 permit with the Corps after the EPA, with the Corps' written support, vetoed the MDEQ 404 permit. As alleged in the Complaint, the Road Commission applied for a § 404 permit from the MDEQ, and the MDEQ stood ready and willing to issue it. But the EPA repeatedly, and arbitrarily and capriciously, objected to the issuance of that permit, causing it to die on the vine. The Corps then required that, in order to receive a Corps-approved § 404 permit, the Road Commission apply *anew* for a § 404 permit.[1]

[1] In its Motion to Dismiss below, the Corps argued it was *not* required to "consider the specific application materials pending before the State permitting agency" and instead that the Road Commission was obligated to submit to the Corps "all information required to complete an application for a permit" pursuant to the Corps' own administrative regulations (Memo in Support of Defendants' Motion to Dismiss, RE 14, Page ID # 1239-1240). In response, the Road Commission detailed many of the differences between Michigan's approved § 404 program and the Corps' § 404 permitting regulations, including separate definitional terms, different public interest factors and mitigation ratios, distinct processing fees and deadlines, enforcement provisions, and, critically, that the Corps' process is subject to the time-

Second, the Government continues to carefully avoid the hard fact (for the Government) that *Bennett* requires final *agency* action, not final *federal government* action. The Government gives the game away when it says the veto did "not terminate *the federal government's* role in this case" (Appellees' Response Brief, RE 28, Page ID # 38). That is not the *Bennett* test—the *Bennett* test requires final *agency* action, not final *federal government* action. The *Bennett* test makes sense since the APA requires final *agency* action in order to allow for judicial review, *not* final federal *government* action. *See* 5 U.S.C. § 704 ("*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.") (emphasis added).

The lower court made the same mistake the Government makes. The court held the EPA's veto is not "final agency action" under the APA because the EPA's veto does not "terminate the federal government's role in the matter." This is legal error. The APA does not speak in terms of "final federal government action," it speaks in terms of "final agency action." By its plain definitional terms, the APA makes clear that actions of multiple agencies are to be treated and regarded

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consuming and holistic environmental-review process laid out in the National Environmental Policy Act (NEPA), 42 U.S.C § 4321, *et seq*. (Plaintiff's Response in Opposition to Defendants' Motion to Dismiss, RE 23, Page ID # 1304-1305).

separately. 5 U.S.C. § 551(1) (defining "agency" to mean "each authority of the Government of the United States, whether or not it is within or subject to review by another agency"). Lumping together two distinct agencies into one "federal government" thus defies the plain text of the APA. *See* Random House Dictionary 612 (2d ed. 1987) ("Each" means "every one of two or more considered individually or one by one").

Here, the EPA's rejection of the MDEQ permit amounted to the consummation of the EPA's review of the MDEQ § 404 permit. The EPA veto requires the Road Commission to either give up on the project or to seek a new permit from the Corps, a different federal agency. Thus this prong of the *Bennett* test is met on the facts as alleged in the Complaint.[2] *Cf. Friends of Crystal River v. EPA*,

[2] It is strange that the Government would argue the lower court's decision holding the law and regulations "require[e] the Road Commission to submit an application to the Corps" went unchallenged by the Road Commission in its principal brief (Appellees' Response Brief, RE 28, Page ID # 35-36, FN4). The entire appeal—nay, the entire case—*is about this very issue*. The EPA veto of the MDEQ permit was arbitrary and capricious, and the Road Commission as a matter of law should not have to pursue a second permit from the Corps when the MDEQ had authority to issue a 404 permit to the Road Commission, barring valid, non-arbitrary and non-capricious EPA objections. *See Sackett*, 566 U.S. 120; *Hawkes*, 136 S. Ct. 1807.

Perhaps the best way to demonstrate the wrongheadedness of the Government's position is to compare where the parties are here to where the parties were in *Sackett* and *Hawkes* when they sought judicial review. In *Sackett*, the Sacketts did not contest that they *could* comply with the compliance order, pay the

35 F.3d 1073, 1080 (6th Cir. 1994) (after the statutory time limit for the state to act in response to an EPA objection expires, Congress intends to completely divest "*the original agency [the EPA]* of jurisdiction, and vest authority in the Army Corps[.]") (emphasis added).

