

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

MENOMINEE INDIAN TRIBE OF
WISCONSIN,

Plaintiff,

v.

U.S. ENVIRONMENTAL PROTECTION
AGENCY, SCOTT PRUITT, Administrator,
U.S. Environmental Protection Agency, U.S.
ARMY CORPS OF ENGINEERS, MARK T.
ESPER, Secretary, U.S. Army,

Defendants.

Case No. 1:18-cv-108

Hon. William C. Griesbach

AQUILA RESOURCES INC.'S MOTION TO DISMISS

Aquila Resources Inc. ("Aquila"), by its undersigned counsel, moves the Court to dismiss the instant action pursuant to Federal Rules of Civil Procedure 12(b)(6). The Tribe has failed to state claims upon which relief may be granted under 33 U.S.C. § 1365(a)(2) or 5 U.S.C. § 706(2)(a). In support of this Motion, Aquila files the accompanying Memorandum in Support.

Respectfully Submitted,

Dated: April 11, 2018

By: /s/ Ashley G. Chrysler

Ashley G. Chrysler
Dennis J. Donohue (*admission pending*)
Daniel P. Ettinger (*admission pending*)
Warner Norcross & Judd LLP
900 Fifth Third Center
111 Lyon Street NW
Grand Rapids, Michigan 49503
(616) 752-2000

*Attorneys for Proposed Intervenor Aquila
Resources, Inc.*

Ronald R. Ragatz
Henry J. Handzel, Jr.
DeWitt Ross & Stevens S.C.
2 E. Mifflin Street, Suite 600
Madison, Wisconsin 53703
(608) 252-9351

*Co-Counsel for Proposed Intervenor
Aquila Resources, Inc.*

16905907

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**AQUILA RESOURCES INC.'S BRIEF IN SUPPORT OF
MOTION TO DISMISS**

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Plaintiff Menominee Tribe of Wisconsin (the “Tribe”) has invoked the Clean Water Act (“CWA”), 33 U.S.C. § 1365(a)(2), and the Administrative Procedures Act (“APA”), 5 U.S.C. § 706(2)(A), as tools for compelling the Environmental Protection Agency (“EPA”) and the Army Corps of Engineers (“Corps”) to restart a wetlands permitting process that has been ongoing before the Michigan Department of Environmental Quality (“MDEQ”) since 2015. The Tribe’s claims can be boiled down to a single demand: compel the EPA and the Corps to “exercise jurisdiction” over the CWA § 404 permitting process for proposed Intervenor Aquila Resources Inc.’s (“Aquila”) Back Forty mining project.

To state a claim for relief under § 1365(a)(2), the Tribe must allege that the EPA (not the Corps) failed to perform a discrete, nondiscretionary duty in accordance with a specific, unequivocal command in the CWA. To state a claim for judicial review of an agency action under APA § 706(2)(A), the agency action must be “final,” meaning that it consummates the agency’s decision-making process *and* either determines rights and obligations or triggers legal consequences. The Tribe has not stated a claim upon which relief may be granted under either statute.

Despite knowing for years that the EPA had delegated its Section 404 authority to the State of Michigan and that Aquila was seeking a Section 404 permit from the State, the Tribe still has not identified what specific action the EPA or the Corps must take to “exercise jurisdiction” or point the Court to any statutory provision that would compel the EPA or the Corps to take that action. Nor has the Tribe identified anything close to a final agency action reviewable under Section 706(2)(A). The Tribe’s failure to do so in its Complaint—after waiting years to bring its claims—shows that the Tribe has no claim against the EPA or the Corps. Its Complaint should be dismissed.

SUMMARY OF THE TRIBE'S ALLEGATIONS

The details of Aquila's project and the state and federal agency review set forth in Aquila's Motion to Intervene provide important context regarding the Back Forty Project and the delegated state wetlands permitting process, but will not be repeated here since the Court must decide this Rule 12(b)(6) motion on the allegations within the four corners of the Tribe's Complaint. The allegations pertinent to the Tribe's claims can be summarized as follows:

The Clean Water Act Section 404 permitting program

Section 404 of the Clean Water Act prohibits discharges to waters of the United States absent a permit from the Army Corps of Engineers. *Id.* ¶ 21. When the Corps processes a Section 404 permit, the "process is a federal action" that "implicates the potential application of other federal statutes and requirements such as environmental review under the National Environmental Policy Act, 42 U.S.C. § 4332, consultation with the U.S. Fish and Wildlife Service under the Endangered Species Act, 16 U.S.C. § 1536, and/or consultation with Indian tribes under the National Historic Preservation Act. 54 U.S.C. § 306109." *Id.* ¶ 23.

