No. _____

In the
# Supreme Court of the United States

MARQUETTE COUNTY ROAD COMMISSION,

*Petitioner,*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

*Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

The Administrative Procedure Act (APA) provides for judicial review of any "final agency action for which there is no other adequate remedy[.]" 5 U.S.C. § 704. Moreover, the APA "creates a 'presumption favoring judicial review of administrative action.'" *Sackett v. Envtl. Prot. Agency*, 566 U.S. 120, 128 (2012) (citation omitted); *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1816 (2016) (same). Here, the Marquette County Road Commission in Michigan intended to build an important road for the upper peninsula of the state. Because the road would impact wetlands, the Road Commission needed a § 404 Clean Water Act (CWA) discharge permit to do so. After a lengthy and expensive application process, the Road Commission had in hand the necessary permit approval from Michigan, which had authority to approve the permit pursuant to § 404(g)-(j) of the CWA. But before the road building could start, the Environmental Protection Agency (EPA) arbitrarily and capriciously vetoed that permit. This veto left the Road Commission with no alternatives but to either give up on the road or start over and apply for another § 404 permit from the Army Corps of Engineers, a process that costs the average applicant $271,596 and can take 788 days to complete. *Rapanos v. United States*, 547 U.S. 715, 721 (2006). The question presented by this case is this:

Whether an arbitrary and capricious EPA veto of a state-approved CWA § 404 permit, a final agency action that denies the state-approved permit forevermore, and binds all parties, is subject to judicial review under the APA.

## LIST OF ALL PARTIES

Petitioner is the Marquette County Road Commission, a local government agency in the State of Michigan. Respondents are the United States Environmental Protection Agency, the United States Army Corps of Engineers, and Cathy Stepp as Region V Administrator for the EPA, who is substituted by operation of law for Susan Hedman, the former Region V Administrator for the EPA, and who was named in her official capacity in the original complaint.

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## PETITION FOR A WRIT OF CERTIORARI

Marquette County Road Commission (the Road Commission) respectfully requests that this Court issue a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Sixth Circuit.

## OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Sixth Circuit is reported at *Marquette County Road Comm'n v. EPA*, 726 Fed. Appx. 461 (6th Cir. 2018), and is reproduced here as Appendix (App.) A. The opinion of the trial court is reported at *Marquette County Road Comm'n v. EPA*, 188 F. Supp. 3d 641, 643 (W.D. Mich. 2016), and is reproduced here as App. B. The order of the trial court denying reconsideration is available at *Marquette County Road Comm'n v. EPA*, No. 2:15-cv-93, 2016 WL 7228156, at *1 (W.D. Mich. Dec. 14, 2016), and is reproduced here as App. C. The order of the Sixth Circuit denying rehearing *en banc* is reproduced here as App. D.

## JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Road Commission brought an action for declaratory and injunctive relief against the EPA, Administrator of the EPA, and the U.S. Army Corps of Engineers (Corps), pursuant to the Clean Water Act (CWA) and the Administrative Procedure Act (APA), alleging, *inter alia*, that EPA's objections to its permit application were arbitrary and capricious. App. B. The Defendants moved to dismiss based on lack of jurisdiction due to the alleged absence of final agency action, and this motion was sustained by the trial

court on May 18, 2016. *Id.* Thirteen days later, this Court decided *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807 (2016). On December 14, 2016, the trial court refused to reconsider the Road Commission's claims in light of *Hawkes*. App. C. On March, 20, 2018, the Sixth Circuit affirmed the findings of the trial court, App. A, and subsequently declined *en banc* review. App. E-1.

## CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The CWA prohibits discharge of dredged or fill material into the "waters of the United States," 33 U.S.C. § 1251, *et seq.*, except in accordance with the § 404 permitting regime, which is jointly administered by the Corps and the EPA, *see* 33 U.S.C. § 1344.

