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No. 17-1154

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

FILED
Mar 20, 2018
DEBORAH S. HUNT, Clerk

MARQUETTE COUNTY ROAD COMMISSION,

Plaintiff-Appellant,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Defendants-Appellees.

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

BEFORE: BATCHELDER, GRIFFIN, and WHITE, Circuit Judges.

ALICE M. BATCHELDER, Circuit Judge. In 2011, Plaintiff-Appellant Marquette County Road Commission ("Road Commission") applied to Michigan's permitting authority—Michigan Department of Environmental Quality ("MDEQ")—for a permit to fill 25 acres of wetlands to construct County Road 595. *See* 33 U.S.C. § 1344. MDEQ wanted to issue the application, but the U.S.

Environmental Protection Agency ("EPA")—which the Clean Water Act ("CWA") empowers to oversee state-run permitting programs—objected to various aspects of the proposal. Despite the Road Commission's numerous attempts to revise the permit application over the following months, EPA remained unsatisfied. Eventually, authority to resolve the permit application transferred to the Army Corps of Engineers ("Corps"). 33 U.S.C. § 1344(j); 40 C.F.R. § 233.50(j). Frustrated with the time and expense of the process, the Road Commission declined to continue the permit review process before the Corps and instead brought claims under the Administrative Procedure Act ("APA") against EPA and the Corps based on EPA's refusal to approve the issuance of the application and the Corps' requirement that the Road Commission re-submit its application materials to continue the process. The district court determined that neither of these agency actions constituted a final agency action. The district court also rejected the Road Commission's alternative arguments that EPA's objections were reviewable, non-final agency action and that completion of the Corps review process would have been futile. The district court dismissed the suit. We agree and AFFIRM.

I.

Section 404 of the CWA regulates the release of dredged and fill matter into waterways, including wetlands. *See* § 33 U.S.C. § 1344. Generally, the Secretary of the Army oversees Section 404 permitting through the Corps. *See id.* However, the CWA also allows states to administer their own Section 404 permitting programs subject to federal approval and

oversight by EPA. *See id.* § 1344(g)-(j); 40 C.F.R. §§ 233.16, 233.20, 233.50, 233.52, 233.53. Michigan is one of two states having federal approval to operate its own permitting program.

State-run permitting programs such as Michigan's are subject to rigorous EPA oversight. *See* 33 U.S.C. § 1344(j); 40 C.F.R. § 233.50. For example, states must submit copies of each permit application to EPA and notify EPA of any action that they take with respect to these applications. 33 U.S.C. § 1344(j).[1] If EPA intends to comment on a state's handling of an application, it must notify the state within thirty days and submit comments to the state within ninety days. *Id.* Once EPA notifies a state that it intends to comment on the permit application, a state may not issue a permit until it receives the comments or ninety days pass, whichever comes first. *Id.* If EPA objects to the state's issuing a permit, a state "shall not issue the permit unless [it] has taken the steps required by [EPA] to eliminate the objection," regardless of how much time has passed. 40 C.F.R. § 233.50(f); accord 33 U.S.C. § 1344(j). EPA must provide reasons for objecting to the issuance of a permit "and the conditions which such permit would include if it were issued by [EPA]." 33 U.S.C. § 1344(j); accord 40 C.F.R. § 233.50(e).

A state has limited options when it wishes to issue a permit to which EPA objects. It may (i) issue

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[1] EPA also functions as a liaison between the state and other involved federal agencies. EPA must provide copies of each application it receives to the Corps and the Department of the Interior (through the U.S. Fish and Wildlife Service), and is responsible for integrating comments from these other federal agencies into its comments to the state. *Id.* at § 1344(j).

a revised permit that eliminates EPA's objection; (ii) deny the permit; or (iii) request a public hearing. See 33 U.S.C. § 1344(j); 40 C.F.R. § 233.50(f)-(g). If the state does not take one of these three actions within ninety days of EPA's objection, authority to make a final decision regarding the permit transfers to the Corps. 33 U.S.C. § 1344(j); 40 C.F.R. § 233.50(j). If the state requests a public hearing, EPA must conduct the hearing and then "reaffirm, modify, or withdraw the objection or requirement for a permit." 40 C.F.R. § 233.50(h). If EPA reaffirms or modifies its objection, the state has essentially the same recourse it had before the hearing: it must within thirty days either issue a revised permit that eliminates EPA's objections or deny the permit. 40 C.F.R. § 233.50(f)-(j). If the state does not take either of these actions, authority to review and make a decision regarding the permit transfers to the Corps. 33 U.S.C. § 1344(j); 40 C.F.R. § 223.50(j).

II.

The Section 404 permitting process has the potential to be onerous, and proved to be so for the Road Commission. The Road Commission submitted its permit proposal for County Road 595 to MDEQ—the state agency that runs Michigan's program—in October 2011 and a revised proposal in January 2012.[2] On April 23, 2012, after consulting with the Corps and the U.S. Fish and Wildlife Service, EPA objected to the Road Commission's proposal. EPA's objections asserted that the Road Commission failed to comply with the requirements of the CWA because, among

[2] EPA, the Corps, and the U.S. Fish and Wildlife Service all received copies of the Road Commission's revised permit application, per statutory directives.

other things, it did not demonstrate that the proposed road was the "least environmentally damaging practical alternative."

Over the next several months the Road Commission revised its proposal numerous times based on conversations between it, MDEQ, and EPA. Despite the Road Commission's attempts to resolve EPA's objections, EPA remained unsatisfied and believed the proposal failed to meet CWA standards. MDEQ, however, thought the most recently revised proposal met CWA standards and wished to grant the Road Commission a permit.

MDEQ requested a public hearing, which EPA held on August 28, 2012. Following the hearing, MDEQ sent a letter to EPA urging EPA to remove its objections so that it could grant the permit. MDEQ contended that "the Road Commission ha[d] been responsive to the concerns expressed in [MDEQ's] and [EPA's] correspondence . . . including the [EPA's] April 23, 2012, objection letter." Since EPA's objection, the letter stated, the Road Commission had expanded its explanation "of the alternatives analysis that demonstrate[s] the proposed route is the least environmentally damaging practicable alternative to achieve the project purpose," "effectively minimized . . . impacts to streams via shorter and wider stream crossings or bridges," "narrowed or removed [the road footprint] across the rare and imperiled wetlands," and "modified [the proposed road route] in several locations to avoid critical wetlands and further reduce overall impacts." MDEQ stated that it believed these improvements adequately addressed EPA's and MDEQ's comments and brought MDEQ "to the point [where] Michigan will soon be in a position to issue a

permit." In closing, the letter "urge[d] []EPA to remove their objection to the MDEQ issuing a permit for construction of Marquette County Road 595."

Nearly three months passed before EPA responded to MDEQ's letter. On December 4, 2012, EPA informed MDEQ that it would withdraw its objection that the Road Commission's proposal was not the least harmful alternative, but continued to object to the issuance of a permit because the Road Commission had still not provided "adequate plans to minimize impacts" or a "comprehensive mitigation plan that would sufficiently compensate for unavoidable impacts."

EPA's continued objection triggered the thirty-day deadline for MDEQ to either resolve EPA's objection and grant the permit, or deny the permit. *See* 40 C.F.R. § 233.50(f)-(j). On the eve of the statutory deadline, MDEQ notified EPA that it was working with the Road Commission to address EPA's objections, but "the short time frame allowed by statute and the complexity of the issues remaining" prevented MDEQ from issuing a permit. MDEQ acknowledged that because it did not resolve EPA's objections in time to grant the permit and declined to deny the permit outright, the CWA directed that "authority to process the permit application . . . transferred to the [Corps]." *See* 33 U.S.C. § 1344; 40 C.F.R. §233.50(f)-(j).

Upon assuming authority over review of the permit, the Corps required the Road Commission to re-submit its application to continue the permitting

process.[3] The Road Commission declined to re-submit and the permitting process for County Road 595 came to a halt.

The Road Commission initiated the instant litigation, filing a five-count declaratory judgment action in the United States District Court for the Western District of Michigan against the EPA (counts one through four) and the Corps (count five). The complaint alleged that: EPA's objections to the Road Commission's permit application were arbitrary and capricious (count one); EPA exceeded its delegated authority by issuing objections based on requirements that are not mandated by the CWA (count two); EPA's objections failed to list the conditions necessary for a permit to issue, as required by Section 404(j) of the CWA (count three); EPA did not follow the procedural requirements of Section 404(j) of the CWA (count four); and the Corps' improperly denied the permit

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[3] Both in its briefing and at oral argument, the Road Commission characterized the submission requested by the Corps as a "new application." At oral argument, the Road Commission asserted that the application requested by the Corps would have "a host of factors that were different from what the DEQ looked at," including "different definitional terms" and the fact that the Road Commission "was going to have to comply with [the National Environmental Policy Act,]" which counsel described as a "significant difference from the application process it had gone through with the DEQ." EPA and the Corps contest this characterization, asserting in briefing and at oral argument that the Corps required the Road Commission to re-submit its application in order to ensure that the Corps considered the proper and most-recent materials given the various revisions to the Road Commission's permit application. Counsel for EPA and the Corps further asserted that the substantive criteria to be considered by the Corps are identical to the criteria considered by MDEQ and the EPA because all the inquiries concern the requirements of § 404. We need not resolve this dispute.

application by failing to act on it (count five). For relief against EPA, the Road Commission requested that the court declare EPA's objections unlawful and restore permitting authority to the MDEQ. Against the Corps, the Road Commission requested that the court declare that the Corps' failure to take action constituted constructive denial and direct the Corps to grant a permit.

EPA and the Corps moved to dismiss the complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The district court granted the motion and dismissed the complaint in full. For the following reasons we affirm.

III.

A.

"[C]hallenge[s] to the availability of judicial review under the APA [are] properly analyzed under Federal Rule of Civil Procedure 12(b)(6) and whether [a] plaintiff has stated a valid claim for relief." *Berry v. U.S. Dep't of Labor*, 832 F.3d 627, 632 (6th Cir. 2016) (citing *Jama v. Dep't of Homeland Sec.*, 760 F.3d 490, 494 n.4 & 495 (6th Cir. 2014)). We review de novo questions of statutory interpretation and a district court's order dismissing a complaint for failure to state a claim. *Id.*

"[A]gency action," as defined by the APA, "includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). Agency action is subject to judicial review when "made reviewable by statute" or—relevant here—when it is "final agency action for which there is no other

adequate remedy in a court." 5 U.S.C. § 704; *see Berry*, 832 F.3d at 632. To be considered "final" under the APA an agency action must generally meet two conditions. *Berry*, 832 F.3d at 633 (citing *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1813 (2016)). "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Hawkes Co.*, 136 S. Ct. at 1813 (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)); *see Berry*, 832 F.3d at 633.

In this appeal, the Road Commission asserts that EPA's objections constituted final, reviewable agency action. As to the first prong of the analysis—the consummation of the agency's decisionmaking process—the Road Commission asserts that EPA's objections served as a "veto" that completed EPA's involvement and denied a permit that MDEQ otherwise would have granted. This, however, is belied by the record and the statute.

Though the Road Commission characterizes EPA's objections as a "veto," the facts show that EPA's objections did not end the Road Commission's pursuit of a Section 404 permit. To the contrary, when EPA lodged objections, the permit review process continued precisely as directed by statute. The Road Commission repeatedly revised its permit application in its attempt to eliminate EPA's objections. Eventually, MDEQ, disagreeing with EPA's assessment that the Road Commission's permit application failed to meet CWA standards, requested a public hearing. EPA held

the hearing, after which it withdrew some objections and renewed others. MDEQ, finding itself unable to issue a permit that resolved EPA's remaining objections and unwilling to deny the permit outright, ceded review authority to the Corps. Only when the Road Commission, tired of the rigmarole the CWA imposes, declined to submit its most recent materials to the Corps did the Road Commission itself discontinue the permitting process.[4] As EPA conceded in briefing, "[h]ad MDEQ denied the permit or issued a permit with conditions resolving EPA's objection, the permitting process would have been at an end, and the Road Commission could then have sought review if it was dissatisfied with the result." In the absence of any decision from either agency to ultimately deny or grant the permit, however, we have nothing to review. *See Friends of Crystal River v. EPA*, 35 F.3d 1073, 1079 n.11 (6th Cir. 1994) (EPA objections to Section 404 permits are unreviewable because they are not final); *cf. Sackett v. EPA*, 566 U.S. 120, 127 (2012) (compliance order's findings and conclusions were final, because they were not subject to further review).[5]

Nor does the Road Commission's artificial attempt to divide the Section 404 permit process into two separate "permits"—a "state permit" and a "Corps permit"—show the consummation of a

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[4] We sympathize with the Road Commission's frustration with the long, expensive, burdensome process it has endured. Unfortunately, it is the process the CWA requires, and one which must be fully completed before APA review can be triggered.

[5] 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.

decisionmaking process. The CWA establishes one continuous application process to obtain a Section 404 permit, of which state-run permitting programs are one part. *See* 33 U.S.C. § 1344. The shift of review authority from MDEQ to the Corps is a midpoint, not a new, separate, and distinct application process. *See id.* Here, the Section 404 permit process could have been consummated with a grant or denial by MDEQ, subject to EPA approval, or a grant or denial by the Corps. These two potential decision points do not equal two separately reviewable permit processes. And though the Road Commission has unquestionably endured a long, expensive, and frustrating permit application process, it voluntarily discontinued the process and did not receive any final determination.[6]

Finally, the Road Commission argues that because the Corps is a separate agency from EPA, the close of the MDEQ review and transfer of the application to the Corps fulfills the first prong of finality review because it marks the consummation of EPA's agency action. But EPA and the Corps are, by statute, charged to work together to assess permits throughout the review process. The Road Commission's parsing of "agency action" to mean each individual agency's actions is inconsistent with prior court precedent. *See Jama*, 760 F.3d at 496 ("Congress has delegated to specific government agencies the task

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[6] Though the Corps did request that the Road Commission submit a "new" application to continue the review process, counsel for EPA and the Corps asserted that this request was merely to ensure continued review of the most up-to-date permit application. The Road Commission's decision not to submit its most up-to-date materials to the Corps for continued review ended a long, but ultimately incomplete, Section 404 permit review process.

of enforcing immigration laws and determining aliens' immigration statuses. *The agencies' decisionmaking process consummates when they issue a final decision* regarding the alien's immigration status." (emphasis added)). And even if this were not the case, EPA's involvement in the Section 404 permitting process does not end when review transfers to the Corps. *See* 33 U.S.C. § 1344(c); *see, e.g., Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 714-15, 717-18 (D.C. Cir. 2016); *cf. Michigan Peat v. EPA*, 175 F.3d 422, 428 (6th Cir. 1999) (finding final agency action where "[s]tatutorily, there was nothing left for the EPA to do once it signed off on the proposed permit").

Because the Road Commission has failed to demonstrate that EPA's objections or the transfer of authority over the permit to the Corps consummated the decisionmaking process in the Section 404 permit proceeding, we need not analyze whether legal consequences flowed. The Road Commission has failed to show that the challenged actions constitute final agency action permitting this court's review under the APA.

B.

The Road Commission contends in the alternative that, even if EPA's objections are not final agency action under the APA, it is nonetheless entitled to judicial review of the merits of those objections under an exception established in *Leedom v. Kyne*, 358 U.S. 184 (1958). *Leedom* is a "narrow anomaly reserved for extreme situations," where agency conduct constitutes a patent violation of its delegated authority. *Shawnee Coal Co. v. Andrus*, 661 F.2d 1083, 1093 (6th Cir. 1981); *see also Friends of*

Crystal River, 35 F.3d at 1079 n.13 (6th Cir. 1994). EPA's objections simply cannot be characterized as a patent violation of its authority, where the CWA explicitly allows EPA to object to a permit application "as being outside the requirements of this section [of the CWA], including, but not limited to, the [Section 404] guidelines developed under subsection (b)(1)." 33 U.S.C. § 1344(j). The Road Commission's attempt to paint the "outside the requirements" language of Section 404 as creating a narrow power to object only to certain matters, while leaving the rest to the state's discretion, is not supported by statutory or regulatory language. *See, e.g.*, 40 C.F.R. § 233.50(e) (permitting EPA objections based on "the Regional Administrator's determination that the proposed permit is . . . outside [the] requirements of the Act, these regulations, or the 404(b)(1) Guidelines.").

For *Leedom* to apply there must also be a showing that the aggrieved party would be "wholly deprived" of its statutory rights. *Detroit Newspaper Agency v. NLRB*, 286 F.3d 391, 397 (6th Cir. 2002). The Road Commission cannot make this showing, because it could simply continue the permit process before the Corps and eventually receive a final decision that is judicially reviewable.

C.

The Road Commission also argues in the alternative that it would have been futile for it to have continued the permit process before the Corps because the Corps had made up its mind and would reject any application from the Road Commission. To support this argument, the Road Commission relies on comments that the Corps made to the first revised

application in March 2012, where the Corps questioned the stated purpose of the project and identified other deficiencies in the Road Commission's proposal. The Road Commission also refers to an email from an EPA employee to the Corps, in which the EPA employee stated sarcastically that it "looked like 'they' want to go to the [Corps] permit for [County Road] 595, EPA is such a job killer . . . hope the [Corps] is more reasonable."

There is nothing to suggest that the Corps' prior comments on an earlier draft of the Road Commission's application meant that the Corps would never grant the permit or that the Road Commission could not resolve the issues prompting those comments. And even if the Road Commission's interpretation of a snide email from an EPA employee to a Corps employee is accurate, the email is not sufficient to show that the Corps had predetermined that it would never grant the Road Commission a permit.

IV.

For the foregoing reasons, we AFFIRM the judgment of the district court.

Appendix B-1

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

MARQUETTE COUNTY
ROAD COMMISSION,

Plaintiff,

v.

UNITED STATES
ENVIRONMENTAL
PROTECTION AGENCY,
et al.,

Defendants.

_____/

File No. 2:15-CV-93

HON. ROBERT
HOLMES BELL

OPINION

This is an action for declaratory and injunctive relief filed by Plaintiff Marquette County Road Commission ("MCRC") against the United States Environmental Protection Agency ("EPA"), Susan Hedman (in her capacity as Administrator of Region V of the EPA), and the United States Army Corps of Engineers ("Corps"), pursuant to the Clean Water Act (CWA), 33 U.S.C. §§ 1251 et seq., and the Administrative Procedure Act (APA), 5 U.S.C. §§ 551 et seq. Before the Court is Defendants' motion to dismiss (ECF No. 13) and Plaintiff's motion for discovery (ECF No. 25). For the reasons stated herein, Defendants' motion to dismiss will be granted and Plaintiff's motion for discovery will be denied.

I. Background

Plaintiff intends to fill 25 acres of wetlands in order to construct a road in Marquette County. To do so, it needs a permit under section 404 of the CWA. As the Sixth Circuit has explained:

> The Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. §§ 1251-1376, enacted in 1972, constituted a reconstruction of America's water pollution laws. Pursuant to the FWPCA, the discharge of pollutants into our nation's waterways is prohibited unless authorized by a permit or exempted by the specific statutory language.
>
> The Act establishes two discrete permitting systems by which individuals might obtain permits from the appropriate federal agency allowing dumping in waterways. The first, which is known as the National Pollutant Discharge Elimination System ("NPDES"), governs the discharge of pollutants from specific sites, known as point sources, *see* § 402 of the FWPCA, 33 U.S.C. § 1342, and most typically affects industry sources. The second permitting scheme, which operates under the Secretary of the Army via the Army Corps of Engineers, regulates the release of dredged and fill matter into waterways, including wetlands. *See* § 404 of the FWPCA, 33 U.S.C. § 1344. The two permitting systems are

> commonly referred to as "the § 402 system" and "the § 404 system," respectively.

Friends of Crystal River v. EPA, 35 F.3d 1073, 1074-75 (6th Cir. 1994).

Plaintiff sought its permit from the Michigan Department of Environmental Quality ("MDEQ"), which is the state agency responsible for implementing Michigan's federally-approved CWA wetland permit program.

> States are authorized to supplant the first federal permitting scheme, the NPDES scheme, pursuant to various provisions of the FWPCA. Additionally, the Clean Water Act of 1977, ("CWA"), passed in 1977, which strengthened the FWPCA by adding additional protections, provides a similar authority to the states with respect to § 404 permits. . . .
>
> Under § 404 a state may establish its own permitting system by complying with the process enumerated therein. Limited federal oversight authority is retained even after the state's acquisition of permitting control. Pursuant to this retained oversight authority, a state is required to present to the EPA copies of all permit applications which are submitted to the state for approval. In addition, the state must notify the EPA of any action that it takes with respect to such applications.

> § 1344(j). The EPA Administrator must, within 10 days, provide copies of the application to the Army Corps, the Department of the Interior, and the Fish and Wildlife Service. The state must be notified within thirty days if the Administrator intends to comment on the state's handling of the application. *Id.* The administrator's comments must be submitted within ninety days. *Id.*

Friends of Crystal River, 35 F.3d at 1075 (footnotes omitted).

Plaintiff submitted its initial application to the MDEQ in October 2011, and a revised application on January 23, 2012. The MDEQ sent copies of the application to the EPA, the Corps, and the United States Fish and Wildlife Service ("FWS"). On April 23, 2012, after consulting with the Corps and the FWS, the EPA submitted comments on the application and objected to issuance of a permit, asserting that Plaintiff's proposal failed to comply with section 404 of the CWA, 33 U.S.C. § 1344, and the 404(b)(1) guidelines, 40 C.F.R. §§ 230.1 et seq., because, among other things, it did not demonstrate that the proposed road was the "least environmentally damaging practical alternative." (Ex. 19,[1] 4/23/2012 EPA letter, ECF No. 6-5.)

> Once a state is notified that the EPA intends to comment, it may not issue the permit until after it has received the comment, or until ninety days have

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[1] All references to exhibits in this Opinion ("Ex. __") refer to exhibits attached to the complaint.

> passed. If the EPA objects to the application, the state "shall not issue such proposed permit" even after the ninety days have elapsed. [33 U.S.C. § 1344(j).] The aggrieved state may request a hearing to air its complaints. However, if the state does not request a hearing, or if it fails to modify its plan so as to conform to the EPA's objections, authority to issue the permit is transferred to the Army Corps.

Friends of Crystal River, 35 F.3d at 1075 (footnote omitted).

Over the next several months, Plaintiff, the MDEQ, and the EPA discussed the application. Plaintiff submitted a second revised application on June 29, 2012, and a third revised application on July 24, 2012. At the MDEQ's request, the EPA held a public hearing on the third revised application on August 28, 2012. On September 17, the MDEQ notified the EPA that "it would soon be in a position to issue a permit under state authorities," and urged the EPA to withdraw its objections. (Compl. ¶ 262, ECF No. 1.) Plaintiff subsequently revised its wetland mitigation plan.

On December 4, 2012, the EPA notified the MDEQ that it was withdrawing some objections, but that it continued to object to the issuance of the permit because it did not believe that Plaintiff had provided "adequate plans to minimize impacts" or a "comprehensive mitigation plan that would sufficiently compensate for unavoidable impacts." (*Id.* ¶ 265.) The EPA informed the MDEQ that the state

had 30 days to either issue a permit which satisfied the EPA's objections or to notify the EPA of its intention to deny the permit. *See* 40 C.F.R. § 233.50(h)(2). Between December 4 and December 27, 2012, Plaintiff "repeatedly" contacted the EPA to obtain more specific information about the objections and the conditions necessary to satisfy them. (Compl. ¶ 271.) It did not receive the information that it desired. Instead, the EPA told Plaintiff to work with the MDEQ. On December 27, 2012, Plaintiff sent the MDEQ a detailed letter responding to the EPA's concerns and asking the state to issue a permit. (Ex. 44, MCRC letter, ECF No. 8-12.)

On January 3, 2013, the MDEQ notified the EPA that, although it was working with Plaintiff to address the EPA's objections, it would not issue a permit because of "the short time frame allowed by statute and the complexity of the issues remaining." (Ex. 45, MDEQ letter, ECF No. 8-13.) The MDEQ acknowledged that, per section 404 of the CWA, "authority to process the permit application . . . is now transferred to the [Corps]." (*Id.*)

Thereafter, the Corps told Plaintiff that it would not issue a permit based on the third revised application submitted to the MDEQ. (Compl. ¶ 299.) Rather, in order to proceed, Plaintiff would need to submit a new application to the Corps. (*Id.*) Plaintiff declined to do so. (*Id.* ¶ 301.)

Plaintiff subsequently brought this five-count declaratory judgment action. In Count I of the complaint, Plaintiff claims that the EPA's objections to its permit application were arbitrary and capricious. In Count II, Plaintiff claims that the EPA

exceeded its delegated authority by issuing objections based on requirements that are not mandated by the CWA. In Count III, Plaintiff claims that the EPA's objections failed to list the conditions necessary for a permit to issue, as required by section 404(j) of the CWA. In Count IV, Plaintiff claims that the EPA did not follow the procedural requirements of section 404(j) of the CWA. In Count V, Plaintiff claims that the Corps improperly denied its permit application by failing to act on it.

Defendants assert that the complaint should be dismissed pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, because the complaint fails to state a claim upon which relief can be granted and because the Court lacks subject matter jurisdiction to adjudicate the claims against the EPA.

II. Jurisdiction

Defendants contend that the Court lacks subject matter jurisdiction over the claims against the EPA. Their core objection to these claims is that the EPA's actions are not reviewable because they do not constitute a "final agency action" under the APA. *See* 5 U.S.C. § 704. As the Sixth Circuit has explained, however, "[t]he APA is not a jurisdiction-conferring statute; it does not directly grant subject matter jurisdiction to the federal courts." *Jama v. Dep't of Homeland Sec.*, 760 F.3d 490, 494 (6th Cir. 2014). Consequently, the "final agency action requirement" of the APA is not jurisdictional. *Id.* at 494 n.4. Rather, the Court's jurisdiction stems from the federal question statute, 28 U.S.C. § 1331, which "'confer[s] jurisdiction on federal courts to review agency action, regardless of whether the APA of its own force may

serve as a jurisdictional predicate.'" *Id.* at 494 (quoting *Califano v. Sanders*, 430 U.S. 99, 105 (1977)); *see also Hill v. Norton*, 275 F.3d 98, 103 (D.C. Cir. 2001) (noting that "challenges brought under the APA fall within the reach of the general federal jurisdiction statute, 28 U.S.C. § 1331").

Plaintiff seeks review of agency action under the APA. The Court has subject matter jurisdiction to review Plaintiff's claims under 28 U.S.C. § 1331. Thus, the Court will not dismiss any claims for lack of subject matter jurisdiction, but will review them to determine whether they state a viable cause of action.

III. Standard of Review

In reviewing a Rule 12(b)(6) motion to dismiss, the Court must "'construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff,'" but it "'need not accept as true legal conclusions or unwarranted factual inferences.'" *Hunter v. Sec'y of U.S. Army*, 565 F.3d 986, 992 (6th Cir. 2009) (quoting *Jones v. City of Cincinnati*, 521 F.3d 555, 559 (6th Cir. 2008)). A complaint must contain "a short and plain statement of the claim showing how the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The purpose of this statement is to "give the defendant fair notice of what the claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

The complaint need not contain detailed factual allegations, but it must include more than labels, conclusions, and formulaic recitations of the elements of a cause of action. *Id.* "Threadbare recitals of the elements of a cause of action, supported by mere

conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 555). To survive a motion to dismiss under Rule 12(b)(6), a complaint must allege facts that "state a claim to relief that is plausible on its face," and that, if accepted as true, are sufficient to "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555, 570.

IV. Finality and EPA objections

Section 704 of the APA authorizes judicial review of "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court. . . ." 5 U.S.C. § 704. Neither party contends that the EPA's actions have been made reviewable by statute. Defendants assert that Plaintiff does not state a viable claim against the EPA because the EPA's actions do not constitute a "final agency action." The Court agrees.

The Court must apply a "two-prong test" to determine whether agency action is "final":

> First, the action must mark the "consummation" of the agency's decisionmaking process–it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which "rights or obligations have been determined," or from which "legal consequences will flow."

Jama, 760 F.3d at 495-96 (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal citations omitted)); *see also Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992) ("The core question is whether the

agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties."). "An agency action is not final if it 'does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action.'" *Jama*, 760 F.3d at 496 (quoting *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 130 (1939)).

