No. 18-555

# In the Supreme Court of the United States

MARQUETTE COUNTY ROAD COMMISSION, PETITIONER

*v.*

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

**BRIEF FOR THE RESPONDENTS IN OPPOSITION**

NOEL J. FRANCISCO
*Solicitor General*
*Counsel of Record*
JEFFREY BOSSERT CLARK
*Assistant Attorney General*
ELLEN J. DURKEE
*Attorney*
*Department of Justice*
*Washington, D.C. 20530-0001*
*SupremeCtBriefs@usdoj.gov*
*(202) 514-2217*

## QUESTION PRESENTED

Whether the court of appeals correctly held that an objection by the Environmental Protection Agency to the issuance of a permit to discharge dredged or fill material under Section 404 of the Clean Water Act, 33 U.S.C. 1344, does not constitute "final agency action" judicially reviewable under the Administrative Procedure Act, 5 U.S.C. 704, because such an objection does not mark the consummation of the Section 404 permitting process.

**TABLE OF CONTENTS**



**TABLE OF AUTHORITIES**

Cases:



Statutes and regulations:

Statutes and regulations—Continued: Page

# In the Supreme Court of the United States

No. 18-555

MARQUETTE COUNTY ROAD COMMISSION, PETITIONER

*v.*

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

**BRIEF FOR THE RESPONDENTS IN OPPOSITION**

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is not published in the Federal Reporter but is reprinted at 726 Fed. Appx. 461. The opinion of the district court granting the government's motion to dismiss (Pet. App. B1-B35) is reported at 188 F. Supp. 3d 641. The opinion of the district court denying petitioner's motion to alter or amend the judgment (Pet. App. D1-D11) is not published in the Federal Supplement but is available at 2016 WL 7228156.

## JURISDICTION

The judgment of the court of appeals was entered on March 20, 2018. A petition for rehearing was denied on May 29, 2018 (Pet. App. E1). On August 3, 2018, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including October 25, 2018,

and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

1. Subject to specified exceptions, the Clean Water Act (CWA or Act), 33 U.S.C. 1251 *et seq.*, generally prohibits the discharge of any pollutant into the waters of the United States. 33 U.S.C. 1311(a); see 33 U.S.C. 1362(7) and (12). Section 404 of the Act establishes an exception to that prohibition. It authorizes the Secretary of the Army, acting through the U.S. Army Corps of Engineers (Corps), to issue permits for the "discharge of dredged or fill material" into the waters of the United States, including certain wetlands, "at specified disposal sites." 33 U.S.C. 1344(a); see 33 U.S.C. 1344(e) (authorizing the Secretary to issue "general permits on a State, regional, or nationwide basis"). Such disposal sites are to be "specified" by "application of guidelines developed by" the Environmental Protection Agency (EPA), "in conjunction with" the Corps. 33 U.S.C. 1344(b). EPA is authorized to "prohibit the specification * * * of any defined area as a disposal site," and to "deny or restrict the use of any defined area for specification * * * as a disposal site." 33 U.S.C. 1344(c).

In certain circumstances, Section 404 authorizes a State to administer "its own * * * permit program for the discharge of dredged or fill material." 33 U.S.C. 1344(g)(1). Such a program requires EPA approval. 33 U.S.C. 1344(g) and (h). If a State obtains such approval, it must administer the program in accordance with Section 404. See 33 U.S.C. 1344(h)(1) and (i); 40 C.F.R. 233.1(d), 233.20, 233.53(b).

Under Section 404(j) of the Act, a State that administers its own CWA permit program must provide copies of permit applications to EPA, which in turn must

provide copies to the Corps and the U.S. Fish and Wildlife Service (FWS). 33 U.S.C. 1344(j); 40 C.F.R. 233.50(a); see 33 U.S.C. 1344(k) (authorizing waiver of Section 404(j)'s requirements for certain categories of discharges). If EPA "intends to provide written comments to such State with respect to such permit application," EPA must "so notify" the State within 30 days and must "provide such written comments" (after considering any comments EPA has received from the Corps or the FWS) within 90 days. 33 U.S.C. 1344(j); see 40 C.F.R. 233.50(d) and (e). If EPA provides written comments objecting to issuance of the proposed 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 [EPA]." 33 U.S.C. 1344(j); see 40 C.F.R. 233.50(e).