The EPA may generally delegate to a state the authority to administer a Section 404 permitting program for the navigable waters in their state, unless they are "waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark . . . including wetlands adjacent thereto." 33 U.S.C. § 1344(g). When administration of the Section 404 permitting program is delegated, the "EPA retains the authority to review and object to permits proposed to be issued in a delegated state, such as Michigan, and EPA consults with the Corps and other federal agencies in reviewing and commenting on proposed permits within

delegated states. 40 C.F.R. § 233.50 et seq.” Compl. ¶ 26. “In 1984, EPA approved the delegation of Section 404 permitting to the State of Michigan under 33 U.S.C. § 1344(g).” *Id.* ¶ 33.

Aquila applies for a wetlands permit for its Back Forty mining project under the delegated state program

Aquila proposes to extract precious-metal ore from a site near the banks of the Menominee River in Menominee County, Michigan. Compl. ¶ 36. The mining project is called the “Back Forty Mine.” *Id.* ¶ 36. Because construction and operation of the mine will affect wetlands, Aquila applied to the MDEQ for a permit under the Section 404 authority delegated to Michigan. *Id.* ¶ 39. After the MDEQ provided the EPA with a copy of the permit application, the EPA objected to the proposed Section 404 permit, and Aquila withdrew the application. *Id.* ¶ 42. In January 2017, Aquila reapplied to the State of Michigan for the Section 404 permit. *Id.* ¶ 43. After several updates to the application, the MDEQ deemed it administratively complete on December 8, 2017. *Id.*

This did not end the process. The permit application is still under review. The MDEQ has submitted a copy to the EPA, and the EPA has solicited public comments on the application. *Id.* ¶¶ 50–51.

The Tribe and Senator Baldwin correspond with the Corps and the EPA

After the EPA’s initial objection in 2017, the Tribe “advised the EPA and the Corps that they were the proper authorities over the Section 404 permitting for the Mine, because the Menominee River and adjacent wetlands were not and could not be delegated to the State of Michigan in 1984 under 33 U.S.C. § 1344(g).” *Id.* ¶ 44. “Senator Baldwin of Wisconsin [also] wrote to the Corps and requested that the federal agencies take jurisdiction of the Section 404 permitting for the Mine.” *Id.* ¶ 45.

In its response to Senator Baldwin, the Corps “declin[ed] to exercise jurisdiction over the Section 404 permit for the Mine.” *Id.* ¶ 46. In response to the Tribe, the Corps likewise declined to exercise jurisdiction over the Section 404 permit for the Mine because Section 404 permitting had been delegated to Michigan. *Id.* ¶ 47. Importantly, the Corps “did not specifically address the Menominee River’s status as an interstate water used for the transport of interstate commerce.” *Id.*

The EPA “responded to the Menominee Tribe [by] offering to ‘consult’ with the Tribe regarding the Section 404 permit process.” *Id.* ¶ 48. Like the Corps, the EPA “did not address the issue with respect to the Menominee River’s status as an interstate water used for the transport of interstate commerce.” *Id.*

The Tribe’s claims against the EPA and the Corps

The Tribe claims that “EPA and the Corps have failed to perform non-discretionary acts and duties in their failure to exercise federal jurisdiction and control over the Section 404 permitting of the Back Forty Mine, which will dredge and/or fill wetlands adjacent to the Menominee River and will affect the River itself.” *Id.* ¶ 3. It further claims that the “EPA and the Corps’ failure to exercise jurisdiction over the Section 404 permitting for the Back Forty Mine on the Menominee River is a violation of their mandatory duties to exercise jurisdiction over Section 404 permitting under the Clean Water Act.” *Id.* ¶ 57. Finally, the Tribe contends that the “EPA and the Corps’ responses to Senator Baldwin and the Menominee Tribe constitute final agency action on the matter of exercising jurisdiction over the Section 404 permit and process for the Back Forty Mine,” and alleges that their “refusal to exercise jurisdiction over the Section 404 permitting for the Back Forty Mine permit is arbitrary, capricious, an abuse of discretion, and not in accordance with the law.” *Id.* ¶ 64.

As for relief, the Tribe seeks “[a] declaration that EPA [and the Corps] acted in violation of the Clean Water Act and arbitrarily and capriciously and abused its discretion in failing to exercise federal jurisdiction over the Section 404 permitting for the Back Forty Mine.” Compl. 16–17. It also seeks “[a]n order enjoining and instructing EPA and the Corps to assume control and exercise jurisdiction over the Section 404 permitting for the Back Forty Mine.” *Id.* at 17.