At issue in this case is whether the EPA's issuance of objections to a section 404 permit to be issued by a state constitutes a final agency action. The Sixth Circuit touched on this question in *Friends of Crystal River*, noting cases which "stand for the broad proposition that an EPA decision to object does not constitute final agency action" and "may [not] be subjected to judicial review." 35 F.3d at 1079 (referring to *American Paper Inst. v. EPA*, 890 F.2d 869, 875 (7th Cir. 1989) (finding that the EPA's decision to object to a section 402 permit was not reviewable because it was a discretionary act); and *Champion Int'l Corp. v. EPA*, 850 F.2d 182 (4th Cir. 1988) (finding that the EPA's unsatisfied objections are not final agency actions, and thus are not reviewable)). In *American Paper*, the Seventh Circuit reasoned that the EPA's decision to object is not reviewable because it is discretionary, but the Sixth Circuit stated that a "more defensible basis for determining EPA objections to be non-reviewable lies in the fact that such decisions are non-final. For example, the EPA may, after issuing an objection, decide to (1) accept the modified state permit; (2) issue a permit on its own; or (3) deny the permit." *Id.* at 1079 n.11.

The foregoing discussion in *Friends of Crystal River* is dictum, because the Sixth Circuit was not asked to review objections to a section 404 permit. In that case, as in this one, a party sought a section 404 permit from the State of Michigan and the EPA objected. *Id.* at 1076. Also, like this case, the EPA and the state could not resolve their objections within the applicable time frame, so permitting authority transferred to the Corps. *Id.* Unlike this case, however, the EPA subsequently withdrew its objections and attempted to have permitting authority transferred back to the state. *Id.* at 1077. The plaintiffs filed suit, challenging the EPA's attempt restore state control over the permitting process. They did not challenge the objections themselves. The court determined that review of the EPA's withdrawal of objections and purported transfer of permitting authority to the state was appropriate because it was a "final, non-discretionary act" that, "if unreviewed, will terminate the federal government's role in th[e] case." *Id.* at 1079.

Although it is not binding, the Court agrees with the discussion in *Friends of Crystal River* regarding the reviewability of EPA objections. As discussed in more detail below, under the first prong of the *Bennett* analysis, those objections do not mark the consummation of its decisionmaking process. After issuing objections, the EPA continues to work with the state to fashion an appropriate permit, and the EPA could decide to withdraw the objections or accept a modified permit. In addition, under the second prong of the *Bennett* analysis, the EPA's objections do not impose new legal consequences or determine the rights or obligations of the permit applicant. The state must decide whether to deny the

permit application or to issue a modified permit. If the state does not do so, the applicant can seek a permit from the Corps, without being bound by the EPA's objections.[2]

1. EPA objections do not mark the consummation of the agency decisionmaking process.

Under the first *Bennett* prong, the EPA's objections do not mark the "consummation" of its decisionmaking process. As it did in this case, the EPA continues to work with the state and the permit applicant after issuing objections. It has authority to modify or withdraw those objections in response to hearings or further information the state or the applicant. But for the lapse in the time provided by the statute and its implementing regulations,[3] the EPA could have continued to work with the state to fashion an acceptable permit. Even after permitting authority transferred to the Corps, the EPA's objections were still "tentative" and "interlocutory" in nature because the Corps can issue a permit on the terms requested by Plaintiff, notwithstanding any objections raised by the EPA. Unlike the situation in

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[2] The CWA does not render EPA objections to a state permit binding on the Corps.

[3] Plaintiff asserts that the EPA improperly allowed the state only 30 days to respond to its final objection on December 4, 2012, but the statute requires the state to submit a revised permit within 30 days after the public hearing, which occurred on August 28, 2012. 33 U.S.C. § 1344(j). Plaintiff does not allege that the state did so. EPA regulations are more forgiving; they allow the state to issue a revised permit within 30 days after receiving notification that the EPA is not withdrawing its objection. 40 C.F.R. § 233.50(h)(2). Unless Plaintiff is challenging the EPA's regulations, the EPA's 30-day requirement was not improper.

Crystal River, the EPA's action did not terminate the federal government's role in the matter.

In the parallel context of section 402 permits, several courts have indicated that EPA objections are not final. *See American Paper Inst.*, 890 F.2d at 875; *Champion Int'l Corp.*, 850 F.2d at 188 ("Since the EPA clearly intends to continue the administrative process and ultimately issue or deny a permit to Champion, its objection and assumption of issuing authority are not final actions subject to judicial review . . . ."); *see also City of Ames v. Reilly*, 986 F.2d 253, 255-56 (8th Cir. 1993) ("Various administrative opportunities still remain: the State could issue its own permit, the EPA could withdraw its objections, or the EPA could issue a final NPDES permit."); *Westvaco Corp. v. EPA*, 899 F.2d 1383, 1389 (4th Cir. 1990) (noting that EPA objections to section 402 permits are not final).

Before the FWPCA was amended in 1977, EPA objections to a state discharge permit under section 402 were found to be reviewable under 33 U.S.C. § 1369(b)(1)(F) (providing for review of EPA actions in "issuing or denying any permit") because, in effect, the objections functioned as a veto or denial of the permit. *See Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193, 196 (1980); *Ford Motor Co. v. EPA*, 567 F.2d 661, 668 (6th Cir. 1977).

Plaintiff cites case law relying on this authority. *See Pa. Mun. Authorities Ass'n v. Horinko*, 292 F. Supp. 2d 95, 105 (D.D.C. 2003) ("In general, EPA objections or modifications to permits have been found to be final agency action.") (citing *Crown Simpson*). However, the 1977 amendments gave the EPA authority to issue the permit after its objections

were not resolved by the state. These amendments call into question the case law relied upon by Plaintiff, because "an EPA objection to a state permit is no longer 'functionally similar' to denying a permit." *Am. Paper Inst.*, 890 F.2d at 874; *accord Envtl. Protection Info. Center v. Pacific Lumber Co.*, 266 F. Supp. 2d 1101, 1113 n.10 (N.D. Cal. 2003).

The permitting scheme for discharge permits under section 402 is similar to that for dredge-and-fill permits under section 404. As with permits under section 404, a state can obtain approval to issue permits under section 402. *See* 33 U.S.C. § 1342(b). In addition, the state's authority to issue the permit is subject to EPA oversight: the EPA receives notice of permit applications and can object to the issuance of a permit. *Id.* § 1342(d). After an objection is raised, the state has the opportunity to request a hearing; if the state does not submit a revised permit that satisfies the EPA's objections within 30 days after the hearing, or within 90 days after the objection (if no hearing is requested), then permitting authority passes from the state to the EPA. *Id.* § 1342(d)(4).

Plaintiff notes that there is a difference between the 402 process and the 404 process: the EPA assumes authority to issue a section 402 permit when the state cannot resolve the EPA's objections within the available time frame, whereas the Corps assumes authority to issue a section 404 permit when the state cannot resolve the EPA's objections within the available time frame.[4] But if the EPA's objections are

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[4] It might be more accurate to say that the EPA and the Corps "re-assume" their respective permitting authorities under section 402 and section 404. Although a state can obtain approval to administer a program for issuing discharge permits under

not final in the section 402 context, it does not stand to reason that they would be final in the section 404 context. In both cases, the state has an opportunity to resolve the EPA's objections and issue the permit, and if the state does not do so, the applicant can seek the permit from the appropriate federal agency. In both cases, a federal agency will then make a final determination whether to issue or deny the permit, without being bound by the EPA's objections, and that decision can be reviewed in court. Thus, in both cases, the EPA's objections are an interlocutory step in the permitting process rather than the consummation of that process.

Nevertheless, Plaintiff asserts that the EPA's unresolved objections to a section 404 permit are final with respect to the EPA because they are the EPA's final word on the matter. According to Plaintiff, after permitting authority transfers to the Corps, there is nothing left for the EPA to do. Plaintiff draws on language from *Michigan Peat v. EPA*, 175 F.3d 422 (6th Cir. 1999), in which the EPA initially objected to a state permit but then withdrew its objections and agreed to it. According to the court, "the logical conclusion is that the EPA's action was final. Statutorily, there was nothing left for the EPA to do . . . ." *Id.* at 428.

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section 402, Congress intended the EPA to have authority over such permits. *See* 33 U.S.C. § 1342(a). Likewise, although a state can obtain approval to administer a program for issuing dredge-and-fill permits under section 404, Congress intended the Corps to have authority over such permits. *See* 33 U.S.C. § 1344(a). Applicants in states which have not obtained approval to administer their own permitting program must apply directly to the EPA or to the Corps, as applicable.

Michigan Peat is distinguishable because Plaintiff's permit was not granted or denied. There is no question that the grant or denial of a permit is a final, reviewable decision. Moreover, it is not the case that there is nothing left for the EPA to do after it issues its objections. It can withdraw them or work with the state to resolve them. Even after permitting authority transfers to the Corps, the EPA continues to play a role. Section 404(b) requires that a permit issued by the Corps specify the disposal sites for dredged or fill material. Section 404(c) permits the EPA "to prohibit the specification . . . of any defined area as a disposal site . . . *whenever he determines*, after notice and opportunity for public hearings, that the discharge of such materials into such area . . . will have an unacceptable adverse effect . . . ." 33 U.S.C. § 1344(c) (emphasis added); see also 33 C.F.R. § 323.6(b) (implementing § 1344(c)). Thus, the EPA maintains statutory authority to object to the permit's specification of a defined area as a disposal site. In addition, when the Corps reviews a permit application, it is likely to seek input from the EPA, just as the EPA sought advice from the Corps when reviewing Plaintiff's state permit application. *See* 33 C.F.R. § 384.5 (noting that Corps officials consult with and seek advice from all other substantially affected federal agencies).

Plaintiff also relies on *Sackett v. EPA*, 132 S. Ct. 1367 (2012), in which the EPA issued a compliance order asserting that the plaintiffs illegally filled wetlands in violation of the CWA. *Id.* at 1369. The order directed the plaintiffs to immediately undertake to restore the site in accordance with an EPA plan. *Id.* at 1371. The plaintiffs requested a hearing but the EPA denied their request. *Id.* The Court concluded

that the compliance order was a final, reviewable action. *Id.* at 1374. As to the first prong of the Bennett analysis, the Court determined that the order marked the "consummation" of the agency's decisionmaking process because the findings and conclusions in the order were not subject to further agency review. *Id.* at 1372. Unlike *Sackett*, the EPA's determination in Plaintiff's case is subject to further agency review. The Corps is not bound by the EPA's objections; it can consider them and determine whether a permit is warranted and on what terms.

When determining whether the EPA's action was one "for which there is no other adequate remedy in a court," 5 U.S.C. § 704, the Court in *Sackett* rejected the government's argument that an adequate remedy for the plaintiffs would have been to seek a permit from the Corps and then seek judicial review of that decision if the Corps denied the permit. *Sackett*, 132 S. Ct. at 1372. According to the Court, "[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." *Id.* Plaintiff uses the foregoing statement to support its argument that the EPA's objections are final. According to Plaintiff, the availability of a permit from another agency (the Corps) is not an adequate remedy and does not render the EPA's actions non-final. This argument takes the Supreme Court's statement out of context. The Court was discussing the adequacy of available remedies, not the finality of the EPA's compliance order. It had already determined that the order was a final action. Thus,

Plaintiff's reliance on the *Sackett* decision is misplaced.[5]

Plaintiff also contends that the mere possibility that another agency (i.e., the Corps) could take action to approve its permit in the future should not preclude review of the EPA's actions. The cases that it cites for this proposition, however, involve either the uncertain possibility of some future, discretionary action to address what has already occurred,[6] or a refusal by

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[5] Plaintiff also cites *Role Models America, Inc. v. White*, 317 F.3d 327, 331 (D.C. Cir. 2003) ("To be final, an action need not be 'the last administrative [action] contemplated by the statutory scheme.'") (quoting *Envtl. Def. Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 590 n.8 (D.C. Cir. 1971). Role Models is distinguishable because the agency's decision in that case bound itself to convey property. The EPA's objections do not bind itself or the Corps in further proceedings. Ruckelshaus is distinguishable because the agency's refusal to suspend registrations of pesticides determined substantial rights and threatened irreparable harm. 439 F.2d at 590 n.8. No substantial rights have been determined in Plaintiff's case; its permit has not been granted or denied. Plaintiff also cites *Mountain States Tel. & Tel. Co. v. FCC*, 939 F.2d 1021, 1027 (D.C. Cir. 1991) ("An order may be final though it is not the very last step in the administrative process, but it is not final if it 'remains tentative, provisional, or contingent, subject to recall, revision, or reconsideration by the issuing agency.' The bar to review of nonfinal orders 'reflect [s] the reasoned policy judgment that the judicial and administrative processes should proceed with a minimum of interruption.'"). *Mountain States* supports the EPA's position, because the EPA's objections are subject to recall and reconsideration in proceedings before the Corps.

[6] *See U.S. Air Tour Ass'n v. FAA*, 298 F.3d 997, 1013 (D.C. Cir. 2002) (uncertain possibility that the FAA could change its rules); *Grand Canyon Trust v. Williams*, 38 F. Supp. 3d 1073, 1078 (D. Ariz. 2014) (other agencies could evaluate the Forest Services's determination, in their discretion).

the agency to reconsider its position.[7] In contrast, if Plaintiff pursues a proper permit application with the Corps, it is certain to obtain a final, reviewable decision on the merits of that application, including the merits of any issues raised by the EPA. The Corps does not have discretion to ignore such an application.

2. EPA objections do not conclusively determine Plaintiff's rights or obligations, or impose legal consequences.

EPA objections also fail under the second prong of the *Bennett* analysis, because they do not conclusively determine Plaintiff's rights or obligations, and their issuance is not an action from which legal consequences will flow. Unlike the plaintiffs in *Sackett*, Plaintiff is not subject to immediate consequences from the EPA's objections. The compliance order in that case required the plaintiffs to promptly restore the property according to an EPA plan and to give the EPA access to site records and documentation. *Sackett*, 131 S. Ct. at 1371-72. If they failed to do so, they could be subject to double penalties in a future enforcement proceeding. *Id.* at 1372. In contrast, the EPA's objections did not require Plaintiff to do anything that it was not already required to do. The objections appear to have prolonged the administrative process that Plaintiff started, but should Plaintiff decide to continue that process, it can do so by seeking a permit from the Corps.

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[7] *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 478-79 (2001) (EPA refused to reconsider its interpretation in subsequent rulemaking).

Plaintiff relies on *Alaska Dep't of Environmental Conservation v. EPA*, 540 U.S. 461 (2004), in which the EPA issued three compliance orders after a state agency issued a permit under the Clean Air Act. *Id.* at 480-81. The compliance orders prohibited the state agency from issuing the permit unless certain conditions were met, and prohibited the applicant from beginning construction. *Id.* The Supreme Court noted the EPA's concession that these orders met the finality requirement, because the EPA had asserted its "final position" on the state permit, and because the compliance orders "imposed new legal obligations on" the party subject to them. *Id.* at 481 n.10. Among other things, the applicant would not be able to escape the "lost costs and vulnerability to penalties . . . of any [state]-permitted construction" that it endeavored. *Id.* at 483. In contrast, the EPA's objections to Plaintiff's permit application did not impose new legal obligations on Plaintiff. Plaintiff was required to obtain a dredge-and-fill permit before the EPA objected, and it is still required to do so. Moreover, unlike that case, the state never issued a permit, and the EPA's actions do not prevent Plaintiff from obtaining one. Thus, as far as its legal obligations are concerned, Plaintiff remains in essentially the same position that it was in before it applied for a permit. What has changed is that authority to issue the federal permit has transferred from a state agency to a federal one.

Plaintiff argues that this transfer of authority has "fundamentally alter[ed] the substantive legal regime to which [it] is now subject." (Pl.'s Resp. in Opp'n to Mot. to Dismiss 19, ECF No. 23.) Plaintiff notes that Michigan's section 404 permit program expressly incorporates Michigan statutes and

regulations, *see* 40 C.F.R. § 233.70 (listing the statutes and regulations incorporated by reference into Michigan's section 404 permit program), whereas a permit application submitted to the Corps is processed pursuant to the Corps' "vaguely worded" regulations. (Pl.'s Resp. 19.) Plaintiff also notes that the Corps' regulations are substantively different from the requirements of Michigan's section 404 permit program. For instance, the two programs define the term "wetland" differently. *Compare* Mich. Comp. Laws § 324.30301(m) *with* 33 C.F.R. § 328.3(c)(4). They also set forth different "public interest" factors. *Compare* Mich. Comp. Laws § 324.30311 *with* 33 C.F.R. § 320.4.

The substantive differences identified by Plaintiff are attributable to the fact that the federal government and the State of Michigan each have their own, separate and independent clean water regulations. *See United States v. Rapanos*, 376 F.3d 629, 646 (6th Cir. 2004) (discussing the differing definitions of wetlands under Michigan and federal law), *overruled on other grounds* in *Rapanos v. United States*, 547 U.S. 715 (2006). But Plaintiff is always required to comply with *both* sets of regulations. Even when Michigan has authority to grant a federal permit, the requirements of state law do not supplant those in the CWA. *Id.* at 647. CWA regulations expressly state that "[a]ny approved State Program shall, at all times, be conducted in accordance with the requirements of the Act and of this part. While States may impose more stringent requirements, they may not impose any less stringent requirements for any purpose." 40 C.F.R. § 233.1(d). Thus, regardless of whether the state or the Corps issues the CWA permit, Plaintiff is subject to the same legal

obligations. In both scenarios, it must comply with both state and federal requirements.

Plaintiff also notes that there are procedural differences when obtaining a permit from the Corps rather than the state. Michigan regulations provide for shorter response times when a permit application is under state review compared to what is set forth in the Corps' regulations. In addition, when the Corps is responsible for issuing a permit, its decision is subject to the lengthy and costly review process laid out by the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq. These distinctions are not sufficient in themselves to render an agency action final, however. The cost of administrative proceedings is not viewed as a legal consequence sufficient to satisfy the second prong of the *Bennett* analysis. *See Home Builders Ass'n of Greater Chicago v. U.S. Army Corps of Eng'rs*, 335 F.3d 607, 616 (7th Cir. 2003) ("[T]he mere presence of increased administrative costs is insufficient to establish the finality required for nonstatutory review under the APA."); *see also FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 242 (1980) (noting that complying with administrative proceedings "is different in kind and legal effect from the burdens attending what heretofore has been considered to be final agency action"). Consequently, the additional burden involved in proceeding before the Corps to obtain a final decision on Plaintiff's permit application does not render the EPA's action final under the APA.[8]

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[8] Plaintiff cites cases in which an agency's determination was deemed to be final because it required the plaintiff to apply for a permit or to undergo additional administrative proceedings. *See Hawkes Co., Inc. v. U.S. Army Corps of Eng'rs*, 782 F.3d 994 (8th

In summary, Plaintiff argues that the EPA's objections have left it with essentially two choices: (1) construct the road and risk enforcement action or (2) go through the "costly, time-consuming, and futile exercise of submitting an entirely new application to the Corps." (Pl.'s Resp. 11.) But Plaintiff was subject to the first consequence even before the EPA issued its objections. There is no question that Plaintiff must obtain a permit in order to complete its construction project; the EPA's objections have not altered that fact. The second consequence is merely a byproduct of the scheme created by Congress to resolve the state's failure to address concerns raised by the EPA in a timely manner. The cost of complying with this scheme is not sufficient to render the EPA's objections to its permit application final and reviewable. Finally, Plaintiff's assertion that an application to the Corps would be "futile" is unsupported, as discussed in Section VI below. Because the EPA's actions do not

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Cir. 2015) (Corps' jurisdictional determination that property contained water of the United States required the plaintiff to apply for CWA permit); *HRI, Inc. v. EPA*, 198 F.3d 1224, 1237 (10th Cir. 2000) (EPA's designation of lands as disputed Indian lands required the plaintiff to apply for a permit). *HRI* is distinguishable because the EPA's designation changed the legal regime to which the plaintiff was subject; the plaintiff was eligible for a permit exemption until the EPA made its designation. In contrast, Plaintiff was required to obtain a CWA permit even before the EPA issued its objections. Hawkes is not persuasive because the plaintiff in that case was required to comply with the CWA before the Corps issued its jurisdictional determination. Moreover, the reasoning in *Hawkes* conflicts with the reasoning of courts in other circuits. *See Belle Co., LLC, v. U.S. Army Corps of Eng'rs*, 761 F.3d 383, 390-94 (5th Cir. 2014) (Corps jurisdictional determination is not a reviewable action); *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 593 (9th Cir. 2008) (same).

satisfy either prong of the *Bennett* analysis, they are not reviewable under the APA.

V. Exception to Finality

In Count II of the complaint, Plaintiff contends that the EPA engaged in ultra vires action outside of its delegated authority. Plaintiff asserts that the EPA did not comply with section 404(j), which permits the EPA to raise objections to a state permit that falls "outside the requirements" of section 404 and the 404(b)(1) guidelines. 33 U.S.C. § 1344(j). Plaintiff contends that the EPA raised issues that are matters of discretion for the MDEQ and, thus, are not "requirements" of section 404 or the 404(b) guidelines. In addition, Plaintiff asserts that the EPA failed to list the conditions necessary for issuance of a permit, as required by 33 U.S.C. § 1344(j). Thus, Plaintiff contends that, even if the EPA's actions are not final and reviewable under 5 U.S.C. § 704, Plaintiff is entitled to review under the exception in *Leedom v. Kyne*, 358 U.S. 184 (1958).

In *Leedom*, the Supreme Court determined that a statutory bar to judicial review would not apply where an agency acted "in excess of its delegated powers and contrary to a specific prohibition" in a statute. *Id.* at 188. The Sixth Circuit "has narrowly interpreted *Leedom* to apply only in 'extreme situations.'" *Friends of Crystal River*, 35 F.3d at 1079 n.13 (quoting *Shawnee Coal Co. v. Andrus*, 661 F.2d 1083, 1093 (6th Cir. 1981)). The *Leedom* exception requires a "readily observable usurpation of power not granted to the agency by Congress"; it is "not automatically invoked whenever a challenge to the scope of an agency's authority is raised." *Shawnee*

Coal Co., 661 F.2d at 1093. "In order to bring a case within the exception, it must be shown that the action of the agency was a patent violation of its authority or that there has been a manifest infringement of substantial rights irremediable by the statutorily prescribed method of review." *Greater Detroit Res. Recovery Auth. v. EPA*, 916 F.2d 317, 323 (6th Cir. 1990).

1. Failure to list the conditions necessary for a permit.

Plaintiff's assertion that the EPA failed to list the conditions necessary for a permit to issue ignores the December 4, 2012, letter from the EPA, which provided a detailed list of such conditions. (*See* Ex. 39, 12/4/2012 EPA letter, ECF No. 8-7, PageID.1042-44.) For example, with regard to mitigation of direct impacts, the letter specified, in part:

> The final wetland and stream compensatory mitigation plans must comply with the 2008 Federal Mitigation Rule (Compensatory Mitigation for Losses of Aquatic Resources; Final Rule). To demonstrate that the proposed stream and wetland mitigation will sufficiently compensate for proposed impacts, the applicant shall provide the following, prior to permit issuance:
>
> • Identification of a third-party land steward for long-term management of the wetland preservation site. The steward shall have land management experience managing wetland preservation sites.

> • Adaptive and long-term management plans for both stream and wetland mitigation that include a monitoring and reporting schedule and funding mechanism.
>
> • Measurable performance standards for stream mitigation. For example, for the goal of reducing sediment input to a stream, the applicant must specify how sediment input will be measured and provide a baseline with which to compare pre-mitigation and post-mitigation conditions.
>
> . . .

(*Id.* at PageID.1042 (footnotes omitted).) Thus, Plaintiff's assertion is not supported by the record.[9]

2. Objections based on impermissible factors.

Regarding the EPA objections that were allegedly based on factors within the discretion of the state rather than requirements of section 404(b)(1),

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[9] Plaintiff focuses on the EPA's objections the *first* revised permit application (see Pl.'s Resp. 6), in which the EPA stated that it could not provide conditions necessary for the permit to issue because Plaintiff had not established that its proposal was the "least environmentally damaging practical alternative." (Ex. 19, 4/23/2012 EPA letter.) Plaintiff subsequently revised its application on two additional occasions, causing the EPA to concede that Plaintiff had identified the least environmentally damaging alternative. Plaintiff does not explain why the EPA's *initial* objections, which were rendered at least partially moot by Plaintiff's revised applications and then superseded by objections issued in December 2012, are the proper subject of review in this matter.

Plaintiff fails to satisfy the narrow exception provided by *Leedom*. There is no dispute that the EPA has statutory authority to issue objections to a state permit. Nevertheless, Plaintiff contends that the following statements by the EPA in its April 2012 objections are instances where it exceeded its statutory authority: "we remain concerned that the magnitude of the proposed impacts to the relatively un-impacted aquatic resources along the route is significant"; "the proposed compensatory mitigation will not sufficiently compensate for the loss of aquatic resources"; and "EPA has not received adequate plans to minimize impacts or a comprehensive mitigation plan that would sufficiently compensate for unavoidable impacts." (Pl.'s Resp. 29 (quoting 4/23/2012 EPA letter, ECF No. 6-5).) Plaintiff notes that the EPA has authority to object to permit conditions that fall "outside the requirements" of the CWA. 33 U.S.C. § 1344(j). But Plaintiff contends that the phrase "outside the requirements" indicates that Congress intended to limit the EPA's power to object to only certain matters, while leaving the rest to the state's discretion. Plaintiff asserts that "qualitative" and "quantitative" factors, like the adequacy of mitigation plans, or the magnitude of environmental impacts, are not "requirements" of the 404(b) guidelines; rather, they are discretionary factors for the state to decide. Consequently, Plaintiff argues that the EPA lacked authority to issue the foregoing objections.

Contrary to Plaintiff's assertion, neither the CWA nor the regulations give exclusive authority or discretion to the state to determine whether any aspect of the CWA or its guidelines have been satisfied. *See* 40 C.F.R. § 233.50(e) (permitting EPA

objections based on "*the Regional Administrator's determination* that the proposed permit is . . . outside [the] requirements of the Act, these regulations, or the 404(b)(1) Guidelines.") (emphasis added). Moreover, the guidelines themselves do not distinguish between "requirements" and other factors. Indeed, many of the guidelines are inherently qualitative and/or quantitative. *See, e.g.*, 40 C.F.R. § 230.1 (noting the fundamental precept of the guidelines that the discharge of dredge and fill material not have an "unacceptable" adverse impact); *id.* § 230.5(c), (j) (requiring assessment of "practicable" alternatives and plans to "minimize" the impacts of the discharge); *id.* § 230.10(a), (c)-(d) (prohibiting discharge if there is a "practicable" alternative with a less adverse impact, if the discharge will cause "significant" degradation of the waters of the United States, or if steps have not been taken to "minimize" potential adverse impacts); *id.* § 230.94 (requiring preparation of a mitigation plan "commensurate" with the scale and scope of the impacts). But it does not necessarily follow that they are "discretionary," or that the state has sole authority to determine whether they have been satisfied.

Plaintiff's narrow view of the EPA's authority is not supported by the statute as a whole or its legislative history. Section 402 of the CWA uses similar language, stating that the EPA can object to a state permit if it is "outside the guidelines and requirements of this chapter." 33 U.S.C. § 1342(d)(2). But no court has held that this language limits the scope of EPA objections to "qualitative" or "quantitative" factors. Indeed, the Senate Report to the 1977 amendments makes clear that Congress wanted "strong EPA oversight" of state programs, and that "the authority of the [EPA] to assure compliance

with guidelines in the issuance and enforcement of permits . . . *is in no way diminished*" by the establishment of a state permit program. S. Rep. No. 95-370, at 73, 78 (1977) (emphasis added), *as reprinted in* 1977 U.S.C.C.A.N. 4326, 4398, 4403. Similarly, the Sixth Circuit has observed:

> Congress has indicated that one purpose of the FWPCA is "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution . . . ." 33 U.S.C. § 1251(b). However, when enacting the 1977 amendments to the FWPCA, legislators noted that the "EPA has been much too hesitant to take any actions where States have approved permit programs. The result might well be the creation of 'pollution havens' in some of those States which have approved permit programs." S. Rep. No. 95–370, 95th Cong., 1st Sess. 73 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326, 4398. Thus, while the purpose of both the 1972 and 1977 Acts may have been to encourage states to assume a portion of the burden of pollution management, the 1977 amendments make equally clear that Congress also intended to *expand* federal oversight.

Friends of Crystal River, 35 F.3d at 1078 (emphasis added). In short, because the EPA was authorized to object to the proposed permit, and because its objections were based on the guidelines, they were by no means a "patent violation" of the EPA's delegated

authority or a "manifest infringement" of Plaintiff's rights. *Greater Detroit Res. Recovery Auth.*, 916 F.2d at 323. Consequently, *Leedom* does not apply.