2. The Government Relies Upon Inapplicable Law To Argue EPA's Work Is Not Consummated

The Government argues the EPA veto did not amount to the consummation of its decisionmaking authority premised upon cases that pre-date *Sackett* and *Hawkes* and speaks to different statutes and factual circumstances. None of them demonstrate that the EPA work here had not consummated. To the contrary, the distinctions between those cases and the instant one help the Road Commission make its point.

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fines, and then seek a permit from the Corps. But they argued they should be entitled to seek judicial review of the compliance order in lieu of those steps. The Supreme Court agreed. Similarly, in *Hawkes*, the Hawkes Company did not contest that the Government insisted it must seek a permit from the Corps if it wished to later challenge the jurisdictional determination. But Hawkes Company argued it should first be entitled to challenge the jurisdictional determination before seeking the § 404 permit. Again, the Supreme Court agreed. The Road Commission should likewise be entitled to seek judicial review of the EPA veto before being forced into a Corps' permit process that as a matter of law it should not have to pursue in order to build its road.

a. *Friends of Crystal River* Supports Conclusion That EPA Veto Consummated EPA Work

For example, the Government relies upon *Friends of Crystal River*, 35 F.3d 1073, to argue the EPA's actions here were not the consummation of its work. The EPA cites to this pre-*Sackett* case for the erroneous proposition that the EPA's "decision to object" to a state permit under § 404(j) is non-final agency action (Memo in Support of Defendants' Motion to Dismiss, RE 14, Page ID # 17-19).

That case, however, did not involve the EPA's "decision to object" to anything. Rather, it involved the EPA's unauthorized *withdrawal of an objection*. This Court rejected the EPA's argument that the withdrawal of its objection was purportedly unreviewable. In so holding, the court explained that the language of § 404(j) showed Congress's intent to "completely divest [EPA] of jurisdiction . . . following expiration of the deadline." 35 F.3d at 1080. *See also Friends of Crystal River v. EPA*, 794 F. Supp. 674, 686 (W.D. Mich. 1992) ("[T]here is no CWA provision that limits judicial review of agency action allegedly taken under section 404(j)."). Thus, the meaning of *Friends of Crystal River*, insofar as it applies here, is that after an unresolved § 404(j) objection, the EPA has nothing left to do. This shows consummation of its decisionmaking power, and means that, when applied correctly to the instant case facts, the Road Commission has met the first prong of

Bennett. The EPA's work is consummated. On these facts, the Government cannot overcome the "strong presumption that Congress intends judicial review of administrative action." *Bowen v. Mich. Academy of Family Physicians*, 476 U.S. 667, 670-72 (1986).

And even if the Government were correct in the way it tries to apply the *Friends of Crystal River* dicta, the fact remains that *Friends of Crystal River* pre-dates *Sackett*. In *Sackett*, the EPA tried to make the same argument as to the consummation of its work following the compliance order that it makes here following its veto of the MDEQ 404 permit. It argued that the compliance order was simply "'a step in the deliberative process,'" *Sackett*, 566 U.S. at 128 (quoting the Government's brief), just as the Government here argues the transition from the MDEQ permit process to the Army Corps of Engineers permit process is "an intermediate step" in the "permit process" (Appellees' Response Brief, RE 28, Page ID #28). And just as the Supreme Court rejected the idea that the compliance order was unreviewable as a step in the deliberative process, so should this Court reject the same contention offered here by the same party.

There is nothing interlocutory about the EPA's veto. Once its objections crystallized into a veto, the Road Commission's MDEQ § 404 permit application was denied, the MDEQ lost authority to issue the permit, and the EPA was divested

of its jurisdiction to alter its decision. *Friends of Crystal River*, 35 F.3d at 1080 (EPA could not withdraw objection to state § 404 permit after statutory time period had run). Because the EPA could not withdraw its objections, accept a modified MDEQ § 404 permit, or even issue a permit of its own (*cf.* § 402), there was nothing left for the EPA to do. *Id.*

