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
Case No. 2:15-cv-93

APPELLANT'S PETITION FOR REHEARING OR REHEARING *EN BANC* UNDER FEDERAL RULES OF APPELLATE PROCEDURE 35 AND 40

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QUESTION PRESENTED

Whether an EPA veto of a wetland-fill permit otherwise approved by a state pursuant to the Clean Water Act (CWA or Act), is not reviewable in Court as final agency action pursuant to *Bennett v. Spear*, 520 U.S. 154 (1997), and Section 704 of the Administrative Procedure Act, even though *Sackett v. EPA*, 566 U.S. 120 (2012), and *U.S. Army Corps of Engineers v. Hawkes*, 136 S. Ct. 1807 (2016), as applied, would hold that the Road Commission could seek judicial review of the EPA veto on the merits immediately.

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INTRODUCTION AND RULE 35(b)(1) STATEMENT

This petition raises an exceptionally important question of federal jurisdiction: Whether an EPA veto of a wetland-fill permit otherwise approved by a State pursuant to the Clean Water Act (CWA or Act), is not reviewable in Court as final agency action pursuant to *Bennett v. Spear*, 520 U.S. 154 (1997), and Section 704 of the Administrative Procedure Act, even though *Sackett v. EPA*, 566 U.S. 120 (2012), and *U.S. Army Corps of Engineers. v. Hawkes*, 136 S. Ct. 1807 (2016), as applied, would hold that the Road Commission could seek judicial review of the EPA veto on the merits immediately.

First, rehearing or rehearing *en banc* is necessary to maintain consistency with Supreme Court precedent—specifically, *Sackett* and *Hawkes*. Second, rehearing *en banc* is necessary because the case is one of exceptional importance in that states that have exercised their right to assume authority within the CWA § 404 permitting process should not have their decisions to approve § 404 permits rejected by the EPA for arbitrary and capricious reasons. To hold otherwise is inconsistent with the intent of Congress in creating the state-permitting process. Fed. R. App. P. 35(b)(1)(A)-(B), and 40. This Court rarely rehears a case *en banc*. But this is an exceptional case. And the opinion is out of step with this Court's recent precedents and those of other circuits, not to mention the Supreme Court. This is an excellent case for *en banc* review.

REASONS FOR GRANTING REHEARING

This case arises from the Marquette County Road Commission's decision to construct a road, County Road 595 (CR595), in Marquette County, Michigan—a rural county in the state's upper peninsula. *Marquette County Road Comm'n v. EPA*, 188 F. Supp. 3d 641, 643 (W.D. Mich. 2016). To do so, the Road Commission needed to fill 25 acres of wetlands. *Id*. To fill the wetlands, the Clean Water Act (CWA or Act) required the Road Commission to obtain a § 404 wetland-fill permit, 33 U.S.C. § 1344. *Id*. CR595 promised substantial economic benefits and improved public safety because large trucks hauling minerals through small towns and along college and school campuses in the county could instead use CR595 and avoid these danger zones (Affidavit of James Iwanicki, P.E. Opposing Motion to Dismiss, RE 23-1, Page ID #1312-13, ¶¶ 4-5). The community, local governments, key state agencies, and state and federal legislators from both parties supported the plan (*id*. Page ID #1313, ¶ 5).

States are authorized to approve a § 404 permit if the permit applications meet certain conditions. *Id*. EPA retains oversight authority when the state takes on this authority. *Id*. Michigan has assumed that responsibility pursuant to the Act. Although Michigan stood ready, willing, and able to issue the § 404 permit, the EPA repeatedly objected to its issuance, based on arbitrary and capricious reasons. As a result of EPA's refusal to allow Michigan to grant the permit, the Road

Commission—if it wanted the road project—had to start *anew* on obtaining a permit from the U.S. Army Corps of Engineers.

The Road Commission instead sought judicial review of the EPA's effective denial of the § 404 permit, relying on the fact that (i) the EPA's work had consummated by way of that denial; and (ii) authority over the Road Commission's project now would transfer to the Corps. The panel asserts that the permit process then simply *continues* with the Corps, pursuant to the Act, and that the Road Commission abandoned that process. But the panel's assertions assume facts not plead contrary to the standard of review at the motion to dismiss stage from which this appeal arose, and facts that are demonstrably not true. More importantly, the panel's decision ignores *Sackett*'s admonition that the APA remedy for agency action, pursuant to Section 704 of the APA, is usually not sought after a later decision by a separate agency. The Court must revisit the decision in order to return the proper interpretation of *Sackett* and *Hawkes*, the interpretation that this Court recognized in *Berry v. U.S. Dep't of Labor*, 832 F.3d 627, 633 (6th Cir. 2016), when it applied *Sackett* and *Hawkes* in the context of a labor case.