VI. Claim against the Corps

In Count V of the complaint, Plaintiff alleges that the Corps failed to take any action on the permit application that it filed with the MDEQ, which constituted a "constructive denial" of that application. (Compl. ¶ 391.) The Corps "took the position that Plaintiff would need to file an entirely new permit application with the Corps," but Plaintiff declined to file a new application. (*Id.* at ¶¶ 14, 299, 301.) As relief, Plaintiff seeks an order setting aside the "constructive denial" of its application and requiring the Corps to approve the permit. (*Id.* ¶ 398.) Defendants assert that these allegations do not state a viable claim.

> [T]he only agency action that can be compelled under the APA is action legally *required*. This limitation appears in § 706(1)'s authorization for courts to "compel agency action *unlawfully* withheld." (Emphasis added.) . . .
>
> Thus, a claim under [5 U.S.C.] § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*.

Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 63-64 (2004) (footnote omitted).

Section 404 of the CWA provides that, when the state does not submit a revised permit to satisfy the EPA's objections within the requisite time period, "the

Secretary *may* issue the permit pursuant to subsection (a) or (e) of this section . . . ." 33 U.S.C. § 1344(j) (emphasis added). This provision indicates the Corps assumes authority to issue the permit; it does not require the Corps to act. Moreover, it refers to subsection (a), which states that the Corps "may issue permits, after notice and opportunity for public hearings," and that the Corps must publish notice within 15 days after the applicant "submits all the information required to complete an application for a permit under this subsection[.]" 33 U.S.C. § 1344(a). Thus, before the Corps is required to act on an application, the applicant must provide the Corps with all the information required to complete one. *Id.* Notably, subsection (a) applies to all applications for a section 404 permit from the Corps, including those in states where there is no federally-approved state permitting program. Consequently, when read in conjunction with subsection (a), subsection (j) cannot be interpreted as requiring the Corps to act on a permit application submitted to the state.

Corps regulations provide specific requirements for a permit application, including the specific form that must be used in the application, the contents of the application, and the applicable fees. 33 C.F.R. § 325.1. Plaintiff does not allege that it complied with these requirements, and neither the statute nor the regulations provide that an applicant who has submitted an application to the state is exempt from them.

Plaintiff relies on an EPA regulation which states that, when the EPA's objections are not resolved by the state, "the [Corps] shall process the permit application." 40 C.F.R. § 233.50(j). However,

this regulation does not specify or mandate any procedure that the Corps must follow when processing permit applications, let alone require that the Corps consider the application submitted to the state. Moreover, the Corps is responsible for adopting its own procedures for processing permit applications; it is not required to follow regulations developed by the EPA. *Cf. Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 273-74 (2009) (delineating EPA and Corps responsibilities for section 404 permits). The Corps has not adopted specific procedures for processing permit applications when authority to issue a section 404 permit transfers from the state to the Corps. Instead, it has decided to follow the same procedures for all such permit applications. *See* 33 C.F.R. § 325.1 (noting that "[t]he processing procedures of this part apply to any Department of the Army (DA) permit"); *see also* 33 C.F.R. § 325.2 (setting forth procedures for processing permit applications).

Practical considerations support the Corps' approach. Although Plaintiff would require the Corps to act as soon as it assumes authority to issue the permit, it cannot do so without knowing which materials are relevant and whether it has received all the necessary information. Even the most recent version of an application submitted to the state may not be relevant. After the EPA issues its objections, the applicant has an opportunity to continue working with the state to resolve them. Substantial changes could be made to the applicant's proposal during that time, and an applicant could decide to submit an application to the Corps that contains these additional revisions. In addition, after permitting authority transfers to the Corps, the applicant could decide to delay its application and make further revisions

before seeking a permit from the Corps. If the applicant believes that the EPA's objections are invalid, it could ignore those objections and modify its application accordingly. In Plaintiff's case, it revised its application several times following the EPA's comments and objections. Even after the EPA objected to Plaintiff's third revised application in December 2012, Plaintiff continued in its attempts to satisfy those objections. The Corps should not be expected to assume that the most recent version of the application that Plaintiff submitted to the state is the relevant application for review, or that the Corps possesses all the relevant information needed to evaluate it.

Plaintiff contends that it should not be required to file an application with the Corps because such an application would be futile. Plaintiff relies on comments that the Corps made to Plaintiff's first revised application in March 2012, in which the Corps questioned the stated purpose of the project and identified other deficiencies. (Compl. ¶¶ 209-11.) Plaintiff asserts that there "is no reason to think the Corps would now reverse course." (Pl.'s Resp. 33.) But Plaintiff revised its application several times after the Corps made comments. There is no reason to think that the same issues would arise for a different application. In any event, Plaintiff's belief that an application would be futile does not excuse it from filing one before seeking judicial review.

Plaintiff also refers to an email from an EPA employee to the Corps, in which the EPA employee stated that it "looks like 'they' want to go to the COE permit for 595, EPA is such a job killer . . . . hope the COE is more reasonable." (Compl. ¶ 15.) Plaintiff contends that this statement is evidence of

administrative bias that renders any application to the Corps futile; however, an email sent to the Corps from another agency is not evidence of bias on the part of the Corps.

In short, Plaintiff does not state a claim based on the Corps' failure to act. The Corps was not legally required to act on the application that Plaintiff filed with the state. The Corps did not deny its application, because Plaintiff declined to file one in accordance with the Corps' procedures. If Plaintiff wanted the Corps to make a determination on its request for a permit, it could have filed a proper application.

Moreover, even if Plaintiff stated a valid claim against the Corps, the relief that it requests is not available. Plaintiff asks the Court to have the Corps issue the permit, but the Court does not have authority to do so. The APA "empowers a court only to compel an agency 'to perform a ministerial or non-discretionary act,' or 'to take action upon a matter, without directing how it shall act.'" *Norton*, 542 U.S. at 64 (quoting Attorney General's Manual on the Administrative Procedure Act 108 (1947)). Because Plaintiff claims that the Corps failed to act on its application, the Court can direct the Corps to consider that application; it cannot require the Corps to issue the permit.

VII.

In summary, Defendants' motion to dismiss will be granted. Plaintiff fails to state a claim against the EPA (and the EPA administrator) because the EPA's actions are not reviewable under the APA. Plaintiff fails to state a claim against the Corps because the Corps was not required to act until Plaintiff filed a

proper application with the Corps. Finally, because the complaint is subject to dismissal for failure to state a claim, Plaintiff's motion for discovery will be denied as moot.[10]

An order and judgment will be entered consistent with this Opinion.

Dated: May 18, 2016

/s/ Robert Holmes Bell
ROBERT HOLMES BELL
UNITED STATES
DISTRICT JUDGE

[10] Plaintiff seeks discovery of information considered by the EPA during its review of Plaintiff's permit application, in order to determine whether the EPA was biased against the application. (Pl.'s Mot. for Limited Discovery 9-10, ECF No. 25.) That information is not relevant to the motion to dismiss.

Appendix C-1

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

MARQUETTE COUNTY
ROAD COMMISSION,
Plaintiff,

v. File No. 2:15-CV-93

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al., HON. ROBERT HOLMES BELL

Defendants.
_____/

JUDGMENT

In accordance with the Opinion entered this date,

IT IS HEREBY ORDERED THAT Plaintiff's action is **DISMISSED** for failure to state a claim.

Dated: May 18, 2016

/s/ Robert Holmes Bell
ROBERT HOLMES BELL
UNITED STATES
DISTRICT JUDGE

Appendix D-1

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

MARQUETTE COUNTY ROAD COMMISSION,

Plaintiff,

v.

File No. 2:15-CV-93

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Honorable Robert Holmes Bell

Defendants.
_____/

OPINION

On May 18, 2016, the Court granted Defendants' motion to dismiss for failure to state a claim against the Environmental Protection Agency ("EPA") because the EPA's actions were not reviewable under the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 551 *et seq.* (ECF No. 28.) The matter is before the Court on Plaintiff's motion for reconsideration in light of the Supreme Court's decision in *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807 (2016). (ECF No. 31.)

I.

Because the Federal Rules of Civil Procedure do not provide expressly for motions for reconsideration, courts customarily treat them as motions to alter or amend judgment under Federal Rule of Civil

Procedure 59(e). *See Huff v. Metro. Life Ins. Co.*, 678 F.2d 119, 122 (6th Cir. 1982) ("The district court properly treated the motion to reconsider as a motion under Rule 59 to alter or amend judgment."). The Rule provides that "[a] motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment." Fed. R. Civ. P. 59(e). "A district court may grant a Rule 59(e) motion only to (1) correct a clear error of law, (2) account for newly discovered evidence, (3) accommodate an intervening change in the controlling law, or (4) otherwise prevent manifest injustice." *Moore v. Coffee Cty., TN*, 402 F. App'x 107, 108 (6th Cir. 2010). "Rule 59(e) . . . does not permit parties to effectively re-argue a case." *Howard v. United States*, 533 F.3d 472, 475 (6th Cir. 2008).

To succeed on a motion for reconsideration, Plaintiff must "not only demonstrate a palpable defect by which the Court and the parties have been misled, but also show that a different disposition of the case must result from a correction thereof." W.D. Mich. LCivR 7.4(a). "A defect is palpable if it is easily perceptible, plain, obvious, readily visible, noticeable, patent, distinct or manifest." *Witherspoon v. Howes*, No. 1:07-cv-981, 2008 WL 4155350, at *1 (W.D. Mich. Sep. 5, 2008) (citing *Compuware Corp. v. Serena Software Int'l, Inc.*, 77 F. Supp. 2d 816, 819 (E.D. Mich. 1999)). The decision to grant or deny a motion for reconsideration under this Local Rule falls within the district court's discretion. *See Evanston Ins. Co. v. Cogswell Props., LLC*, 683 F.3d 684, 691 (6th Cir. 2012). A motion for reconsideration presents an opportunity for the Court to address an erroneous factual conclusion, because the Court overlooked or misconstrued the record, or to correct a misunderstanding of the law, because the Court

applied the wrong standard, wrong test, relied on bad precedent, or something similar. *Fleet Eng'rs, Inc. v. Mudguard Tech., LLC*, No. 1:12-CV-1143, 2013 WL 12085183, at *1 (W.D. Mich. Dec. 31, 2013). Disagreement with the Court's interpretations of facts, or applications of the correct law, rarely provide a sound basis for a motion for reconsideration. *Id.*

II.

The APA authorizes judicial review of "final agency action for which there is no other adequate remedy in a court[.]" 5 U.S.C. § 704. There are two conditions that must be satisfied in order for an agency action to be considered final under the APA. First, "the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). Second, "the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* However, "[e]ven if final, an agency action is reviewable under the APA only if there are no adequate alternatives to APA review in court." *Hawkes*, 136 S. Ct. at 1815.

Plaintiff relies upon *Hawkes*, a recent Supreme Court decision, to argue that this Court's opinion contains a palpable defect, and that a different disposition of the case must result from a correction thereof. In *Hawkes*, the Supreme Court held that an approved jurisdictional determination ("JD"), which definitively stated the presence or absence of waters of the United States on a particular property, was a final agency action. *Hawkes*, 136 S. Ct. at 1813. Under *Bennett*'s first prong, the Supreme Court held that an

approved JD "clearly 'mark[ed] the consummation' of the Corps' decisionmaking process on that question." *Id.* Further, "the definitive nature of approved JDs also [gave] rise to 'direct and appreciable legal consequences,' thereby satisfying the second prong of *Bennett*[.]" *Id.* at 1814 (quoting *Bennett*, 520 U.S. at 178). The Supreme Court also held that the two alternatives to direct judicial review of an approved JD—either discharge fill material without a permit, risking an EPA enforcement action, or apply for a permit and seek judicial review if dissatisfied with the results—were not adequate. *Id.* at 1815. Therefore, an approved JD was a reviewable final-agency action. *See id.* at 1816 (affirming Eighth Circuit judgment).

A. Consummation of the agency's decisionmaking process

In its motion, Plaintiff equates the EPA's objections with an approved JD. An approved JD is issued after extensive fact-finding by the Corps, and is typically not revisited if the permitting process moves forward. *Id.* at 1814. Although not dispositive, the Corps has described approved JDs as final agency action. *See* 33 CFR § 320.1(a)(6); *Hawkes*, 136 S. Ct. at 1814; *see also Nat'l Assoc. of Home Builders v. U.S. E.P.A.*, 956 F. Supp. 2d 198, 210 (D.C. Cir. 2015). Likewise, the Supreme Court has held that approved JDs are definitive rulings by the Corps. *Id.*

Here, Plaintiff argues that, after permitting authority transfers to the Corps, there is nothing left for the EPA to do. That is not entirely accurate. Indeed, once permitting authority transfers to the Corps, the EPA lacks authority to withdraw its objections and return permitting authority to the

state. *See Friends of Crystal River v. U.S. E.P.A.*, 35 F.3d 1073, 1080 (6th Cir. 1994) ("[T]he [Clean Water Act] specifically provides a time limit in which a state must comply with EPA objections. A failure on the part of the state to so conform within the statutory time limit results in the transfer of authority to the Army Corps. Consequently, we conclude Congress intends to completely divest the original agency of jurisdiction, and vest authority in the Army Corps following expiration of the deadline.").

Nonetheless, the EPA's involvement in the permitting process continues even after the Corps has permitting authority. Under § 404(b), a permit issued by the Corps must specify the disposal sites for dredged or fill material, and § 404(c) permits the EPA Administrator to "prohibit the specification . . . of any defined area as a disposal site . . . whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area . . . will have an unacceptable adverse effect[.]" 33 U.S.C. § 1344(c); *see also* C.F.R. § 323.6(b) (implement § 1344(c)). Thus, the EPA has statutory authority to object to the permit's specification of a defined area as a disposal site. Further, when the Corps reviews a permit application, it will likely seek input from the EPA. *See* 33 C.F.R. § 384.5 (noting that Corps officials consult with and seek advice from all other substantially-affected federal agencies).

Plaintiff urges the Court to review the actions of the EPA and the Corps separately. The APA defines "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[.]" 5 U.S.C. § 551(1). It defines "agency action" to include "the

whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act[.]" 5 U.S.C. § 551(13). Plaintiff argues that, Congress's use of the word "each" shows that, for the purpose of determining final agency action, the EPA is to be regarded and treated separately from the Corps. *See* Oxford English Dictionary 16 (2d ed. 1989) (defining each to mean "every (individual of a number) regarded or treated separately"). Further, Congress's use of the phrase "whether or not it is within or subject to review by another agency" supports this approach. However, looking solely at the EPA, its involvement is not complete once permitting authority transfers to the Corps; it retains veto power under § 404(c).

Moreover, Plaintiff's interpretation would contravene congressional intent by essentially ignoring the Corps' permitting authority to allow applicants immediate access to judicial review. The Clean Water Act ("CWA"), 33 U.S.C. §§ 1251 *et seq.*, draws a clear distinction between final agency actions that resolve the permitting process—the issuance or denial of the permit by either the state or the Corps—and intermediate actions that require its continuation—the EPA's objections and the failure of the state to timely issue or deny the permit. *See Crystal River*, 35 F.3d at 1079. Congress created an ongoing permitting process, the final result of which is the issuance or denial of a permit, not the EPA's objections. Further, both the Corps is not bound by these objections. Rather, these objections are simply "advisory in nature" and do not resolve the pending permit request. *See Hawkes*, 136 S. Ct. at 1813 (noting the difference between an approved JD and a preliminary JD).

In addition, *Bennett*'s first prong was not at issue in *Hawkes*. *Hawkes*, 136 S. Ct. at 1813 ("[T]he Corps [did] not dispute that an approved JD satisfie[d] the first *Bennett* condition."). As such, *Hawkes* does not provide an intervening change in controlling law with respect to this prong. Therefore, Plaintiff has failed to satisfy its burden of demonstrating a palpable defect by which the Court and the parties were misled, and it has not shown that a different disposition of the case must result.

B. Legal consequences

To determine whether there was a legal consequence under *Bennett*'s second prong, the Supreme Court has examined whether the opposite result would have a legal consequence. *Hawkes*, 136 S. Ct. at 1814. An affirmative JD was at issue in *Hawkes*. The Court assessed whether a negative JD, a determination that a property did not contain waters of the United States, had legal consequences. Under a Corps and EPA memorandum of agreement, a negative JD was binding on both agencies, "creating a five-year safe harbor from [enforcement] proceedings [under the CWA] for a property owner." *Id.* at 1814. Thus, the Court held that, because an affirmative JD represented the denial of the five-year safe harbor that negative JDs afford, an affirmative JD had legal consequences. *Id.* (citing 5 U.S.C. § 551(13)).

Plaintiff analogizes a negative JD to the situation where the EPA concurs with the state's issuance of a proposed § 404 permit. If the EPA concurs, the applicant would receive a state permit, with the force and effect of both state and federal law, which is binding for five years. Likewise, Plaintiff

argues that the EPA's objections had real and appreciable legal consequences because the EPA deprived Plaintiff of the proposed state permit and obligated Plaintiff to go through the Corps' permitting process. Similar to an affirmative JD, the EPA's objections divested Plaintiff of the permit proposed by the state and created the need for Plaintiff to seek a permit from the Corps.

Defendant argues that delaying or requiring an applicant to continue through the full administrative process is not a legal consequence. Further, the situation in *Hawkes* is distinguishable from the permitting process at issue here. In *Hawkes*, as a result of the memorandum of agreement, a negative JD bound both agencies to a five-year safe harbor from enforcement proceedings. *Hawkes*, 136 S. Ct. at 1814. Thus, a negative JD "both narrow[ed] the field of potential plaintiffs and limit[ed] the potential liability a landowner faces for discharging pollutants without a permit. Each of those effects is a 'legal consequence[]' satisfying the second *Bennett* prong." *Id.* Consequently, an affirmative JD, which was also binding for five years, amounted to a conclusive denial of that five-year safe harbor period.

In contrast, here, Plaintiff's permit has not been denied. In Plaintiff's own words, the EPA's objections "created the need for Plaintiff to seek a permit from the Corps." (ECF No. 32, PageID.2017.) This is not a legal consequence. *See FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 242 (1980) (noting that complying with administrative proceedings "is different in kind and legal effect from the burdens attending what heretofore has been considered to be final agency action"). Plaintiff must simply continue

with the administrative process. There has been no conclusive denial of the permit. In fact, there has been no definitive decision by any permitting authority as to whether, or under what conditions, Plaintiff should receive a permit. Therefore, Plaintiff has failed to show a palpable defect upon which the Court was misled and whose correction requires a different disposition in the case.

C. Adequacy of alternatives

Plaintiff also argues that the availability of obtaining a permit from the Corps is relevant to the Court's determination of whether there exists an adequate alternative remedy at law. Plaintiff relies on *Hawkes* to argue that obtaining a permit from the Corps is not an adequate alternative. In *Hawkes*, the Supreme Court held that "it [was not] an adequate alternative to APA review for a landowner to apply for a permit and then seek judicial review in the event of an unfavorable decision [of a JD]." *Hawkes*, 136 S. Ct. at 1815. Plaintiff relies upon the Supreme Court's language that the Corps' process can be "arduous, expensive, and long" to argue that a Corps permit is not an adequate alternative remedy to judicial review. *See id.* at 1815.

Again, *Hawkes* is distinguishable from this case. In the event of an unfavorable decision regarding a JD, the landowner could apply for a permit and seek judicial review of its denial. The permit was a separate, alternative remedy to the JD decision. Here, the permit itself is at issue. In other words, a permit from the Corps is not an alternative; it is the very thing that Plaintiff sought from the state. Accordingly, Plaintiff has failed to demonstrate a palpable defect,

in light of *Hawkes*, whose correction requires a different disposition of the case.

D. Other grounds for reconsideration

Plaintiff's remaining claims simply raise the same arguments that this Court has already rejected. Under Local Rule 7.4(a), the Court need not address the substance of these arguments. W.D. Mich. LR 7.4(a) ("[M]otions for reconsideration which merely present the same issues ruled upon by the Court shall not be granted."). Therefore, the Court denies Plaintiff's motion for reconsideration of those claims. *See, e.g., Savage v. United States*, 102 F. App'x 20, 22-23 (6th Cir. 2004) (affirming the district court's denial of a motion for reconsideration because the movant "essentially reasserted the issues raised" previously); *Graham ex rel. Estate of Graham v. Cty. of Washtenaw*, 358 F.3d 377, 385-86 (6th Cir. 2004) (affirming the district court's denial of the motion for reconsideration because it "merely raised arguments that were already ruled upon; it failed to show either a reason justifying relief from the judgment or a palpable defect by which the court was misled").

IV.

The Supreme Court has instructed courts to apply the APA's finality requirement in a "flexible" and "pragmatic" way. *Abbott Labs. v. Gardner*, 387 U.S. 136, 149-50 (1967). But this flexible and pragmatic approach should not be used to contravene the administrative process that Congress created in the CWA. Plaintiff relies on the presumption of judicial review of agency action, but that presumption applies only to *final* agency action. *Hawkes*, 136 S. Ct.

at 1811 (quoting *Sackett v. EPA*, 132 S. Ct. 1367, 1373 (2012)).

Further, *Hawkes* did not fundamentally alter *Bennett*'s requirements for final agency action. Plaintiff has not shown a plain or obvious error in the Court's decision. At most, Plaintiff has shown that it disagrees with the Court's interpretation of fact and law. In light of *Hawkes*, Plaintiff has failed to show a palpable defect in the Court's decision, and that a different disposition of the case must result. Therefore, the Court denies Plaintiff's motion for reconsideration.

An order will enter in accordance with this opinion.

Dated: December 14, 2016 /s/ Robert Holmes Bell
ROBERT HOLMES BELL
UNITED STATES
DISTRICT JUDGE

Appendix E-1

FILED
May 29, 2018
DEBORAH S. HUNT, Clerk

No. 17-1154

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARQUETTE COUNTY
ROAD COMMISSION,

Plaintiff-Appellant,

v. ORDER

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, et al.,

Defendants-Appellees.

BEFORE: BATCHELDER, GRIFFIN, and WHITE, Circuit Judges.

This court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY THE COURT

[Signature]
Deborah S. Hunt, Clerk

MARQUETTE COUNTY ROAD COMMISSION,

Plaintiff,

v. Case No.:

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.

_____/

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff, Marquette County Road Commission ("MCRC"), hereby brings this action for declaratory and injunctive relief against the United States Environmental Protection Agency, Susan Hedman, in her official capacity as Administrator of Region V of the United States Environmental Protection Agency (collectively, "USEPA"), and the United States Army Corps of Engineers (the "Corps") pursuant to the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251, *et seq.*, and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551, *et seq.* In support of its Complaint, MCRC alleges as follows:

Appendix F-2

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Appendix F-5

INTRODUCTION

1. This case involves the unlawful and predetermined efforts of Defendants USEPA and the Corps to block the permitting and construction of a critical primary county road in northwestern Marquette County ("CR 595") that, according to detailed traffic studies, would have improved the health, safety, and welfare of the residents of Marquette County by reducing dangerous heavy truck traffic through highly populated residential, commercial, and educational areas of the County's three largest cities.

2. In order to build CR 595, MCRC needed to obtain a permit to fill approximately 25 acres of wetlands from the Michigan Department of Environmental Quality ("MDEQ"), the state agency responsible for implementing Michigan's federally-approved CWA wetland program. Because USEPA retains authority to oversee MDEQ's processing of applications that impact more than one acre of wetland, MCRC also needed to gain approval from USEPA. As such, on August 18, 2011, MCRC formally notified both MDEQ and USEPA of its intention to submit an application for a wetland fill permit and requested a "pre-application" meeting to discuss the project with the state and federal agencies.

3. While MCRC was still preparing its application, however, top USEPA officials in Washington, DC surreptitiously met with a number of environmental activists vocally opposed to the road and determined that MCRC's forthcoming permit application should be denied and that any attempt by

MDEQ to grant the permit application would be blocked by USEPA.

4. Indeed, documents recently released by USEPA pursuant to a Freedom of Information Act ("FOIA") request reveal that shortly after MCRC submitted its pre-application meeting request -- but before MCRC filed its actual permit application -- USEPA met with several environmental activists and political operatives and "definitively" avowed to oppose MCRC's forthcoming application no matter what occurred during the application process.

5. In particular, a letter sent to the Office of Senator Barbara Boxer by the prominent environmental activist, Dr. Laura Farwell, recounts the details of an August 30, 2011 meeting held at USEPA Headquarters during which the head of USEPA's Office of Wetlands, Oceans and Watersheds is reported to have "**definitively reiterated EPA's position**" to Farwell and others that "**the haul road [(i.e., CR 595)] would not happen.**" (*See* 11/28/12 Farwell Letter, attached as **Exhibit 1** (emphasis added).)

6. On October 6, 2011, unaware that top USEPA officials were already determined to make sure that the construction of CR 595 "would not happen," MCRC submitted a detailed and fully documented permit application (the "CR 595 Application") to MDEQ. The state agency, as required, then sent copies of the Application to USEPA, the Corps, and United States Fish and Wildlife Service ("USFWS").

7. After consulting with the Corps and USFWS, who had also been lobbied by the same group of environmental activists opposed to the road, USEPA followed its predetermined plan and lodged a number of unsupported and vague objections to the CR 595 Application on the ostensible basis that the Application purportedly failed to satisfy Section 404 of the CWA, 33 U.S.C. § 1344, and the 404(b)(1) guidelines, 40 C.F.R. §§ 230.1 *et seq*. Moreover, in contravention of its statutorily imposed duty, USEPA repeatedly refused to identify what permit conditions would be necessary for its objections to be satisfied; leaving MCRC to guess what it needed to do to obtain the requested permit.

8. MCRC, nevertheless, worked diligently with MDEQ in an effort to timely resolve what it perceived to be USEPA's objections. By way of example, MCRC provided numerous detailed explanations of its voluminous Application verbally and in writing, substantially revised its Application several times, and, most notably, increased its wetland mitigation proposal to preserve in perpetuity, via binding conservation easement, 1,576 acres of high-quality wetlands and uplands, 4.3 miles of streams, and two lakes; representing an unprecedented 63:1 mitigation ratio.

9. Certain that MCRC's revised CR 595 Application complied with all state and federal laws, MDEQ stated, in writing, its intention to grant the permit and urged USEPA to withdraw its objections.

10. On December 4, 2012, in a letter to MDEQ, USEPA withdrew many of its existing objections, but then, in conformance with its predetermined plan,

arbitrarily lodged an entirely new series of objections that were both intentionally vague and unsupported by law.

11. Despite the fact that USEPA provided only 30 days for MCRC and MDEQ to resolve these new objections and despite the CWA's clear mandate requiring USEPA to list the necessary permit conditions, USEPA again failed to identify what particular permit conditions would be necessary for the proposed permit to issue. Worse yet, USEPA repeatedly ignored, evaded, and/or deflected MCRC's numerous written and verbal pleas for guidance as to what application revisions USEPA deemed necessary for the new objections to be withdrawn.

12. Although there was a substantial amount of uncertainty regarding what revisions and commitments USEPA would accept, MCRC worked diligently over the course of the next three weeks and responded to USEPA's new objections by way of a December 27, 2012 letter. The letter was comprehensive, positively addressed each of USEPA's purported concerns on a point-by-point basis, and demonstrated that the CR 595 Application complied with all applicable state and federal laws.

13. Rather than reply to the detailed letter and provide a reasoned response to MCRC's efforts, USEPA kept good on its promise to the environmental activists to ensure that the "haul road would not happen," and simply let the 30-day deadline expire.

14. As a result, the CR 595 Application transferred, by statute, to the Corps who, contrary to its own regulations, failed to take any action on the

pending Application and instead took the position that MCRC would need to file an entirely new permit application with the Corps.

15. In anticipation that MCRC might try to file an entirely new permit application with the Corps, another recently released FOIA document reveals that one of the USEPA officials responsible for the USEPA's denial of the CR 595 Application wrote sarcastically to the Corps official who authored the Corps' objections to the CR 595 Application stating that it "**looks like 'they' want to go to the COE for a permit for 595, EPA is such a job killer . . . . hope the COE is more reasonable.**" (*See* 09/10/13 Elston Email, attached as **Exhibit 2** (emphasis added).)