The APA provides that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. Specifically reviewable are agency actions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Further, a reviewing court shall "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

## INTRODUCTION

In *U.S. Army Corps of Eng'rs v. Hawkes Co.,* 136 S. Ct. 1807 (2016), and *Sackett v. EPA*, 566 U.S. 120 (2012), this Court overturned decades of uniform case law prohibiting judicial review of jurisdictional

determinations (JDs) and compliance orders issued pursuant to the CWA. This Court unanimously held in both cases that the agency actions taken pursuant to the Act were final and subject to judicial review under the APA. Other than the holdings of the two decisions, perhaps the most important lesson to be derived from the two cases is this: the courts should take a "pragmatic" approach to finality when determining their own jurisdiction to hear appeals from agency action under the APA. *Hawkes*, 136 S. Ct. at 1815. Unfortunately for the Road Commission here, the Sixth Circuit refused to correctly apply this lesson of *Hawkes* and *Sackett*, and left the Road Commission without recourse to the courts to challenge an arbitrary, final decision of the EPA to veto a state-approved CWA permit that left the people and community of this Michigan Upper Peninsula county without a new county road that would have improved the lives of Michiganders and improved the water quality in the state. Instead, the EPA forced the Road Commission to start the permitting process over with the Corps, a process that would be even more expensive and time-consuming than the process it went through with the State of Michigan to win the state-approved permit pursuant to § 404(j) of the CWA.

The facts are straightforward and for the most part not in dispute. The Road Commission wished to build a county road extension—County Road 595 (CR595)—for use as a shortcut for commercial truck traffic. App. F-5. The proposed 21-mile road would allow for trucks to bypass a number of busy city streets in Marquette County, thereby bettering the health, safety, and welfare of those who lived in that county. App. F-5. To do so, the Road Commission

needed to fill 25 acres of wetlands. App. F-5. To fill the wetlands, the Road Commission needed a permit pursuant to § 404 of the Clean Water Act. App. F-5. States are authorized to approve a § 404 permit if the permit applications meet certain conditions. App. F-5; *see also* 33 U.S.C. § 1344(g)-(j). The EPA retains limited oversight authority when the state takes on this authority; that authority includes the ability to inform the state it will not approve the permit the state intends to issue. 33 U.S.C. § 1344(j). When it objects in this way, then the property owner must begin the permitting process anew with the Corps. *Id*.

That's what happened here. In 2011, the Road Commission submitted a permit application to the Michigan Department of Environmental Quality (MDEQ), the agency in charge of administering the federally approved § 404 permitting plan for the State of Michigan. App. F-5. The Road Commission and MDEQ worked together to arrive at an approved plan for CR595, and the MDEQ submitted the permit plan for CR595 to the EPA per the CWA. App. F-6. The EPA and Corps objected to the plan. App. F-6–7. The EPA offered unsupported and vague objections to the CR595 application. App. F-7. Despite the vagueness of the objections, the Road Commission did its best to remedy the objections, to no avail. App. F-7. When the Road Commission offered to keep 63 acres of wetlands for every one acre of wetlands filled by the planned road, App. F-7, the EPA still demanded more. App. F-7–8. Over nearly two years, no matter what the Road Commission offered, the EPA lodged objections.

Finally, after a hearing on the objections in September 2012, and a series of repeated rejections

from the EPA, the MDEQ submitted the Road Commission's revised permit application to the EPA, and it stated that it believed the permit application complied with all federal and state laws and that the EPA should withdraw its objections to CR595. App. F-7. The EPA refused to do so and on December 4, 2012, the EPA arbitrarily lodged an entirely new set of objections that were both intentionally vague and unsupported by law. App. F-8. The MDEQ and the Road Commission could not hope to comply with vague, unlawful objections, and by operation of the CWA after 30 days those objections crystalized into a veto of the MDEQ-approved permit; authority to approve CR595 then transferred from the MDEQ to the Corps. App. F-8–9. That transfer forced the Road Commission to start anew with the Corps in its pursuit of a permit for CR595. App. F-7–8.

The Road Commission rejected that option and instead sought review in the courts of what it correctly calls final agency action pursuant to the APA. App. F. This Court's CWA jurisprudence makes one thing certain: final agency action that occurs pursuant to the CWA is *not* beyond the judicial review of Article III courts. When the EPA takes action which "mark[s] the consummation of the agency's decision making process," that determines "rights or obligations . . . from which legal consequences will flow," that action is "final" and subject to judicial review under the APA. *See Bennett v. Spear*, 520 U.S. 154, 178 (1997). Here, the EPA's decisionmaking process was consummated in regards to the state § 404 permit when it vetoed the state plan, and that decision set in motion legal consequences—to wit, the requirement that the Road Commission now start the permitting process over

with the Corps. Pursuant to *Sackett*, *Hawkes*, and *Bennett*, the EPA's veto of the state-approved § 404 permit should be reviewable in federal court per § 704 of the APA.

The contrary finding by the Sixth Circuit stands in direct conflict with the established APA precedent of this Court as articulated in *Sackett* and *Hawkes*.