After receiving written objections from EPA, the State may (1) deny the permit application, (2) issue a permit revised to satisfy EPA's objections, or (3) request a public hearing. 33 U.S.C. 1344(j); 40 C.F.R. 233.50(g) and (i). If the State does not take any of those actions within 90 days, the authority to issue a permit shifts to the Corps. 33 U.S.C. 1344(j); 40 C.F.R. 233.50(g), (i), and (j). If the State requests a public hearing, EPA must conduct such a hearing and must "reaffirm, modify or withdraw" its objections. 40 C.F.R. 233.50(h). If EPA reaffirms or modifies its objections, the State may either deny the permit application or issue a permit revised to satisfy EPA's objections. 33 U.S.C. 1344(j); 40 C.F.R. 233.50(h)(2). If the State does not take either action within 30 days, the authority to issue a permit shifts to the Corps. 33 U.S.C. 1344(j); 40 C.F.R. 233.50(h)(2) and (j).

If permitting authority shifts to the Corps, the Corps conducts its own analysis of the permit application in accordance with the Act. 33 U.S.C. 1344(a), (e), and (j). Although the Corps is not bound by EPA's objections, EPA may provide input as the permitting process continues. See 33 C.F.R. 384.5; Pet. App. A11-A12, B16. EPA may also exercise its authority to prohibit or restrict the use of any defined area as a disposal site. 33 U.S.C. 1344(c).

2. Michigan is one of the two States with an EPA-approved permit program under Section 404. 40 C.F.R. 233.70, 233.71. The Michigan Department of Environmental Quality (MDEQ) administers Michigan's program. Pet. App. A4.

In October 2011, petitioner submitted to the MDEQ a Section 404 permit application to discharge dredged or fill material into 25 acres of wetlands in conjunction with the proposed construction of a county road. Pet. App. B2, B4. A few months later, petitioner submitted to the MDEQ a revised application. *Id.* at B4. After consulting with the Corps and the FWS, EPA provided written comments to the MDEQ objecting to issuance of the proposed permit. *Ibid.* EPA objected on the ground that petitioner had not demonstrated that its preferred route was the "least environmentally damaging practical alternative." D. Ct. Doc. 6-5, at 2 (July 8, 2015). EPA also objected on the ground that petitioner's proposed plan to mitigate the road's effects on "aquatic resources" would not "fully compensate for the loss of aquatic function and value." *Ibid.*

After receiving EPA's written objections, petitioner revised its permit application, and the MDEQ requested a public hearing. Pet. App. B5. EPA held such a hearing in August 2012. *Ibid.* The next month, the

MDEQ sent a letter to EPA stating that "Michigan will soon be in a position to issue a permit under state authorities," and urging EPA to "remove [its] objection to Michigan's issuance of a permit." D. Ct. Doc. 8-4, at 2 (July 8, 2015). In response to comments from the MDEQ and EPA, petitioner subsequently submitted a further revised "wetland mitigation plan." D. Ct. Doc. 8-6, at 2 (July 8, 2015).

In December 2012, EPA withdrew its objection that petitioner's preferred route was not the least environmentally damaging practical alternative, but reaffirmed its objection that petitioner had not submitted an adequate mitigation plan. D. Ct. Doc. 8-7, at 2 (July 8, 2015). EPA "attached detailed requirements" for such a mitigation plan. *Ibid.* EPA explained that, if within 30 days the MDEQ did not issue a permit consistent with those requirements or notify EPA of its intent to deny the permit application, "authority to process the permit application [would] transfer[] to the Corps." *Id.* at 3.

The MDEQ subsequently notified EPA that, because of "the short time frame allowed by statute and the complexity of the issues remaining," the MDEQ would not be "issuing a permit" to petitioner, even though it believed "there are reasons to support the approval" of petitioner's project. D. Ct. Doc. 8-13, at 2 (July 8, 2015). The MDEQ recognized that, given its decision, "authority to process the permit application * * * is now transferred to the [Corps]." *Ibid.*

"Upon assuming authority over review of the permit," Pet. App. A6, the Corps asked petitioner to submit to the Corps the relevant permit application and supporting documents, *id.* at A6-A7. Because petitioner had made numerous revisions since its initial application, the Corps made that request to ensure that it had

before it all the materials petitioner wished the Corps to consider. *Id.* at A11 n.6, B32-B33. Petitioner declined to provide materials to the Corps, however, and voluntarily discontinued the permitting process. *Id.* at A7, A11 n.6.