Footnote 5 of the panel's opinion best captures the panel's error. It states: "As counsel for EPA and the Corps noted at oral argument, the Road Commission could to this day continue to pursue a Section 404 permit for County Road 595 by submitting its most recent revised application to the Corps." But that gives *decisive*

weight to a *weightless* point. In *Sackett*, the Sacketts—faced with an EPA compliance order they found arbitrary and capricious—were required to fill their property, *apply for a CWA permit from the Corps*, and then and only then could they challenge the original compliance order. The government asserted that this was a "step in the deliberative process," *Sackett*, 566 U.S. at 129—just as the panel ruled here that this was a "continuing process." But the Supreme Court brushed aside whether it was a step in the process, in favor of holding that the compliance order was reviewable immediately because it was final as to the compliance order and it had consequences for the Sacketts. *Id*. at 130-31. Likewise here, the objections lodged to the State-approved § 404 permit should be reviewable because those objections terminated that permit—that is, the objections had legal consequences, per *Bennett*. The objections were final as to the permit the State was ready to issue.

Likewise in *Hawkes*, after Hawkes Company received its affirmative Jurisdictional Determination (JD), it was required to pursue a CWA permit from the Corps. *There was a process*. There, the same agency that issued the JD was then to decide whether to give a permit to Hawkes Company. In that sense, the injury was lesser in that at least one agency was in charge of the "permitting process" that involved whether Hawkes needed a permit. Only after Hawkes applied for the permit could it challenge whether it needed a permit. The Supreme Court rejected the

government's argument that this ongoing "process" meant that Hawkes Company could not appeal the JD. *Hawkes*, 136 S. Ct. at 1816.

Elevating "continuing process" over the substance of the decision being challenged is where the panel erred. What matters is that the Road Commission had a § 404 permit in its grasp and the EPA took it away. That final decision imposed consequences on the Road Commission, thus meeting the requirements of *Bennett v. Spear* and § 704 of the APA to allow for judicial review immediately.

I. Rehearing *En Banc* Is Warranted To Resolve the Conflict Between *Sackett*, *Hawkes*, and the Panel Decision

In furtherance of the "generous review provisions" of the APA, *Abbott Labs v. Gardner*, 387 U.S. 136, 140-41 (1967) (quoting *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955), and the Act's strong presumption of reviewability, the Supreme Court decisions take a pragmatic approach to finding agency action is final under the APA. *See Hawkes*, 136 S. Ct. at 1815; *Abbott Labs*, 387 U.S. at 148-50; *accord Bell v. New Jersey*, 461 U.S. 773, 779 (1983); and *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 200-01 (1983). Here, the EPA veto of the § 404 permit the State wanted to issue was both final agency action and it determined rights and obligations; likewise, legal consequences flowed from the veto. That is the *sine qua non* of a reviewable decision under § 704 of the APA.

But the panel decision ignored the "generous review provisions" of the APA in favor of a determination that the "continuing process" of seeking a permit—first from the State, and then if not successful with the State from the Corps—statutorily precluded following the APA. That was error as a matter of law and a failure to apply *Sackett* and *Hawkes* correctly—actually, a failure to apply them at all.

The test for determining final agency action under the APA is generally described as a two-prong analysis: "First, the action must mark the 'consummation' of the agency's decisionmaking process." And second, "the action must be one by which 'rights or obligations have been determined,'" or from which "'legal consequences will flow.'" *Bennett*, 520 U.S. at 177-78 (citations omitted). The second prong of the *Bennett* test is written in the disjunctive. Even if new "legal consequences" do not flow, the agency action may still be final if it determines "rights" or "obligations." The circumstances here demonstrate that the EPA's work was consummated as to the § 404 permit the State intended to issue, and consequences as well as rights or obligations were determined.

A. EPA's Objections Marked the Consummation of EPA's Work

The panel decision failed to account for the fact that, *as to the State-approved § 404 permit*, the permit was denied by operation of EPA's arbitrary and capricious objections. That permit was denied and the Road Commission had to start a new permit process with the Corps. And while EPA may have more work to do as to a

new permit if the Road Commission had submitted a new one to the Corps, there was no more work for EPA to do as to the § 404 permit that EPA vetoed. The agency's decisionmaking process as to the State-approved § 404 permit was consummated. *Sackett* demonstrates as much.

In *Sackett*, EPA issued a compliance order asserting the Sacketts had filled wetlands to build a home on their lot near Priest Lake, Idaho, without a federal permit in violation of the CWA. *Sackett*, 566 U.S. 120. Like the Road Commission, the Sacketts contested EPA's arbitrary and capricious action and sought review of EPA's final decision in court. *Id*. at 122. The government filed a motion to dismiss for lack of subject matter jurisdiction, which was granted—just as happened here.