## STATEMENT OF THE CASE

### A. Congress Designed § 404(g)-(j) of the CWA To Allow States To Assume Federal Permitting Authority with Limited Oversight

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). 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). Congress then authorized the Corps to issue permits for the discharge of dredged and fill material into navigable waters by enacting § 404 of the CWA. *Id*. § 1344; *see also* 33 C.F.R. § 320.2; § 323.3(a). 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. 33 U.S.C. § 1319.

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 § 404 of the CWA. 33 U.S.C. § 1251(b) (added by Pub. L. No. 95-217 § 5(a), 91 Stat. 1566 (Dec. 27, 1977)). Specifically, Congress allowed states desiring to administer their own permit program ("404 program") for the discharge of fill into navigable waters to submit to the EPA a complete description of the program they proposed to establish and administer under state law. 33 U.S.C. § 1344(g) (added by Pub. L. No. 95-217 § 67).

If a state's proposed § 404 program met certain prescribed statutory requirements, Congress directed the EPA to approve the state's § 404 program and notify the Corps. 33 U.S.C. § 1344(h)(2)(A) (added by Pub. L. No. 95-217 § 67); *see also* 40 C.F.R. § 233.15; 33 C.F.R. § 323.5.

The CWA sets out a detailed procedure for how the state and the EPA should work together on a 404 permit application should the state assume permitting authority, *see* 33 U.S.C. § 1344(j), as Michigan did in 1979. Mich. Comp. Laws § 281.701, *et seq.* A state must present to the EPA copies of all permit applications it receives. *Marquette County Road Comm'n*, 188 F. Supp. at 643-44. In addition, the state must notify the EPA of any action that it takes with respect to these applications. 33 U.S.C. § 1344(j). Within 10 days, the EPA Administrator must provide copies of the application to the Corps, the Department of the Interior, and the U.S. Fish and Wildlife Service (FWS). *Id.* The Administrator must notify the state

within 30 days if it intends to comment on the state's handling of the application. *Id.* The Administrator must submit comments within 90 days. *Id.*

Once the EPA notifies a state that it intends to comment on the permit application, the state may not issue the permit until after it receives the comment, or until 90 days have passed. *Id.* If the EPA objects to the application, the state "shall not issue such proposed permit" even after the 90 days have elapsed. *Id.* The aggrieved state may request a hearing to air its complaints. *Id.* 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 Corps. *Id.* Once the state cannot modify the permit to conform to the objections of the EPA, the objection crystallizes into a veto and permitting authority transfers to the Corps. *Id.*

### B. The Road Commission Seeks To Bolster Public Safety Through Development of County Road 595

Marquette County, located in the upper peninsula of Michigan, is over 1,873 square miles in size, making it larger than the State of Rhode Island. *See An Examination of Federal Permitting Processes*: Hearing Before the Subcommittee on The Interior, Energy, and Environment, 115th Cong. (2018), https://docs.house.gov/meetings/GO/GO28/20180315/106919/HHRG-115-GO28-Transcript-20180315.pdf, at 7. Servicing the County's 67,000 residents are 1,274 miles of roads and 94 bridges. *Id.* The Road Commission, which is responsible for ensuring the

safety and efficiency of the County's vast road and bridge system, averages over 20 CWA permits a year. *Id.*

County Road 595 was proposed by the Road Commission with one important goal in mind: to increase public safety, health, and welfare through the alleviation of dangerous traffic conditions. *Id.* Without CR595, heavy truck traffic is forced dangerously close to heavily populated areas of the County, including through the heart of small towns, near universities, and dangerously close to elementary schools. *Id.* at 7-8.

### C. The EPA Repeatedly Refuses To Approve the Permit Despite Numerous Attempts at Mitigation

The Road Commission sought its permit for CR595 from the Michigan Department of Environmental Quality (MDEQ), the state agency responsible for implementing Michigan's federally approved CWA wetland permit program, in October 2011, and submitted a revised application on January 23, 2012. App. A-4–5. The MDEQ sent copies of the application to the EPA, the Corps, and the FWS, per the CWA. *Id.* On April 23, 2012, after consulting with the Corps and the FWS, EPA submitted comments on the application and objected to its issuance, asserting that the Road Commission's proposal purportedly failed to comply with § 404 because it did not demonstrate that the proposed road was the "least environmentally damaging practical alternative." *Id.* The Road Commission, the MDEQ, and EPA discussed the application over the next