3. In 2015, petitioner brought suit against EPA, the Corps, and EPA's regional administrator in federal district court. Pet. App. F1-F136. Petitioner alleged, *inter alia*, that EPA's objections to issuance of the proposed permit were arbitrary, capricious, and contrary to the CWA. *Id.* at F107-F128. Petitioner sought declaratory and injunctive relief. *Id.* at F131.

a. The district court granted the government's motion to dismiss the complaint. Pet. App. B1-B35. As relevant here, the court held that "EPA's actions are not reviewable" under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* Pet. App. B34. The court explained that the APA authorizes judicial review of "final agency action for which there is no other adequate remedy in court." *Id.* at B9 (quoting 5 U.S.C. 704). The court further explained that, under *Bennett* v. *Spear*, 520 U.S. 154 (1997), an agency's action is "final" only if it satisfies two requirements: (1) "the action must mark the 'consummation' of the agency's decisionmaking process"; and (2) "the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" Pet. App. B9 (citation omitted).

The district court held that EPA's objections to the proposed permit did not satisfy either of those prerequisites. Pet. App. B11-B12. With respect to the first requirement, the court concluded that EPA's objections did "not mark the consummation of its decisionmaking process" because, "[a]fter 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." *Id.* at B11. The court also explained that, "[e]ven after permitting authority transferred to the Corps," the Corps could "issue a permit on the terms requested by [petitioner], notwithstanding any objections raised by the EPA." *Id.* at B12. With respect to the second requirement, the court explained that "EPA's objections do not impose new legal consequences or determine the rights or obligations of the permit applicant" because, even if the State does not "issue a modified permit," "the applicant can seek a permit from the Corps, without being bound by the EPA's objections." *Id.* at B11-B12.

b. Two weeks after the district court entered its judgment, this Court held that a "jurisdictional determination" (JD), through which the Corps informs a landowner whether waters protected by the CWA are present at a particular site, is "final agency action" under the APA. See *United States Army Corps of Eng'rs* v. *Hawkes Co.*, 136 S. Ct. 1807, 1811 (2016). Petitioner moved the district court to alter or amend its judgment in light of *Hawkes*. D. Ct. Doc. 31 (June 13, 2016). The court denied the motion. Pet. App. D1-D11.

The district court explained that "*Bennett*'s first prong was not at issue in *Hawkes*," so "*Hawkes* does not provide an intervening change in controlling law with respect to th[at] prong." Pet. App. D7. The court also found the JD at issue in *Hawkes* to be distinguishable from EPA's objections here. *Id.* at D8. The court explained that, whereas the JD in *Hawkes* had "definitively stated the presence or absence of waters of the United States on a particular property," *id.* at D3,

EPA's objections did not represent a "conclusive denial of [a Section 404] permit," *id.* at D9.

4. The court of appeals affirmed. Pet. App. A1-A14. Addressing *Bennett*'s first prong, the court held that petitioner had "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." *Id.* at A12. The court rejected petitioner's contention that "EPA's objections served as a 'veto' that completed EPA's involvement and denied a permit that MDEQ otherwise would have granted." *Id.* at A9. The court explained that, "when EPA lodged objections, the permit review process" "did not end," but rather "continued precisely as directed by statute." *Ibid.*

The court of appeals rejected petitioner's "artificial attempt to divide the Section 404 permit process into two separate 'permits'—a 'state permit' and a 'Corps permit.'" Pet. App. A10. The court explained that the "CWA establishes one continuous application process to obtain a Section 404 permit," which petitioner had "voluntarily discontinued" in this case when it declined "to submit its most up-to-date materials to the Corps." *Id.* at A11 & n.6. The court also found it to be immaterial that "the Corps is a separate agency from EPA." *Id.* at A11. The court explained that "agency action" in the APA does not refer to "each individual agency's actions," *ibid.*, and that in any event, "EPA's involvement in the Section 404 permitting process does not end when review transfers to the Corps," *id.* at A12. The court of appeals therefore concluded that the "challenged actions" did not constitute "final agency action," without reaching *Bennett*'s second prong. *Ibid.*

The court of appeals denied rehearing en banc without dissent. Pet. App. E1.

**ARGUMENT**

The court of appeals correctly held that, because EPA's objections to a State's issuance of a Section 404 permit do not mark the consummation of the Section 404 permitting process, those objections do not constitute "final agency action" judicially reviewable under the APA. The court of appeals' decision does not conflict with any decision of this Court or another court of appeals. The petition for a writ of certiorari should be denied.