ARGUMENT

To survive a motion to dismiss under Rule 12(b)(6), a complaint must “‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests,’” and “state a plausible claim for relief.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007) (omission in original), *quoting Conley v. Gibson*, 355 U.S. 41, 47 (1957). This plausibility requirement calls for the plaintiff to make factual allegations sufficient to raise the “right to relief above the speculative level,” such that the court has “‘a reasonable expectation that discovery will reveal evidence’ supporting the plaintiff’s allegations.” *Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir. 2009). That standard is not satisfied here.

To assert a claim for relief under CWA § 1365(a)(2) the Tribe had to point to a nondiscretionary duty to take some discrete action that the EPA and the Corps are specifically and unequivocally commanded to take under the CWA. The failure to “exercise jurisdiction over 404 permitting” alleged here does not point to a discrete, nondiscretionary action, nor has the Tribe identified a specific, unequivocal command in the CWA that the EPA or the Corps failed to obey. Moreover, the CWA does not even authorize a suit against the Corps, only the EPA.

To state a claim for review under APA § 706(A)(2), the Tribe must seek review of a “final agency action.” The Tribe seeks review of the EPA’s letter inviting consultation with the Tribe and the Corps’ letters to the Tribe and Senator Baldwin declining to exercise jurisdiction. Those

letters do not mark the consummation of an agency decision-making process, nor do they determine anyone's rights or obligations or trigger any legal consequences. They are not final agency actions and therefore not subject to review under § 706(A)(2).

I. The Tribe's § 1365 claim fails because the Tribe has not identified a discrete, nondiscretionary act, much less one that the EPA or the Corps were statutorily commanded to take.

To assert a claim under § 505(a)(2) of the CWA, 33 U.S.C. § 1365(a)(2), the Tribe must “allege[] a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.” *Id.* This citizen suit provision is a waiver of sovereign immunity. *U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 615 (1992); *Pres. Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Eng'rs*, 87 F.3d 1242, 1249 (11th Cir. 1996); *Conservation Law Found., Inc. v. Pruitt*, 881 F.3d 24, 28 (1st Cir. 2018). And as such, it must be “strictly construed, in terms of its scope, in favor of the sovereign.” *Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999) (quoting *Lane v. Peña*, 518 U.S. 187, 192 (1996)).

Because this precise language also exists in the citizen suit provisions of the Clean Air Act, 42 U.S.C. § 7604(a)(2), and the Endangered Species Act, 16 U.S.C. § 1540(g)(1)(C), cases interpreting those statutes are instructive. In the Seventh Circuit, there is a dearth of case law interpreting this language from any statute, and none of the on-point authority is controlling. *See, e.g., Sierra Club v. Johnson*, 500 F. Supp. 2d 936, 940 (N.D. Ill. 2007) (applying 42 U.S.C. § 7604(a)(2)). There is, however, a robust body of case law in other circuits on which the Court may rely.

In other Circuits, this language in § 1365 has been narrowly “confin[ed] [in] scope to the enforcement of legally required acts or duties of a specific and discrete nature that precludes broad agency discretion.” *Murray Energy Corp. v. Adm'r of Envtl. Prot. Agency*, 861 F.3d 529, 535 (4th Cir. 2017), *as amended* (July 18, 2017) (citing *Envtl. Def. Fund v. Thomas*, 870 F.2d 892, 899 (2d

Cir. 1989); *Mountain States Legal Found. v. Costle*, 630 F.2d 754, 766 (10th Cir. 1980); *Kennecott Copper Corp. v. Costle*, 572 F.2d 1349, 1355 (9th Cir. 1978)). It must essentially be such a duty that could have traditionally been enforced through the writ of mandamus.¹ *Murray*, 861 F.3d at 535. Consequently, “the nondiscretionary nature of the duty must be clear-cut—that is, readily ascertainable from the statute allegedly giving rise to the duty.” *WildEarth Guardians v. McCarthy*, 772 F.3d 1179, 1182 (9th Cir. 2014). To allege that such a duty exists, the plaintiff must “identify a ‘specific, unequivocal command’ from the text of the statute at issue.” *Id.*

The Tribe’s CWA claim fails because the Tribe has not alleged that the EPA or the Corps failed to perform some discrete, non-discretionary act. It complains of the EPA’s and the Corps’ “failure to exercise jurisdiction over the Section 404 permitting for the Back Forty Mine,” but it is hard to fathom a less specific and discrete act or duty than the “exercise of jurisdiction.” Every action the EPA or the Corps could conceivably ever take is an “exercise of jurisdiction.” While the Tribe points to 33 U.S.C. § 1344(g), it fails to point to any clear-cut, specific, unequivocal command in that section that the EPA or the Corps has failed to comply with.