In *Sackett*, the Government alleged that the order was not the consummation of the EPA's decisionmaking process because it invited the Sacketts to engage "in informal discussions" about the order after the EPA issued it. Just as the Supreme Court rejected that premise in *Sackett*, so should this Court reject the Government's argument that its veto of the MDEQ permit was not final because the State could have once again worked with the EPA to resolve the EPA's objections. *See also Safari Club Int'l v. Jewell*, 842 F.3d 1280, 1289–90 (D.C. Cir. 2016) (holding that agency findings representing the agency's final decision that no permit would issue for the 2014 calendar year constituted final appealable agency action because the possibility that an agency may revise its decision based on new information is a common characteristic of agency action, and does not make an otherwise definitive decision non-final) (citation and quotation omitted). Moreover, that argument misses the Road Commission's allegation of fact that the EPA objections to the permit were arbitrary and capricious—there is no way the State could have ever satisfied the

EPA, because the EPA was acting arbitrarily and capriciously. That is why the EPA's objections amounted to a veto, a consummation of its work in regards to the MDEQ-approved permit, and thus a decision that the Road Commission can challenge in court.

b. Other Cases the Government Relies Upon for First Prong of *Bennett* Argument Involve § 402 Permitting Process, Not § 404 Permitting Process

The other cases the Government relies upon in regards to the first prong of *Bennett* are similarly unavailing. *Ind. Customers of NW Utilities v. Bonneville Power Administration*, 408 F.3d 638 (9th Cir. 2005), differs from the instant case because there the customers challenging the administrative decision to raise their power rates as arbitrary and capricious ultimately would have the ability to challenge the rate increase after FERC approved the increase. *Id*. at 646. In the instant case, on the other hand, if the district court decision is upheld, then the Road Commission will never have the chance to challenge the EPA's decision to veto the MDEQ permit. Rather, if the Road Commission pursues a permit with the Corps as the EPA has required, then the Road Commission will only have the ability to challenge the Corps' refusal to issue a permit as arbitrary and capricious. It will never have the chance to challenge the EPA veto of the MDEQ permit—that decision, unlike the

decision in *Ind. Customers of NW Utilities*, will never go reviewed. That violates the APA.

Likewise, *S. Cal. Alliance of Publicly Owned Treatments Works v. EPA*, 853 F.3d 1076, 1085 (9th Cir. 2017), *Champion Int'l Corp. v. EPA*, 850 F.2d 185 (4th Cir. 1988), and *City of Ames v. Reilly*, 986 F.2d 253 (8th Cir. 1993), also critically differ from the instant case. Those cases, unlike the instant case, address the EPA's oversight role of state permitting authorities for NPDES permits under § 402 of the Clean Water Act. *S. Cal. Alliance*, 853 F.3d at 1081; *Champion Int'l Corp.*, 850 F.2d at 185; *City of Ames*, 986 F.2d at 254; *see also* 40 C.F.R. § 123.44(h). Under § 402 (as in those three cases), an unresolved EPA objection to a state NPDES permit transfers permitting authority *not to the Corps*, but to the EPA itself. *Compare* 33 U.S.C. § 1342(d)(4) *with* 33 U.S.C. § 1344(j)(2)(B). Because the EPA retains decisionmaking authority after an unresolved § 402 objection, but loses decision-making authority after an unresolved § 404 objection, those cases are simply inapposite—the EPA has additional work to do in the § 402 context; thus its work is not consummated there.

Here, on the other hand, the EPA has no more work to do. After its veto, permitting authority transferred to the Corps, and the Road Commission was ordered to submit a new permit application.

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

The Government's argument that no rights, obligations, or consequences flow from the EPA veto rests on even shakier ground than its argument as to the first prong of *Bennett*.

