No. 18-555

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

PETITIONER'S REPLY BRIEF

MICHAEL J. PATTWELL
212 E. Grand River Ave.
Lansing, MI 48906
Telephone: (517) 318-3043
mpattwell@clarkhill.com

TIMOTHY R. SNOWBALL
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Telephone: (916) 419-7111
tsnowball@pacificlegal.org

MARK MILLER
Counsel of Record
CHRISTINA M. MARTIN
Pacific Legal Foundation
4440 PGA Blvd., Ste. 307
Palm Beach Gardens, FL 33410
Telephone: (561) 691-5000
mmiller@pacificlegal.org
cmartin@pacificlegal.org

Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Federal Statutes

INTRODUCTION

This case involves judicial review of final agency action regarding a Clean Water Act (CWA) Section 404 permit pursuant to the Administrative Procedure Act (APA)—nothing more, nothing less. Despite this Court's recent unanimous rulings finding final agency action reviewable in court per the APA over the federal government's objections—*see U.S. Army Corps of Engineers v. Hawkes*, 136 S. Ct. 1807 (2016), and *Sackett v. EPA*, 566 U.S. 120 (2012)—the Respondents (including the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps)) have steadfastly refused to accept that the principle applies here, as well. They continue to do so in their answer brief by playing a semantic shell game between the two prongs established for judicial review in *Bennett v. Spear*, 520 U.S. 154 (1997), despite the fact that: 1) the facts alleged by Petitioner meet both prongs of *Bennett*; and 2) the facts allege meet Section 704 of the APA's standard for judicial review, as well.

Although the Respondents continue with the shell game in their brief in opposition, they now concede one crucial point that below they denied: the Corps required the Road Commission to submit a new Section 404 CWA permit application after the EPA vetoed the permit the State of Michigan stood ready to issue. *See* Resp.'s Br. in Opp. at 11 ("the Corps . . . asked petitioner to submit a 'new' application[.]"). That factual concession amounts to an implicit legal concession that, *in regards to the State of Michigan Department of Environmental Quality (MDEQ) Section 404 CWA permit application process*, the EPA's work was consummated and the first prong of

Bennett was met. Moreover, it recognizes that there were consequences to the Road Commission that flowed from that consummation of EPA's work in regards to that vetoed state permit: now, the Road Commission had to take action in order to obtain a Section 404 CWA permit—it had to submit a *new* permit application to the Corps. In other words, the second prong of *Bennett* was met.

Moreover, the lower court also failed to accept the holdings of *Sackett* and *Hawkes*—which is why we are here now. *Marquette Cty. Rd. Comm'n v. U.S. Envtl. Prot. Agency*, Case No. 17-1154 (6th Cir. Mar. 20, 2018) (App. A). The lower court's failure to apply this Court's precedents, plus the government's obstinacy, makes this much more than just a request for error correction: it renders the case the right vehicle for this Court to ensure the executive branch and the lower courts hear and understand how to apply Section 704 of the APA.

Repeatedly, this Court has tried to get this point across: it did so again just this term in *Weyerhaeuser v. U.S. Fish and Wildlife Service*, 139 S. Ct. 361 (2018). The Court explained—again unanimously—that the "Administrative Procedure Act creates a 'basic presumption of judicial review [for] one 'suffering legal wrong because of agency action.'" *Weyerhaeuser*, 139 S. Ct. at 370 (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) (quoting 5 U.S.C. § 702)). Despite that reminder, which this Court delivered via its *Weyerhaeuser* decision after Petitioner filed its petition but before the Respondents filed their response, the Respondents failed to take the point. In *Weyerhaeuser*, this Court explained that federal agencies sometimes fail to properly apply the

law and even violate the law, and will continue to do so if those decisions are shielded from judicial review. *Id*. at 370. "That is why this Court has so long applied a strong presumption favoring judicial review of administrative action." *Id*. (quoting *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1652-1653 (2015)). Although *Weyerhaeuser* addressed facts arising in the Endangered Species Act context and not the CWA context, the holding regarding judicial reviewability of agency action applies with equal force in this context.

The Court should either grant the petition or summarily reverse the court below.