Relying on *Bennett*, the Supreme Court had no trouble finding that the compliance order "marks the 'consummation' of the agency's decision making process." *Sackett*, 566 U.S. at 127. The reasoning the Court used is instructive. The Court held the order marked the consummation of the agency's decisionmaking process because "the 'Findings and Conclusions' that the compliance order contained were not subject to further agency review." *Id*. at 127-28. That circumstance mirrors the instant case, where the EPA objections to the § 404 permit *the State intended to issue* will *never* be subject to further agency review. That permit denial is final and EPA's work is done as to that permit. The Corps—a separate agency—will review a *new* permit application, just as in *Sackett* the Corps would

have reviewed the Sacketts' new permit application under the government's theory of the case. EPA acted arbitrarily and capriciously in *Sackett* when it issued the compliance order, and the EPA acted arbitrarily and capriciously here when it vetoed the § 404 permit the State intended to issue pursuant to its authority under the CWA as written by Congress. In *Sackett*, the Supreme Court said the Sacketts could resort to the courts to challenge EPA for its final decision as to the compliance order. *Sackett*, 566 U.S. at 130-31. So it must be here as to the § 404 permit the EPA vetoed.

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

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

Under the second *Bennett* prong, "the action must be one by which 'rights or obligations have been determined,'" or from which "'legal consequences will flow.'" *Bennett*, 520 U.S. at 178 (quoting *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)). Here, the panel did not even address this prong of *Bennett*. If it had done so, then it would have had to concede that the second prong of *Bennett* is met on the instant case's facts.

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

In *Hawkes*, to demonstrate that a Corps affirmative jurisdictional determination has legal consequences, the Supreme Court first looked to a circumstance where the Corps determined that jurisdictional waters were absent (a/k/a a "negative JD") from a property, *Hawkes*, 136 S. Ct. at 1814. Where the Corps issues a negative JD, legal rights and obligations flow—the landowner can use his property without a permit, and the agencies cannot bring an enforcement action for violating the Clean Water Act. *Id*. The Court then looked to the circumstance before it, where the Corps had made an affirmative jurisdictional determination. *Id*. The Court said that affirmative JDs have legal consequences because "[t]hey represent the denial of the safe harbor that negative JDs afford" and warn applicants "that if they discharge pollutants onto their property without

obtaining a permit from the Corps, they do so at the risk of significant criminal and civil penalties." *Id*. at 1815.

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

In reality, the EPA veto left the Road Commission in an even worse position than Hawkes Company; at least Hawkes Company could have applied for the permit and then upon receiving a final decision on that permit application sued the Corps because the predicate jurisdictional determination was arbitrary and capricious. *Not so here*—here, no court will likely *ever* review the EPA's predicate decision to reject the state permit, unless this Court reverses the lower court's decision. If the Road Commission must seek a Corps permit, the EPA veto may be deemed moot or outside the scope of the later challenge to the Corps' permit decision. *See Sackett*, 566 U.S. at 127 ("[T]he remedy for denial of action that might be sought from one agency does not ordinarily provide an 'adequate remedy' for action already taken by another agency."). Moreover, the EPA veto will be no more final after a Corps permit decision than it is now. As in *Hawkes*, the Corps permit process does not add anything, legally or factually, to the challenged agency action in regards to the § 404 permit the state intended to issue. The APA specifically provides that agency final decisions that have no other adequate remedy in court are subject to judicial review. 5 U.S.C. § 704. Here, the Road Commission has no way, let alone an adequate way, to challenge the EPA decision to veto the State-approved § 404 permit.

2. The Veto Imposes a Legal Obligation on the Road Commission

In this case, as in *Sackett* and *Hawkes*, by reason of the agency action at issue, the Road Commission has the obligation to obtain a permit *from the Corps* if they

wish to proceed with the road project. The Road Commission had no such obligation prior to the EPA veto. Without filing that new permit application with the Corps, no road project will ever take place. If EPA had not vetoed the State permit, then the road project would already be underway, without the Road Commission ever asking for a permit from the Corps. Like the Sacketts, the Road Commission has "little practical alternative but to dance to the EPA's tune" and apply for the Corps permit. *Sackett*, 566 U.S. at 132 (Alito, J., concurring). "In a nation that values due process, not to mention private property, such treatment is *unthinkable*." *Id*. (emphasis added). Yet the panel's decision has rendered the unthinkable the law of the circuit.