1. *FTC v. Standard Oil* Does Not Undercut Road Commission's Argument Regarding Second Prong of *Bennett*

Like the trial court, the Government rests much of its argument regarding the second prong of *Bennett* as applied to the instant case on *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232 (1980). But the *FTC* case is readily distinguishable, just as it was readily distinguishable from the facts of *Hawkes*, where the Government similarly tried to rely upon the case. *See* Brief for the Petitioner, *United States Army Corps of Engineers v. Hawkes*, No. 15-290, 2016 WL 322596, at *1, *37-38 (U.S. Jan. 22, 2016). In *FTC*, the Federal Trade Commission served a number of oil companies with a complaint stating the Commission had "reason to believe" these companies violated the Federal Trade Commission Act. *FTC*, 449 U.S. at 234. However, that complaint did not purport to be the Commission's final word on the violation. Instead, it provided the offending oil company with an opportunity to participate in an administrative hearing for the purpose of determining whether the oil company actually violated the Act. *Id.* at 241-43. The Supreme Court held the

complaint was not "final agency action" because it was not a final decision by the FTC and for that reason the complaint itself had no legal consequence. *Id.* at 243. That is quite different from the EPA veto of the MDEQ permit in this case, where the MDEQ has completed the administrative review process of the Road Commission's permit application and the EPA veto of the MDEQ permit is the EPA's final word on that MDEQ permit. There is no invitation to engage in an administrative hearing with the EPA in this case. *FTC* is, therefore, not analogous to this case.

2. An EPA Approval of the MDEQ Permit Would Have Been Reviewable in Court, Making the EPA Veto No Different From the Positive/Negative JD in *Hawkes*

The Government argues that a distinction between *Hawkes* and the instant case is that in *Hawkes* a negative jurisdictional determination would have been a determination Hawkes Company could have relied upon for five years and binding on the Corps and EPA (Appellees' Response Brief, RE 28, Page ID # 42-43). But here, the same "flip-side of the equation" has legal consequences, as well. Here, if the 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 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. The EPA veto had consequences, imposed a legal obligation on the Road Commission, and denied the Road Commission the legal right to build the road, since the EPA's veto was arbitrary and capricious.

3. State Assumption of § 404 Permitting Authority Means Arbitrary and Capricious EPA Veto Denied Road Commission a Statutory Right to the Permit

In an effort to salvage its argument about the second prong of *Bennett*, the Government makes the curious argument that, since the State of Michigan voluntarily chose to opt-in to the Clean Water Act's permitting program, the Road Commission did not have a statutory right to the permit, even if the State intended to issue it. That is so, the EPA contends, because under the Clean Water Act the EPA had discretion to deny the MDEQ permit.

Although EPA had *discretion* to deny the permit, Congress ensured via the APA that this discretion (like all agency final decisions with consequences), would not be *unfettered*. And that is the case before the Court as it stands on an appeal from a motion to dismiss. EPA acted arbitrarily and capriciously when it denied the Road Commission the § 404 permit the MDEQ stood ready to issue. *Hawkes* stands for the proposition that final agency decisions that arbitrarily and capriciously deny a party a legal right are reviewable via the APA. *See also Safari Club Int'l*, 842 F.3d at 1289–90 (agency findings that represented "a defacto denial of permits" held to have determined rights and obligations).

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

Tellingly, the Government does not argue that pursuing a new permit with the Corps amounts to an adequate remedy for the injury the Road Commission sustained when the EPA vetoed its MDEQ permit. Here, the EPA veto forces the Road Commission to now start a new permit application, with different requirements, before the Corps. As the Supreme Court explained in *Sackett*, "the 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." *Sackett*, 566 U.S. at 127. And so it is here. Moreover, that the Road Commission could respond to the

EPA's arbitrary and capricious veto of the MDEQ permit by submitting a new permit application to the Corps does not amount to an adequate remedy, where to do so will cost the Road Commission upwards of $271,596 and 788 days (more than two years) of its time. *See Rapanos v. United States*, 547 U.S. 715, 719 (2006) ("the average applicant for an individual permit spends 788 days and $271,596 in completing the process"). That remedy would be no better than the disease.

II

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

The Government acknowledges that the law allows for exceptions to the APA's finality requirement, *see Leedom v. Kyne*, 358 U.S. 184 (1958), but submits this case does not fit the exception. To be sure, the *Leedom* exception applies only to situations where the agency has usurped more power than it lawfully possesses in its treatment of a regulated party like the Road Commission. But, assuming *arguendo* the Court does not find that the EPA veto was a reviewable final agency decision, then the facts of this case fit the *Leedom* exception.