ARGUMENT

The Respondents advance several reasons why the Court should deny the petition. Each reason fails to withstand scrutiny.

I

APA REQUIRES JUDICIAL REVIEW OF EPA VETO OF STATE PERMIT; CWA IS SILENT ON THE QUESTION AND THUS DOES NOT PROHIBIT JUDICIAL REVIEW

The Respondents first submit, in defense of the lower court's decision, that the CWA contemplates a "single Section 404 permit," Brief in Opp. at 10-11, and thus the obvious distinctions between the permit application MDEQ required and the different permit application the Corps demanded, *see* App. B-20–21, after the EPA rejected the MDEQ approved plan are of no consequence. The Respondents then recast this same point as a second reason to deny review, submitting that the CWA setting out how a new permit may be pursued with the Corps if the EPA vetoes a state-approved permit means that Congress

did not intend for the veto of the state-approved permit to be reviewable. Those arguments fail as a matter of law and fact.

First, it is of no legal consequence that the Road Commission can only obtain one Section 404 permit for its road project. Of course that is true, but so what? The Road Commission had a state-approved Section 404 permit within its grasp—a permit contemplated by the CWA pursuant to Section 404(j)—but then the EPA arbitrarily and capriciously vetoed the permit. That decision was final as to the state-approved CWA permit.

The Respondents argue that because the CWA sets out that if a permittee cannot obtain the permit from the state, they can start over with the Corps, a statutory scheme that purportedly forecloses judicial review of the veto of the state-approved permit. But the CWA by its terms does not prohibit review of that EPA decision to reject the state-approved permit. *See* 33 U.S.C. § 1344(g)-(j). The Respondents simply insert into the Act what is not there, and ask this Court to read into the silence an intent on Congress's part to strip away the judicial reviewability provisions of the APA as applied to Sections 1344(g)-(j). This Court cannot read statutory silence in the manner the Respondents demand so as to escape judicial reviewability of their actions. *See, e.g.*, *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 354 (1988) ("Given that Congress' *silence* in the removal statute does not negate the power to dismiss such cases, that *silence* cannot sensibly be read to negate the power to remand them.") (emphasis added); *Wos v. E.M.A. ex. rel. Johnson*, 568 U.S. 627, 652 (2013) (Roberts, C.J., dissenting) ("That *silence* is a good indication that

Congress did not mean to strip States of their traditional authority to regulate torts.") (emphasis added).

Indeed, the APA explicitly allows for the judicial review the Road Commission seeks. *See* 5 U.S.C. § 704 ("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."). The lower court relied upon Congress's *silence* in the CWA about judicial reviewability to "strip away," *cf. Wos, supra*, the Road Commission's right to judicial review of the EPA's final agency action pursuant to the explicit language of the APA. The EPA's arbitrary veto of the MDEQ's permit will *never* be reviewable in court should the lower court's decision hold sway—there is no other adequate remedy in court to test *that veto*. That flies in the face of the very text of the APA.

Moreover, the CWA is not just silent on the states' role in CWA permitting. To the contrary, the CWA explicitly sets out that states have the primary responsibilities and rights "to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this [Act]. It is the policy of Congress that *the States . . . implement the permit programs under sections 402 and 404 of this Act*." 33 U.S.C. § 1251(b). But the Respondents' actions that led to this case, and their position before the courts, turn that policy on its head. Rather than follow the CWA, which puts the primary authority to manage its water resources with Michigan, the Respondents misled the

lower courts, and argue here, that it is Michigan which should answer to (not simply "*consult with*" as the CWA states) the EPA Administrator, even when the Administrator acts arbitrarily and capriciously. That flies in the fact of the CWA's text. *Id.*

Respondents minimize what the Road Commission had already gone through to obtain the state-approved Section 404 permit, and further ignore what it will take to start over and see through a new CWA permit application with the Corps. This Court has set out that it will take more than "788 days and $271,596 in completing the process," *Rapanos v. United States,* 547 U.S. 715, 721 (2006), to obtain that permit. No party should have to spend that time and money after having properly followed the CWA, simply because the EPA wishes to make the party "dance to the EPA's tune." *Sackett*, 566 U.S. at 132 (Alito, J., concurring). But the lower court decision requires the Road Commission to dance to the EPA's tune, contrary to this Court's repeated admonitions to the contrary.