several months and ultimately the Road Commission submitted a revised version of its application twice, the latter on July 24, 2012. *Id.* The last revised application proposed to protect 63 acres of wetlands for every one acre of wetlands filled by the planned road. App. F-7. At the MDEQ's request, pursuant to the CWA, the EPA held a public hearing on the third revised application on August 28, 2012. *Id.* On September 17, 2012, the MDEQ notified EPA that it was in a position to approve the Road Commission's most recent permit application. App. A-5–6. Nearly three months passed and then on December 12, 2012, the EPA informed the MDEQ that it would continue to object to CR595 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.'" App. A-6. The Road Commission repeatedly attempted to work with the EPA to find out what could be done to ameliorate those objections, but the EPA refused to cooperate, App F-8, and—by operation of the CWA—30 days after that December 12 EPA letter, the permitting process was transferred from the MDEQ to the Corps. 33 U.S.C. § 1344(j).

### D. Misapplication of APA Precedent at the Trial and Circuit Courts

The Road Commission subsequently brought this five-count declaratory judgment action in the Western District of Michigan. App. A-7. In Count I of the complaint, it asserted the EPA's objections to its MDEQ permit application were arbitrary and capricious. App. A-7. In Count II, the Road Commission claimed that EPA exceeded its delegated

authority by issuing objections based on requirements not mandated by the CWA. App. A-7. In Count III, the Road Commission claimed that EPA's objections failed to list the conditions necessary for a permit to issue, as required by § 404(j) of the CWA. App. A-7. In Count IV, it claimed that EPA did not follow the procedural requirements of § 404(j) of the CWA when it vetoed the MDEQ permit. App. A-7. In Count V, the Road Commission claimed that the Corps improperly denied its permit application by failing to act on it. App. A-7.

Defendants asserted the lower court should dismiss the complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, because the complaint failed to state a claim upon which relief could be granted and because the court lacked subject-matter jurisdiction to adjudicate the claims against the Federal Defendants. App. A-8. The district court granted the motion and dismissed the complaint.

The Road Commission appealed and the Sixth Circuit affirmed the dismissal. The court held that the EPA veto of the state-approved § 404 permit was not a final agency action because the entire permit process—including the transfer of permit authority from the state to the Corps—was one "continuous" process and the EPA would "work together" with the Corps if and when the Road Commission pursued its permit with the Corps. App. A-11. Therefore, the EPA's involvement in the permit-application process had not been consummated and thus its action as to the state-approved permit was not final. App. A-12.

The Road Commission now seeks review only of the decision of the lower courts to conclude that the EPA rejection of the last permit application submitted for approval by the MDEQ to the EPA did not amount to final agency action appealable pursuant to § 704 of the APA.

## REASONS FOR GRANTING THE PETITION

The Sixth Circuit has decided an important federal question below that directly conflicts with this Court's holdings in *Hawkes* and *Sackett*. As such, this case presents an opportunity to further clarify and provide guidance to the lower courts on the proper scope of judicial review under the CWA specifically and the APA generally. For these compelling reasons, this Court should grant Petitioner's request for a writ of certiorari.

### I

### AN EXPRESS SPLIT BETWEEN SUPREME COURT PRECEDENT AND THE INSTANT CASE EXISTS

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

The test for determining final agency action is two-pronged: "First, the action must mark the 'consummation' of the agency's decisionmaking process." *Bennett*, 520 U.S. at 177-78 (citation omitted). Second, "the action must be one by which 'rights or obligations have been determined,'" or from which "'legal consequences will flow.'" *Id.* at 178. Even if new "legal consequences" do not flow, the agency action may still be final if it determines "rights or obligations." Likewise, the action may be final if it fixes a "right" but not an "obligation." *See Sackett*, 566 U.S. at 126.

The *Bennett* test provides multiple bases for a court to find agency action sufficiently final to allow for judicial review under the APA.

### A. This Court's Holdings in *Hawkes* and *Sackett* Provide That Final Decisions Under the CWA Are Reviewable

In *Hawkes* and *Sackett* this Court reversed 40 years of uniform lower court case law that prohibited judicial review of certain final agency actions taken pursuant to the CWA. In both cases the Court unanimously held that JDs and compliance orders, respectfully, are "final" and subject to judicial review under the APA. The same is true of the EPA veto at issue here.

### 1. *Hawkes* Makes Final Agency Decisions Under the CWA Reviewable in Federal Court

In *Hawkes*, this Court unanimously applied *Bennett v. Spear* and reaffirmed that in furtherance of the "generous review provisions" of the APA, *Bennett*, 520 U.S. at 163, and the Act's strong presumption of reviewability, federal courts should take a "pragmatic" approach when considering whether an agency administrative decision meets the test for finality in the APA.

