UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN NORTHERN DIVISION

Case No. 2:15-CV-00093
Hon. Robert Holmes Bell

MARQUETTE COUNTY ROAD COMMISSION,

Plaintiff,

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,

Defendants.

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PLAINTIFF

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INTRODUCTION AND SUMMARY OF ARGUMENT

Marquette County Road Commission (County)'s Motion to Alter or Amend Judgment (Motion) (ECF No. 31) gives this Court the first opportunity any court will have to address judicial review of a United States Environmental Protection Agency (EPA) veto of a state permit under 33 U.S.C. § 404(j) of the Clean Water Act since the Supreme Court decision in *United States Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S. Ct. 1807 (2016). In *Hawkes*, the Supreme Court unanimously applied *Bennett v. Spear*, 520 U.S. 154 (1997), and reaffirmed that courts should take a "pragmatic" approach when considering whether an agency administrative decision meets the test for finality in the Administrative Procedure Act (APA). 5 U.S.C. § 704. *Hawkes* recognized that the APA opens the courthouse doors to review of arbitrary decisions like the one before the Court in this case.

Here, in its opinion granting the EPA's Motion to Dismiss (ECF No. 28), the Court did not have the benefit of the Supreme Court's *Hawkes* decision and thus did not take the "pragmatic" approach described in that case when this Court reviewed the EPA veto for finality. Instead, this Court rejected the County's arguments regarding finality by overlooking facts that demonstrated the EPA decision amounted to a final decision in regards to the Michigan Department of Environmental Quality (DEQ)'s intent to approve the road project. The County properly applied for a permit from the Michigan DEQ to build County Road 595 through a portion of the Michigan

upper peninsula. Like the jurisdictional determination in *Hawkes*, the EPA repeatedly rejected the Michigan DEQ plan to approve a permit for the road project. Instead, EPA vetoed that state permit and, by operation of law, transferred authority from the State DEQ to the United States Army Corps of Engineers (Corps). In this case, these actions amounted to a final agency decision that imposed a legal obligation on the County and took away its lawful right to build the road the state permit would have allowed. Therefore, the EPA veto is justiciable and the County's motion for reconsideration should be granted.

In its first pass on the EPA's motion (ECF No. 28), this Court rejected the Eighth Circuit's decision in *Hawkes* in part by concluding that other courts disagreed with the decision regarding the appealability of a final jurisdictional determination, *see Fairbanks North Star Borough v. U.S. Army Corps of Engineers*, 543 F.3d 586 (9th Cir. 2008) and *Belle Co. v. U.S. Army Corps of Engineers*, 762 F.3d 383 (5th Cir. 2014), *rev'd sub. nom. Kent Recycling Svcs., LLC v. U.S. Army Corps of Engineers,* 136 S. Ct. 2427 (2016), and that those other courts had the better of the argument. (ECF No. 28 at 20 n.8). *Fairbanks* and *Belle* are no longer good law. Under *Hawkes*, this Court should recognize that the federal courts have jurisdiction to review final agency decisions like the one before it today. The Court should grant the motion for reconsideration and deny the EPA's motion to dismiss.

ARGUMENT

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

The test for determining final agency action is generally described as a two-prong analysis: "First, the action must mark the 'consummation' of the agency's decision making 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 (citation omitted). Even if new "legal consequences" do not flow, the agency action may still be final if it determines "rights or obligations." Likewise, the action may be final if it fixes a "right" but not an "obligation." *See Sackett v. EPA*, 132 S. Ct. 1367, 1371 (2012). The *Bennett* test provides multiple bases for a court to find agency action final. Like the final decision of the EPA in *Sackett*, and now like the final Corps decision in *Hawkes*, the decision of the EPA in the instant case rises to the level of final agency action that allows judicial review of the decision.