If anything, the Tribe’s claim is that the Corps and the EPA have a mandatory duty to exercise permitting authority. The EPA has no such authority. *See* 33 U.S.C. §§ 1344(a),(e) (authorizing the “Secretary” to issue permits, not the “Administrator”). And a claim that the Corps has such authority was already attempted in *Huron Mountain Club v U.S. Army Corps of Engineers*, 545 F. App’x 390 (6th Cir. 2013), and failed. As the Sixth Circuit aptly held, the Corps has no “non-discretionary duty under the CWA to administer the CWA permitting program.” *Id.*

¹ This is consistent with how the United States Supreme Court has interpreted “failure to act” under the waiver of sovereign immunity in the APA. *See Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63 (2004) (“[A] ‘failure to act’ is properly understood to be limited . . . to a *discrete* action.”).

at 394. There is no specific, unequivocal statutory command to the Corps to “initiate the permit process” or to “force permitting requests” to the Corps. *Id.* at 394, 306. This claim should therefore be dismissed under Rule 12(b)(6).

II. The Corps is not subject to suit under § 1365 because it is not the “Administrator.”

While § 1365(a)(2) creates a right of action as to nondiscretionary acts, it does so only “against the Administrator of the Environmental Protection Agency, who shares enforcement responsibilities under the Act with the Corps of Engineers, rather than against the Corps itself.” *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng’rs*, 101 F.3d 503, 506 (7th Cir. 1996); *see All. To Save Mattaponi v. U.S. Army Corps of Eng’rs*, 515 F. Supp. 2d 1, 5–6 (D.D.C. 2007) (discussing relevant authority on this point). Again, this provision must be strictly construed. The CWA does not unequivocally allow suit against the Corps, and a strict reading of § 1365(a)(2) cannot yield an interpretation that the Legislature intended to do so. “[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.” *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992)). The Tribe’s claim against the Corps under the CWA should be dismissed for this reason as well.

III. The Tribe’s APA claims should be dismissed because it failed to allege a “final agency action” subject to review under § 706(2).

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. “As a general matter, two conditions must be satisfied for agency action to be considered ‘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.” *Home Builders Ass’n of Greater Chicago v. U.S. Army Corps of Eng’rs*, 335 F.3d 607,

614 (7th Cir. 2003) (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)). The only agency decision alleged in the Tribe’s complaint is one that the EPA made decades ago—the decision to delegate CWA § 404 permitting authority to Michigan.

Per the Tribe’s own allegations, the only reason the Corps refused to exercise jurisdiction over the permitting process was “that jurisdiction lies with the State of Michigan by virtue of prior Section 404 permitting delegation to the State.” Compl. ¶ 4, 47. The Tribe further admits that the EPA “did not address the issue with respect to the Menominee River’s status as an interstate water used for the transport of interstate commerce.” *Id.* ¶ 48. The Tribe thus admits that neither letter makes any factual or legal determinations at all regarding the jurisdictional status of the waters at issue. *Id.* ¶¶ 47–48. Neither letter, as alleged or in reality, reflects the consummation of a decision-making process, much less one that is binding on anyone, including the agencies. They at most reiterate the fact that the EPA already delegated authority to the State of Michigan, a decision consummated in 1984. Because the Tribe has not plausibly alleged that either of the letter responses are a “final agency action” subject to review under the APA, its APA claims against the EPA and the Corps should be dismissed.

CONCLUSION

For the reasons given above, Aquila respectfully requests that the Court dismiss all of the Tribe’s claims under Rule 12(b)(6).

Respectfully Submitted,

WARNER NORCROSS & JUDD LLP

Dated: April 11, 2018

By /s/ Ashley G. Chrysler

Ashley G. Chrysler

Dennis J. Donohue (*admission pending*)

Daniel P. Ettinger (*admission pending*)

Warner Norcross & Judd LLP

900 Fifth Third Center

111 Lyon Street NW

Grand Rapids, Michigan 49503

(616) 752-2000

*Attorneys for Proposed Intervenor Aquila
Resources, Inc.*

Ronald R. Ragatz

Henry J. Handzel, Jr.

DeWitt Ross & Stevens S.C.

2 E. Mifflin Street, Suite 600

Madison, Wisconsin 53703

(608) 252-9351

*Co-Counsel for Proposed Intervenor Aquila
Resources, Inc.*

17050939-1