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

Faced with this no-win situation, Hawkes decided to challenge the Corps' jurisdictional determination in court. *Id.* at 1813. Although Hawkes lost in the district court, the Eighth Circuit held that Hawkes could seek immediate judicial review of the Corps jurisdictional determination, relying in large part on the *Sackett* case. *Hawkes Co. v. U.S. Army Corps of Eng'rs*, 782 F.3d 994, 994 (8th Cir. 2015). This

Court granted certiorari, and upheld the Eighth Circuit decision granting Hawkes their day in court, explaining that "[t]his conclusion tracks the 'pragmatic' approach we have long taken to finality." *Hawkes*, 136 S. Ct. at 1815 (citing *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967)).

First, this Court easily found that the Corps jurisdictional determination marked the consummation of that agency's decisionmaking process. Issued after "extensive factfinding," approved JDs, unlike preliminary determinations, remain valid and enforceable for a period up to five years. *See Hawkes*, 136 S. Ct. at 1813-14. The Court compared Hawkes' claims to those presented in *Frozen Food Express v. United States*, 351 U.S. 40 (1956), where the Court "considered the finality of an order specifying which commodities the Interstate Commerce Commission believed were exempt by statute from regulation, and which it believed were not." *Hawkes*, 136 S. Ct. at 1815. This Court held that such determinations are immediately reviewable because the action gave notice to every carrier that did not have authority from the Road Commission to transport those commodities, and that they did so "at the risk of incurring criminal penalties." *Id.* (citing *Frozen Food*, 351 U.S. at 44-45).

Second, this Court also found that the definitive nature of approved JDs gives rise to "direct and appreciable legal consequences," satisfying the second *Bennett* prong. *Hawkes*, 136 S. Ct. at 1814-15. To demonstrate that a Corps' affirmative jurisdictional determination has legal consequences, the Court first looked to a circumstance where the Corps determined

that jurisdictional waters were absent from a property. *Hawkes*, 136 S. Ct. at 1814. Where the Corps issues a negative JD, legal rights and obligations flow—the landowner can use his property without a permit, and the agencies cannot bring an enforcement action for violating the CWA. *Id.* The Court then looked to the circumstance before it, where the Corps had made an affirmative JD, finding that affirmative JDs also have legal consequences because "[t]hey represent the denial of the safe harbor that negative JDs afford" and warn applicants "that if they discharge pollutants onto their property without obtaining a permit from the Corps they do so at the risk of significant criminal and civil penalties." *Id.* at 1814-15.

Finally, this Court found that Hawkes had no other adequate remedy to APA review in a federal court. *Id.* at 1815-16. As this Court has long held, "parties need not await enforcement proceedings before challenging final agency action where such proceedings carry the risk of 'serious criminal and civil penalties.'" *Id.* at 1815 (citing *Abbott*, 387 U.S. at 153). In addition, it is not "an adequate alternative to APA review [] to apply for a permit and then seek judicial review in the event of an unfavorable decision." *Id.* Such a requirement is "arduous, expensive, and long," *id.* (citing *Rapanos v. United States*, 547 U.S. 715, 721 (2006) (plurality opinion)), and "adds nothing" to a final agency determination, *id.* at 1816.

### 2. *Sackett* Likewise Counsels in Favor of Allowing Judicial Review

In *Sackett*, the EPA issued a compliance order asserting that the Sacketts had filled wetlands to build a home on their half-acre lot near Priest Lake, Idaho, without a federal permit in violation of the CWA. The Sacketts contested the EPA's determination and sought review of the EPA's final decision in court. The government contended, in part, that the adequate remedy the Sacketts had—in lieu of suing in court—was to apply for a Corps permit and then challenge the compliance order. The Ninth Circuit affirmed. At the time the Court heard the case, five circuit courts and at least 10 district courts had held that compliance orders were not reviewable under the APA. *See Sackett v. EPA*, 622 F.3d 1139, 1143 (9th Cir. 2010).