I

THE EPA VETO OF THE MICHIGAN DEQ PERMIT MARKS THE CONSUMMATION OF THE EPA'S DECISION MAKING PROCESS

Hawkes and *Sackett* reversed 40 years of lower court case law relating to the reviewability of agency actions under the Clean Water Act, making them watershed administrative law decisions that reverberate across the legal landscape.

A. *Hawkes* Makes Final Agency Decisions Under the CWA Reviewable in Court

In *Hawkes*, three related business entities (Hawkes) in Minnesota sought to harvest peat moss in peat bogs for landscaping. *Hawkes*, 136 S. Ct. at 1812. The Corps claimed Clean Water Act jurisdiction over the property containing the bogs as regulated wetlands. *Id*. at 1813. Hawkes believed the jurisdictional determination was arbitrary and capricious, but Hawkes had little recourse. *Id*. Hawkes could abandon all use of the land at great loss; seek a federal permit (which Corps officials openly opposed) for a few hundred thousand dollars; or proceed to use the land without federal approval, subjecting Hawkes to fines of $37,500 a day and criminal prosecution. *Id*. at 1815-16.

Faced with this no-win situation, Hawkes challenged the Corps' jurisdictional determination in court. *Id*. at 1813. Although Hawkes lost in the district court, the Eighth Circuit Court of Appeals held Hawkes could seek immediate judicial review

of the Corps jurisdictional determination, relying in large part on *Sackett*. *Hawkes v. United States Army Corps of Engineers*, 782 F.3d 994 (8th Cir. 2015), *aff'd*, 136 S. Ct. 1807 (2016). The High Court upheld the Eighth Circuit decision granting landowners their day in court to challenge federal overreaching under the Clean Water Act. *Hawkes*, 136 S. Ct. at 1813. The Court, explained, "[t]his conclusion tracks the 'pragmatic' approach we have long taken to finality." *Id*. at 1815 (citing *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967)).

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

though no administrative or criminal proceeding could be brought for failure to conform to the jurisdictional determination itself, the final agency determination deprived respondents of a five-year safe harbor from liability under the Act, and further warned that if Hawkes discharged pollutants onto the property without a permit from the Corps, it did so at the risk of significant criminal and civil penalties. *Id.* at 1816-17.

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

In its opinion explaining why it dismissed the case, this Court mistakenly said that the "permit was not granted or denied" (ECF No. 28 at 14) when the EPA

rejected the permit the Michigan DEQ was set to approve. In fact, the Corps demanded that the County apply for a *new* permit after the EPA rejected the state permit, a demand which, as a practical matter, is tantamount to a permit denial. Further, that demand left the County in at least as untenable a position as Hawkes—having to spend an indefinite amount of time, and hundreds of thousands of dollars, for a Corps permit or drop the project altogether.[1]

In reality, the EPA veto left the County in an even worse position than Hawkes; at least Hawkes could have applied for the permit and then upon receiving a final decision on that permit application sued the Corps because the predicate jurisdictional determination was arbitrary and capricious. *Not so here*—here, no court will likely *ever* review the EPA's predicate decision to reject the state permit. If the County must seek a Corps permit, the EPA veto may be deemed moot or outside the scope of the later Corps permit challenge.[2] 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

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

[2] *See Sackett*, 132 S. Ct. at 1372 ("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.").

not add anything, legally or factually, to the challenged agency action. The Administrative Procedure Act 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 County has no way, let alone an adequate way, to challenge the EPA decision to veto the DEQ permit.

B. *Sackett* Likewise Counsels in Favor of Finding Courthouse Doors Open

In *Sackett*, the EPA issued a compliance order asserting the Sacketts had filled wetlands to build a home on their half-acre lot near Priest Lake, Idaho, without a federal permit in violation of the Clean Water Act. Like the Plaintiffs in this case, the Sacketts contested the EPA's arbitrary and capricious action and sought review of the EPA's final decision in court. The government filed a motion to dismiss for lack of subject matter jurisdiction, which was granted. The government contended, in part, that the adequate remedy the Sacketts had—in lieu of suing in court—was to apply for a Corps permit and then challenge the compliance order. The Ninth Circuit affirmed. At the time the Supreme Court heard the case, five circuit courts and at least ten district courts had held that compliance orders were not reviewable under the APA. *See Sackett v. EPA*, 622 F.3d 1139, 1143 (9th Cir. 2010). But the Supreme Court reversed, unanimously.