1. 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. "As a general matter, two conditions must be satisfied for agency action to be 'final.'" *Bennett* v. *Spear*, 520 U.S. 154, 177 (1997). "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.'" *Id.* at 177-178 (citations omitted). The court of appeals correctly held that EPA's objections to Michigan's issuance of a proposed Section 404 permit to petitioner were not judicially reviewable under the APA because they did not satisfy the first *Bennett* requirement, *i.e.*, because they did not mark the consummation of the Section 404 permitting process. Pet. App. A12.

a. Petitioner seeks judicial review of EPA's objections to Michigan's issuance of a proposed Section 404 permit to petitioner. Pet. App. F107-F128. EPA's submission of those objections, however, did not mark the consummation of the Section 404 permitting process.

Rather, after EPA states its objections, the permitting process continues: The applicant may submit a revised permit application; the State may deny a permit or issue one revised to satisfy EPA's objections; and if the State does neither, the Corps may deny a permit or issue one notwithstanding EPA's objections. See 33 U.S.C. 1344(j); Pet. App. A9-A10; pp. 3-4, *supra*.

In this case, the MDEQ neither granted nor denied petitioner's permit application. See p. 5, *supra*. The MDEQ recognized that the effect of that approach was to transfer permitting authority to the Corps. See *ibid*. The Corps in turn recognized that the matter was properly before it, and it asked petitioner to resubmit the materials that petitioner wished the agency to consider. See Pet. App. A6-A7. The MDEQ and the Corps thus made clear that consideration of petitioner's permit application could continue notwithstanding EPA's objections. The court of appeals therefore correctly held that EPA's objections did not mark the consummation of the permitting process under *Bennett*'s first prong. *Id*. at A12.

b. Petitioner contends (Pet. 20) that EPA's objections served as a "veto" of an "MDEQ-approved permit." The court of appeals correctly rejected that argument as contrary to both "the record and the statute." Pet. App. A9.

First, "[t]he CWA establishes one continuous application process to obtain a Section 404 permit, of which state-run permitting programs are one part." Pet. App. A11. The CWA therefore does not contemplate an "MDEQ-approved permit," as distinct from a "Corps permit." Pet. 21. Rather, the CWA contemplates only a single Section 404 permit. See 33 U.S.C. 1344(j). And, contrary to petitioner's contention (Pet. 20), the MDEQ

did not "approve[]" any Section 404 permit in this case. Although the MDEQ stated that there were "reasons to support the approval" of petitioner's project, it ultimately declined to "issu[e] a permit," at which point "authority to process the permit application" shifted to the Corps. D. Ct. Doc. 8-13, at 2.

Second, "EPA's objections did not end [petitioner's] pursuit of a Section 404 permit." Pet. App. A9. "To the contrary, when EPA lodged objections, the permit review process continued precisely as directed by statute," *ibid.*, with the authority to issue a permit ultimately shifting to the Corps, which is not bound by EPA's objections, *id.* at B12 & n.2. Petitioner is therefore wrong in characterizing EPA's objections as a "veto." Pet. 20. The permitting process ended only when petitioner declined to submit the relevant materials to the Corps. Pet. App. A10.

Third, "[t]he shift of review authority from MDEQ to the Corps is * * * not a new, separate, and distinct application process." Pet. App. A11. Rather, it is a continuation of the same Section 404 permitting process. See 33 U.S.C. 1344(j). Petitioner asserts (Pet. 20) that a "new permit application filed with the Corps" would have been for "a different project subject to different legal requirements." But when the Corps in this case asked petitioner to submit a "new" application, it did so merely to ensure that it had all the relevant materials. Pet. App. A11 n.6; see *id.* at B32-B33. Petitioner's submission of those materials, if it had occurred, would have enabled an ongoing permitting process to continue rather than commencing consideration of a new permit request.

c. Petitioner does not contend that the decision below conflicts with any decision of another court of appeals. Petitioner argues (Pet. 13-26), however, that the decision below conflicts with this Court's decisions in *Sackett* v. *EPA*, 566 U.S. 120 (2012), and *United States Army Corps of Engineers* v. *Hawkes Co.*, 136 S. Ct. 1807 (2016). That is incorrect.

In *Sackett*, the Court held that EPA's issuance of a compliance order under Section 309 of the CWA, 33 U.S.C. 1319, is "final agency action" reviewable under the APA. 566 U.S. at 122, 125-127. The compliance order in *Sackett* contained findings and conclusions that the plaintiffs' property was subject to the CWA and that the plaintiffs had violated the CWA by "placing fill material on the property." *Id.* at 122; see *id.* at 124-125. The Court held that the issuance of the order marked the consummation of EPA's decisionmaking process because those findings and conclusions were "not subject to further agency review." *Id.* at 127.