But this Court unanimously reversed. Relying on *Bennett*, the Court had no trouble finding that the compliance order "marks the 'consummation' of the agency's decision making process." *Sackett*, 566 U.S. at 127. The Court held the order marked the consummation of the agency's decisionmaking process because "the 'Findings and Conclusions' that the compliance order contained were not subject to further agency review." *Id.*

This Court also found that the applicable compliance order satisfied the second *Bennett* prong. Before *Sackett*, the courts focused on the independent legal consequences flowing from the agency action while ignoring the alternative basis for determining finality—whether the agency action fixes "rights or

obligations." In *Sackett*, this Court explained that the compliance order not only created independent legal consequences but it also determined a legal obligation:

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

*Sackett*, 566 U.S. at 126.

In *Port of Boston*, cited in *Sackett* above, this Court had to decide who had primary jurisdiction to review an order by the Maritime Commission and, in the process, the Court addressed the standard for determining final agency action. Relevant here is the Court's holding that agency orders need not create a new, independent legal consequence to be final. According to the Court, the Road Commission's order lacked finality "because it had no independent effect on anyone" and had the "hollow ring of another era." 400 U.S. at 70-71. Citing *Frozen Food*, 351 U.S. at 44,

the Court concluded that "[a]gency orders that have no independent coercive effect are common" but that was not the "relevant consideration[] in determining finality." *Port of Boston*, 400 U.S. at 70-71. Instead, the relevant consideration was "whether the process of administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined." *Id.* at 71. There was "no possible disruption of the administrative process" because there was "nothing else for the Commission to do." *Id.*

Finally, this Court found that the Sacketts had no other adequate remedy in a court except for APA review. They could not bring a civil enforcement action under 33 U.S.C. § 1319, which is reserved for initiation by the EPA itself, *Sackett*, 566 U.S. at 127, and applying to the Corps for a permit and then filing suit under the APA when the permit was denied was equally inadequate, because "[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.*

### B. The Holding Below Stands in Direct Conflict with This Court's Rulings in *Hawkes* and *Sackett*

In *Hawkes* and *Sackett*, this Court said the petitioners could seek remedy in federal court to challenge final decisions of the EPA. So it should be here. Like the final decision of the Corps in *Hawkes* and the final decision of the EPA in *Sackett*, the decision of the EPA in the instant case rises to the

level of final agency action. As such, Petitioner has the right to judicial review of that decision.

### 1. The EPA Veto of the MDEQ Permit Marked the Consummation of the EPA's Decisionmaking Process

The Sixth Circuit concluded that the EPA veto of the Road Commission's MDEQ-approved permit did not amount to final agency action because the permit was not granted or denied when the EPA rejected it. *Marquette County Road Comm'n v. EPA*, 726 Fed. Appx. 461, 466 (6th Cir. 2018). It also found that there was more for EPA to do even after the Corps assumed permitting authority. *Id.* at 467. But *Hawkes* and the facts and logic that undergird it should have been dispositive to the question of the finality of the EPA veto in this case.

The court below failed to account for the fact that the permit at issue, the *MDEQ-approved permit* and not some hypothetical future application to the Corps, was directly denied by operation of the EPA veto. That the permit was denied by the veto of the EPA is beyond question, as the Road Commission could only submit a new permit to the Corps for its consideration. A new permit application filed with the Corps would not be for the same project that had been denied by the EPA, and for which the Road Commission rightly seeks judicial redress under the APA, but effectively for a different project subject to different legal requirements. There is nothing speculative about that. The Road Commission went through a nearly 15-month permitting process with MDEQ and EPA that entailed an administratively

complete application, a plethora of supporting studies and reports, countless meetings and conferences, and numerous application revisions aimed at satisfying EPA's vague objections. Not only did this process entail "extensive factfinding" by the EPA, but the denial of the MDEQ-approved permit gave the Road Commission notice that to continue to pursue the project without a permit would expose it to civil as well as criminal penalties, mirroring the facts and analysis of *Hawkes*.

The situation faced by the Road Commission was effectively the same no-win situation faced by *Hawkes*. While the EPA may have had "more work to do" as to a new permit if the Road Commission had submitted one to the Corps, there was no more work for EPA to do *as to the MDEQ-approved permit* that EPA had already vetoed. The fate of that permit, *the permit at issue here*, was already signed and sealed. The agency's decisionmaking process as to the MDEQ-approved permit was fully consummated. Hawkes believed it did not need a Corps permit, and successfully sought the right to challenge that arbitrary and capricious agency jurisdictional determination in court. Likewise here, the Road Commission cannot proceed without a Corps permit only because the EPA arbitrarily and capriciously refused to allow the Road Commission to obtain the permit that the MDEQ stood ready, willing, and able to grant. Here, just as in *Hawkes* and *Frozen Food*, the EPA veto of the state § 404(j) permit deprives the Road Commission of *that permit* forevermore. That is why the Road Commission seeks to challenge the EPA's decision today. The proper place to do so is in a federal court.