16. USEPA's December 4, 2012 objection letter and refusal to consider MCRC's timely response thereto (the "Final Decision") had the effect of an outright denial of the CR 595 Application and constitutes in a final reviewable agency action because it: (a) barred MDEQ from granting the requested permit under the CWA; (b) ended MDEQ's assumed authority over the Application; and (c) required MCRC to go through the burdensome, costly, time consuming, and futile exercise of submitting an entirely new permit application to the Corps, who had previously aided in the formation of and in fact joined in the USEPA's Final Decision.

17. As a result of USEPA's unlawful Final Decision, MCRC is unable to construct a critical road aimed at reducing dangerous heavy truck traffic through highly populated residential, commercial, and educational areas in Marquette County. USEPA's

unlawful Final Decision also improperly subjected MCRC to a burdensome and futile permitting process with the Corps.

18. For the following reasons, among others, MCRC now asks this Court to set aside USEPA's Final Decision because it was arbitrary, capricious, an abuse of discretion, in excess of statutory authority, made without observance of congressionally prescribed procedure, unsupported by fact, and/or otherwise not in accordance with law.

19. First, the CR 595 Application fully complied with both Section 404 of the CWA and the 404(b)(1) guidelines where it demonstrated, inter alia, that:

a. MCRC's team of seasoned environmental experts properly assessed the proposed road's cumulative direct and secondary effects on the aquatic ecosystem to the extent reasonable and practicable;

b. CR 595 was the least environmentally damaging practical alternative capable of achieving the project's very legitimate purpose of, inter alia, reducing dangerous heavy truck traffic through more highly populated residential, commercial, and educational areas;

c. The design and route of CR 595 utilized state-of-the-art methodologies and best practices to avoid and minimize aquatic impacts to the greatest extent practicable;

d. MCRC's stream mitigation proposal to enhance/restore over 11,000 linear feet of stream and make several other stream improvements adequately compensated for the unavoidable impact to approximately 2,300 linear feet of stream; and

e. MCRC's wetland mitigation proposal to preserve in perpetuity, via binding conservation easement, 1,576 contiguous acres of land, including 647 acres of high-quality wetlands, 929 acres of upland buffers, two lakes, and 4.3 miles of streams, adequately compensated for the unavoidable impact of a mere 25 acres of jurisdictional and non-jurisdictional wetlands.

20. *Second*, USEPA exceeded its congressionally-delegated authority under Section 404(j)(2)(B) of the CWA because none of the terms set forth in the Application were "outside the requirements" of Section 404 of the CWA or the 404(b)(1) guidelines. Rather than focus on the actual "requirements" of Section 404 of the CWA or the 404(b)(1) guidelines, USEPA's Final Decision was based on impacts *unrelated* to the aquatic ecosystem, optional aspects of the 404(b)(1) guidelines, and clear bias against the project.

21. *Third*, USEPA arbitrarily failed to adequately explain the reasons for its Final Decision or list the conditions which the permit would need to include if it were issued by the USEPA as mandated by Section 404(j)(2)(B) of the CWA. This statutory violation was further exacerbated by USEPA's staunch refusal, despite numerous requests, to advise

MCRC what conditions the permit would need to include in order to be issued.

22. *Fourth*, by asserting wholly new grounds in support of its December 4, 2012 decision, but nevertheless demanding that MDEQ either resolve these new objections or deny the permit within 30 days, USEPA failed to comply with the public hearing and temporal requirements of Section 404(j)(2)(B) of the CWA.

23. MCRC thus seeks: (a) a declaration that the USEPA's Final Decision was arbitrary and capricious and issued in violation of Section 404(j) of the CWA; (b) an order setting aside USEPA's Final Decision and restoring MDEQ's assumed authority over the CR 595 Application; and (c) an injunction prohibiting USEPA from further objecting to or interfering with MDEQ's processing of the CR 595 Application.

24. MCRC also seeks review of the Corps' failure to take any action on the CR 595 Application in violation of the mandates of Section 404(j) of the CWA and USEPA's 404 State Program Regulations which required the Corps to process the transferred CR 595 Application as submitted to MDEQ. See 33 U.S.C. 1344(j); 40 C.F.R. § 233.50(h)(2), (j).

25. The Corps' failure to take any action on the CR 595 Application constituted an impermissible constructive denial (presumably based upon the Corps' and the USEPA's past objections which were arbitrary and capricious) and violated the Corps' 404 Permit Processing Regulations which, among other things, require all Corps permit denials to be in

writing. *See* 33 C.F.R. §§ 320.1 *et seq.*; 33 C.F.R. §§ 331.4, 331.6, and 331.12.

26. As a result of the Corps' unlawful constructive denial of the CR 595 Application, MCRC is unable to construct a critical road in Marquette County aimed at reducing dangerous heavy truck traffic through highly populated residential, commercial, and educational areas.

27. MCRC thus seeks: (a) a declaration that the Corps' failure to take any action whatsoever with respect to the CR 595 Application violated Section 404(j) of the CWA, the USEPA's regulations, and the Corps' regulations, and constituted an impermissible constructive denial of the CR 595 Application that was arbitrary and capricious; (b) an order setting aside the Corps' constructive denial of the CR 595 Application and directing the Corps to grant the permit in the form previously found sufficient by MDEQ; and (c) an injunction prohibiting USEPA from further objecting to or interfering with the permit as issued.

28. Without this Court's review, the unlawful actions of the USEPA and Corps will be forever shielded from judicial review and MCRC will be left with no other means to protect and enforce its rights under the CWA and APA.

PARTIES

29. Plaintiff MCRC is a body corporate established pursuant to Michigan's County Road Law, MCL 224.1 *et seq.*, responsible for the safe and efficient management of the Marquette County road system, vested by the State of Michigan with the

authority to sue and be sued, and located at 1610 North 2nd Street, Ishpeming, Michigan 49849.

30. Defendant USEPA is an agency of the United States established pursuant to Reorganization Plan No. 3 of 1970, 84 Stat. 2086. USEPA is the primary federal agency responsible for overseeing Michigan's assumption of Section 404 of the CWA.

31. Defendant Susan Hedman is the Administrator of Region 5 of the USEPA and, upon information and belief, was one of the USEPA officials directly responsible for USEPA's Final Decision in this case.

32. Defendant Corps is a branch of the Department of the Army and an agency of the United States. The Corps is the primary federal agency responsible for processing wetland permit applications subject to an unresolved USEPA objection.

JURISDICTION AND VENUE

33. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction); 28 U.S.C. § 2201 (authorizing declaratory relief); 28 U.S.C. § 2202 (authorizing further "necessary or proper relief"); and 5 U.S.C. § 702 (providing for judicial review of agency action under the APA).

34. The property over which the road was to be built and the wetlands which were proposed to be filled are situated in Marquette County, Michigan. Accordingly, venue in this judicial district is proper under 28 U.S.C. § 1391(e)(1)(B).

LEGAL BACKGROUND

A. State Assumption Under Section 404 Of The Clean Water Act

35. In 1972, Congress amended the Federal Water Pollution Control Act, commonly known as the CWA, to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

36. To accomplish this goal, Congress prohibited the discharge of any pollutant (including dredge and fill material) into navigable waters of the United States (including certain adjacent wetlands) unless done in compliance with a permit issued under the CWA. *Id.* §§ 1311(a), 1362(7), (12).

37. Congress then authorized the Corps to issue permits for the discharge of dredged and fill material into navigable waters by enacting Section 404 of the CWA. *Id.* § 1344; *see also* 33 C.F.R. § 320.2; 33 C.F.R. § 323.3(a)

38. The CWA imposes heavy civil and criminal penalties on persons who discharge fill into navigable waters without a permit or in violation of a permit. *Id.* § 1319.

39. In 1977, Congress recognized that the States should have the primary right and responsibility over the development and use of land and water resources and thus expressed its intention for States to implement Section 404 of the CWA. *Id.* § 1251(b) (added by P.L. 95-217 §§ 5(a), (December 27, 1977)).

40. Specifically, Congress allowed States desiring to administer their own permit program for the discharge of fill into navigable waters to submit to USEPA a complete description of the program they proposed to establish and administer under State law ("404 Program"). *Id.* § 1344(G) (added by P.L. 95-217 § 67 (December 27, 1977); *see also* 40 C.F.R. 233.1 *et seq.*

41. If a State's proposed 404 Program met certain prescribed statutory requirements, including that the State had authority to issue permits in compliance with Section 404 of the CWA and the 404(b)(1) guidelines, Congress directed USEPA to approve the State's 404 Program and notify the Corps. *Id.* § 1344(H)(2)(A) (added by P.L. 95-217 § 67 (December 27, 1977); *see also* 40 C.F.R. § 233.15; 33 C.F.R. § 323.5.

42. Congress nevertheless established a detailed process in Section 404(j) of the CWA for USEPA to oversee State 404 Programs:

a. *First,* a State administrating its own 404 Program is required to transmit to USEPA a copy of each permit application received by such State and provide notice to USEPA of every action related to the consideration of such permit application, including each permit proposed to be issued by such State. *Id.* § 1344(j); *see also* 40 C.F.R. § 233.50(a).

b. *Second,* within 10 days of receiving such permit application, USEPA is required to provide copies of such permit application to the Corps and the USFWS who, in turn, may

provide comments to USEPA on the permit application. *Id.*; *see also* 40 C.F.R. § 233.50(b).

c. *Third*, if USEPA intends to provide written comments on a permit application, USEPA must notify the State within 30 days of receiving the permit application and provide such written comments to the State, after consideration of any comments made in writing by the Corps and/or the USFWS, within 90 days of receiving the permit application. If such State is so notified by USEPA, it may not issue the proposed permit until after the receipt of such comments from USEPA, or after 90 days have elapsed, whichever first occurs. *Id.*; *see also* 40 C.F.R. § 233.50(d).

d. *Fourth*, a State may not issue a proposed permit if it receives such written comment in which USEPA objects to the issuance of such proposed permit as being outside the requirements of Section 404, including, but not limited to, the guidelines developed under Section 404(b)(1) unless the State modifies such proposed permit in accordance with such comments. *Id.*; *see also* 40 C.F.R. §§ 233.20(b), 50(f).

e. *Fifth*, whenever USEPA objects to the issuance of a permit, such written objection must contain a statement of the reasons for such objection and the conditions which such permit would include if it were issued by USEPA. *Id.*; *see also* 40 C.F.R. § 233.50(e).

f. *Sixth*, in any case where USEPA objects to the issuance of a permit, on request of the State, a public hearing shall be held by USEPA on its objection. *Id.*; *see also* 40 C.F.R. § 233.50(g).

g. *Seventh*, if a public hearing is held, USEPA shall, following that hearing, reaffirm, modify, or withdraw its objections and notify the State of this decision. 40 C.F.R. § 233.50(h). This provision, however, is contained only in USEPA regulations and is inconsistent with Section 404(j) of the CWA. Nothing in the CWA allows USEPA to modify or issue new objections after the deadline for objecting or after public comment.

h. *Eighth*, if the State does not resubmit such permit revised to meet USEPA's objection within 30 days after completion of the hearing or, if no hearing is held, within 90 days of the objection, the Corps may issue the permit. 33 U.S.C. § 1344(j); *see also* 40 C.F.R. § 233.50(h)(2), (j).

43. When interpreting Section 404(j) and other provisions within the CWA, Congress demanded that "to the maximum extent possible the procedures utilized for implementing [Section 404] shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government." 33 U.S.C. § 1251(f).

B. The 404(b)(1) Guidelines

44. Section 404(h)(1)(A) of the CWA requires that all State-issued 404 permits assure compliance with the 404(b)(1) guidelines (the "Guidelines"). 33 U.S.C. 1344(h)(1)(A); *see also* 40 C.F.R. § 230.2(a)(3).

1. Assessment Of Direct And Secondary Effects On The Aquatic Ecosystem

45. The 404(b)(1) guidelines require an assessment of a proposed discharge's cumulative "direct" and "secondary effects" on the physical, chemical, and biological components of the "aquatic ecosystem" to the extent "reasonable and practicable." 40 C.F.R. § 230.11.

46. "Direct effects" are the short-term and long-term effects of a discharge of dredged or fill material on: (a) the physical substrate at the disposal site; (b) water, current patterns, circulation including downstream flows, and normal water fluctuation; (c) the kinds and concentrations of suspended particulate/turbidity in the vicinity of the disposal site; (d) the introduction of contaminants into the aquatic ecosystem; and (e) the structure and function of the aquatic ecosystem and organisms. *Id.* § 230.11(a)-(f).

47. "Secondary effects" are the effects on an "aquatic ecosystem" that are associated with a discharge of dredged or fill materials, but do not result from the actual placement of the dredged or fill material. *Id.* § 230.11(h)(1). Examples of secondary effects include fluctuating water levels, septic tank leaching, and surface runoff. *Id.* § 230.11(h)(2).

48. "Direct" and "secondary effects" do not extend beyond the "aquatic ecosystem" or to separate features of a project that are not themselves built upon a "disposal site."

49. "Aquatic ecosystem" means waters of the United States, including wetlands but not including groundwater, id. § 230.3(c), and "disposal site" means the portion of the waters of the United States where specific disposal activities are permitted, *id.* § 230.3(i).

50. To be "reasonable" an action must be non-speculative and feasible of being done. To be "practicable" an action must be "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." *Id.* § 230.3(q). As such, the Guidelines do not require assessment of speculative effects on the aquatic ecosystem that are not reasonably foreseeable.

2. The Least Environmentally Damaging Practicable Alternative To Achieve The Project Purpose

51. The Guidelines prohibit the discharge of dredged or fill material if there is a "practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem." *Id.* § 230.10(a)(1). This requirement is commonly known as the Least Environmentally Damaging Practicable Alternative ("LEDPA").

52. "An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." *Id.* § 230.10(a)(2).

Thus, in performing a LEDPA analysis, the permitting authority has a duty to consider the applicant's project purpose, if genuine and legitimate, and may not substitute a purpose it deems more suitable.

53. When considering potential practicable alternatives, the permitting authority may base its decision on information exclusively provided by the applicant and consider facts related to reduction of traffic congestion, increased safety, serving local needs, personal accessibility for local residents and communities, and enhancing local economic development.

54. With respect to road and highway projects, federal and state permitting agencies routinely recognize that alternative routes may not be practicable where they are cost prohibitive, create traffic problems, generate safety concerns, run through residential areas, present logistical hauling problems, and pose design, engineering, and maintenance difficulties.

3. Significant Degradation Of Waters Of The United States

55. The Guidelines prohibit discharges that "will cause or contribute to significant degradation of the waters of the United States." *Id.* § 230.10(c).

56. Because this provision is limited to "degradation of waters of the United States," the scope of its inquiry is limited to the effects of a discharge on the "aquatic ecosystem." *Id.*

57. Because the term "significant" means "important, major, or consequential," this provision trades off some degradation of the aquatic ecosystem for economic, industrial, and recreational development. *Id.*

58. Effects contributing to significant degradation of the aquatic ecosystem include significantly adverse effects of the discharge of pollutants on: (a) human health or welfare; (b) life stages of aquatic life and other wildlife dependent on aquatic ecosystem; (c) aquatic ecosystem diversity, productivity, and stability; and (d) recreational, aesthetic, and economic values. *Id.*

59. Findings of significant degradation related to a proposed discharge must be based upon appropriate factual determinations, evaluations, and tests set forth in Subparts B and G of the Guidelines. *Id.*

4. Appropriate And Practicable Minimization Of Impacts On The Aquatic Ecosystem

60. The Guidelines prohibit the discharge of dredged or fill material "unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystems" based on the specialized methods of minimization of impacts in Subpart H of the Guidelines. *Id.* § 230.10(d) (emphasis added); *see also* 40 C.F.R. § 230.5(j).

61. Because the Guidelines only require that "appropriate and practicable steps" be undertaken to minimize adverse impacts to the aquatic ecosystem,

the Guidelines do not require that adverse effects be "completely offset."

62. Subpart H of the Guidelines delimit the ways an applicant may minimize adverse impacts on the aquatic ecosystems from discharges. *Id.* §§ 230.70 *et seq.*

63. These minimization mechanisms focus on the location of discharge, material to be discharged, control and dispersion of discharge, technology used to control runoff and avoid filling unique habitat, and reducing obstruction to water flows. *Id.*

64. Such minimization mechanisms do not include long-term monitoring, wildlife crossings and fencing, using conservation easements to prohibit future development in surrounding areas, and other measures that are unrelated to the actual discharge into waters of the United States. *Id.*

5. Compensatory Mitigation

65. Subpart J of the Guidelines govern the standards and criteria for the use of all types of compensatory mitigation, including on-site and off-site permittee-responsible mitigation. *Id.* § 230.91(a).[1]

66. The Guidelines state that "[c]ompensatory mitigation for unavoidable impacts may be required to ensure that an activity requiring a section 404 permit

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[1] Section 314(b) of the 2004 National Defense Authorization Act (Pub. L. 108-136), directed the Corps to promulgate standards that, to the maximum extent practicable, maximize available opportunities for mitigation, provide for regional variations in wetland conditions, functions, and values, and apply equivalent standards and criteria to each type of compensatory mitigation.

complies with the Section 404(b)(1) Guidelines." *Id.* § 230.91(c)(3).

a. The Amount And Type Of Mitigation

67. Compensatory mitigation requirements must be "commensurate" with the amount and type of impact to the aquatic ecosystem that is caused by the permitted activity. *Id.* § 230.93(a)(1).

68. A permitting authority's determination of what type of mitigation should be required must be based on what is "practicable and capable of compensating for the aquatic resource functions that will be lost as a result of the permitted activity." *Id.*

69. In making this determination, the permitting authority must assess the likelihood for ecological success and sustainability, the location of the compensation site relative to the impact site and their significance within the watershed, and the costs of the compensatory mitigation project. *Id.*

70. The permitting authority "shall account for regional characteristics of aquatic resource types, functions and services when determining performance standards and monitoring requirements for compensatory mitigation projects." *Id.* § 230.91(c)(3).

71. "The amount of required compensatory mitigation must be, to the extent practicable, sufficient to replace lost aquatic resource functions. In cases where appropriate functional or condition assessment methods or other suitable metrics are available, these methods should be used where practicable to determine how much compensatory mitigation is required." *Id.* § 230.93(f)(1). However,

"[i]f a functional or condition assessment or other suitable metric is not used, a minimum one-to-one acreage or linear foot compensation ratio must be used." *Id.*

72. Federal courts routinely uphold the use of 1:1 or 2:1 mitigation ratios and the majority of wetland mitigation banks in the United States use a 1:1 ratio. Furthermore, in 2003, the Corps' entire Nationwide 404 Program had the potential to achieve 1.2 acres of wetland creation or restoration for every 1 acre of impacted wetland.

73. A permitting authority, however, must require a mitigation ratio greater than one- to-one where necessary to account for, among other things, the method of mitigation and the likelihood of success. *Id.* § 230.93(f)(2).

74. "The rationale for the required replacement ratio must be documented in the administrative record for the permit action." *Id.*

b. Mitigation By Preservation

75. Mitigation may be performed using the methods of restoration, enhancement, establishment, and in certain circumstances preservation. *Id.* § 230.93(a)(3).

76. Preservation means the removal of a threat to, or preventing the decline of, aquatic resources through the implementation of appropriate legal and physical mechanisms. *Id.* § 230.92.

77. Preservation may be used when the resources to be preserved: (a) provide important physical, chemical, or biological functions for the

watershed; (b) contribute significantly to the ecological sustainability of the watershed; (c) is appropriate and practicable; (d) are under threat of destruction or adverse modifications; and (e) will be permanently protected through an appropriate real estate or other legal instrument. *Id.* § 230.93(h).

78. The permitting authority "may require the restoration, establishment, enhancement, and preservation, as well as the maintenance, of riparian areas and/or buffers around aquatic resources where necessary to ensure the long-term viability of those resources." *Id.* § 230.93(i). However, if buffers are included, mitigation credit must be provided for those buffers. *Id.*

79. By way of example, the Corps' own wetland preservation guidance for Wisconsin and Minnesota uses wetland preservation ratios of 8:1 for high-quality preservation wetlands and 10:1 for low-quality preservation wetlands. This guidance also calls for upland preservation ratios of 4:1 for high-quality preservation uplands and 10:1 for low-quality preservation uplands.

c. Mitigation Permit Conditions

80. The Guidelines provide a detailed list of the information which should be included in either a mitigation plan or the mitigation conditions of a final permit. *Id.* §§ 230.93(k), 230.94(c)(1)-(14), and 230.96(a)(1).

81. The level of detail of a mitigation plan or mitigation permit conditions, however, need only be commensurate with the scale and scope of the impacts. *Id.* § 230.94(c)(1)(i).

82. With regard to timing, the Guidelines only suggest that "[i]mplementation of the compensatory mitigation project shall be, to the maximum extent practicable, in advance of or concurrent with the activity causing the authorized impacts." *Id.* § 230.93(m).

83. As such, numerous federal courts have held that a complete mitigation plan is not required prior to the issuance of a 404 permit. Rather, a permit conditioned on future implementation of a reasonably complete mitigation plan complies with the CWA.

i. Site Protection Measures

84. The Guidelines require that the aquatic habitats, riparian areas, buffers, and uplands comprising the overall mitigation project be provided long-term protection "through real estate instruments or other available mechanisms, as appropriate." *Id.* § 230.97(a)(1).

85. Appropriate real estate instruments include: (a) conservation easements held by federal, state, or local resource agencies; (b) transfer of title to such entities; or (c) restrictive covenants. *Id.*

86. To provide sufficient site protection, a conservation easement or restrictive covenant should, where practicable, establish in an "appropriate third party" the right to enforce site protections and provide such third party the resources necessary to monitor and enforce these site protections. *Id.*

87. The real estate instrument, management plan, or other mechanism providing long-term protection of the mitigation site must, to the extent

appropriate and practicable, prohibit incompatible uses, such as clear cutting or mineral extraction, that might otherwise jeopardize the objectives of the mitigation project. *Id.* § 230.97(a)(2).

88. A real estate instrument, management plan, or other long-term protection mechanism used for site protection need only be approved concurrent with the activity causing the authorized impacts. *Id.* § 230.97(a)(5).

ii. Long-Term Monitoring

89. The Guidelines require that mitigation plans address the monitoring requirements for the project, including the parameters to be monitored, the length of the monitoring period, the party responsible for conducting the monitoring, the frequency for submitting monitoring reports to the permitting authority, and the party responsible for submitting those monitoring reports. *Id.* § 230.96(a)(1).

90. A permitting authority, however, may extend the original monitoring period and/or revise monitoring requirements when remediation and/or adaptive management is required. *Id.* § 230.96(a)(2). As such, final detailed monitoring requirements are not needed prior to permit issuance.

iii. Financial Assurances

91. The Guidelines require that a permitting authority "require sufficient financial assurances to ensure a high level of confidence that the compensatory mitigation project will be successfully completed in accordance with applicable performance standards." *Id.* § 230.93(n).

92. However, in cases where a "formal, documented commitment from a government agency or public authority" is available to ensure a high level of confidence that the mitigation will be provided and maintained, a permitting authority may determine that financial assurances are not necessary for that mitigation project. *Id.*

93. Any long-term financing mechanisms need only be approved in advance of the activity causing the authorized impacts. *Id.* § 230.97(d)(4).

C. Michigan's 404 Program

94. In 1979, with the intention of assuming administration of Section 404 of the CWA, the Michigan legislature passed the Geomare-Anderson Wetlands Protection Act, MCL 281.701 *et seq.*, which is now Part 303 of NREPA, MCL 324.30301 *et seq.*

95. On October 16, 1984, Michigan became the first state to receive authorization from USEPA to administer Section 404 of the CWA. 40 C.F.R. § 233.70.

96. Among other laws and agreements, Michigan's 404 Program consists of a November 9, 2011 Memorandum of Agreement between USEPA and MDEQ ("MOA"). *Id.*

97. The MOA waives federal review of the vast majority of permit applications in areas under Michigan's 404 jurisdiction. However, the USEPA, Corps, and USFWS must review projects which impact one or more acres of wetland or over 1,000 feet of stream.

98. For reviewable projects, the MOA requires MDEQ to promptly submit to USEPA the complete permit application; any supplemental materials such as project alternatives, environmental assessments, and mitigation plans; and any public notice and proposed permit so that USEPA has an opportunity to object.

99. If USEPA objects and MDEQ is unable to resolve such objection, the MOA provides that MDEQ may not provide the permit applicant with any authorization under Section 404 of the CWA even if the applicant successfully appeals MDEQ's denial of a permit at a state tribunal or court.

100. At the present time, USEPA reviews about two percent of all wetland permit applications received by MDEQ, and, upon information and belief, has caused only a small number of MDEQ wetland permit applications to be transferred to the Corps for processing in the last 30 years.

101. Relevantly, Michigan Administrative Code Rule 281.925(7)(e), which is also part of Michigan's approved 404 Program, requires use of the following wetland mitigation ratios:

> 5:1 for restoration/creation of rare or imperiled wetlands;
>
> 2:1 for restoration/creation of forested wetlands and some coastal wetlands; 1.5:1 for restoration/creation all other wetlands;
>
> 10:1 for preservation of wetlands.

102. Michigan's regulation allows the permitting authority to increase the mitigation ratio

if the replacement wetland is of a different ecological type than the impacted wetland, or if the adjustment would be beneficial to the wetland resources due to factors specific to the mitigation site or the site of the proposed activity. Mich. Admin. Code R. 281.925(7)(f).

103. The regulation, however, prohibits the permitting authority from increasing or decreasing the mitigation ratio by more than 20 percent on the basis that an adjustment would be beneficial to wetland resources. *Id.*

D. The Corps' Permit Application Processing Regulations

104. Once a complete 404 permit application is received by the Corps, Section 404(a) of the CWA requires the Corps to publish a notice of public hearing within 15 days. 33 U.S.C. § 1344(a); *see also* 33 C.F.R. § 325.3.

105. The Corps then reviews and processes 404 permit applications pursuant to the procedures and authorities set forth at 33 C.F.R. §§ 320, 323, and 325.

106. If the Corps denies an application, such denial is subject to the administrative appeal process contained in 33 C.F.R. § 331.

107. Under this regulatory framework, the Corps is required to provide applicants whose permit applications have been denied with a copy of the decision document, a notification of appeal process fact sheet, and a request for appeal form. 33 C.F.R. § 331.4. The applicant then has 60 days to file its request for appeal. 33 C.F.R. § 331.6.

108. "No affected party may file a legal action in the Federal courts based on a permit denial or a proffered permit until after a final Corps decision has been made and the appellant has exhausted all applicable administrative remedies." 33 C.F.R. § 331.12.

109. The cost of preparing and submitting to the Corps a 404 permit application is often substantial. The United States Supreme Court has reported that the average applicant for an individual Corps permit "spends 788 days and $271,596 in completing the process."

110. The Corps' processing of 404 permit applications for roads or highways routinely takes several years, and in some instances over a decade, to complete. Moreover, the cost of completing this lengthy process is substantial, and especially with respect to 404 permit applications for roads and highways, can cost millions of dollars.

E. The Administrative Procedures Act

111. Complaints challenging agency action under CWA are subject to judicial review under the APA. 5 U.S.C. §§ 701 *et seq*.

112. Section 702 of the APA creates a right to appeal agency action (including the failure to act) and provides, in relevant part, that: "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." *Id.* § 702.

113. Federal courts reviewing final agency action may hold unlawful and set aside agency action, findings, and conclusions found to be: (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (b) contrary to constitutional right, power, privilege, or immunity; (c) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (d) without observance of procedure required by law; and (e) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. *Id.* § 706(2).

114. Federal courts reviewing final agency action may also "compel agency action unlawfully withheld or unreasonably delayed." *Id.* § 706(1).

FACTUAL ALLEGATIONS

A. Woodland Road

1. The Woodland Road Application For Permit

115. In 2007, a group of private property owners, trade associations, local businesses, and others formed Woodland Road LLC for the purpose of constructing a multi-purpose road in Marquette County. (*See* Supporting Documentation for Woodland Road Application for Permit, attached as **Exhibit 3.**)

116. The purpose of this project was to: (a) facilitate the transportation of mining, forest, and aggregate products to and from natural-resource rich areas in northwestern Marquette County; (b) provide the public, private industries, and emergency responders with safe access to and from that area; and (c) reduce heavy haulage trucking on existing public

roads located in more populated areas of Marquette County. (*Id.* at 2.)

117. Over the course of several years, Woodland Road LLC expended significant resources planning and designing a road that would: (a) be the LEDPA capable of achieving the project purpose; and (b) avoid/minimize impacts to wetlands, streams, and wildlife to the greatest practicable extent while utilizing accepted road design standards so as to not compromise public safety. (*Id.* at 1-52, 66-68.)