Relying on *Bennett*, the Court had no trouble finding that the compliance order "marks the 'consummation' of the agency's decision making process." *Sackett*, 132 S. Ct. at 1372. The reasoning the Court used is instructive. The Court held the order marked the consummation of the agency's decision making process because "the 'Findings and Conclusions' that the compliance order contained were not subject to further agency review." *Id*. That circumstance mirrors the instant case, where the EPA veto of the state permit will never be subject to further agency review. That permit denial is final and the EPA's work is done. The Corps—a separate agency—will review the 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. The 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 DEQ permit. In *Sackett*, the Supreme Court said the Sacketts could resort to the courts to challenge the EPA for its final decision. So it should be here.

II

THE EPA VETO IMPOSES A LEGAL OBLIGATION AND TAKES AWAY A LEGAL RIGHT

In addition to a determination that the agency action marks the "consummation of the agency decision making process," *Bennett* also requires a finding that the agency action fixes "rights or obligations" *or* is an action from which "legal

consequences will flow." *Bennett*, 520 U.S. at 177-78. Although this Court concluded that legal obligations were not imposed and consequences did not flow from the EPA veto, that decision does not square with the Supreme Court's unanimous decisions in *Hawkes* and *Sackett*.

Before *Sackett*, the courts focused on the independent legal consequences flowing from the agency action while ignoring the alternative basis for determining finality—whether the agency action fixes "rights or obligations." In *Sackett*, the Supreme Court explained that the compliance order not only created independent legal consequences but it also determined a legal obligation:

> Through the order, the EPA "'determine'" "'rights or obligations.'" *Bennett v. Spear*, 520 U. S. 154, 178, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997) (quoting *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71, 91 S. Ct. 203, 27 L. Ed. 2d 203 (1970)). By reason of the order, the Sacketts have the legal obligation to "restore" their property according to an agency-approved Restoration Work Plan, and must give the EPA access to their property and to "records and documentation related to the conditions at the Site." App. 22, ¶ 2.7. Also, "'legal consequences . . . flow'" from issuance of the order.

Sackett, 132 S. Ct. at 1371.

In *Port of Boston*, cited in *Sackett* above, the Supreme Court had to decide who had primary jurisdiction to review an order by the Maritime Commission and, in the process, the Court addressed the standard for determining final agency action. Relevant here is the Court's holding that agency orders need not create a new,

independent legal consequence to be final. According to the Court, the argument that the Commission's order lacked finality "because it had no independent effect on anyone" had the "hollow ring of another era." 400 U.S. at 70-71. Citing *Frozen Food*, 351 U.S. at 44, the Court concluded that "[a]gency orders that have no independent coercive effect are common" but that was not the "relevant consideration[] in determining finality." *Port of Boston*, 400 U.S. at 70-71. Instead, the relevant consideration was "whether the process of administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined." *Id.* at 71. In that case, there was "no possible disruption of the administrative process" because there was "nothing else for the Commission to do." *Id.* So it is in this case. No further EPA administrative review of the Michigan DEQ's permit is required or even allowed. In point of fact, now that the Corps has assumed control of review of the new permit application, the EPA will not revisit that determination—ever. In other words, the veto of the state permit legally binds the State of Michigan and the County.