*Sackett* demonstrates the same. Like the compliance order in *Sackett*, the EPA veto of the state-approved permit will *never* be subject to further agency review. That permit denial is final and the EPA's work is done. The Corps—a separate agency—will review the new permit application; just as in *Sackett*, the Corps would have reviewed the Sacketts' new permit application under the government's theory of the case. The EPA acted arbitrarily and capriciously in *Sackett* when it issued the compliance order, and the EPA acted arbitrarily and capriciously here when it vetoed the MDEQ permit. The Road Commission merely seeks to have its proper day in court in order to make this case.

### 2. The EPA Veto Imposed a Legal Obligation and Denied a Legal Right

Here, rights or obligations have been determined and legal consequences have flowed, although the Court need only find one or the other in order to find the EPA veto final.

#### a. The EPA Veto Imposed a Legal Obligation

By reason of the final EPA action discussed above, the Road Commission has the legal obligation to obtain a permit from the Corps if they wish to proceed with the road project. Like *Hawkes* and *Sackett*, to proceed with the project without fulfilling this new legal obligation would expose it to significant criminal and civil penalties. The Road Commission

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

Likewise, no further EPA administrative review of the MDEQ's permit is required or even allowed. In point of fact, now that the Corps has assumed control of review of the new permit application, the EPA will not revisit that determination—ever. In other words, the veto of the state permit legally binds the State of Michigan and the Road Commission. This conclusion is bolstered by the Supreme Court's analysis in *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103 (1948), on which *Bennett* relied. *Chicago* held that administrative determinations are reviewable if they "impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process." *Id.* at 113.

This formulation is helpful in analyzing this case because the EPA veto both imposed an obligation on the Road Commission and denied a right to it forever, with absolutely no way in which to remedy the loss of due process that Congress intended § 704 of the APA to remedy. *See Hawkes*, 136 S. Ct. at 1817 (Kennedy, J., concurring) (judicial review of the

jurisdictional determination pursuant to the APA protects due process rights of property owners facing wrongful applications of the "notoriously unclear" Clean Water Act). The EPA demand that the Road Commission pursue a new permit from the Corps *flows from the veto*, not from the Clean Water Act.

**b. The EPA Veto Denied a Legal Right**

But for the EPA veto, the Road Commission would be free to exercise its right to build the road without Corps' approval. If the EPA had not vetoed the permit, then the Road Commission could have gone forward with its CR595 project without fear of an enforcement action. The permit would have the force and effect of both state and federal law. *See, e.g.*, 33 U.S.C. § 1344(j), (p); 40 C.F.R. § 233.50; 40 C.F.R. § 233.70. The permit would have been binding for a period of five years and, thus, like a negative JD, would have had legal consequences. 40 C.F.R. § 233.23(b). Similarly, an affirmative JD—what the Hawkes Company received—has the same effect as the veto that the Road Commission received. Just like the legal consequence of an affirmative JD (i.e., denial of the safe harbor and resort to the Corps' permitting process), the EPA veto denied the Road Commission the proposed state § 404 permit and warns the Road Commission that if it discharges pollutants onto its property without obtaining a permit from the Corps, it does so at the risk of significant criminal and civil penalties.

Therefore, like the affirmative JD in *Hawkes*, which divested the plaintiff of the safe harbor and created the need for plaintiff to seek a permit from the

Corps, the EPA's veto in this case divested the Road Commission of the § 404 permit proposed by the state and created the need for the Road Commission to seek a permit from the Corps. The veto changed the legal regime, denying the Road Commission a legal right, and is final agency action under the APA.

### 3. Petitioner Had No Other Adequate Remedy In a Court Than APA Review

There is no "other adequate remedy" for an EPA veto of a state-approved permit like the permit the MDEQ was prepared to issue to the Road Commission. Under the current administrative regime, the Road Commission's only choice is to either give up on the project or start the permit process over with the Corps. Like *Sackett*, the Road Commission has no alternative statute, like 33 U.S.C. § 1319, by which to seek remedy. *See Sackett*, 566 U.S. at 127. In this case the Corps demanded that the Road Commission apply for a new permit after the EPA rejected the state permit. The Corps demand is tantamount to an outright permit denial. That demand left the Road Commission in at least as untenable a position as Hawkes Company—having to spend an indefinite amount of time, and hundreds of thousands of dollars, for a Corps permit or drop the project altogether. But "the remedy for denial of action that might be sought from one agency does not ordinarily provide an 'adequate remedy' for action already taken by another agency."[1] *Sackett*, 566 U.S. at 127.