118. As a result of these efforts, Woodland Road LLC identified a route located primarily on private land that closely followed a set of existing roads and trails and ran 22.3 miles from the Marquette County Triple A Road ("Triple A Road") in Champion Township south to U.S. Highway 41 ("U.S. 41") in Humboldt Township ("Woodland Road"). (*Id.* at 2.)

119. Although nearly all of the upland habitats along the proposed road had been repeatedly logged and/or converted into pine plantations over the last 150 years, Woodland Road LLC conducted comprehensive assessments of the wildlife, streams, and wetlands that would be impacted by the project. (*Id.* at 53-65.)

120. Because Woodland Road could not be built without impacting the aquatic ecosystem, on August 4, 2009, Woodland Road LLC applied to MDEQ for a permit to impact a total of 31.09 acres (later reduced to 27.1 acres) of jurisdictional and non-jurisdictional wetlands ("Woodland Road Application"). (*Id.* at 1-132.)

121. The Woodland Road Application was prepared primarily by King & MacGregor Environmental, Inc. ("KME"), in conjunction with dozens of individuals working for several engineering and environmental firms at a cost of millions of dollars.[2]

122. Jeffery King and Charles Wolverton served as the lead project coordinators for the Woodland Road Application.

a. Mr. King is a professional wetland scientist certified by the Society of Professional Wetlands Scientists and has been recognized as an expert in the field of wetland delineation and permitting by Michigan courts and administrative tribunals. During his 12-year career with the Michigan Department of Natural Resources ("MDNR"), Jeff served as a District Supervisor in each of MDNR's Southern Michigan Districts where he oversaw the permitting of hundreds of wetland fill applications. During his 25-year

[2] KME is an environmental and ecological consulting firm specializing in, among other things: (a) state and federal wetland permitting; (b) wetland delineations and functional assessments; (c) wetland mitigation and monitoring, hydrologic modeling, and invasive species control; (d) rare, threatened, endangered plant and wildlife assessments; and (e) stream assessments and restoration. KME's staff includes a number of regulatory specialists, biologists, botanists, ecologists, arborists and landscape architects who collectively have obtained hundreds of wetland fill permits from the Corps and/or MDEQ without USEPA objection.

career as a consultant, Jeff has served as a member of Michigan's Value Stream Mapping Committee, Michigan Wetland Advisory Council, and the Association of State Wetland Managers.

b. Mr. Wolverton, now retired, is a former professional wetland scientist certified by the Society of Professional Wetlands Scientists and a recognized expert in the field of wetland permitting. During his 16-year career with MDNR, Mr. Wolverton served in several roles including Chief of the Wetland Protection Unit and Project Leader of the National Wetlands Inventory in Michigan. During his 25-year career as a consultant, Mr. Wolverton worked on a diverse array of wetland permitting projects and has designed and supervised construction of more than 1,200 acres of wetlands. He is a former board member of the Society of Wetland Scientists, past member of the Ecological Society of America, and past chairman of the board of directors of Ducks Unlimited Michigan.

123. The Woodland Road Application contained an evaluation of six route alternatives and six route variations and demonstrated that from all of these options Woodland Road was the LEDPA capable of achieving the project purpose. (*Id.* at 1-52.)

124. With the exception of a limited impact to the threatened narrow-leaved gentian plant that

would be mitigated through a permit from MDNR, the detailed wildlife assessments in the Woodland Road Application demonstrated that Woodland Road would not adversely affect any endangered, threatened, or rare: (a) plant species; (b) bird or mammal species that inhabit the aquatic ecosystem; or (c) reptiles, amphibians, or fish species. (*Id.* at 53-65, 70-79.)

125. The Woodland Road Application contained a thorough study of the proposed road's impact on streams (including ecological assessments, stream crossing diagrams, floodplain modeling, and hydraulic calculations) and demonstrated that the proposed road design would protect stream habitat and inhabitants by maintaining the natural stream bottoms, flow, and temperature, and preventing runoff after construction. (*Id.*)

126. The Woodland Road Application contained a comprehensive study of the proposed road's impact on wetlands (including delineation of all wetlands located within, at least, 100 feet of the centerline of the proposed road, wetland impact spreadsheets and cross-section drawings, and profile drawings showing the exact location of all impacted wetlands) and demonstrated that only 31.09 acres (later reduced to 27.10 acres) of jurisdictional and non-jurisdictional forested, shrub/scrub, and emergent wetlands would be impacted. (*Id.*)

127. Although most of the habitat along Woodland Road consisted of plant communities common in the Upper Peninsula and although the unavoidable impact of 31.09 acres of wetland (later reduced to 27.10 acres) was minimal where it would affect far less than 0.01% of Marquette County's

298,648 acres of palustrine wetlands, Woodland Road proposed a comprehensive plan to mitigate and monitor the 27.10 acres of proposed wetland impacts through the restoration of 3.52 acres of impacted wetlands, creation of 52.85 acres of new wetlands, and preservation, via conservation easement to the State of Michigan, of 10 acres of existing high-quality wetlands. (*Id.* at 80-104.)

128. The 66.37 acres of proposed wetland mitigation represented a net gain of wetlands with a selected wetland replacement ratio of 1.5 acres of wetland mitigation for each acre of scrub/shrub and emergent wetland impacted (i.e., 1.5:1); and 2.0 acres of wetland mitigation for each acre of forested wetland impacted (i.e., 2:1). (*Id.*)

129. Woodland Road LLC also proposed a detailed monitoring plan whereby it agreed to monitor the wetland mitigation for a period of five years following the completion of construction, and meet certain performance standards which could be enforced via corrective action imposed by MDEQ. (*Id.*)

2. Public Comment On The Woodland Road Application

130. On December 17, 2009, MDEQ placed the Woodland Road Application on Public Notice and sent copies of the Application to the USEPA, Corps, and USFWS.

131. MDEQ then held a public hearing on the Woodland Road Application at Westwood High School in Ishpeming on February 10, 2010.

132. Numerous public comments supporting and opposing the Woodland Road Application were received by state and federal agencies.

3. Federal Objections To The Woodland Road Application

133. In March of 2010, the USEPA, Corps, and USFWS provided MDEQ with their combined federal comments on and objections to the Woodland Road Application and recommended that MDEQ deny same. (*See* 3/12/10 Corps Letter, 3/15/10 USFWS Letter, and 3/17/10 USEPA Letter, attached collectively as **Exhibit 4**.)

134. *First*, the federal agencies found that the purpose of the road was purportedly to "deliver ore from the proposed Kennecott mine at Eagle Rock for processing" and for that reason the project should be evaluated in conjunction with the permitting of both the Eagle Mine and the Humboldt Mill; not separately. (*Id.*)

135. *Second*, largely ignoring the project purpose and failing to recognize the fact that Woodland Road would be built on or near existing roads and trails, the federal agencies determined that several much longer alternative routes which used existing roads might be the LEDPA because "we expect that hydrologic modification and habitat fragmentation have already occurred in wetlands and streams associated with these routes." The federal agencies also called for a more detailed assessment of the wetland acreages and types that would be impacted by these various route alternatives. (*Id.*)

136. *Third*, the federal agencies found Woodland Road LLC's wetland and wildlife assessments to be insufficient because they did not analyze the: (a) direct effects on wetlands associated with another entity's potential relocation of a snowmobile trail ("Trail 5"); (b) secondary effects on rare wetland communities such as bogs, bog lakes, and wet meadows within the project vicinity; (c) secondary effects to wildlife that might result from year-round traffic; (d) secondary effects to wetlands that might result from the possible introduction of invasive species and pollutants from increased traffic; and (e) secondary effects to wetlands that might result from the possibility that the proposed road could lead to increased development and mining activity in the area. (*Id.*)

137. *Fourth*, the federal agencies objected on the basis that the Woodland Road Application purportedly failed to minimize: (a) potential secondary effects that might result from possible alteration of wetland hydrology (i.e., preventing flow between wetlands) and habitat fragmentation (i.e., preventing amphibians, turtles, and reptiles from crossing the road); and (b) potential secondary impacts to the gray wolf, Kirtland's warbler, and Canada lynx; although Woodland Road LLC had found these species not to be present. (*Id.*)

138. *Fifth*, the federal agencies objected to the proposed wetland mitigation plan on the conflicting grounds that the plan: (a) failed to demonstrate that the wetlands were threatened by development; (b) relied, in part, upon wetland restoration which, in USFWS's opinion, provided only "limited ecological

value"; (c) failed to consider additional options for wetland restoration which USEPA said was a mitigation measure preferred over wetland creation; (d) relied, in part, upon wetland creation which, in USFWS's opinion, were "small" and "scattered" and therefore "unlikely to replace ecological values"; but (e) relied, in part, upon wetland creation which were not located on a pro-rata basis in the four watersheds adversely affected by the project. (*Id.*)

139. Notably, the federal agencies neither criticized the proposal to convey the wetland preservation area to the State of Michigan via conservation easement, nor required a detailed final mitigation plan prior to permit issuance. (*Id.*)

140. The USEPA letter stated that it constituted "a federal objection to the issuance of a permit for this project" and that MDEQ had 90 days to either deny the permit or resolve the issues raised by the federal agencies. (*Id.*)

141. None of the federal agencies provided a statement of the conditions which such permit would include if it were to be issued. (*Id.*)

142. In fact, on March 9, 2010, USFWS staff wrote to USEPA staff that they had been unable to collaborate with the Corps and would be "lucky to have something thrown together by Friday afternoon. Huge project . . . huge impacts . . . just won't be able to cover many specifics." (*See* 3/9/10 Deloria Email, attached as **Exhibit 5**.)

4. Woodland Road LLC's Response To The Federal Objections

143. By way of letters dated April 9, 2010 and April 16, 2010, Woodland Road LLC addressed all of the objections raised by the federal agencies. (*See* 4/9/10 and 4/16/10 MCRC Letters, attached collectively as **Exhibit 6**.)

144. Among other things, Woodland Road LLC explained in writing that:

a. The federal government's re-characterization of the project's purpose (*i.e.*, to haul ore) was incorrect, failed to acknowledge the numerous other planned public uses and benefits of the road, and was belied by the road design where a single-purpose haul road would have entailed a shorter single-lane route with no public access;

b. No bogs or bog lakes would be impacted by the project and the unavoidable impact to wet meadow wetlands would be mitigated by relocating any narrow-leaved gentian plants pursuant to a pending MDNR permit;

c. The Moose Country Snowmobile Club's application to relocate Trail 5 proposed only 0.25 acres of wetland impact;

d. To ensure minimum impact to wetland hydrology and maximize water flow, the road would use a three-foot thick porous crushed-rock base with

geotextile fabric where it crossed wetlands;

e. The sub-watershed assessment showed that road runoff would not be discharged directly into streams but rather into uplands;

f. Substantial development along the road corridor was unlikely due to the isolated geographical area, use of adjacent lands for timber harvesting, and enrollment of much of the land under the Commercial Forest Act;

g. Any introduction of invasive species to wetlands by vehicles could be remedied through monitoring and corrective action permit requirements;

h. Additional mining in and around the road corridor was speculative and would not be caused by the construction of the road;

i. It would coordinate with USFWS to select permit conditions to address any speculative impacts to the Kirtland's warbler, gray wolf, and Canada lynx if the presence of those species is documented in the future;

j. The proposed creation of 52.85 acres of wetland was likely to successfully replace the ecological values of the 27.10 acres of impacted wetlands where the created wetlands would be

directly connected to large existing wetlands and would be ground-water driven, which is a more reliable hydrologic source for wetlands as opposed to surface-water fed;

k. Additional wetland restoration was not feasible due to the fact that the project area has had little wetland impact in the past and thus minimal wetlands to restore; and

l. The "Porcupine" wetland crossing (which had been of particular concern to USEPA) had been revised to further reduce wetland impacts thus lowering the total wetland impact of the project below the proposed 27.10 acres. (*Id.*)

145. MCRC also held several permitting conferences with USEPA and MDEQ whereby MCRC sought guidance as to what permit conditions would be necessary for USEPA to remove its objections.

146. During these conferences, USEPA refused to disclose what conditions would be necessary for the permit to issue and made clear that USEPA would not withdraw its objections. According to a Corps employee's recollection, "EPA indicated they are not willing to lift their objection to permit issuance, and said that not only are alternatives available, but the project on its own has unacceptable environmental impacts." (*See* 05/10/10 Battle Email, attached as **Exhibit 7**.)

147. Because of its inability to obtain the information needed to address the federal issues,

Woodland Road LLC was forced to withdraw the Woodland Road Application on May 7, 2010, and MDEQ closed its file on May 14, 2010.

148. Shortly after the withdrawal, an MDEQ employee sent an email to USEPA discussing the possibility that Woodland Road LLC might reapply for a permit and stated that "hopefully it will be something along the lines that we discussed with them but as we heard in several meetings the only alternative that they feel is acceptable is the woodland road route. On the bright side if it does happen you'll get to make another trip to Marquette!!" (05/10/10 Smolinski Email, attached as **Exhibit 8.**)

149. USEPA and certain MDEQ employees continued to track "rumors" that a permit application for the construction of a road in the same "vicinity as the Woodland Road" would be submitted.

B. County Road 595

1. Purpose Of CR 595

150. After the withdrawal of the Woodland Road Application, Kennecott Eagle Minerals Company ("KEMC") announced its intentions to use CR 550 as the primary route to haul ore from the Eagle Mine to the Humboldt Mill.

151. KEMC's decision to utilize the CR 550 route, which travels through the cities of Marquette, Negaunee, and Ishpeming, caused substantial concern among local governmental units and the general public.

152. In response to these concerns, a number of local public officials, businesses, industries, and

residents began evaluating measures available to resolve the heavy truck transportation issues in the region, particularly traffic originating from the natural resource rich areas of northwestern Marquette County and traveling through the cities of Marquette, Negaunee, and Ishpeming.

153. On October 18, 2010, MCRC, as the public agency responsible for providing safe transportation in Marquette County, determined that developing a new all-season primary county road running from the Triple A Road in Champion Township south to U.S. 41 in Humboldt Township within a four-mile wide corridor was in the public's best interest. (*See* MCRC's 10/18/10 Resolution, attached as **Exhibit 9**.)

154. MCRC defined the project purpose as constructing a primary county road that would: (a) improve emergency, commercial, industrial and recreational access to a somewhat isolated but key industrial, commercial, and recreational area in northwestern Marquette County by connecting those areas to U.S. 41; and (b) reduce heavy truck travel through Marquette County population centers. (*Id.*; *see also* CR 595 Project Corridor Map, attached as **Exhibit 10**.)

155. The Michigan Department of Transportation ("MDOT") determined that CR 595 would "serve as a vital commercial and connector route in Marquette County" and "primary road funds may be applied to the construction of the proposed route CR 595." (*See* 11/18/10 and 6/2/11 MDOT Letters, attached collectively as **Exhibit 11**.)

156. The Federal Highway Administration ("FHWA") agreed that there was a need for CR 595 and approved CR 595 as "a proposed future major collector rural route." (*See* 1/11/11 MDOT Letter, attached as **Exhibit 12**.)

157. A traffic crash reconstruction specialist from the Michigan State Police ("MSP") concluded that "[t]he construction of County Road 595 will almost certainly increase traffic safety by creating a more uniform and efficient traffic flow on County Road 550 and along the US-41/M-28 corridor through the Cities of Marquette, Negaunee, and Ishpeming." (*See* 7/18/11 MSP Letter, attached as **Exhibit 13**.)

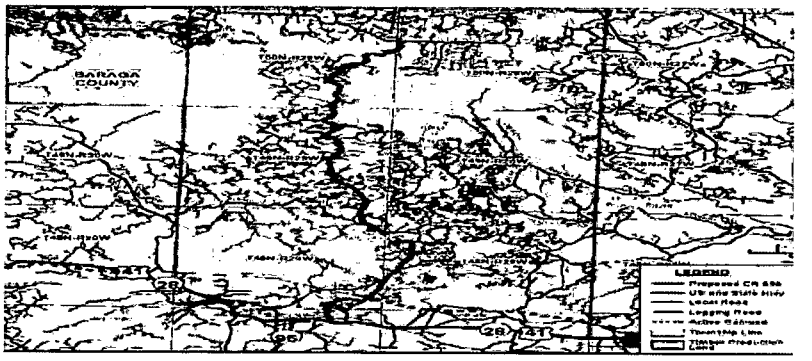
158. Recognizing the importance of the project, KEMC committed to funding significant portions of the design, planning, and construction of CR 595 if all necessary governmental permits were obtained by September of 2012.

2. Planning Of CR 595

159. Over the course of the next year, MCRC expended significant resources planning and designing a road that would: (a) be the LEDPA capable of achieving the project purpose; and (b) avoid and minimize impacts to wetlands, streams, and wildlife to the greatest practicable extent while utilizing accepted road design standards so as to not compromise public safety.

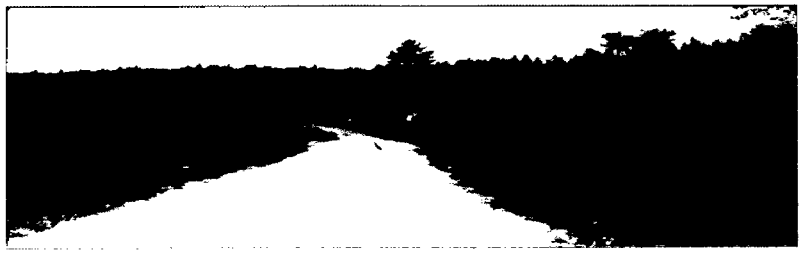
160. MCRC conducted comprehensive assessments of wildlife, streams, and wetlands in the project corridor and made hundreds of revisions to the originally-proposed Woodland Road in order to reduce wetland impacts.

161. As a result of these efforts, MCRC identified a new route primarily on private land that ran 21.4 miles from the Triple A Road in Champion Township south to U.S. 41 in Humboldt Township. The following map depicts the proposed CR 595 route:



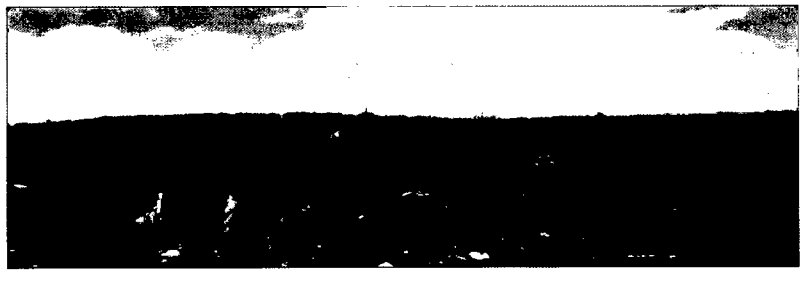
162. Approximately 99% of the route was located within 500 feet of an existing road or trail to further limit impacts to wetlands, streams, and wildlife. The following photographs illustrate portions of the existing roads and trails over which CR 595 was to be constructed:

*Existing Wolf Lake Road



*Existing Dead River Bridge On Trail

163. Nearly all of the upland habitats along CR 595 had been repeatedly logged and/or converted into pine plantations over the last 150 years. The following photograph illustrates some of the existing upland habitats along the proposed road:



*Clear Cut North of Brocky Lake

*Former Logging Site at Yellow Dog Plains

164. Locating CR 595 primarily on timber production land further reduced the proposed roads impacts to wetlands, streams, and wildlife.

3. CR 595 Application For Permit

165. On August 18, 2011, MDEQ informed USEPA that MCRC would be applying for a wetland fill permit to construct CR 595 and had requested a "pre-application" meeting with all state and federal regulators who would be reviewing the CR 595 Application. USEPA agreed to meet and scheduled the pre-application meeting for September 12, 2011.

166. Prior to this "pre-application" meeting and on August 30, 2011, a very different type of meeting regarding CR 595 took place at USEPA Headquarters in Washington, DC. MCRC was neither invited to nor informed of the meeting. In attendance (as far as is known at the present time) were top USEPA officials, Congressional staff, KBIC representatives, and a prominent environmental activist opposed to the construction of CR 595. It further appears that USEPA made no formal record of the meeting.

167. A recently released letter sent by environmental activist Dr. Laura Farwell to Congressional staff and the USEPA, however, states that "**during the August 30, 2011 meeting at EPA Denise Keehner of EPA's Office of Wetlands, Oceans and Watersheds definitively reiterated EPA's position and stated that the haul road [(i.e., CR 595)] would not happen.**" (*See* **Ex. 1** (emphasis added).)

168. On October 6, 2011, unaware that USEPA officials in Washington had already pledged to block

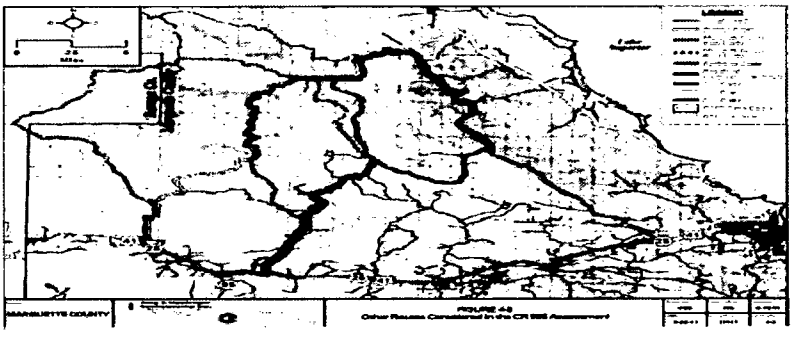
the permitting of CR 595, MCRC applied to MDEQ for a permit to impact a total of 25.60 acres (later increased to 25.81 acres) of jurisdictional and non-jurisdictional wetlands. On January 23, 2012, MCRC submitted a revised application completely replacing the previous filing. (*See* 1/23/12 CR 595 Application Excerpts, attached as **Exhibit 14.**)

169. The CR 595 Application was prepared by KME, in conjunction with dozens of individuals working for several engineering and environmental firms and other private sector companies at a cost of millions of dollars.

a. The LEDPA Analysis

170. To identify the LEDPA to achieve the Project Purpose, the CR 595 Application contained an analysis of nine alternatives predominantly outside of the project's four-mile wide corridor. (*Id.* at 38-70, 86-89, 139-62, 193-203.)

171. The following is an illustration showing seven of the nine alternatives to CR 595:



172. The CR 595 Application demonstrated that CR 595 (green) was the LEDPA and all of the

alternatives either failed to meet the project purpose or were impracticable. (*Id.*)

173. Specifically, the CR 550 (yellow), CR 510 (blue), and the three Red Road (red) alternatives, all of which used existing public roads, did not meet the project purpose and were otherwise infeasible and impracticable because, among other reasons, they: (a) were substantially longer than CR 595 and would result in a substantial increase in air emissions and gas/diesel consumption; (b) traveled through more highly populated residential, commercial, and educational areas used as school bus routes; and (c) were likely to lead to increased traffic congestion, emissions, accidents, and noise complaints. (*Id.*)

b. Assessment Of Direct And Secondary Impacts To The Aquatic Ecosystem

i. Wetland Assessments

174. The CR 595 Application contained a thorough study of the proposed road's direct and indirect impacts on wetlands, including, but not limited to:

a. a comprehensive delineation of all wetlands located within 200 feet of the proposed road centerline with supporting wetland data forms showing the soil profiles, dominant vegetation, hydrology indicators, and, if applicable, any observed aquatic species and wetland type;

b. a complete set of wetland impact spreadsheets, wetland cross section descriptions, and plan and profile drawings

showing the exact locations of all impacted wetlands;

c. an assessment of the functional values of the wetlands along the proposed route using the Michigan Rapid Assessment Method for Wetlands ("MiRAM"); and

d. an assessment of disruption of near-surface hydrology, increased runoff, pollution related to winter road maintenance, secondary development, and invasive species. (*Id.* at 72-81, 162-192.)

175. The CR 595 Application demonstrated that most of the land cover along the proposed road consisted of plant communities common in the Upper Peninsula and that the 25.81 acres of impacted wetlands consisted of 19.38 acres of forested wetlands, 5.83 acres of emergent wetlands, and 0.60 acres of scrub-shrub wetlands. (*Id.*)

176. The CR 595 Application further identified that the project's unavoidable impact of 25.81 acres of wetland was minimal where it would affect less than 0.01% of Marquette County's 298,648 acres of palustrine wetlands. (*Id.*)

177. The proposed road would impact just over one acre of wetland per linear mile of road construction with only 11 impacted wetland areas exceeding ½ acres. (*Id.*)

ii. Stream Assessments

178. The construction of CR 595 required 22 stream crossings via the installation of new clear-span bridges or concrete box culverts all of which would

have been appropriately sized using MDEQ's previously recommended Stream Simulation Methodology to ensure that these structures had minimal impacts on the streambed, stream flow, and provided an area sufficient to allow most wildlife species and fish to pass freely. (*Id.* at 81-90, 162-192.)

179. The CR 595 Application contained a thorough study of the proposed impact on these streams, including, but not limited to: (a) ecological assessments of the stream crossing sites; (b) detailed stream crossing maps and diagrams; (c) floodplain and floodwater modeling; (d) hydraulic calculations using the Stream Simulation Methodology; and (e) pebble count surveys so that the proper size and composition of stream substrate would be provided in disturbed areas. (*Id.*)

180. With respect to the potential impact on streams, the CR 595 Application demonstrated that the proposed road design, soil erosion management practices, and stormwater pollution prevention plans would protect stream habitat and inhabitants by maintaining natural stream bottoms, flow, temperatures, and turbidity. (*Id.*)

iii. Flora And Fauna Assessments

181. The CR 595 Application contained a thorough study of the proposed impact on flora and fauna, including, but not limited to: (a) a wide-ranging botanical survey to characterize vegetative communities within 150 feet of the centerline of the proposed road; (b) comprehensive assessments of large and small mammals, birds, reptiles and

amphibians, fish and aquatic macroinvertebrates; and (c) a habitat fragmentation analysis. (*Id.* at 107-26.)

182. With respect to the potential impact on wildlife, the CR 595 Application demonstrated that CR 595 would neither: (a) impact any endangered, threatened, or rare plant species because the impact to the threatened narrow-leaved gentian would be properly mitigated; (b) impact any endangered, threatened, or special concern bird species; (c) lead to an unacceptable loss rate that would adversely impact general bird populations in the area; (d) have any substantial negative impact on large or small mammals, including the Canada lynx (no presence) or gray wolf (no critical habitat within five miles); (e) nor adversely impact any threatened, endangered, or special-concern reptiles, amphibians, or fish species.

183. Specifically, with respect to habitat fragmentation, the CR 595 Application identified that while CR 595 would result in the loss of approximately 170 acres of habitat within its clearing limits, it was not likely to diminish overall regional landscape connectivity to any measurable extent or reduce biodiversity within the project corridor where, among other things: (a) a majority of wildlife species located around the road corridor utilized more than one type of land cover and could easily move among habitat components; (b) the proposed road would be only ¼ the width of an interstate highway and would not present a physical barrier to fish and wildlife species movement; and (c) animal densities and biomass in the area were relatively low due to a short growing season, heavy lake-effect snowpack, and other climate-related factors.

c. Avoidance And Minimization Of Direct And Secondary Effects On The Aquatic Ecosystem

184. In determining the CR 595 route and design, serious efforts were made to avoid and minimize impacts to wetlands, streams, and wildlife to the greatest extent possible utilizing accepted road design standards. (*Id.* at 47-70, 74-79, 84-86, 89-90, 99-107, 114-15, 122-27.)