The Road Commission does not deny that the CWA gives the EPA oversight authority of the state's CWA permit approval promise, but—contrary to the lower court's decision—the CWA does not immunize the EPA's decision to veto the state-approved CWA permit from judicial review.

II

CROWN SIMPSON SUPPORTS CONCLUSION THAT EPA VETO OF STATE PERMIT IS IMMEDIATELY REVIEWABLE IN COURT

Although the Sixth Circuit did not address *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193 (1980), in affirming that the Road Commission could not appeal the EPA's veto of the MDEQ Section 404 permit, *see* App. A-1–A-13, the Respondents attempt to distinguish the case in their brief in opposition. They do so because *Crown Simpson* counsels in favor of granting the Road Commission's petition.

In *Crown Simpson*, this Court held that pre-1977 § 402(d) EPA objections to state permits were akin to CWA permit denials and therefore immediately reviewable. *Id.* at 196-97. Relevantly, the Court recognized that the 1977 amendments *gave EPA the power to issue its own permit*, but stated that "[w]e do not consider the impact, if any, of this amendment on the jurisdictional issue presented herein." *Id*. at 194 n.2 (emphasis added). In 1986, the Sixth Circuit summarized the above-cited decisions but, like the *Crown* Court, "left open the question whether the 1977 amendment to § 402 affected the jurisdiction of the Court of Appeals to review an EPA veto of a state permit." *Cincinnati Gas & Elec. Co. v. EPA*, 791 F.2d 931, 1986 WL 16890, at *2 (6th Cir. 1986). Since that time, neither this Court nor the Sixth Circuit has had the occasion to address the issue as to § 402. *But see Pa. Mun. Auths. Ass'n v. Horinko*, 292 F. Supp. 2d 95, 106 (D.D.C. 2003) (stating that EPA's § 402(d) objections are reviewable under the *Bennett* test because they are final and determine rights or obligations). The Respondents submit in

their brief in opposition that the 1977 amendments to § 402, which transferred permitting authority from the state to the EPA after the EPA objects to the state permit, means that *Crown Simpson* is no longer good law as applied to § 402, because the EPA continues to be involved in the permitting process, and thus its work is not consummated, per the first prong of *Bennett*. Br. in Opp. at 13-14.

The EPA may be right about the implication of the 1977 amendments as to Section 402 for *Crown Simpson*, but there is a significant legal distinction for the Respondents' argument as between Section 402 and Section 404. Under Section 402(d), an unresolved EPA objection results in the EPA's assumption of permitting authority and issuance of a permit. The EPA continues to review the permit application in the Section 402 scheme. On the other hand, under Section 404(j), an unresolved EPA objection results in a veto of the state permit application, and requires the applicant to start from scratch by submitting a new permit application *to the Corps*—not the EPA—and proceeding through that grueling permitting process. Thus, while EPA's decisionmaking *continues* after an unresolved Section 402(d) objection, EPA's decisionmaking ends—or *is consummated* in the language of *Bennett's* first prong—after an unresolved Section 404(j) objection. This distinction is fatal to EPA's Section 402 and Section 404 comparison because the APA contemplates judicial reviewability of "final *agency* action," not final *government* action. *See* 5 U.S.C. § 704 ("final *agency* action for which there is no other adequate remedy in a court are subject to judicial review.") (emphasis added). But the Respondents elide this legal distinction when they cast the Section 402 and Section 404 permitting

schemes as identical, and suggest that the federal *government's* work is not done under Section 404 when the EPA objects to the state permit. The federal government's work is not done, but the agency's work—the EPA's work—is. The Section 402 and Section 404 permitting schemes are not the same, and the distinction between the two makes all the difference when it comes to judicial reviewability of the EPA's veto of the state permit pursuant to Section 404.

In fact, the consequence of an unresolved Section 404(j) objection (namely, denial of the state permit and option of submitting a new application to the Corps), is more akin to the pre-1977 effect of an unresolved Section 402(d) objection the Sixth Circuit and Supreme Court both found to be immediately reviewable in *Crown Simpson*.