This conclusion is bolstered by the Supreme Court's analysis in *Chicago and Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103 (1948), on which *Bennett* relied. *Chicago* held that administrative determinations are reviewable if they "impose an obligation, deny a right or fix some legal relationship as a

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

A. The Veto Imposes a Legal Obligation on Plaintiffs

In this case, as in *Sackett* and *Hawkes*, by reason of the agency action at issue, Plaintiffs have the obligation to obtain a permit *from the Corps* if they wish to proceed with the road project. The County 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 the EPA had not vetoed the state permit, then the road project would already be underway, without the County ever asking for a permit from the Corps. Like the Sacketts, the County has "little practical alternative but to dance to the EPA's tune" and apply for the Corps permit. *Sackett*, 132 S. Ct. at 1375 (Alito, J., concurring). "In a nation that values due process, not to mention private property, such treatment is unthinkable." *Id*.

B. The Veto Denies Plaintiffs a Legal Right

This is a 12(b)(6) dismissal case wherein the facts are taken as asserted. *See Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (In a motion to dismiss, "a court must accept a complaint's allegations as true.").

The complaint alleges that EPA based its veto on arbitrary and capricious objections to the state permit. (ECF No. 1 ¶¶ 311-25). On the facts presented in the complaint, the EPA should have allowed the state DEQ to issue the 404(j) permit. Therefore, the EPA demand that the County pursue a new permit from the Corps flows from the veto, not from the Clean Water Act. But for the veto, the County would be free to exercise its right to build the road without Corps' approval. The veto changed the legal regime, denying the County a legal right, and is final agency action under the APA.

III

APPELLATE COURTS RECOGNIZE THE IMPORT OF *HAWKES* FOR REVIEW OF ADMINISTRATIVE ACTION BEYOND THE CWA JURISDICTIONAL DETERMINATION OR COMPLIANCE ORDER CONTEXT

To be sure, the facts of this case do not mirror the facts of either *Hawkes* or *Sackett*. The County does not ask the Court to review a *jurisdictional determination* that required the Sacketts and Hawkes to secure a Clean Water Act permit; rather, it asks the Court to review a different kind of EPA action that required the County to

apply to the Corps for a CWA permit, since the EPA had vetoed the permit application the County submitted to the Michigan DEQ. But to read *Sackett* and *Hawkes* as limited to their facts misses the broad strokes with which the High Court painted its unanimous *Hawkes* decision. In just the few months since *Hawkes*, two federal courts of appeals have recognized the wide ramifications of *Hawkes* for review of administrative agency decisions in general, beyond the context of *Hawkes* and *Sackett*.

In *Rhea Lana v. Department of Labor*, 2016 WL 3125035, *1 (D.C. Cir. June 3, 2016), the Department sent Rhea Lana an "advisory letter" stating that back wages were due Rhea Lana sales representatives and warning that failure to comply could subject Rhea Lana to increased penalties under the Fair Labor Standards Act for a knowing and willful violation. *Rhea Lana*, 2016 WL at *1-*2. The High Court reviewed a similar argument in *Hawkes*—that once landowners are put on notice by a jurisdictional determination that their property is subject to the Clean Water Act, any violation of the Act (such as by discharging a pollutant to covered waters without a federal permit) will increase the landowners' potential liability for a knowing and willful violation. The Supreme Court accepted this as a legal consequence and so did the D.C. Circuit Court in *Rhea Lana*:

> The exposure to willful-violation penalties apparently resulting from receipt of such advice would be a legal consequence within the meaning of *Bennett v. Spear*, just as exposure to double penalties made EPA's

> compliance order legally consequential in *Sackett*. The Supreme Court's decision this week in *Hawkes* further supports that result. There, the Court concluded that jurisdictional determinations issued by the Army Corps of Engineers have legal consequences under *Bennett*, because negative jurisdictional determinations "limit[ ] the potential liability a landowner faces for discharging pollutants without a permit," while positive determinations "den[y] . . . [a] safe harbor" from administrative enforcement proceedings. *Hawkes Co.*, 136 S. Ct. at 1814. The DOL letter at issue here, like the jurisdictional determination in *Hawkes*, has the kind of "direct and appreciable legal consequences" on potential liability that count for purposes of finality. *Id.* at 1814 (internal quotation marks omitted).