Here, by contrast, the relevant process is the Section 404 permitting process. Even after EPA reaffirmed its objection to petitioner's proposed permit, petitioner could have sought a Section 404 permit from the Corps, which would not have been bound by EPA's objections. Pet. App. B12 & n.2, B17. EPA's objections thus were "an interlocutory step in the permitting process rather than the consummation of that process." *Id.* at B15.

In *Hawkes*, the Court held that the Corps' issuance of "an 'approved jurisdictional determination' stating the agency's definitive view" on "whether a particular parcel of property" contains "'waters of the United States'" is "final agency action" reviewable under the APA. 136 S. Ct. at 1811 (citations omitted). The Corps

in *Hawkes* did "not dispute that an approved JD satisfies the first *Bennett* condition," and the Court determined that "an approved JD clearly 'marks the consummation' of the Corps' decisionmaking process on" whether there are "'waters of the United States' on a parcel of property." *Id.* at 1813 (brackets and citations omitted). Here, by contrast, EPA's objections do not resolve the question whether petitioner will receive a Section 404 permit, since if petitioner had not "voluntarily discontinued the process," Pet. App. A11, the Corps could have issued a permit notwithstanding EPA's objections, *id.* at B12 & n.2.

d. In *Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193 (1980) (per curiam), the Court held that an EPA objection to a proposed state permit under Section 402 of the CWA, 33 U.S.C. 1342, was reviewable directly in the court of appeals under 33 U.S.C. 1369(b)(1)(F), which authorized court of appeals review of EPA actions "in issuing or denying any permit under" Section 1342. 445 U.S. at 195; see *id.* at 194-197. At the time of the EPA objection in that case, however, the applicable CWA provision did not provide for a transfer of permitting authority to a federal agency in those circumstances. See *id.* at 194 n.2 (declining to consider the effect of a 1977 amendment to Section 402, enacted after the EPA objection in that case, giving EPA the power "to issue its own permit if the State fails to meet EPA's objection within a specified time"). It was in that context that the Court "agree[d] with the concurring opinion" in the court of appeals "that EPA's veto of a state-issued permit is functionally similar to its denial of a permit in States which do not administer an approved permit-issuing program." *Id.* at 196; see *National Ass'n of Mfrs.* v. *Department of Def.*, 138 S. Ct. 617, 632 (2018).

That rationale is logically inapplicable under the current statutory scheme, where the effect of an EPA objection to a potential state Section 404 permit is to transfer permitting authority to the Corps rather than to render a permit unavailable.

2. The court of appeals rested its decision solely on the first *Bennett* prerequisite for "final agency action." Substantially for the reasons stated above, however, the district court was correct in holding that *Bennett*'s second condition is not satisfied either. Pet. App. B19-B24; *id.* at D7-D9.

Petitioner asserts (Pet. 22-25) that the objections EPA communicated to Michigan authorities imposed new legal obligations on petitioner. But petitioner was "required to obtain a [Section 404] permit before the EPA objected, and it is still required to do so." Pet. App. B20. If petitioner had constructed the proposed road without a Section 404 permit, it would have violated the CWA, regardless of whether EPA had objected, and regardless of whether permitting authority had shifted to the Corps. See 33 U.S.C. 1311(a), 1319.

To be sure, EPA's objections may have had the practical effect of making the overall Section 404 permitting process (if petitioner had continued to pursue it) more protracted than it otherwise would have been. Petitioner contends (Pet. 22) that, as a result of EPA's objections, it now must "obtain a permit from the Corps," rather than from the MDEQ. See Pet. 24 (arguing that EPA's objections denied petitioner the "right to build the road without [the] Corps' approval"). At most, however, EPA's objections required petitioner to *continue* with a permitting process that petitioner was obligated to invoke regardless of EPA's objections—a requirement "different in kind and legal effect from the burdens attending

what heretofore has been considered to be final agency action." *FTC* v. *Standard Oil Co. of Cal.*, 449 U.S. 232, 242 (1980); see also *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."); *Aluminum Co. of Am.* v. *United States*, 790 F.2d 938, 941 (D.C. Cir. 1986) (Scalia, J.) ("It is firmly established that agency action is not final merely because it has the effect of requiring a party to participate in an agency proceeding."); Pet. App. B23 ("The cost of complying with this scheme is not sufficient to render EPA's objections to [petitioner's] permit application final and reviewable."). Petitioner therefore is wrong in contending (Pet. 22-25) that EPA's objections determined legal rights or obligations for purposes of *Bennett*'s second prong.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
*Solicitor General*
JEFFREY BOSSERT CLARK
*Assistant Attorney General*
ELLEN J. DURKEE
*Attorney*

JANUARY 2019