3. The Veto Denies the Road Commission a Legal Right

This is an appeal from a judgment following a 12(b)(6) dismissal case wherein the facts are taken as asserted. *See Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (In a motion to dismiss, "a court must accept a complaint's allegations as true."). The complaint alleges that EPA based its veto on arbitrary and capricious objections to the permit. (Complaint, RE 1, Page ID #75-79, ¶¶ 311-25.) Taking those facts as true, the EPA should have allowed the State to issue the § 404(j) permit. Therefore, EPA's implicit demand that the Road Commission pursue a new permit from the Corps flowed from the veto, not from the CWA. But for the veto, the Road Commission would have built the road without a Corps permit. The veto changed

the legal regime, denied the Road Commission a legal right, and is final agency action under the APA.

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

Final agency action is judicially reviewable under the APA if there is "no other adequate remedy in a court." 5 U.S.C. § 704. There is no such remedy for an EPA veto of a State-approved permit like the permit the State was prepared to issue to the Road Commission. The Road Commission's only choice is to either give up on the project or start the permit process over with the Corps. The panel decision concedes this but says the Clean Water Act requires it; but that misunderstands the issue. That the CWA describes a process does not mean final agency decisions made within the process are not reviewable under the APA. *Sackett*; *Hawkes*. The EPA's arbitrary objections to the State-approved § 404 permit were final; that permit will never be resurrected. There is no remedy in court, let alone an adequate remedy, to address the arbitrary and capricious decision of the EPA to nix the State-approved permit. Under the logic of *Sackett* and *Hawkes*, and the pragmatic interpretation of the APA that Supreme Court precedent compels, the panel decision simply erred on an exceptional question, and to remain consistent with Supreme Court precedent this Court must vacate the decision.

II. The Panel Opinion Should Be Reheard or Vacated

Even if the Court does not rehear the case *en banc*, the panel should rehear it and withdraw its decision for two reasons.

First, it should vacate its decision because the panel's reasoning contravenes the Supreme Court's instruction that courts take a pragmatic approach when considering the finality of agency action. *See Hawkes*, 136 S. Ct. at 1815 (citing *Abbott Labs.*, 387 U.S. at 149) ("The cases dealing with judicial review of administrative actions have interpreted the 'finality' element in a pragmatic way.")). It is illogical to say the EPA's objections to the State's § 404 permit were tentative because the EPA might, years later, lodge different objections to a different permit proposed by the Corps in response to a new permit application.

Friends of Crystal River v. EPA, 35 F.3d 1073, 1080 (6th Cir. 1994), holds that once the EPA's objections crystalize into what amounts to a veto, the EPA is "completely divest[ed]" of jurisdiction and may neither reinvest the State with permitting authority nor issue a permit to Plaintiff. But under the panel's reasoning here, no proposed permit of the Corps would ever be final since EPA has the authority to issue a 404(c) veto "whenever" EPA determines the discharge under review will have an "unacceptable adverse effect" on identified natural resources, even if that is post-permit. *See Mingo Logan Coal Co. v. EPA*, 714 F.3d 608, 615 (D.C. Cir. 2013) ("[T]he text of section 404(c) does indeed clearly and

unambiguously give EPA the power to act post-permit."). But that's obviously not the case. That the EPA retains this authority does not render a Corps decision to grant or deny a permit non-final and non-appealable. Likewise, the EPA decision to arbitrarily object to the State-approved § 404 permit should be appealable because the EPA's work is consummated as to that permit; it may retain oversight authority as to a later Corps permit, but that has no bearing on the permit at issue here.

And second, the panel should vacate its decision because its reasoning does not even hold internally when the facts of the complaint are taken as true. The panel holds that a new permitting process starts if, and only if, the applicant submits to the Corps a new application for permit complying with the Corps' substantively and procedurally different regulations. Plaintiff, in this case, was not permitted to file with the Corps the *same* application it submitted to the State. Rather, the Corps informed Plaintiff that its regulations required Plaintiff to submit a *new* application containing information different than that contained in Plaintiff's state application. (Affidavit of James Iwanicki, P.E., ECF No. 23-1, Page ID #1314-1315, ¶¶ 16-19).

CONCLUSION

The Road Commission has not shoehorned this case into the *Sackett* and *Hawkes* paradigm. The panel has instead ignored the implications of those decisions for the instant case. The case must be reheard, the panel opinion vacated, and a decision consistent with *Sackett* and *Hawkes* reached.

DATED: May 2, 2018.

Respectfully submitted,

/s/ Mark Miller

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CERTIFICATE OF COMPLIANCE

I certify that (1) this petition complies with the word-count limitation set forth in Rule 35(b)(2) and Rule 40(b)(1) of the of the Federal Rules of Appellate Procedure, and contains 3,833 words; and (2) in compliance with Rule 32(a)(5)'s typeface requirements and Rule 32(a)(6)'s type style requirements, this petition has been prepared in a proportionally-spaced typeface using Microsoft Word in 14-point font and Times New Roman typeface.

/s/ Mark Miller
MARK MILLER

CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2018, 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