[1] For a specialized "individual" permit of the sort at issue in this case, for example, one study found that the average applicant spends 788 days and $271,596 in completing the process, without

In reality, the EPA veto in this case left the Road Commission in an even worse position than Hawkes Company; at least Hawkes Company could have applied for the permit and then upon receiving a final decision on that permit application sued the Corps because the predicate JD was arbitrary and capricious. Not so here—here, no court will likely ever review the EPA's predicate decision to reject the state permit. If the Road Commission must seek a Corps permit, the EPA veto may be deemed moot or outside the scope of the later Corps permit challenge. *See Sackett*, 566 U.S. at 127 ("[T]he remedy for denial of action that might be sought from one agency does not ordinarily provide an 'adequate remedy' for action already taken by another agency."). Moreover, the EPA veto will be no more final after a Corps permit decision than it is now. As in *Hawkes*, the Corps permit process does not add anything, legally or factually, to the challenged agency action.

There is no remedy in court, let alone an adequate remedy, to address the arbitrary and capricious decision of the EPA to veto the MDEQ-approved permit.

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counting costs of mitigation or design changes. Even more readily available "general" permits took applicants, on average, 313 days and $28,915 to complete. *Hawkes*, 136 S. Ct. at 1812 (internal quotations and citations omitted).

## II

## THIS CASE PRESENTS AN IMPORTANT ISSUE OF FEDERALISM

As noted above, Congress recognizes 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 § 404 of the CWA. 33 U.S.C. § 1251(b) (added by Pub. L. No. 95-217 § 5(a)). To achieve that end, Congress allows states desiring to administer their own 404 program for the discharge of fill into navigable waters to submit to the EPA a complete description of the program they propose to establish and administer under state law. 33 U.S.C. § 1344(g) (added by Pub. L. No. 95-217 § 67). Once accepted, the state then assumes the § 404 authority, subject to the EPA's limited oversight.

Only Michigan and New Jersey have accepted this federal invitation in the years since, but more states are considering it—including the state of Florida, which earlier this year passed a law signaling its intent to take on the responsibility. *See, e.g.*, § 373.4146, Fla. Stat. (2018). But why would any state take on the time and expense that assuming this responsibility would entail if the EPA can arbitrarily and capriciously veto the state's carefully determined plan as the EPA did to Michigan here? Here, the local community of Marquette County and the state of Michigan both wanted the road project and believed they had taken precautions to properly protect the water resources of the state, but the EPA capriciously overruled their carefully laid plans. Allowing the

EPA's decisionmaking in this case to be immune from judicial review, as the Sixth Circuit did here, frustrates Congress's intent behind § 404(g) of the CWA. It is unreasonable to believe that more states will take on this CWA § 404 authority if the state knows that its judgment can be second-guessed for arbitrary and capricious reasons by the EPA, and that this second-guessing is immune from challenge in the courts.

## III

## THIS CASE IS THE IDEAL VEHICLE TO SETTLE THIS QUESTION

In *Sackett*, the Supreme Court spelled out why the Court should reverse the trial court's decision: "The APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all. And there is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties[.]" *Sackett*, 566 U.S. at 130-31. The Government wants this Court to accept that, despite the clear admonitions of *Sackett* and *Hawkes*, the Government can strong-arm the Road Commission into applying for another § 404 permit despite the fact that the EPA denied the MDEQ § 404 permit arbitrarily and capriciously. Landowners should have the right to challenge agency overreaching in court, especially a contested determination like EPA's veto of the MDEQ § 404 permit. The only practical way for that to happen is through immediate judicial review. The EPA veto here has all the hallmarks of final agency action, but the Road Commission has no adequate

remedy in court. *See* 5 U.S.C. § 704. The EPA veto in this case is as much a "final agency action" as the jurisdictional determination in *Hawkes* and the compliance order in *Sackett*. These decisions require that the Road Commission be allowed to seek relief in a federal court. The Sixth Circuit denied them this relief.

## CONCLUSION

The petition for certiorari should be granted. In view of the conflict of the decision below with *Sackett* and *Hawkes*, the Court may wish to consider summary reversal.

DATED: October, 2018.

Respectfully submitted,

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