Id. at *6. Likewise here, the EPA veto has direct and appreciable legal consequences for the County: it must now apply for a new permit from the Corps with its attendant significant costs and delays. *See Hawkes,* 136 S. Ct. at 1812. Those consequences render the EPA decision to veto the state permit appealable to federal court.

In *Texas v. EEOC*, 2016 WL 3524242 *1 (5th Cir. June 27, 2016), the Equal Employment Opportunity Commission issued a hiring guidance document setting forth the standard by which it would measure disparate impact hiring practices. As in *Rhea Lana* and in *Hawkes*, the Government argued the agency action was simply advisory and therefore not "final" under the APA. But the Fifth Circuit disagreed. After a detailed analysis of *Hawkes*, the court held:

> "[L]egal consequences" are created whenever the challenged agency action has the effect of committing the agency itself to a view of the law that, in turn, forces the plaintiff either to *alter its conduct*, or expose itself to potential liability. In *Hawkes Co.*, this agency action was the issuance of a JD asserting that the plaintiff's land was subject to the CWA's permitting requirements, thus depriving the plaintiff of the

> agency-created safe harbor and *forcing the plaintiff to submit to the agency's view* or risk liability. Here, it is the EEOC's promulgation of the Guidance, which offers regulated entities a safe harbor from DOJ referral, and thus ultimately from liability, only if employers alter their hiring policies to comply with the Guidance's directives.

Texas, 2016 WL 3524242 at *8 (emphasis added). The logic of this Fifth Circuit case points this Court towards granting the County's motion and reversing the decision to dismiss the case. The EPA action at issue here forced the County "to alter its conduct": Before the EPA decision, it pursued a permit from the Michigan DEQ; after, it must pursue the permit from the Corps. The EPA forced the County to "submit to the agency's view." But for the EPA veto, the County would have its state permit in hand and turned to building a road. Instead, it must begin the arduous and expensive permit process all over again.

Relying on *Hawkes*, these cases provide ample authority for a broad application of the APA giving regulated entities like the County the power to challenge a wide variety of agency action. Certainly here, where the agency action is equivalent to the action at issue in *Hawkes* in terms of its practical consequences, the Court should hold that *Hawkes*—issued after this Court originally granted the motion to dismiss—warrants a different decision now.

CONCLUSION

In every relevant sense, the EPA veto in this case is as much of a "final agency action" as the jurisdictional determination in *Hawkes* and the compliance order in *Sackett*. Therefore, the Court should hold the veto subject to judicial review under the APA. Amicus Curiae Pacific Legal Foundation urges this Court to grant the County's motion, reverse the Court's earlier order granting the motion to dismiss, and deny the government's motion to dismiss.

DATED: August 19, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief Amicus Curiae was electronically filed this 19th day of August, 2016, through the ECF filing system and will be sent electronically to the registered participants as identified in the Notice of Electronic Filing.

/s/ Mark Miller
MARK MILLER

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN NORTHERN DIVISION

MARQUETTE COUNTY ROAD COMMISSION, Plaintiff, 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, Defendants.	)	Case No. 2:15-CV-00093 Hon. Robert Holmes Bell

AMICUS CURIAE'S CERTIFICATE OF COMPLIANCE WITH W.D. MICH. LCivR 7.1(d)

Amicus Curiae Pacific Legal Foundation (PLF) hereby certifies pursuant to W.D. Mich. LCivR 7.1(d) that counsel for PLF conferred with counsel for the Defendants in a good-faith effort to resolve this matter. Counsel for Defendants advises that Defendants take no position on the relief requested in the motion.

DATED: August 19, 2016.

Respectfully submitted,

/s/ Mark Miller

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