A. Allegations Meet *Leedom* Exception

The Government submits that only "extreme legal error where an agency acts 'manifestly beyond the realm of its delegated authority'" allows for judicial review of non-final agency action (Appellees' Response Brief, RE 28, Page ID # 49). That is the case before the Court.

Congress authorized states to implement § 404 in order to foster cooperative federalism, and Congress limited the grounds upon which the EPA could object to a proposed state permit. 33 U.S.C. § 1344(j)(2)(B). EPA's objections did not fall within those grounds, thus demonstrating that it acted beyond the realm of its authority—opening the courthouse door to this suit, regardless of whether the EPA's actions were final agency action or not. *See, e.g.*, *Friends of Crystal River*, 794 F. Supp. at 685 ("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*, 358 U.S. 184); *see also Champion Int'l Corp.*, 850 F.2d at 185-86 (holding that "the district court had subject matter to entertain" whether "EPA had exceeded its delegated authority" when objecting to a state NPDES permit under § 402(d)).

1. EPA Objections Went Beyond Its Oversight Authority

The lower court relied upon the undisputed fact that the EPA has final oversight authority of the MDEQ permit decision pursuant to the Act (Opinion Granting Motion to Dismiss, RE 28, Page ID # 1976-1979; Appellees' Response Brief, RE 28, Page ID # 52-54). Thus, the lower court and Government's position is that *any* objection by the EPA in relation to a state-approved § 404 permit is immune from judicial review. But, under the clear and unambiguous text of § 404(j)(2)(B), EPA may only object to those aspects of proposed state permits that are "outside the requirements" of § 404 and the § 404(b)(1) Guidelines. 33 U.S.C. § 1344(j)(2)(B). The lower court and Government's position do not take into account what the Act actually says about the EPA's authority.

In its Complaint, the Road Commission detailed a number of ways in which the EPA violated § 404(j)(2)(B)'s express limitation on the EPA's oversight by basing its veto on factors not contained within the 404(b)(1) Guidelines (RE 1, Page ID # 81, ¶¶ 334-339). For example, Plaintiff demonstrated that the EPA's objections impermissibly focused discretionary matters such as the minimization of speculative secondary effects of the project and the minimization of separate features of the project that were not themselves to be built upon the permitted disposal areas. *See Friends of Back Bay v. USACE*, No. 2:10CV270, 2011 WL 12473234, at *18-19

(E.D. Va. Feb. 8, 2011) (explaining that "secondary effects" of this sort do not fit § 404(b)(1)). By way of further example, Plaintiff demonstrated that the EPA objections focused on discretionary aspects of the Road Commission's mitigation plan which, under the 404(b)(1) Guidelines, are not required to be completed prior to permit issuance. *See Sierra Club v. Slater*, 120 F.3d 623, 636 (6th Cir. 1997) ("[I]t is not necessary to have a final, detailed mitigation plan prior to approval of a § 404 permit . . . .").

The *EPA-trumps-State-permitting-decisions-at-all-times-for-any-reason* rule the lower court adopted here, and the Government contends is correct, overlooks the fundamental fact that section 404(h) of the CWA grants primacy to states with EPA-approved 404 Programs. The lower court holding on this point also would swallow *Leedom*. Section 404(j) does not contain a broad grant of oversight authority authorizing the EPA to object to a proposed state permit whenever the EPA finds the permit to be objectionable for any reason. Rather, Congress limited the EPA's veto authority to only the "requirements" of the CWA and the Guidelines. In doing so, Congress left discretionary decisions to approved state permitting authorities. Such states maintain permanent staffs within special agencies who have particular subject-matter expertise. They are the officials directed by Congress to make case-by-case and site specific determinations under § 404 and they are the ones with superior,

professional knowledge of local conditions who are on the ground working with applicants on a day-to-day basis.