185. These efforts included a detailed analysis of twenty different route and design variations within a four-mile wide corridor which were evaluated pursuant to the following environmental and safety factors: (a) avoid higher quality wetlands to the extent possible; (b) avoid/minimize wetland impacts by crossing wetlands at narrow points where feasible; (c) minimize new stream crossings by crossing at existing stream crossings; (d) avoid indirect impacts to camps and lakefront areas; (e) avoid steep rock outcrops or narrow deep valleys when possible; (f) consider snow removal as a primary issue with road design and location; (g) use existing county roads where use would not affect existing development; (h) reduce grades to 6% or less where possible and avoid sharp curves; (i) decrease road fill depths in wetlands by lowering road grade; (j) use steeper 1:3 road embankment slopes and 1:2 road embankment slopes with guardrails where feasible to minimize wetland impacts; and (k) use design speed modifications where feasible. (*Id.*)

186. To further avoid/minimize wetland impacts, CR 595 was designed to: (a) be 32 feet in width as opposed to the standard primary county road

width of 42 feet; and (b) use fill with good hydraulic conductivity and a crushed rock groundwater drainage layer in wetlands where groundwater flow is present. (*Id.*)

187. To further avoid/minimize stream impacts, CR 595 was designed to: (a) remove and rehabilitate existing, often deficient, stream crossings along the existing system of roads and trails in the 595 corridor; (b) employ clear-span bridges and properly sized bottomless concrete box culverts on large stream crossings to preserve natural stream flow and bottoms; (c) use properly sized arch culverts on small stream crossings to preserve natural stream flow and bottoms; and (d) reduce the length of crossings by using headwalls and wingwalls. (*Id.*)

188. To prevent the introduction of runoff into streams and wetlands, CR 595 was designed to: (a) divert runoff away from streams and wetlands and into adjacent uplands; (b) implement best management practices such as paving, rock riprap check dams, rock-lined runoff channels, geotextile fencing, slope seeding and mulching, and other proven erosion control practices; (c) avoid placement of storm drains on bridges; and (d) utilize temporary erosion control practices during construction. (*Id.*)

189. If wood turtles, a special-concern species, were found to be present (although none had been observed to date), MCRC committed to install fencing necessary to funnel turtles under bridges and through wide culverts at appropriate locations. (*Id.*)

190. To protect the gray wolf, moose, and other wildlife species, although no critical habitat existed in

the area, MCRC committed to coordinate with USFWS and MDNR to implement mitigation measures such as signage to alert drivers, barriers adjacent to important wildlife travel corridors, speed limit advisories in critical areas, mortality surveys, and other actions to address wildlife-related issues. (*Id.*)

d. Mitigation Of Unavoidable Impacts To The Aquatic Ecosystem

i. Wetland Mitigation

191. The CR 595 Application contained a comprehensive plan to mitigate the proposed 25.81 acres of wetland impacts through the restoration of 3.52 acres of impacted wetlands and creation of 49.40 acres of new wetlands. (*Id.* at 80, 207-21.)

192. The 52.93 acres of proposed wetland mitigation represented a net gain of wetlands with a selected wetland replacement ratio of wetland mitigation to wetland impacted of 1.5:1 (scrub-shrub and emergent) and 2:1 (forested). (*Id.*)

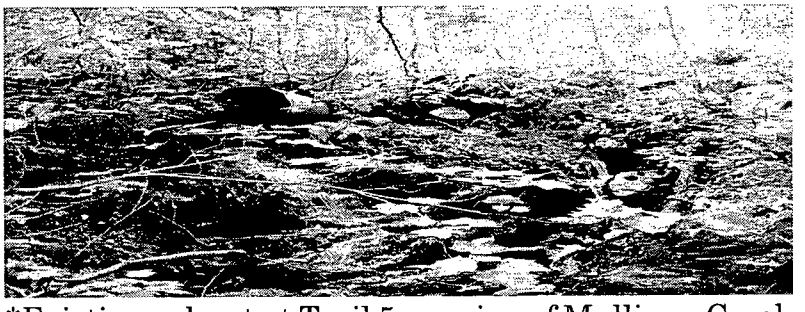
193. The CR 595 Application also contained a detailed monitoring plan pursuant to which MCRC agreed to: (a) monitor the wetland mitigation for a minimum period of five years following the completion of construction; and (b) meet certain performance standards which could be enforced via corrective action imposed by MDEQ. (*Id.*)

ii. Stream Mitigation

194. The following photographs depict the inadequately-sized existing stream crossings

negatively impacting the aquatic ecosystems along the proposed CR 595 route:

*Existing Mill Creek Crossing



*Existing culvert at Trail 5 crossing of Mulligan Creek Tributary

195. The CR 595 Application proposed to replace 15 existing stream crossings which were inadequately sized and negatively impacting aquatic ecosystems. (*Id.* at 89, 223-26.)

196. The CR 595 Application also proposed to fully restore four existing stream crossings that would have been abandoned by the construction of CR 595 and were inadequately sized and negatively impacting aquatic ecosystems. (*Id.*)

197. A further component of the CR 595 Application's stream mitigation plan entailed: (a) the relocation of a portion of Triple A Road; (b) removal of

three existing corrugated metal culvert crossings on the East Branch Salmon Trout River and restoration of the stream channel and banks; and (c) the installation of a new 65-foot span box beam bridge on a new road crossing location that would span the entire stream crossing so as to not disturb the natural stream bottom or stream banks. This major stream mitigation project would have eliminated a road crossing over three culvert crossings of the East Branch Salmon Trout River that has conveyed substantial sedimentation to the river for many years. (*Id.*)

4. USEPA Regional Administrator Meetings In Marquette

198. On January 26, 2012, USEPA Regional Administrator ("RA"), Dr. Susan Hedman, traveled to Marquette to meet with MCRC regarding the CR 595 Application. RA Hedman also met separately with several environmental and tribal groups, including the Keweenaw Bay Indian Community ("KBIC"), where she discussed USEPA's pending review of the CR 595 Application, among other things.

199. According to recently released documents, Senator Carl Levin's office later received information from an informant that during her visit with the environmental and tribal groups RA Hedman advised the anti-mining groups that: (a) the USEPA would fight mining in Michigan; (b) there will be no mining in the Great Lakes basin; and (c) USEPA had formed an anti-mining committee to further these goals. The informant also notified Senator Levin's office that KBIC had received substantial USEPA grants which KBIC used to oppose mining activity in Marquette

County. (*See* Berglund Email Chain, attached as **Exhibit 15.**)

200. When confronted with this information by Senator Levin's office, USEPA responded by stating that the alleged comments had been falsely attributed to RA Hedman.

201. USEPA did, however, admit to giving hundreds of thousands of dollars to KBIC who was actively lobbying USEPA against local mining and against CR 595.

202. USEPA also admitted to forming an internal mining team which it did not publicize on its website and which was regularly meeting on CR 595.

203. Furthermore, another recently released document shows that a lead member of USEPA's mining team may very well have been opposed to mining and economic development in the Great Lakes region. On January 20, 2011, a member of USEPA's mining team received a request for a member of the Wisconsin-based Oneida Nation to be added to USEPA's tribal mining team because "Wisconsin is the new front." In response, the USEPA mining team member agreed and commented that "the Welcome to WI signs stating 'Open for Business' is a sign of things to come" and that a proposed taconite mine in Wisconsin was "pushing jobs" during a town hall meeting he attended. (*See* 1/20/11 Cozza Email, attached as **Exhibit 16.**)

5. Public Comment On The CR 595 Application

204. On January 23, 2012, MDEQ placed the CR 595 Application on Public Notice and sent copies to USEPA, the Corps, and USFWS.

205. MDEQ held a public hearing on the CR 595 Application on February 21, 2012 at the Country Village Conference Center in Ishpeming, Michigan.

206. Many individuals, entities, and organizations provided comments to MDEQ in support of and opposition to the CR 595 Application.

207. Several individuals, environmental organizations, and KBIC directly lobbied USEPA, the Corps, and/or USFWS to object to the CR 595 Application.

6. Federal Objections To The CR 595 Application

208. On March 2, 2012, MCRC met with USEPA, USFWS, and Corps who indicated that they would formally object to the issuance of the requested permit, based primarily upon what they allegedly considered to be an inadequate LEDPA analysis.

a. The Corps' Objection To The CR 595 Application

209. By way of a March 29, 2012 letter, the Corps communicated to USEPA and others that in its view, "[t]he County Road 595 application is deficient in several areas, including the project purpose, reasonable comparison of alternatives, an adequate Section 404(b)(1) analysis, and an adequate

compensatory mitigation proposal." (*See* 3/29/12 Corps Objection, attached as **Exhibit 17**.)

210. Although difficult to decipher, the Corps appeared to complain, among many other things, that:

a. The stated project purpose was purportedly too narrow, should have been "to improve transportation between US-41 and northern Marquette County," and illegitimate because CR 595 would not improve safety and access for emergency responders;

b. The LEDPA analysis was insufficient and should have considered rail as an alternative (even though USEPA and Corps had previously accepted the Woodland Road LLC's conclusion that rail was not the LEDPA);

c. Wetland impacts were not adequately characterized because the proposed road widths within the right-of-way could purportedly be changed at a later date;

d. The vegetative assessments were allegedly inadequate because they did not appear to analyze the segments of CR 595 that varied from the Woodland Road;

e. The wetland mitigation plan would likely fail to replace the functional value of the impacted wetlands because many of the proposed mitigation sites were allegedly too close to CR 595;

f. The wetland mitigation monitoring plan was allegedly insufficient because it neither

required remedial action, contained a long enough monitoring period, nor addressed financial assurances or conservation easements; and

g. The proposed stream mitigation would likely fail to result in net benefits in water quality because there was allegedly no support for the premise that replacing undersized culverts at existing stream crossings with properly sized culverts would improve water quality. (*Id.*)

211. The Corps did not list the conditions necessary for the permit to issue. (*Id.*)

b. USFWS' Objection To The CR 595 Application

212. By way of a April 5, 2012 letter, USFWS objected to just about every aspect of the CR 595 Application and "recommended against issuance of a permit." (*See* 4/5/12 USFWS Objection, attached as **Exhibit 18**.)

213. With respect to the assessment of direct impacts, USFWS: (a) focused on the overall "clearing, excavation, and fill" that would "be required along the entire 21.4 mile route" and "impact a minimum of 171 acres"; (b) speculated that "more impacts are likely in order to facilitate passing lanes, stream crossings, and wider ditches" not contemplated by the actual application; (c) expressed its unfounded "concern that rare, unique, or high-quality wetlands would be impacted by the project"; and (d) opined that the replacement and improvement of the existing and

inadequately-sized stream crossings might somehow cause an adverse impact to stream flow. (*Id.*)

214. With respect to the assessment of indirect impacts, USFWS: (a) expressed its unfounded opinion that the proposed equalization culverts and groundwater drainage layers may not work and may lead to fragmented wetlands; (b) found that while the application provided general measures to monitor for invasive species, the application "fails to provide any specific details on how non-native invasive species will be monitored along CR 595." (*Id.*)

215. With respect to impacts on wildlife, USFWS objected on the basis that the CR 595 Application: (a) called for road heights in certain areas that would restrict amphibians and reptiles from crossing the road; (b) did not evaluate mitigation measures (e.g., lowering speed limits) in unspecified areas to help minimize vehicle collisions with animals such as white-tailed deer, gray wolf, and moose; and (c) failed to restrict removal of potential and unspecified migratory bird nesting habitat along the entire road corridor during the nesting period which runs from April 15 to August 15 of each year. (*Id.*)

216. Although no Kirtland's warblers were identified during two separate field surveys, USFWS found that additional studies and surveys were allegedly needed, because Kirtland's warbler habitat is "temporal in nature." (Id.)

217. Although MCRC's studies showed that the Canada lynx was not present in the area, USFWS determined that additional studies were needed,

because a Canada lynx was allegedly spotted in the Eastern Upper Peninsula in 2003 and 2010. (*Id.*)

218. USFWS also concluded, without any supporting evidence, that some of the proposed wetland mitigation was unlikely to succeed because it was too close to CR 595. (*Id.*)

219. USFWS did not list the conditions necessary for the permit to issue. (*Id.*)

c. USEPA's Objection To The CR 595 Application

220. On April 23, 2012, USEPA submitted to the MCRC what USEPA described as the combined federal comments on and objections to the CR 595 Application. (*See* 4/23/12 USEPA Objection, attached as **Exhibit 19**.)

221. Ignoring the catastrophic flood in 2003 that cut off the northern portion of Marquette County from emergency access for several days, USEPA first objected on the basis that one of the stated purposes of CR 595 (namely, that the road be within a four-mile wide corridor west of Silver Lake Basin to provide access to the areas of Marquette County north of the Dead River in the event of another catastrophic flood) was too narrowly defined and impermissibly limited alternative routes which would meet the project purpose. (*Id.*)

222. USEPA next found that the LEDPA analysis was deficient because the CR 595 Application: (a) "may have" overestimated the aquatic impacts of the Mulligan Plains East-Sleepy Hollow alternative; (b) contained insufficient information

regarding the cost of crossing the Yellow Dog River; and (c) improperly ruled out CR 510-Red Road-Sleepy Hollow-Wolf Lake Road because of the length and additional cost of the route. (*Id.*)

223. USEPA objected to MCRC's assessment of direct impacts on the basis that the proposed project's clearing, excavation, and fill along the entire 21.4 mile route would impact 171 acres of mostly non-jurisdictional uplands. (*Id.*)

224. With respect to indirect impacts, USEPA determined that the CR 595 Application allegedly contained insufficient details regarding: (a) the proposed monitoring and mitigation of invasive species that could arise from vehicles traveling along the proposed route; (b) the effect the road would have on fragmented wetlands over 0.5 acre in size even though the road design utilized equalization culverts and groundwater drainage layers to facilitate water exchange between wetlands; and (c) the speculative loss of stream function downstream of the proposed crossings even though those crossings were adequately sized with the Stream Simulation Methodology and in many cases replaced existing inadequately-sized crossings. (*Id.*)

225. USEPA next found that the wildlife assessments were purportedly insufficient and ordered MCRC to take the following actions: (a) coordinate with USFWS to address impacts to migratory birds along the entire route that might result from the "the large amount of habitat clearing"; (b) conduct a survey for Kirtland's warblers although no Kirtland's warblers were identified during two separate field surveys; (c) reconsider one segment of

the proposed road (i.e., the Porcupine wetland) which required 25 feet of vertical fill because it would inhibit animal movement; (d) work with MDNR "to identify areas with higher relative densities of wildlife and to develop any potential mitigative measures"; and (e) analyze the proposed road's impact on dispersing the Canada lynx which, according to MCRC's studies, was not present in the area. (*Id.*)

226. Lastly, USEPA determined that: (a) the wetland creation plan purportedly had a low probability of success because the type of wetlands impacted by the proposed road (i.e., forested wetlands) were "difficult to replace" and two of the proposed wetland creation sites were too close to the proposed road; and (b) additional stream mitigation would be needed to compensate for the new and longer replacement stream enclosures. (*Id.*)

227. Because USEPA -- at this point in time -- determined that CR 595 was not the LEDPA, USEPA refused to list the "conditions which such permit would include if it were issued by the [USEPA]" stating that it was "not possible at this time to provide the conditions necessary for issuance of this permit in accordance with CWA 404(b)(1) Guidelines." (*Id.*)

7. MCRC's Supplementation Of The CR 595 Application And Response To The Federal Objections

228. In response to a request by MDEQ for additional information, and between April and May of 2012, MCRC supplemented the CR 595 Application with a plethora of information regarding its LEDPA analysis and confirmed that CR 595 was the LEDPA

capable of achieving the project purpose. (*See* 4/12/12, 5/7/12, and 5/29/12 MCRC Letters, attached collectively as **Exhibit 20**.)

229. On May 2, 2012 and May 14, 2012, MCRC requested guidance from USEPA regarding the additional conditions that USEPA would require for the federal objections to be withdrawn. (See 5/2/12 MCRC Letter, attached as Exhibit 21.) USEPA did not identify any of the conditions necessary for its objections to be withdrawn. USEPA did, however, request that MCRC consider "preservation" as a means of mitigation.

230. In response to a request by MDNR for additional information, MCRC meet with MDNR and supplemented the CR 595 Application with a plethora of information demonstrating that CR 595 would have minimal impacts to wildlife. Among other things, MCRC committed to:

a. post yellow moose crossing signs along the proposed road, limit large grassy roadsides that could be attractive to wildlife, implement wildlife underpasses and fencing if MDNR identified any areas of concern, and create and enforce a detailed wildlife-vehicle mortality monitoring plan;

b. install a smooth asphalt road surface to lower noise;

c. coordinate with adjacent landowners to limit the construction of secondary roads and conduct a survey to identify

the locations of the narrow-leaved gentian;

d. use only certified weed-free top soil and straw and native grasses and forbs along the proposed road and monitor invasive species, if any, along the proposed road corridor;

e. reduce the total length of culverts in the initial construction plans from 1,735 feet to 1,219 feet; and

f. limit road salt use to intersections, steep hills, and curves. (*See* 5/30/12 MCRC Letter, attached as **Exhibit 22.**)

231. By way of two June 6, 2012 letters sent to MDEQ and USEPA, MCRC provided a comprehensive response to the remainder of the federal objections and MDEQ's informational requests. (*See* 6/6/12 MCRC Letters, attached as **Exhibit 23.**) These two letters included:

a. Information showing that the compensatory floodplain cuts and peat excavation areas along the proposed road would have no adverse impacts on wetland flows;

b. Revisions to the CR 595 Application increasing the size of and partially burying the wetland equalization culverts to assuage the federal concerns regarding wetland fragmentation;

c. A three-year plan for monitoring and eradicating any invasive species that may appear along the 595 corridor in the future;

d. A commitment to further work with MDNR to develop a plan to minimize wildlife impacts along the 595 corridor;

e. A commitment to perform new Kirtland's warbler and Canada lynx studies for CR 595 and all of the alternative routes;

f. A reduction of 303 feet of proposed stream enclosures and a commitment to replace two box culverts with box beam bridges to further facilitate wildlife passage and maintenance of stream functionality;

g. Revisions to the bridge plans for the Second River crossing to propose a bankfull width channel to be constructed and stabilized with rock;

h. Revisions to the Dead River crossing to increase the width of the bridge from 24 feet to 32 feet;

i. A commitment to minimize runoff into streams and wetlands by implementing additional best management practices taken from the USDA's Stream Simulation Work Group;

j. A more thorough evaluation of the 22 stream crossings, including a detailed

habitat and biologic assessment of all impacted streams and an analysis of all direct and indirect stream impacts;

k. A menu of proposed projects, with measurable performance standards, to mitigate the 1,391 feet of unavoidable stream impacts (i.e. streams in bridges or culverts). Among other things, the stream mitigation proposal included: (i) a plan to restore 1,637 linear feet of the East Branch Salmon Trout River; (ii) a plan to restore 2,000 linear feet of Partridge Creek; (iii) 0.9 miles of paving projects to reduce sediment load into the Big Garlic River and the Yellow Dog River on CR 510; and (iv) replacement of six undersized or improperly installed culverts in varying locations around Marquette County;

l. A revised wetland impact assessment acknowledging the potential secondary impact on 0.4 acres of wetlands that would have been fragmented by the construction of the proposed road and an assessment of the functional values of all impacted wetlands using MiRAM which showed that 10.68 acres of the 26.06 acres of impacted wetlands were ranked "S3/G4" pursuant to MNFI. Notably, the breakdown of "S3/G4" wetlands were: 8.29 acres of Hardwood Conifer Swamp, 1.76 acres of Rich

Conifer Swamp, and 0.63 acres of Northern Hardwood Swamp;

m. A buffet of alternative wetland mitigation proposals, with measurable performance standards, involving the creation of 12.55 acres of emergent and scrub-shrub wetlands and the preservation of high quality (i.e., MiRAM scores over 70 and S3/G4 ranks) forested wetland systems with upland buffers at up to twelve candidate preservation sites. Many of these proposed mitigation sites contained large patches of the State-threatened narrow-leaved gentian plants; and[3]

n. Revised cost estimates, detail drawings, and plan and profile drawings for constructing CR 595. (*Id.*)

232. USEPA did not respond to these letters in writing.

8. MDEQ's And MDNR's Consultation With MCRC Regarding The Federal Objections

233. On June 11, 12, and 15, 2012, MCRC met with MDEQ and MDNR onsite and reviewed the federal objections in detail. In particular, the group

[3] The intent of providing a buffet of alternative options for stream and wetland mitigation was to receive guidance from the federal agencies on what would constitute acceptable components of the mitigation plans since the federal agencies had refused to list the "conditions which such permit would include if it were issued by the [USEPA]."

conducted a field review of the proposed stream crossings and wetland impacts and discussed the wetland preservation options that would satisfy the Corps, USFWS, and USEPA.

234. MDEQ advised MCRC that a preservation mitigation ratio of 10:1 should be used for impacts to low-quality wetlands and that a preservation mitigation ratio of 12:1 should be used for impacts to high-quality wetlands ranked "S3/G4" or containing narrow-leaved gentian.

235. On June 25, 2012, MDEQ encouraged MCRC to submit: (a) a "final stream mitigation plan containing at least one stream mitigation project by each impacted HUC8 watershed, based on lineal feet of proposed stream impacts per watershed"; (b) a final wetland mitigation plan with a combination wetland creation for emergent and scrub wetlands and preservation for the forested wetlands; and (c) a final "clean copy" of the comprehensive application denoting the revisions. MDEQ also urged MCRC to use the Wolf Lake Road route variation at the southern portion of the CR 595 route to minimize impacts to aquatic resources. (*See* 06/25/12 MDEQ Letter, attached as **Exhibit 24**.)

236. With respect to wetland mitigation, MDEQ directed MCRC to submit documentation showing that: (a) the proposed wetland preservation areas were threatened from logging; (b) the proposed preservation wetlands would replace the functions and values of the impacted wetlands; and (c) such replacement of functions would be maintained following the completion of road construction. Notably, MDEQ wrote that for "impacts to rare and

imperiled (S/3/G4) wetlands a 5:1 mitigation ratio or a 12:1 preservation mitigation ratio is required." (*Id.*)

237. With respect to stream mitigation, MDEQ suggested that MCRC submit documentation showing: (a) the proposed stream channel enclosure, excavation, reconstruction, and relocation impacts in lineal feet; (b) the measures used to mitigate these stream impacts; and (c) the lost functionality of the impacted streams that would be replaced by the mitigation. (*Id.*)

9. MCRC's Second Revised CR 595 Application

238. In light of the substantial revisions needed to address the federal objections, MCRC, at MDEQ's request, submitted a revised permit application dated June 29, 2012 which, among other things: (a) reduced the proposed wetland impacts down to 24.32 acres; (b) incorporated the Wolf Lake and Kipple Creek route variations requested by MDEQ thereby reducing the length of the proposed road from 21.4 miles to 20.9 miles; and (c) contained significant structure redesign such as replacing culverts with bridges or enlarging the culverts to improve both wildlife movement and hydraulics. (*See* 6/29/12 Second Revised CR 595 Application, attached as **Exhibit 25**.)

239. The Second Revised CR 595 Application contained a Second Wetland Mitigation Plan that proposed to preserve in perpetuity via conservation easements 228.1 acres of upland buffer and 311.9 acres of existing high quality wetlands with the following attributes: (a) MiRAM scores over 70 (on a scale of 100); (b) MNFI ranks of S3/G4; and (c)

established populations of State-threatened narrow-leaved gentian plants. (*Id.*)

240. Not even counting the upland buffers, the proposed wetland preservation areas exceeded the State required acreage of wetland preservation by 45.2 acres and used wetland mitigation ratios of 10:1 for regular wetlands and 12:1 for rare wetlands ranked S3/G4 or wetlands housing narrow-leaved gentian. (*Id.*)

241. The Second Wetland Mitigation Plan also contained information showing that the proposed preservation areas: (a) were mostly located in the same HUC10 watersheds as the impacted wetlands; (b) were under threat of logging, recreational development, and recreational vehicular traffic; (c) would be fully evaluated and delineated as part of a baseline assessment; and (d) would be subject to rigorous invasive species monitoring. (*Id.*)

242. The Second Revised CR 595 Application also contained a Second Stream Mitigation Plan that provided a comprehensive analysis of the 2,224.25 lineal feet (later revised to 2,319.25) of stream impacts and 9,940 lineal feet of stream benefits derived from reconstructing 17 inadequate stream crossing structures along the existing CR 595 route using design protocols in the Stream Simulation Methodology. (*Id.*)

243. Additionally, the Second Stream Mitigation Plan proposed to take actions outside of the CR 595 corridor to: (a) replace two substandard stream culvert crossings at Flopper Creek and Halfway Creek with bridges, install paving and

curbing to minimize stormwater runoff, and create a stable stream channel to maximize fish movement and wildlife passage; (b) restore 1,637 feet of the East Branch Salmon Trout River by relocating 0.8 mile of Triple A Road, replacing three corrugated metal culverts with a 65-foot bridge; (c) pave a 0.7 mile segment of CR 510 to reduce sediment that is being introduced into the Big Garlic River; and (d) pave 0.2 mile of CR 510 to reduce sediment being introduced into the Yellow Dog River. (*Id.*)

10. USEPA's Informal Objection To The Second Revised CR 595 Application

244. The same day as the Second Revised CR 595 Application was submitted, MCRC held a site visit with USEPA and MDEQ. During the site visit, USEPA's Tinka Hyde and Melanie Burdick (f/k/a Melanie Haveman) stated orally that: (a) the CR 510-Red Road-Sleepy Hollow route alternative could be the LEDPA; and (b) the Second Wetland and Stream Mitigation Plan was allegedly inadequate because it purportedly failed to account for unspecified "secondary" or "indirect" wetland and stream impacts that would allegedly be caused by CR 595.

245. Although USEPA continued its refusal to identify the conditions necessary for its objections to be removed, USEPA's Melanie Burdick (f/k/a Melanie Haveman) stated that a wetland preservation ratio of 20:1 should be utilized by MCRC to mitigate the proposed road's wetland impacts.

246. Ms. Burdick further provided an unlabeled document generally listing the type of wetland

preservation that would presumably satisfy USEPA's objection. That document directed MCRC toward sites that, among other things: (a) would provide compensation for habitat fragmentation such as "areas adjacent to existing wilderness areas (e.g., along the McCormick Wilderness)"; (b) were high quality resources including headwaters to the Dead River or Yellow Dog River or other riparian areas; (c) were greater than 100 acres in size and had a buffer so logging could not occur around the perimeter; (d) were under a demonstrable threat of logging; and (e) could be managed by an experienced third party land manager. (*See* Unlabeled USEPA Mitigation Guidance, attached as **Exhibit 26**.)

247. On July 5, 2012, MCRC sent USEPA a letter confirming the discussions from the June 29, 2012 site visit. MCRC explained why the CR 510-Red Road-Sleepy Hollow alternative was not the LEDPA, and committed to search for wetland preservation sites that met criteria described by USEPA. (*See* 7/5/12 MCRC Letter, attached as **Exhibit 27**.)

11. MCRC's Third Revised CR 595 Application

248. On July 24, 2012, MCRC submitted its Third Revised CR 595 Application which incorporated all of MCRC's responses to the federal objections and corrected several typographical and calculation errors contained in the prevision application. (*See* 07/24/12 KME Letter and 8/12/12 Summary of Third Revised CR 595 Application, attached as **Exhibit 28**.)

249. That same day, MCRC submitted a Third Stream Mitigation Plan that corrected the stream

impact and mitigation calculations. As revised, the proposed road had 26 stream crossings which: (a) entailed 1,650 lineal feet of stream within bridges and culverts; (b) replaced 515 feet of existing substandard stream crossing structures; and (c) involved 589 feet of streambed reconstruction. (*See* Third Stream Mitigation Plan, attached as **Exhibit 29**.)

250. On August 21, 2012, MCRC submitted its Third Wetland Mitigation Plan which was tailored to meet USEPA's comments and unlabeled guidance document. As directed, the Third Wetland Mitigation Plan proposed to compensate for the direct impact to 25.48 acres of wetlands as well as all associated secondary impacts to aquatic resources resulting from the construction of CR 595 by preserving, via conservation easement, 1,576 acres of high quality habitat adjacent to the federally owned McCormick Wilderness, consisting of 647 acres of remote and existing high-quality wetlands, 929 acres of upland buffer, 4.3 miles of headwater tributary streams, and two lakes. (*See* Third Wetland Mitigation Plan, attached as **Exhibit 30**.)