III

RESPONDENTS CONCEDE THAT THE PERMIT APPLICATION PROCESS BEGINS ANEW WITH CORPS ONCE EPA VETOES STATE PERMIT, UNDERSCORING THAT VETO WAS FINAL AGENCY ACTION

Respondents admit that the EPA veto of the state permit amounted to a requirement that the Road Commission submit a new CWA permit application, *see* Br. in Opp. at 11, but suggest that in doing so they were impliedly assisting the Road Commission—to make sure that the Corps received "all the relevant materials" for its consideration of the Road Commission's new permit application. *Id.* Whether *assisting* or hindering, that the Road Commission was forced to start anew with the Corps underscores that

both prongs of *Bennett* were met. The EPA's decision to force the Road Commission to begin anew with the Corps consummated the EPA's work as to the state permit, *see* Pet. at 20-22, and imposed legal obligations and consequences upon the Road Commission in regards to its ability to move forward with the road project. *See* Pet. at 22-24.

IV

OTHER ARGUMENTS RAISED BY RESPONDENTS ARE UNAVAILING

The Respondents also contend that the second prong of *Bennett* is not met on these facts, but the Road Commission disposed of that argument in its Petition. *See* Pet. at 15-19. The EPA veto of the state permit obligated the Road Commission to pursue a new permit application with the Corps if the Road Commission wanted to build its road without facing civil or criminal penalties under the CWA, as the Respondents concede, and that requirement satisfied *Bennett*'s prong. That is not the only consequence and obligation, but it is more than sufficient to demonstrate that the Road Commission has met *Bennett*'s second prong for judicial reviewability of agency decisionmaking.

Further, the Respondents rely on a hodgepodge of lower court case law to try to show that the EPA's veto is not reviewable under the APA, but each case is distinguishable from the instant case. The Corps has failed to cite a single Supreme Court case where APA review was denied in a case like this, where the agency action involved a case-specific adjudication. *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232 (1980), on which the Respondents rely, is not such a case.

In *FTC*, the Federal Trade Commission served a number of oil companies with a complaint stating the Commission had "reason to believe" these companies violated the Federal Trade Commission Act. 449 U.S. at 234. However, that complaint did not purport to be the Commission's final word on the violation. Instead, it provided the offending oil company with an opportunity to participate in an administrative hearing for the purpose of determining whether the oil company actually violated the Act. *Id.* at 241-43. An opportunity the oil company declined. *Id*. This Court held the complaint was not "final agency action" because it was not a final adjudicative decision and for that reason the complaint itself had no legal consequence. *Id*. at 243. But that is quite different from the veto in this case where the Road Commission has completed the state permitting process and the EPA's objections to the state permit amounts to a final decision on the state permit. *FTC* is, therefore, not analogous to this case.

CONCLUSION

The APA creates a "basic presumption of judicial review [for] one 'suffering legal wrong because of agency action.'" *Weyerhaeuser*, 139 S. Ct. at 370 (citations omitted). "The trend in the area of administrative law clearly is in the direction of greater review of agency action, not less." Br. of Amici Curiae County Road Association of Michigan and Stand U.P. in Support of Petitioner at 6. Congress designed the APA's judicial reviewability provisions to rein in arbitrary agency action of the kind the Road Commission has described. This case fits the APA's judicial review mechanism hand in glove and the CWA neither precludes review nor commits the EPA's

action to agency discretion. The Court should either grant certiorari or summarily reverse.

DATED: February, 2019.

Respectfully submitted,

MICHAEL J. PATTWELL
Clark Hill PLC
212 E. Grand River Ave.
Lansing, Michigan 48906
Telephone: (517) 318-3043
mpattwell@clarkhill.com

TIMOTHY R. SNOWBALL
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Telephone: (916) 419-7111
tsnowball@pacificlegal.org

MARK MILLER
Counsel of Record
CHRISTINA M. MARTIN
Pacific Legal Foundation
4440 PGA Blvd., Ste. 307
Palm Beach Gardens, FL 33410
Telephone: (561) 691-5000
mmiller@pacificlegal.org
cmartin@pacificlegal.org

Counsel for Petitioner