2. Lower Court Both Wrongly Relied Upon and Misinterpreted Legislative History

The lower court also concluded that the Road Commission's "narrow view of the EPA's authority is not supported by the statute as a whole" (*see* Opinion Granting Motion to Dismiss, RE 28, Page ID # 1978). The lower court relied upon § 402(d)(2)(B) of the CWA and said this provision of the Act allows the EPA to object to a state permit if it is "outside the guidelines and requirements of this chapter" and that "no court has held that this language limits the scope of the EPA objections to qualitative or quantitative factors." (*Id.*) This Court, however, said otherwise about this exact language in the section, explaining that the language "provides the Administrator with but narrow review powers over a proposed permit when a State is supervising its own permit program under the FWPCA." *Ford Motor Co. v. EPA*, 567 F.2d 661, 669-71 (6th Cir. 1977). Indeed, the Sixth Circuit explained that without the "guidelines and requirements" limitation on EPA's oversight authority, "EPA could arbitrarily deny permit modifications and render state NPDES permit programs a farce." *Id.* at 671. The same is true here in the § 404(j) context.

The lower court's analogy to § 402 is also unpersuasive because the language in § 402(d)(2)(B) (i.e., "outside the guidelines and requirements of this chapter") *is a more generous grant* of oversight authority to the EPA than that provided in § 404(j) (i.e., "outside the requirements" of the CWA and § 404(b)(1) Guidelines). The limiting word "requirements" in § 404(j) applies to both § 404 and the § 404(b)(1) Guidelines whereas the limiting word "requirements" in § 402(d)(2)(B) applies only to § 402 and not to the guidelines promulgated by the EPA thereunder. Thus, the EPA has *more* oversight authority under § 402 than it does under § 404. And yet, this Court held that even in that context, the EPA had only "narrow review powers" over a state-issued § 402 permit. The lower court's decision failed to apprehend both the state of the EPA's review authority under § 402 and § 404.

The lower court's reliance on the legislative history of § 402 also fails to support its erroneous conclusion that the EPA could act in the manner it did here without opening the door to the very challenge at issue in the instant case. This is so for three reasons.

First, the legislative history quoted by the lower court is ambiguous and the court should not have relied upon legislative history in order to avoid the plain statutory language in § 404(j). *Cf. Milner v. Dep't of the Navy*, 562 U.S. 562, 572 (2011) (refusing to allow "ambiguous legislative history to muddy clear statutory

language"). Nor can it replace the plainly stated policy of Congress "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution . . . ." 33 U.S.C. § 1251(b).

Second, the legislative history cited by the Court spoke to § 402, not § 404. As previously explained, § 402 allows EPA a broader oversight authority than § 404.

Third, the legislative history cited by the lower court does not reflect congressional intent. Specifically, with respect to EPA's oversight authority under § 402, the more meaningful legislative history explains:

> This amendment does *not* modify the existing substantive standard of EPA's review to allow the Administrator to *substitute his judgment for that expressed by the State in its proposed permit*; EPA may object to a State proposed permit only in a case in which limitations and conditions of the State permit are clearly outside the guidelines and requirements of this act . . . . The role of the Administrator in reviewing State-proposed permits, *analogous to that of a Federal court reviewing the action of the administrative agency, is maintained under this amendment*. Once the Administrator has approved a State permit program under subsection 402(b), his role in the NPDES process is limited to reviewing State proposed permits, providing comments on proposed permits, and exercising the authority to object to issuance of a permit in those cases of a clear failure to conform to the guidelines and requirements of the act . . . . This process for approval of State permitting programs was included in the act to continue the primary State role in water pollution control and *not to establish EPA as a supervisor of State permitting activities*.

See 123 Cong. Rec. H12,934 (daily ed. Dec. 15, 1977) (Statement of Rep. Roberts) (emphasis added).

Thus, as can be seen by resorting to legislative history (the Road Commission would prefer to avoid reliance on legislative history but only addresses it because the lower court relied upon it), even under § 402's broader grant of oversight authority to the EPA, Congress did not intend for the EPA to "substitute its judgment for that expressed by the State in its proposed permit" or for the EPA to be a "supervisor of State permitting activities." The court's opinion renders Congress's use of the word "requirements" in § 404(j)(2)(B) meaningless and grants the EPA carte blanche authority to veto state permitting decisions in its sole discretion without judicial review. As the Sixth Circuit warned in *Ford*, 567 F.2d at 671, without the "requirements" limitation imposed on EPA's oversight authority, "EPA could arbitrarily deny [state] permit[s] . . . and render state [404] permit programs a farce." Respectfully, that is what the Road Commission has alleged in its Complaint—the EPA veto rendered the state § 404 permit program "a farce."