251. The Third Wetland Mitigation Plan thus provided a ratio of approximately 25:1 for preserved wetlands as compared to direct wetland impacts and preserved one-and-a-half times as much upland to serve as a buffer to protect the ecological integrity of the preserved wetlands. (*Id.*)

252. MCRC's initial evaluation of the preservation area showed that: (a) the proposed preservation wetlands consisted of several high-quality wetland types including poor conifer swamp, rich conifer swamp, hardwood conifer swamp, mixed

wetland emergent/shrub/forested, northern wet meadow, and bog; (b) 67 of the 70 different preservation wetlands evaluated scored within MiRAM's high or moderate wetland function value range; and (c) the preservation of wetlands or lakes contained the following threatened species: common loon, dwarf bilberry, Farwell's water milfoil, narrowed-leaved gentian, and northern blue butterfly. (*Id.*)

253. The Third Wetland Mitigation Plan demonstrated that the designated preservation area was under a demonstrable threat of logging (i.e., the land was owned by timber companies) and that MCRC was willing to transfer ownership of the land to either the State of Michigan or the federal government. Moreover, the Third Wetland Mitigation Plan called for intensive preservation and invasive species monitoring, including a baseline survey and GIS map, to assist in the development of a long-term management plan. MCRC further committed to providing financial assurance if required. (*Id.*)

12. MDEQ's Proposed Permit Conditions

254. On August 24, 2012, MDEQ sent USEPA and MCRC a letter enclosing 53 draft conditions MDEQ would impose on any future permit. In addition to the general requirement that all work be completed in accordance with the Third Revised CR 595 Application, MDEQ included the following additional permit conditions, among others, related to the proposed wetland mitigation:

a. The permittee shall execute a conservation easement over all wetland preservation areas in a form identical to the conservation easement model on the MDEQ's website at www.michigan.gov/wetlands;

b. The permittee shall provide documentation of ownership for the wetland preservation areas including: (i) a title report or title opinion that provides 50-year ownership history including copies of all deeds, encumbrances, easements, severed mineral rights, and other pertinent documents; (ii) a written statement from the property owner that there are no easements, encumbrances, or transfers of the property, in whole or in part, not disclosed in the title search or ownership history; (iii) subordination of any property interest (e.g., mineral rights, mortgages, easements) that would interfere with establishment and protection of the conservation easement; (iv) a title insurance policy insuring the conservation easement area in the name of MDEQ, in an amount determined by MDEQ; and (v) a copy of the warranty deed;

c. The conservation easement boundaries shall be demarcated by the placement of signage along the perimeter. The

signage shall be placed at an adequate frequency, visibility, and height for viewing, made of a suitable material to withstand climatic conditions, and should be replaced as needed;

d. Except as otherwise provided by this permit or approved in writing by MDEQ, the following activities are prohibited in perpetuity within the conservation easement areas: (i) alteration of surface topography, creation of paths, trails, or roads; (ii) placement of fill, dredging, or excavation; (iii) drainage of surface or groundwater; (iv) construction or placement of any structure; (v) plowing, tilling, or cultivating the soils or vegetation; (vi) cutting, removal, or alteration of vegetation; including the planting of non-native plant species; (vii) ranching, grazing, farming; (viii) use of chemical pesticides, fungicides, herbicides, or other chemical treatment; (ix) construction of unauthorized utility or petroleum lines; (x) storage or disposal of garbage, yard waste, trash, debris, abandoned equipment; (xi) accumulation of machinery or other waste materials; (xii) use or storage of off road vehicles; (xiii) placement of billboards or signage; (xiv) use of the wetland for the dumping of untreated storm water (except as otherwise allowed in this

permit); or (xv) actions or uses detrimental or adverse to water conservation and purity, and fish, wildlife, or habitat preservation.

e. The permittee shall submit a surety bond or letter of credit to the MDEQ in a form identical to the financial assurance models on the MDEQ's website at www.michigan.gov/wetlands in an amount to ensure that: (i) the conservation easements are recorded; (ii) signs are posted; (iii) site enhancement measures are completed; (iv) a management plan is provided; (v) baseline conditions are documented; (vi) an adequate stewardship agreement and funds have been established; and (vii) all other mitigation actions are performed as required to comply with the requirements and conditions of this permit.

f. The financial assurance document shall be provided to and accepted by MDEQ prior to signature of this permit by MDEQ.

g. The permittee shall submit a baseline ecological report for the conservation easement area, a conservation easement area management plan, a long-term management plan, and monitoring, and maintenance plan meeting detailed requirements.

h. The permittee shall identify a responsible party to provide for the long-term management, maintenance and monitoring of the conservation easement area(s). A stewardship agreement with an appropriate third party (e.g., municipality or non-profit resource management agency such as a land conservancy) and MDEQ, that is in compliance with the MDEQ-approved long-term management plan shall be established and recorded as Exhibit E to the Conservation Easement Agreement.

i. A long-term financing mechanism or endowment fund to provide for the long- term management, monitoring and sustainability of the site shall be considered as part of the Stewardship Agreement to provide for the long-term maintenance and sustainability of the conservation easement area(s). (*See* 8/24/12 MDEQ Draft Permit Conditions, attached as **Exhibit 31**.)

13. Public Comment On The Third Revised CR 595 Application

255. In early June 2012, USEPA and MDEQ staff began discussing the possibility of MDEQ requesting a public hearing on USEPA's objections. Although one of USEPA's lead employees opined that she did not "think a public hearing or more time will change [RA Hedman's] determination" on the Application, MDEQ nevertheless requested a public

hearing. (*See* 06/08/12 Haveman Email, attached as **Exhibit 32**.)

256. Specifically, on July 11, 2012, MDEQ formally requested that USEPA hold a public hearing because of "the widespread support for this project" and MCRC's comprehensive revised application. MDEQ further urged USEPA to make its decision by October 1, 2012, so that MCRC would not lose funding for the project. (*See* 07/11/12 Creal Letter, attached as **Exhibit 33**.)

257. On July 30, 2012, USEPA issued a Notice of Public Comment on the Third Revised CR 595 Application.

258. Numerous entities, organizations, and individuals submitted comments in support of and in opposition to the Third Revised CR 595 Application.

259. On August 27, 2012, MDNR notified USEPA that the CR 595 Application met all of MDNR's requirements. (*See* 8/27/12 MDNR Letter, attached as **Exhibit 34**.)

260. On August 28, 2012, USEPA held a public hearing on MCRC's Third Revised CR 595 Application. At the public hearing, USEPA representatives acknowledged that KEMC would withdraw its funding commitment for the proposed road if USEPA did not withdraw its objections before October 2012.

14. MDEQ Notifies USEPA Of Its Intent To Approve The Third Revised CR 595 Application

261. In response to continuing discussions with MDEQ, MCRC re-evaluated the four proposed passing lanes and, by way of a September 14, 2012 letter, committed to revise one of the passing lanes to reduce wetland impacts from 1.38 acres to 1.08 acres. MCRC also committed to discussing the particulars of the long and short-term management plan for the wetland preservation area in its next meeting with MDEQ and USEPA. (*See* 9/14/12 MCRC Letter, attached as **Exhibit 35**.)

262. On September 17, 2012, MDEQ Director Dan Wyant sent a letter to USEPA explaining that "the improvements to the Road Commission's proposal since last April have brought this project to the point that Michigan will soon be in a position to issue a permit under state authorities." MDEQ then urged "the USEPA to remove their objection to the DEQ issuing a permit for construction of Marquette County Road 595." (*See* 9/17/12 MDEQ Letter, attached as **Exhibit 36**.) To MCRC's knowledge, USEPA did not respond.

15. MCRC's Fourth Wetland Mitigation Plan

263. On October 3, 2012, in preparation for an upcoming meeting with USEPA and MDEQ, MCRC provided both agencies with a "Mitigation Task List" that contained the following schedule of commitments:

a. Submit a preliminary baseline assessment describing habitat types and acreage to MDEQ prior to October 31, 2012;

b. Submit a Draft Stewardship Agreement between MDEQ, MCRC, and the selected land steward (Michigamme Township) prior to MDEQ counter- signature of the permit;

c. Submit a Long-term Management Plan prior to MDEQ counter-signature of the permit outlining: (i) how the preservation area shall be managed in accordance with the Conservation Easement; (ii) a vegetation management strategy for controlling non-native invasive plant species identified in the baseline assessment; (iii) overall site management required to minimize any threats to the preservation area that could have a negative effect on the long- term viability of the Conservation Easement; (iv) an assessment of existing uses and the maintenance issues associated with existing pathways, trails, and structures; and (v) a reporting time period;

d. Identify a source of funding for the Steward's management of the preservation area prior to MDEQ counter-signature of the permit;

e. Submit a Conservation Easement and Title Report prior to start of construction of CR 595;

f. Submit a surety bond or letter of credit to ensure that the Conservation Easement is recorded, signs are posted, site enhancement features are completed, a management plan provided, the baseline conditions documented, stewardship agreement and funds are established prior to MDEQ counter- signature of the permit;

g. Conduct and submit a baseline ecological assessment documenting the current ecological conditions of the preservation area by November 1, 2013; and

h. Place signs, or other suitable markings along the boundary of the preservation area within 180 days of issuance of the permit or sooner as weather conditions might allow. (*See* 10/3/12 Mitigation Task List, attached as **Exhibit 37**.)

264. On October 31, 2012, MCRC submitted its Fourth Wetland Mitigation Plan which included, among other things, a preliminary baseline ecological assessment, short and long-term management plans, an invasive species monitoring plan, and a draft cooperative stewardship agreement naming MCRC as the land steward. Notably, the draft cooperative stewardship agreement recorded MCRC's intent to

transfer the preservation area to the United States Forest Service in order to expand the existing McCormick Wilderness. (*See* Fourth Wetland Mitigation Plan, attached as **Exhibit 38**.)

16. USEPA's December 4, 2012 Objections To The Third Revised CR 595 Application

265. On December 4, 2012, USEPA advised MDEQ that USEPA had "decided to withdraw the Agency's objection regarding the permit applicant's Alternatives Assessment," but that it "has not received adequate plans to minimize impacts or a comprehensive mitigation plan that would sufficiently compensate for unavoidable impacts." (*See* 12/4/12 USEPA Objections, attached as **Exhibit 39**.)

266. With respect to USEPA's objection that the Application purportedly failed to minimize the direct and indirect impacts to wetlands, streams, and wildlife from CR 595, USEPA stated without supporting citation or analysis that:

a. Wildlife. "The clearing of trees from the 21 mile long road corridor will fragment a significant portion of the wildlife habitat that exists along the road alignment. The fragmentation would be a significant physical barrier to wildlife movement and would likely increase wildlife mortality. Moose is one of the wildlife species likely to be adversely impacted by construction of CR 595. The proposed CR 595 alignment cuts through habitat that is

frequently used by moose. CR 595 would be a significant physical barrier to movement for moose and is likely to result in an increase in moose mortality due to vehicle-moose collisions. Habitat fragmentation will also lower habitat quality for bird species that are dependent on large blocks of undisturbed forest for nesting habitat."

b. Invasive Species. "The construction of a new road along the CR 595 alignment will also provide a corridor for the spread of invasive plant species which would contribute to the degradation of high quality wetland plant communities found along the road corridor as well as degrading wildlife habitat."

c. Stormwater Runoff. "[E]ven with [the Applicant's proposed] BMPs, the construction of CR 595 would likely result in a number of wetlands and streams being newly exposed to salt and other pollutants. Exposure to road salt and other pollutants associated with road runoff has been shown to result in the degradation of both wetland and stream quality."

d. Wetlands. "The construction of CR 595 is likely to have an adverse effect on flood storage functions of the wetlands in the road corridor, especially during

spring thaws in years with heavy snow accumulation."

e. Streams. "Stream habitat quality may degrade due to changes in channel configuration at road crossings and exposure to salt and other pollutants."

f. Secondary Development. "New road construction or additional development along the CR 595 corridor is likely to cause additional disruption to wildlife travel corridors. Secondary development may contribute to the degradation of wetlands due to habitat fragmentation, introduction of invasive species and disruption of wetland hydrology through alteration of surface flow patterns within the impacted watersheds or within wetlands. In addition, the construction of new secondary roads and new development has the potential to adversely impact stream habitat and water quality due to the addition of pollutants such as sediments and road salt to streams, the degradation or loss of stream buffer areas and may also have an adverse impact on stream channel stability." (*Id.*)

267. To satisfy these objections regarding minimization of direct and indirect impacts, USEPA directed MCRC in its December 4, 2012 letter to provide the following:

a. Secondary Development. "A detailed proposal describing the . . . locations of protected critical habitat areas" along the 595 corridor and the "mechanisms," such as "conservation easements" or "deed restrictions," necessary to "limit the building or connection of secondary road in critical habitat areas."

b. Wetlands, Streams, and Invasive Species. "Plans for monitoring and managing wetlands along the CR 595 corridor for a minimum of 10 years. These plans shall include methods to assess, manage and mitigate for indirect impacts to aquatic resources resulting from the addition of pollutants, fragmentation, invasive species, and changes in overall wetland and stream functions."

c. Wetlands. "Long-term monitoring and maintenance plans for the applicant's proposed porous rock road design and wetland equalization culverts . . . to ensure that these structures perform as designed in the future."

d. Funding. A funding mechanism for all long-term monitoring and management of indirect impacts along the 595 corridor.

e. Wildlife. A plan, approved by MDNR and USFWS, describing the locations and design of an appropriate number of

sufficiently-sized wildlife crossings and fencing "in areas with the highest moose density as indicated on the Moose Survey Plots of Northern Marquette County map" and "along major stream crossings" on the 595 route. (*Id.*)

268. With respect to USEPA's objection that the Third Revised CR 595 Application purportedly failed to compensate for wetland and stream impacts from CR 595, USEPA identified the following alleged deficiencies in MCRC's Fourth Wetland Mitigation Plan:

a. Management Plan. There is no long-term management plan to ensure that the wetlands are managed to maintain them as high quality habitats.

b. Steward. No long-term manager for the site has been identified, and no funding mechanism for long-term management has been established.

c. Mineral Rights. The applicant has not secured mineral rights for all preservation areas. If all necessary mineral rights are not included as part of the mitigation plan, some of the preservation area may be subject to mining or other mineral extraction activities at some point in the future. (*Id.*)

269. To satisfy its objections regarding certain components of the Fourth Wetland Mitigation Plan, USEPA directed MCRC to:

a. Steward. Identify an experienced "third-party" land steward for long-term management of the wetland preservation site.

b. Management Plan. Submit "[a]daptive and long-term management plans for both stream and wetland mitigation [in the preservation area] that include a monitoring and reporting schedule and funding mechanism."

c. Management Plan. Provide "[m]easurable performance standards for stream mitigation" in the preservation area which "specify how sediment input will be measured and provide a baseline with which to compare pre-mitigation and post-mitigation conditions."

d. Funding. Show that "financial assurances are in place for construction and long-term management of both stream and wetland mitigation" in the preservation area.

e. Mineral Rights. Demonstrate that "all necessary mineral rights to ensure that the wetland preservation area will be permanently protected have been secured . . . ." (*Id.*)

270. USEPA then stated that MDEQ had 30 days within which to either: (a) grant MCRC a permit consistent with USEPA's "minimization and mitigation plans;" or (b) notify USEPA that MDEQ intends to deny the permit. (*Id.*)

17. USEPA's Repeated Refusals To Explain The Conditions Necessary To Satisfy Its New Objections

271. Between December 4, 2012 and December 27, 2012, MCRC repeatedly contacted USEPA by email and phone to ascertain the basis for its new objections and the specific conditions necessary to satisfy its new objections. USEPA, however, refused to answer any questions directly, instead stating that USEPA would "check into it and get back to" MCRC or stating that MCRC should submit its questions to MDEQ.

272. In light of the USEPA-imposed 30-day deadline to resolve USEPA's objections (extending through the Christmas and New Year holidays when many state and federal agency staff are unavailable) MCRC emailed USEPA on December 4, 2012, to find out who at USEPA would be responsible for working with MCRC to resolve the USEPA's objections. USEPA did not respond in writing. (*See* Iwanicki/Hyde Email Chain, attached as **Exhibit 40**.)

273. On December 7, 2012, MCRC contacted USEPA's Tinka Hyde by phone and reiterated the need for USEPA to provide more detail as to what conditions would need to be added to the permit in order for USEPA to withdraw its objections and asked

USEPA to identify the USEPA staff members responsible for identifying the conditions necessary for the permit to issue so that MCRC could conference with those individuals. Ms. Hyde refused to answer the questions directly. (*Id.*)

274. That same day, MDEQ confirmed to MCRC that MDEQ had not heard anything from USEPA regarding what conditions would need to be added to the permit in order for USEPA to withdraw its objections, or which USEPA staff members were responsible for identifying same. (*Id.*)

275. By December 13, 2012, MCRC had still not received any feedback from USEPA regarding what conditions would need to be added to the permit in order for USEPA to withdraw its objections. As such, MCRC renewed its request for coordination via an email to USEPA's Tinka Hyde. (*Id.*)

276. Ms. Hyde responded stating that "[s]ince MDEQ is the permitting authority, they have the lead on this project and will be following up with you. I encourage you to work directly with MDEQ." (*Id.*)

277. The next day, on December 14, 2012, MCRC reiterated its request for coordination explaining that the request to USEPA was reasonable and expressed its disappointment with USEPA's refusal to provide any specific details as to what conditions were necessary for the permit to issue. (*Id.*)

278. USEPA's Tinka Hyde responded by stating that a 4:30 p.m. call with USEPA had been set up by MDEQ, but maintained USEPA's position that "MDEQ, as the permitting authority, has the lead." Understandably unsatisfied, MCRC responded by

pointing out that while MDEQ "may have the lead," MCRC is attempting to resolve the USEPA's concerns, so "it would make sense that MCRC should be talking directly to the EPA." (*Id.*)

279. As such MCRC again renewed its request for USEPA to inform MCRC who at USEPA would be making the decision as to the conditions necessary for the permit to issue. (*Id.*)

280. On December 14, 2012, MCRC conducted a phone conference with both USEPA and MDEQ. Specifically MCRC again asked USEPA to: (a) identify where along the road corridor USEPA would require additional wildlife crossings; (b) allow MDNR to serve as the experienced third-party land steward for the preservation site; and (c) accept legal opinions and title commitments evidencing MCRC's ability to obtain the remaining mineral rights underneath the preservation site.

281. USEPA refused to provide any guidance as to what additional wildlife crossings USEPA would require, refused to acknowledge that MDNR would be an appropriate third-party land steward for the preservation site, and refused to accept legal opinions and title commitments evidencing MCRC's ability to obtain the remaining mineral rights underneath the preservation site, instead stating that all mineral rights had to be owned prior to any withdrawal of the USEPA's objections. The latter, of course, would be essentially impossible within the approximately 20 days remaining in the 30-day period allowed to resolve the USEPA objections. In addition, ownership of all subsurface mineral rights is not necessary in order to

protect the land from unwanted alterations and, in fact, is an unreasonable demand.

282. On December 16, 2012, MCRC provided USEPA and MDEQ with a partial draft response to USEPA's December 4, 2012 objections to the Third Revised CR 595 Application. The purpose of providing an advanced draft response was to initiate an open, honest, and helpful line of communication with USEPA so as to allow MCRC to ascertain the permit conditions which would satisfy USEPA's objection. (*See* 12/16/12 Partial Draft Response To USEPA's Objections, attached as **Exhibit 41**.)

283. In response to USEPA's "mitigation requirements," MCRC: (a) identified MDNR as the experienced third-party steward of the preservation area; (b) committed to sign a stewardship agreement with MDNR and agreed to compensate MDNR for its services; (c) proposed adaptive and long-term management plans with measurable performance standards for wetland and stream mitigation; (d) committed to establish financial accounts with funding sufficient to pay for the implementation of these mitigation management plans; and (e) stated that it was conducting a legal analysis to determine whether it would be able to secure all mineral rights under the preservation site. (*Id.*)

284. In response to USEPA's minimization requirements, MCRC: (a) explained that it was awaiting MDNR feedback on mitigation measures to protect the unspecified critical habitat areas along CR 595 from secondary development; (b) agreed to provide MDEQ with plans for monitoring and managing wetlands along the CR 595 corridor for a minimum of

10 years; (c) ensured that these monitoring and management plans would include methods to assess, manage, and mitigate impacts to aquatic resources along the CR 595 corridor resulting from pollutants, fragmentation, invasive species, and changes in wetland and stream functions; (d) proposed a long-term monitoring and maintenance plan for the road's groundwater drainage layers and wetland equalization culverts; (e) agreed to have funding mechanisms in place for these monitoring and management plans; and (f) explained that the 22 proposed stream crossings were already designed to facilitate wildlife crossings and advised that MCRC was awaiting MDNR's comments as to whether additional wildlife crossings were needed. (*Id.*)

285. USEPA, however, continued to refuse to provide clarification of what conditions would satisfy its objections. Instead, USEPA's attorney sent MCRC a letter on December 17, 2012 redirecting MCRC back to USEPA's December 4, 2012 objections and advising MCRC that it needed to work with MDEQ, not USEPA, to resolve USEPA's objections. (*See* 12/17/12 USEPA Letter, attached as **Exhibit 42.**)

286. On December 21, 2012, United States Senator Carl Levin wrote USEPA regarding his concern that "EPA's objections are not entirely clear and seem to have become moving targets" and his request that "EPA's objections need to be clearly defined in order for MDEQ to be responsive to them; I urge you to prove clarity and specificity as you hopefully work through these issues." (*See* 12/21/12 Senator Levin Letter, attached as **Exhibit 43.**)

18. MCRC's Final Response To USEPA December 4, 2012 Objections

287. On December 27, 2012, MCRC responded to USEPA's new objections by way of a detailed letter addressing USEPA's concerns on a point-by-point basis. (*See* 12/27/12 MCRC Letter, attached as **Exhibit 44**.)

288. Specifically, in the response to USEPA's objections to MCRC's stream and wetland mitigation plans, MCRC:

a. delivered a Stewardship Agreement naming MDNR as the third-party steward responsible for management of the preservation site;

b. committed to place $650,000 in an endowment to finance MDNR's management services;

c. submitted extensive adaptive and long-term monitoring and management plans containing measurable performance standards for wetland and stream mitigation at an estimated cost of $1,067,000;

d. committed to establish financial accounts with funding sufficient to pay for the implementation of these mitigation monitoring and management plans, and a $1,300,000 endowment for the payment of property taxes; and

e. demonstrated by way of attorney opinions, title insurance commitments, and abstracts that the remaining mineral rights could be secured for the preservation site. (*Id.*)

289. In the response to USEPA's stated position that MCRC had allegedly failed to minimize secondary impacts to unspecified critical habitats along the 595 corridor, MCRC:

a. identified several specific areas of critical habitat (i.e., areas it defined as being inhabited by threatened or endangered species such as the narrow-leaved gentian) within the 595 corridor;

b. explained that any impacts to areas of critical habitat within the CR 595 corridor would require permits from the State of Michigan prior to impact;

c. committed to further delineate the location of any critical habitats along CR 595 and adopt a Critical Habitat Monitoring and Management Plan to include annual monitoring of any secondary impacts and corrective actions to be taken if secondary impacts to these areas were identified;

d. explained that the presence of the existing 65 roads/trails already connected to CR 595 minimized the need for future road connections; but

e. nevertheless agreed to, inter alia, ban new roads in critical habitats (including wetlands and areas inhabited by the narrow-leaved gentian) or within a reasonable distance of an existing road on the same property. (*Id.*)

290. In the response to USEPA's stated position that MCRC had allegedly failed to minimize other secondary impacts to wetlands and wildlife, MCRC:

a. provided a detailed plan for monitoring and managing the 122 wetland complexes along the CR 595 corridor for a minimum of 10 years and at an estimated cost of $1,560,000;

b. submitted an invasive species monitoring plan for the CR 595 corridor that would include pre-construction removal/treatment of invasive species, post- construction invasive species monitoring, and post-construction annual removal/treatment of invasive species at an estimated cost of $328,000;

c. proposed a long-term monitoring and maintenance plan for the CR 595's groundwater drainage layers and wetland equalization culverts which included installation of 26 observation wells and data loggers, surveys of top-of-casing of wells, and preparation of

annual reports at an estimated cost of $180,000;

d. explained that the 22 proposed stream crossings were already designed to facilitate wildlife crossings, that MDNR had concluded that additional wildlife crossings were not needed, and that USFWS had not commented on the need for additional wildlife crossings; but

e. nevertheless included a plan to: (i) mitigate and monitor direct and indirect wildlife impacts from CR 595 that entailed the erection of signs in wildlife crossing areas; (ii) design and construct wildlife crossings; (iii) implement wildlife-vehicle mortality monitoring that included daily inspection of CR 595 to document road kills; (iv) monitoring wildlife use of wildlife crossings; and (v) submit annual reports at an estimated cost of $2,650,000. (*Id.*)

291. MCRC also agreed to obtain a $5.7 million surety bond or letter of credit to ensure that the required monitoring, management, and reporting activities required by the permit would be carried out. (*Id.*)

292. USEPA did not reply to MCRC's comprehensive December 27, 2012 response document.

19. Transfer Of The Third Revised CR 595 Application To The Corps

293. On January 3, 2013 MDEQ sent USEPA a letter explaining that MCRC had been working with MDEQ "to address the concerns raised by the USEPA's reaffirmed objection" and that MDEQ "believe[d] that there [were] reasons to support approval of this project." (1/3/13 MDEQ Letter, attached as **Exhibit 45**.)

294. Because of the short timeframe and complexity of the issues remaining, MDEQ advised USEPA that it would be unable to grant a permit complying with USEPA's "minimization and mitigation plans" and thus acknowledged that the permit application would be "now transferred to [the Corps]." (*Id.*)

295. Although USEPA did not reply to MCRC's comprehensive December 27, 2012 response document, USEPA did make time to respond to a flurry of press inquiries regarding its successful blockage of the project, pass around news articles of the denied permit application, and schedule meetings with environmental organizations regarding the future, if any, of CR 595.

296. USEPA also received and accepted emails from a number of environmental organizations and state employees praising USEPA for stopping the project.

297. One MDEQ employee wrote to USEPA to express how "thankful" he was that "the EPA held their ground on County Road 595," while another state employee sent an email to USEPA joking about

a news article that referred to CR 595 as a "boondoggle." (*See* Cronk and Dortman Emails, attached collectively as Exhibit 46.)

C. The Corps' Failure To Process The Transferred CR 595 Application

298. The Corps, which had already objected to the issuance of the requested permit, did not take any formal action on the transferred CR 595 Application.

299. Specifically, on a number of occasions, the Corps stated to MCRC and others that (a)the Corps would not issue the permit as requested in the Third Revised CR 595 Application filed with MDEQ; and (b) in order to proceed MCRC would need to submit a wholly new application to the Corps.

300. The Corps, however, neither issued a denial of the 595 Application nor provided a notification of any appealable action pursuant to 33 C.F.R. § 331.4.

301. As of present date, MCRC has not submitted a new application to the Corps.

D. Consequences Of USEPA's Final Decision

302. USEPA's Final Decision divested MDEQ of the authority to process the CR 595 Application under the CWA and marked the consummation of USEPA's oversight of the permit Application; leaving both MDEQ and USEPA with nothing left to do with respect to the Application.

303. USEPA's Final Decision also caused the CR 595 Application to be transferred to the Corps who had previously objected to its issuance.

304. However, because the Corps did not take any action on the Application, MCRC has been unable to obtain the permits necessary to construct CR 595 and may not commence construction of CR 595. Moreover, the preparation and submission of a new application to the Corps would be a time-consuming, costly, and entirely futile process especially where the Corps has already voiced its opposition to the project.

305. As a result, heavy truck traffic originating in northwestern Marquette County is now routed south on CR 550 into the city of Marquette and then westerly on U.S. 41 through Marquette Charter Township and the cities of Negaunee and Ishpeming.

306. The CR 550 route is more highly populated and passes through numerous residential, retail, and commercial areas, including crossing directly in front of several bus stops and the main dormitory complex at Northern Michigan University.

307. The CR 550 route is approximately 55 miles long, more than twice the length of CR 595, adds about 1.5 million miles of commercial vehicle traffic on Marquette County Roads per year for Eagle Mine haulage alone, requires local transportation businesses to consume an estimated 464,000 gallons of additional fuel every year, and introduces approximately 4,989 extra tons of pollution and greenhouse gases into the local airstream each year.

308. Since January 2013, there have been several pedestrian and vehicular accidents on the CR

550 route as a result of the increased heavy truck traffic.

COUNT I

Declaratory Judgment Action

USEPA's Objections Were Arbitrary And Capricious

309. MCRC hereby realleges and incorporates by reference the allegations contained in each of the preceding paragraphs as though fully set forth herein.

310. MCRC's CR 595 Application complied with all requirements of Section 404 of the CWA including the 404(b)(1) guidelines.

311. For the following five reasons, USEPA's April 23, 2012 objections to the CR 595 Application were arbitrary and capricious, unsupported by fact, and otherwise not in accord with law.

312. *First,* USEPA's (later withdrawn) objection to MCRC's description of the "project purpose" was:

a. unsupported by the administrative record;

b. plainly wrong where the Project Purpose of, inter alia, reducing traffic congestion, increasing safety, serving local needs, and providing accessibility for local residents and communities West of Silver Lake Basin were genuine and legitimate; and/or

c. otherwise not in accord with the Guidelines.

313. *Second*, USEPA's (later withdrawn) objection to MCRC's finding that CR 595 constituted LEDPA was:

a. unsupported by the administrative record;

b. plainly wrong where it failed to take into consideration cost, existing technology, and logistics in light of overall project purposes; and/or

c. otherwise not in accord with the Guidelines.