B. Road Commission Cannot Vindicate Its Statutory Rights Without Review of EPA Veto

The Government submits (implicitly) that even if the facts alleged meet the *Leedom* exception in terms of alleging action beyond the EPA's discretionary

authority, the Road Commission still could not seek judicial review of the decision because it may vindicate its rights after it pursues a permit from the Corps. But that argument returns us to the point made earlier—EPA wants to cloak its arbitrary and capricious decision to veto the MDEQ permit with immunity, by forcing the Road Commission to dance to the EPA's tune and pursue a new permit application with the Corps. While the Road Commission could then bring a challenge as to the Corps' actions as to that permit application, it could never challenge the EPA's unlawful actions as to the denial of the MDEQ permit. That the Road Commission can challenge the Corps' decision if the Road Commission pursues that permit does not vindicate the Road Commission's Administrative Procedure Act right to review of the EPA veto as manifestly beyond the EPA's power.

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

"Lex non cogit ad inutilia" means "the law does not know useless acts." This tenet has served Anglo-American jurisprudence for centuries. *See Seaconsar Far East, Ltd. v. Bank Markazi Jomhouri Islami Iran*, [1999] 1 Lloyd's Rep. 36, 39 (English Court of Appeal 1998); *People ex rel. Bailey v. Supervisors of Greene*,

12 Barb. 217, 221-22 (N.Y. 1851); *see also Ohio v. Roberts*, 448 U.S. 56, 74 (1980) ("The law does not require the doing of a futile act."); *Cary v. Curtis*, 44 U.S. (3 How.) 236, 246 (1845) ("[T]he law never requires . . . a vain act."); *and Stevens v. United States*, 2 Ct. Cl. 95, 101 (1866) ("[T]he law does not require the performance of a useless act."). The tenet certainly fits the instant case well.

The Government submits that it would not have been a charade for the Road Commission to start anew on another permit application, contending that the Corps' earlier objections to the MDEQ § 404 permit should not count against it. But the Government's brief assumes good faith on the part of the EPA and the Corps, where the Road Commission set out a prima facie case for bad faith on the agencies' part. *Compare Rapanos*, 547 U.S. at 721 ("In deciding whether to grant or deny a permit, the [Corps] exercises the discretion of an enlightened despot . . . .").

Neither the EPA nor the Corps intended for this road project to ever go forward. Putting the Road Commission through another two years of delay and expense is exactly the kind of agency overreach that the courts, including this Court, have rejected and allowed landowners to challenge. *See, e.g.*, *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.").

CONCLUSION

In *Sackett*, the Supreme Court spelled out why the Court should reverse the trial court's decision: "The APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all. And there is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties[.]" *Sackett*, 566 U.S. at 130-31. The Government wants this Court to accept that, despite the clear admonitions of *Sackett* and *Hawkes*, the Government can strong-arm the Road Commission into applying for another § 404 permit despite the fact that the EPA denied the MDEQ § 404 permit arbitrarily and capriciously. The Court should reject the Government's contention. And should the Court disagree, then the Court must nevertheless reverse in order to allow the Road Commission to pursue its *Leedom* claim against the EPA. EPA went well beyond its authority under the Clean Water Act when it objected to the § 404 permit the MDEQ intended to issue, and it would be futile for the Road Commission to now seek a Corps-issued § 404 permit where the Corps will not issue one.

Landowners should have the right to challenge agency overreaching in court, especially a contested determination like EPA's veto of the MDEQ § 404 permit. The only practical way for that to happen is through immediate judicial review. The

EPA veto here has all the hallmarks of final agency action, but the Road Commission has no adequate remedy in court. *See* 5 U.S.C. § 704. This Court must reverse.

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Respectfully submitted,

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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 6,494 words.

/s/ Mark Miller
MARK MILLER

CERTIFICATE OF SERVICE

I hereby certify that on August 31, 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