314. *Third*, USEPA's vague objections to MCRC's assessment of direct impacts and concerns that the proposed project's clearing, excavation, and fill along the entire 21.4 mile route would impact 171 acres of mostly non-jurisdictional uplands were:

a. unsupported by the administrative record;

b. illegally focused on putative secondary impacts extending beyond the aquatic ecosystem;

c. improperly based on separate features of the project that would not themselves be built upon disposal areas; and/or

d. otherwise not in accord with the Guidelines.

315. *Fourth*, USEPA's vague demands for additional information and minimization measures, objections to MCRC's detailed assessment of indirect and wildlife impacts, concern that "the large amount of habitat clearing" would have a negative impact on migratory birds, and worry that the elevation of the road would "create a barrier that is likely to inhibit animal movement" were:

a. unreasonable and impracticable;

b. speculative and unsupported by the administrative record;

c. illegally focused on putative secondary impacts extending beyond the aquatic ecosystem;

d. improperly based on separate features of the project that would not themselves be built upon disposal areas; and/or

e. otherwise not in accord with the Guidelines.

316. *Fifth*, USEPA's objection to MCRC's wetland mitigation plan on the basis that it purportedly had a low probability of success because forested wetlands were allegedly "difficult to replace" was:

a. speculative and unsupported by the administrative record;

b. not based on appropriate factual determinations, evaluations, and tests;

c. plainly wrong where similar forested wetlands have been successfully created in Marquette County and elsewhere on numerous occasions; and

d. otherwise not in accord with the Guidelines.

317. For the following three reasons, USEPA's subsequent December 4, 2012 objections to the revised CR 595 Application were also arbitrary and capricious, unsupported by fact, and otherwise not in accordance with law.

318. *First*, USEPA's conclusory finding that the proposed road would allegedly have "significant direct and indirect impacts on high quality wetland and stream resources, as well as on wildlife" was:

a. speculative and unsupported by the administrative record;

b. not based on appropriate factual determinations, evaluations, and tests;

c. illegally focused on putative secondary impacts extending beyond the aquatic ecosystem;

d. improperly based on separate features of the project that would not themselves be built upon disposal areas;

e. plainly wrong where the proposed mitigation measures more than adequately compensated for any adverse effects; and/or

f. otherwise not in accord with the Guidelines.

319. *Second*, USEPA's conclusory finding that the CR 595 Application allegedly failed to minimize direct and indirect impacts to aquatic resources was:

a. neither supported by the administrative record nor appropriate factual determinations;

b. impermissibly centered on speculative future impacts unlikely to occur and unrelated to the permitted activity;

c. illegally focused on putative secondary impacts extending beyond the aquatic ecosystem;

d. improperly based on separate features of the project that would not themselves be built upon disposal areas;

e. plainly wrong where, *inter alia*, the proposed road and route design utilized state-of-the-art methodologies and best practices to avoid and minimize impacts; and/or

f. otherwise not in accord with the Guidelines.

320. Moreover, USEPA's ambiguously worded, ever changing, and redundant "minimization requirements" were neither "appropriate and practicable," compliant with the specialized methods of minimization set forth in Subpart H of the

Guidelines, nor required by any provision of the Guidelines.

321. *Third*, USEPA's conclusory objection that the CR 595 Application allegedly failed to contain a "comprehensive mitigation plan that would sufficiently compensate for unavoidable impacts" was:

a. unsupported by the administrative record;

b. unaccompanied by the "rationale for the required replacement ratio" as required by the Guidelines;

c. plainly wrong where, *inter alia*, MCRC's proposal to preserve 1,576 acres of high-quality wetlands and uplands adequately compensated for the unavoidable impact to a mere 25 acres of wetlands and represented a preservation ratio (*i.e.*, 63:1) greatly in excess of that required by the Guidelines (*i.e.*, 1:1), the Corps' internal guidance documents (*i.e.*, 8:1), Michigan law (i.e., 10:1), and the USEPA's own field staff (*i.e.*, 20:1); and/or

d. otherwise not in accord with the Guidelines which only require mitigation to be "commensurate" with the amount and type of impact to the aquatic ecosystem that is caused by the permitted activity.

322. Furthermore, USEPA's ambiguously worded and eleventh-hour "mitigation requirements" were neither "appropriate and practicable" nor required by any provision of the Guidelines which, notably, do not require a detailed mitigation plan or implementation of mitigation prior to issuance of a 404 permit.

323. USEPA's refusal to remove its objections even after MCRC's December 27, 2012 point-by-point response to same was arbitrary and capricious where MCRC had completely resolved and capitulated to each and every one of USEPA's (albeit ambiguous) "minimization and mitigation requirements."

324. For example, USEPA's refusal to accept MDNR as the third-party steward for the preservation site was arbitrary and capricious where MDNR manages 12% of Michigan's total land area, 6 million acres of mineral estates and oil and gas leases, and numerous wetland mitigation sites.

325. By way of further example, USEPA's refusal to accept MCRC's attorney opinions, title insurance commitments, and abstracts demonstrating that the remaining mineral rights would be secured for the preservation site was also arbitrary and capricious where the 404(b)(1) guidelines: (a) permit the use of "appropriate real estate or other legal instruments" such as "conservation easements," "restrictive covenants," or "transfer of title" to accomplish protection of preservation sites; but (b) only require that such "appropriate real estate or other legal instruments" be approved concurrent with the activity causing the authorized impacts. 40 C.F.R. §§ 230.93(h) and 230.97(a).

326. USEPA's Final Decision constitutes a final agency action subject to judicial review under the APA where:

a. USEPA's Final Decision marked the consummation of both MDEQ's and USEPA's review of the CR 595 Application and left nothing for either MDEQ or USEPA to do with respect to that Application. To be sure, the USEPA may not reconsider its objections after the applicable temporal deadlines in Section 404(j) of the CWA have passed.

b. Legal consequences directly flowed from USEPA's Final Decision where it forced MCRC to either wade through the prohibitively burdensome, time consuming, and expensive Corps permitting process. Indeed, the United States Supreme Court and other federal courts have held that the remedy for denial of action that might be sought from one agency (e.g., the Corps) does not provide an adequate remedy for action already taken by another agency (e.g., the USEPA).

327. The legal issues presented by this appeal are fit for review and further delay would result in hardship to MCRC.

328. Any further administrative proceeding before the Corps would be futile where the Corps: (a) helped formulate and joined in the USEPA's Final

Decision; and (b) expressed to MCRC that it would not grant even the revised CR 595 Application submitted to MDEQ.

329. There exists an actual and substantial controversy between MCRC and USEPA regarding the legitimacy of USEPA's objections and refusal to withdraw same. Moreover, for the reasons stated above, MCRC is currently and continuously injured by the USEPA's unlawful objections.

330. The case is currently justiciable because USEPA has asserted jurisdiction over MCRC's permit application and unlawfully objected to same.

WHEREFORE, MCRC respectfully requests that this Court enter an Order: (a) declaring that USEPA's Final Decision was arbitrary and capricious, unsupported by fact, and otherwise not in accord with law; (b) setting aside USEPA's Final Decision and restoring MDEQ's assumed authority over the CR 595 Application; (c) enjoining USEPA from further objecting to or interfering with MDEQ's processing of the CR 595 Application; (d) awarding to MCRC its attorneys' fees, to the extent allowed by law pursuant to 28 U.S.C. § 2412(d)(1)(A), together with expenses and costs; and (e) granting to MCRC any further such relief this Court deems just and equitable.

COUNT II

Declaratory Judgment Action

USEPA Exceeded Its Congressionally Delegated Oversight Authority Under Section 404(j)(2)(B) Of The CWA

331. MCRC hereby realleges and incorporates by reference the allegations contained in each of the preceding paragraphs as though fully set forth herein.

332. Section 404(j)(2)(B) of the CWA *only* authorizes the USEPA to object to a State's issuance of a 404 permit where the proposed permit is "outside the requirements" of Section 404 of the CWA and the Section 404(b)(1) guidelines.

333. By objecting to the issuance of the proposed permit here, USEPA exceeded its delegated oversight authority because none of the terms set forth in the CR 595 Application were "outside the requirements" of Section 404 of the CWA or the Section 404(b)(1) guidelines.

334. For example, USEPA's objections to MCRC's minimization of direct and indirect effects impermissibly focused on: (a) speculative and future secondary effects unlikely to occur; and (b) "critical habitats," "secondary development," and "wildlife crossings . . . large enough to accommodate larger wildlife species such as moose, cougar, and bear" beyond the "aquatic ecosystem."

335. Section 404 of the CWA and the Guidelines do not, however, "require" minimization of such speculative secondary effects, nor do they "require" the application of such minimization measures to separate features of a project that would not themselves be built upon the permitted disposal areas.

336. By way of further example, USEPA's objections to MCRC's revised mitigation plans were impermissibly based on the alleged lack, prior to

permit issuance, of: (a) "a signed stewardship agreement;" (b) "demonstration that financial assurances are in place for construction and long-term management of both stream and wetland mitigation;" (c) final "adaptive and long-term management plans" for stream and wetland mitigation; (d) "measurable performance standards" for stream mitigation; and (e) "demonstration that all necessary mineral rights . . . have been secured."

337. Nothing in Section 404 of the CWA or the Guidelines "require" that these detailed aspects of a mitigation plan be signed and completed prior to permit issuance. Rather, Section 404 of the CWA and the Guidelines merely require that a permit be conditioned on future implementation of a reasonably complete mitigation plan.

338. Neither Section 404 of the CWA nor the Guidelines "require" financial assurance where, as here, there exists a "documented commitment from a government agency or public authority" that the compensatory mitigation will be provided and maintained.

339. Neither Section 404 of the CWA nor the Guidelines "require" that the selected mechanism for providing long-term protection of a mitigation site prohibit mineral extraction where to do so would be inappropriate or impracticable, nor do they "require" that all mineral rights underneath a mitigation site be obtained where, as here, the selected mechanism for providing long-term protection of the mitigation site prohibits adverse effects to the site's aquatic ecosystem.

340. USEPA's *ultra vires* objections constitute a final agency action subject to judicial review under the APA.

341. Any further administrative proceeding before the Corps would be futile where the Corps: (a) helped formulate and joined in the USEPA's *ultra vires* objections; and (b) expressed to MCRC that it would not grant even the revised CR 595 Application submitted to MDEQ.

342. The legal issues presented by this appeal are fit for review and further delay would result in hardship to MCRC.

343. There exists an actual and substantial controversy between MCRC and USEPA regarding the legality of USEPA's objections, and MCRC is currently and continuously injured by the USEPA's unlawful objections.

344. The case is currently justiciable because USEPA has asserted jurisdiction over MCRC's permit application and unlawfully objected to same.

345. Without this Court's intervention, USEPA's ultra vires actions will be forever shielded from judicial review and MCRC will be left with no other means to protect and enforce its rights under the Constitution, CWA, and APA.

WHEREFORE, MCRC respectfully requests that this Court enter an Order: (a) declaring that USEPA's objections exceeded USEPA's congressionally-delegated oversight authority under Section 404(j)(2)(B) Of the CWA; (b) setting aside USEPA's *ultra vires* objections and restoring MDEQ's

assumed authority over the CR 595 Application; (c) enjoining USEPA from further objecting to or interfering with MDEQ's processing of the CR 595 Application; (d) awarding to MCRC its attorneys' fees, to the extent allowed by law pursuant to 28 U.S.C. § 2412(d)(1)(A), together with expenses and costs; and (e) granting to MCRC any further such relief this Court deems just and equitable.

COUNT III

Declaratory Judgment Action

USEPA Failed To List The Conditions Necessary For The Requested Permit To Issue As Mandated By Section 404(j)(2)(B) Of The CWA

346. MCRC hereby realleges and incorporates by reference the allegations contained in each of the preceding paragraphs as though fully set forth herein.

347. Section 404(j) of the CWA mandates that when objecting to a State's issuance of 404 permit, "such written objection shall contain a statement of the reasons for such objection and the conditions which such permit would include if it were issued by [USEPA]."

348. USEPA's April 23, 2012 objections failed to specify "the reasons for such objection[s]" and "the conditions which such permit would include if it were issued by [USEPA]." Indeed, USEPA even stated that because MCRC had not purportedly "demonstrated that the project is the LEDPA . . . it is not possible at this time to provide the conditions necessary for issuance of this permit . . . ."

349. With regard to MCRC's minimization of "direct impacts," USEPA based its objection on the following sentence: "[a]lthough the application outlines measures to minimize likely impacts to aquatic resources, we remain concerned that the magnitude of the proposed impacts to the relatively un-impacted aquatic resources along the route is significant."

350. Besides the fact that USEPA's stated concern has nothing to do with the "direct effects" of the permitted discharges into waters of the United States, USEPA wholly failed to describe the "direct impacts" of concern or list what additional minimization measures should have been included in the permit.

351. With regard to MCRC's minimization of "indirect impacts," USEPA expressed its concern that: (a) "[a]lthough the applicant has proposed methods to minimize . . . indirect impacts, the project will have long-term impacts on hydrology [(e.g., wetland flow patterns from floodplain compensating cuts)] and water quality (e.g., road salt, sediment, oil inputs) that would degrade habitats adjacent to the proposed road;" and (b) "[t]here are no specifics on the monitoring and mitigation for invasive species, and we remain concerned that natural communities adjacent to the road will be disturbed by invasive species."

352. Besides the fact that USEPA's stated concerns were unsupported by the administrative record, USEPA did not list the minimization measures it would require in order to assuage its speculative

concerns, nor did it list what additional invasive species monitoring and mitigation it would require.

353. With regard to MCRC's minimization of "wildlife impacts," USEPA expressed its irrelevant and overreaching concern that "the large amount of habitat clearing required for the proposed project will have negative impacts on migratory birds" and the elevation of the road "would create a barrier that is likely to inhibit animal movement." Rather than list the minimization measures necessary to assuage these groundless concerns, USEPA merely recommended coordination with USFWS and MDNR to address USEPA's concerns.

354. With regard to MCRC's wetland and stream mitigation plan, USEPA expressed its concern that "[b]ecause the proposed compensatory mitigation relies primarily on forested wetland creation, the probability of success of replacing the lost wetland functions is low;" and (b) "additional stream mitigation would be needed to compensate for the new and longer replacement stream enclosures."

355. Besides being unsupported and plainly wrong, USEPA's objection wholly failed to list what wetland and stream mitigation measures it would deem acceptable.

356. USEPA's December 4, 2012 objections also failed to contain a reasonably understandable "statement of the reasons for such objection[s]" and failed to adequately specify "the conditions which such permit would include if it were issued by [USEPA]." To be sure, USEPA did not provide any required

"permit conditions" or modify the "permit conditions" supplied by MDEQ.

357. *First*, USEPA objected to MDEQ's intention to grant the CR 595 Application on the basis that "construction of County Road 595 would have significant direct and indirect impacts on high quality wetland and stream resources, as well as on wildlife," but neither identified the alleged direct and indirect impacts nor explained the reasons why it believed these purported impacts would be significant.

358. *Second*, USEPA objected to MDEQ's intention to grant the CR 595 Application on the basis that USEPA allegedly "has not received adequate plans to minimize impacts," but then, within only 30 days for MCRC to cure the purported deficiencies, set forth an unreasonably vague and open ended set of "minimization requirements" which did not satisfy USEPA's statutory obligation to list "the conditions which such permit would include if it were issued by [USEPA]."

359. By way of example, USEPA required MCRC to place "conservation easements or deed restrictions" on "critical habitat areas" to protect these areas from "secondary development" but provided no guidance on what areas USEPA would deem critical or where it believed secondary development was likely to occur.

360. USEPA required MCRC to adopt "plans for monitoring and managing wetlands along the CR 595 corridor for a minimum of 10 years" and "funding mechanisms . . . for long-term monitoring and management of indirect impacts" but provided no

guidance on what types of monitoring and management it would deem acceptable or what amounts of funding it would find sufficient.

361. USEPA required MCRC to adopt a plan to install additional wildlife crossings capable of accommodating "larger wildlife species such as moose, cougar, and bear" and "[f]encing along the road to guide wildlife to the crossings" but did not specify the design, number, or locations of such crossings and fencing USEPA would deem acceptable. Instead, USEPA stated that "[t]he design will depend on the target wildlife species and the physical characteristics of the road corridor" and that "the applicant shall coordinate placement of the crossings with the MDNR and [USFWS]."

362. *Third*, USEPA objected to MDEQ's intention to grant the CR 595 Application on the basis that USEPA allegedly had not received "a comprehensive mitigation plan that would sufficiently compensate for unavoidable impacts," but then, within only 30 days for MCRC to cure the purported deficiencies, set forth an unreasonably vague and open-ended set of "mitigation requirements" which did not satisfy USEPA's statutory obligation to list "the conditions which such permit would include if it were issued by [USEPA]."

363. For example, apparently having found that neither MCRC nor Michigamme Township would be an appropriate third-party land steward for the preservation site, USEPA required, prior to permit issuance, identification of a third party land steward with "land management experience managing wetland preservation sites" and a "signed stewardship

agreement with the land steward to maintain the proposed preservation area in perpetuity."

364. Besides exceeding that which is required by the Guidelines and being plainly wrong, USEPA's objection failed to identify any particular land steward it would deem acceptable.

365. Apparently having found insufficient the long-term management commitments outlined in MCRC's Wetland and Stream Mitigation Plans and MDEQ's long-term management permit conditions (which included monitoring, reporting, and funding), USEPA demanded, prior to permit issuance, a final "[a]daptive and long-term management plan for both stream and wetland mitigation that include a monitoring and reporting schedule and funding mechanism."

366. Besides exceeding the temporal flexibility of the Guidelines which do not require such finalized plans prior to permit issuance, USEPA's objection failed to explain how MCRC's long-term management commitment or MDEQ's long-term management permit conditions were deficient or what additional long-term management measures USEPA would deem suitable.

367. Apparently having found insufficient the financial assurance commitments outlined in MCRC's Wetland and Stream Mitigation Plans and MDEQ's financial assurance permit conditions, USEPA demanded, prior to permit issuance, "[d]emonstration that financial assurances are in place for construction and long-term management of both stream and wetland mitigation."

368. Besides exceeding that which is required by the Guidelines and being plainly wrong, USEPA's objection failed to identify the amount and type of financial assurance it would require.

369. USEPA further required MCRC to demonstrate that "all necessary mineral rights to ensure that the wetland preservation area will be permanently protected have been secured," but failed to explain what mineral rights would, in its opinion, be necessary to protect the preservation site or what type of demonstration would be sufficient to show that such mineral rights could be secured.

370. Because USEPA's objections were ambiguous and open-ended and because USEPA failed to list the permit conditions it would require for the objections to be lifted, MCRC on numerous occasions (both by phone and written correspondence) requested USEPA to provide guidance as to how MCRC might resolve the objections.

371. Despite these repeated pleas by MCRC and others, USEPA refused to provide any reasonably understandable statement of reasons for its objections, or specify "the conditions which such permit would include if it were issued by [USEPA]."

372. USEPA's failure to follow the objection requirements mandated by Congress in Section 404(j) of the CWA constituted a final agency action subject to judicial review under the APA.

373. The legal issues presented by this appeal are fit for review and further delay would result in hardship to MCRC.

374. There exists an actual and substantial controversy between MCRC and USEPA regarding the legality of USEPA's conduct. And, MCRC is currently and continuously injured by USEPA's unlawful action and inaction.

375. The case is currently justiciable because USEPA has asserted jurisdiction over MCRC's permit application and unlawfully objected to same.

376. Without this Court's intervention, USEPA's unlawful actions and inactions will be forever shielded from judicial review and MCRC will be left with no other means to protect and enforce its rights under the Constitution, CWA, and APA.

WHEREFORE, MCRC respectfully requests that this Court enter an Order: (a) declaring that USEPA failed to follow the objection requirements mandated by Congress in Section 404(j) of the CWA; (b) remanding oversight of the CR 595 Application back to USEPA, directing USEPA to follow the objection requirements mandated by Congress in Section 404(j) of the CWA, and restoring MDEQ's assumed authority over the CR 595 Application; (c) awarding to MCRC its attorneys' fees, to the extent allowed by law pursuant to 28 U.S.C. § 2412(d)(1)(A), together with expenses and costs; and (d) granting to MCRC any further such relief this Court deems just and equitable.

COUNT IV

Declaratory Judgment Action

USEPA's Eleventh-Hour Objections Violated The Public Hearing And Temporal Requirements Set Forth In Section 404(j)(2)(B) Of The CWA

377. MCRC hereby realleges and incorporates by reference the allegations contained in each of the preceding paragraphs as though fully set forth herein

378. Section 404(j)(2)(B) of the CWA provides that if USEPA objects to the issuance of a proposed permit, USEPA must hold a public hearing if requested by the State, and the State may resubmit such permit revised to meet such objection within 30 days after completion of the hearing or, if no hearing is requested within 90 days after the date of such objection.

379. USEPA violated this statutory mandate by asserting wholly new grounds in support of its December 4, 2012 objection but nevertheless demanding that MDEQ either resolve the new objections or deny the permit within 30 days.

380. USEPA's illegal conduct deprived MCRC from a public hearing and from the statutorily proscribed time during which it could have resolved USEPA's new objections.

381. USEPA's failure to follow the temporal objection process mandated by Congress in Section 404(j) of the CWA constituted a final agency action subject to judicial review under the APA.

382. The legal issues presented by this appeal are fit for review and further delay would result in hardship to MCRC.

383. There exists an actual and substantial controversy between MCRC and USEPA regarding the legality of USEPA's conduct. And, MCRC is currently and continuously injured by USEPA's unlawful action and inaction.

384. The case is currently justiciable because USEPA has asserted jurisdiction over MCRC's permit application and unlawfully objected to same.

385. Without this Court's intervention, USEPA's unlawful actions and inactions will be forever shielded from judicial review and MCRC will be left with no other means to protect and enforce its rights under the Constitution, CWA, and APA.

WHEREFORE, MCRC respectfully requests that this Court enter an Order: (a) declaring that USEPA failed to follow the temporal objection process mandated by Congress in Section 404(j) of the CWA; (b) remanding oversight of the CR 595 Application back to USEPA and restoring MDEQ's assumed authority over the CR 595 Application (c) allowing MDEQ to request a public hearing on USEPA's new objections, and/or affording MCRC the statutorily proscribed time to resolve USEPA's new objections; (d) awarding to MCRC its attorneys' fees, to the extent allowed by law pursuant to 28 U.S.C. § 2412(d)(1)(A), together with expenses and costs; and (e) granting to MCRC any further such relief this Court deems just and equitable.

COUNT V

Declaratory Judgment Action

The Corps' Failure To Act On The CR 595 Application Was Arbitrary And Capricious And Made In Violation Of The Corps' Own Regulations

386. MCRC hereby realleges and incorporates by reference the allegations contained in each of the preceding paragraphs as though fully set forth herein.

387. Pursuant to Section 404(j)(2)(B), if a USEPA objection to a proposed wetland fill permit is not resolved within certain statutorily proscribed timeframes, the Corps "may issue the permit pursuant to subsection (a) or (e) of [Section 404 of the CWA], as the case may be, for such source in accordance with the guidelines and requirements of [the CWA]." 33 U.S.C. § 1344(j)(2)(B).

388. The USEPA's 404 State Program Regulations further specify that where a USEPA objection to a proposed wetland fill permit is not resolved within certain statutorily proscribed timeframes, the Corps "shall process the permit application." 40 C.F.R. § 233.50(j).

389. In this case, USEPA's objections to the CR 595 Application were not, according to USEPA, resolved within statutory timeframes set forth in Section 404(j)(2)(B) of the CWA.

390. The Corps, however, failed to take any action whatsoever with respect to the CR 595 Application in violation of the mandates of Section

404(j) of the CWA and the USEPA's 404 State Program Regulations.

391. The Corps' failure to take any action on MCRC's CR 595 Application constituted an impermissible constructive denial (presumably based upon the Corps' and USEPA's past objections which were arbitrary and capricious) and violated the Corps' 404 Permit Processing Regulations which, among other things, require all Corps permit denials to be in writing. *See* 33 C.F.R. §§ 320.1 *et seq.*; 33 C.F.R. §§ 331.4, 331.6, 331.12.

392. As a result of the Corps' unlawful constructive denial of MCRC's permit application, MCRC is unable to construct a critical road in northwestern Marquette County aimed at reducing dangerous heavy truck traffic through highly populated residential, commercial, and educational areas.

393. The Corps' constructive denial of the CR 595 Application and failure to act were arbitrary, capricious, an abuse of discretion, in violation of statutory authority, made without observance of congressionally prescribed procedure, unsupported by fact, and/or otherwise not in accordance with law.

394. The Corps' constructive denial of the CR 595 Application and failure to act constituted a final agency action subject to judicial review under the APA.

395. The legal issues presented by this appeal are fit for review and further delay would result in hardship to MCRC.

396. There exists an actual and substantial controversy between MCRC and the Corps regarding the legality of Corps' conduct. And, MCRC is currently and continuously injured by the Corps' unlawful action and inaction.

397. The case is currently justiciable because the Corps asserted jurisdiction over MCRC's permit application and unlawfully and constructively denied same.

398. Without this Court's intervention, the Corps' unlawful actions and inactions will be forever shielded from judicial review and MCRC will be left with no other means to protect and enforce its rights under the Constitution, CWA, and APA.

WHEREFORE MCRC respectfully requests that this Court enter an Order: (a) declaring that the Corps' failure to take any action whatsoever with respect to the CR 595 Application violated Section 404(j) of the CWA, the USEPA's regulations, and the Corps' own regulations, and constituted an impermissible constructive denial of MCRC's permit application that was arbitrary and capricious; (b) setting aside the Corps' constructive denial of MCRC's permit application and directing the Corps to grant the requested permit as approved by MDEQ; (c) an injunction prohibiting USEPA from further objecting to or interfering with the permit as issued; (d) awarding to MCRC its attorneys' fees, to the extent allowed by law pursuant to 28 U.S.C. § 2412(d)(1)(A), together with expenses and costs; and (e) granting to MCRC any further such relief this Court deems just and equitable.

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Date: July 8, 2015

Respectfully submitted,

CLARK HILL PLC

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EXHIBIT LIST

1. November 28, 2012 Farwell Letter
2. September 10, 2013 Elston Email
3. Supporting Documentation for Woodland Road Application for Permit
4. March 12, 2010 Corps Letter, March 15, 2010 USFWS Letter, and March 17, 2010 USEPA Letter
5. March 9, 2010 Deloria Email
6. April 9, 2010 and April 16, 2010 MCRC Letter
7. May 10, 2010 Battle Email
8. May 10, 2010 Smolinski Email
9. MCRC's October 18, 2010 Resolution
10. CR 595 Project Corridor Map
11. November 18, 2010 and June 2, 2011 MDOT Letters
12. January 11, 2011 MDOT Letter
13. July 18, 2011 MSP Letter
14. January 23, 2012 CR 595 Application Excerpts

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15. Berglund Email Chain

16. January 20, 2011 Cozza Email

17. March 29, 2012 Corps Objection

18. April 5, 2012 USFWS Objection

19. April 23, 2012 USEPA Objection

20. April 12, 2012, May 7, 2012, and May 29, 2012 MCRC Letters

21. May 2, 2012 MCRC Letter

22. May 30, 2012 MCRC Letter

23. June 6, 2012 MCRC Letters

24. June 25, 2012 MDEQ Letter

25. June 29, 2012 Second Revised CR 595 Application

26. Unlabeled USEPA Mitigation Guidance

27. July 5, 2012 MCRC Letter

28. July 24, 2012 KME Letter and August 12, 2012 Summary of Third Revised CR 595 Application

29. Third Stream Mitigation Plan

30. Third Wetland Mitigation Plan

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31. August 24, 2012 MDEQ Draft Permit Conditions

32. June 8, 2012 Haveman Email

33. July 11, 2012 Creal Letter

34. August 27, 2012 MDNR Letter

35. September 14, 2012 MCRC Letter

36. September 17, 2012 MDEQ Letter

37. October 3, 2012 Mitigation Task List

38. Fourth Wetland Mitigation Plan

39. December 4, 2012 USEPA Objections

40. Iwanicki/Hyde Email Chain

41. December 16, 2012 Partial Draft Response to USEPA's Objections

42. December 17, 2012 USEPA Letter

43. December 21, 2012 Senator Levin Letter

44. December 27, 2012 MCRC Letter

45. January 3, 2013 MDEQ Letter