

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

MENOMINEE INDIAN TRIBE OF
WISCONSIN,

Case No. 1:18-cv-108

Hon. William C. Griesbach

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,

and

AQUILA RESOURCES INC.,

Intervenor-Defendant.

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

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION.....	1
ARGUMENT	2
I. The Tribe has not identified a discrete, nondiscretionary duty that the EPA or the Corps was required to carry out under the CWA.....	2
A. There is no requirement that the EPA or the Corps “exercise jurisdiction” over the Section 404 permitting process, particularly when authority has been assumed by the State of Michigan.....	2
B. The Tribe has not met its burden to show that the CWA’s citizen suit provision applies to its claims against the Corps.....	6
II. Count II should be dismissed because the EPA and the Corps’ letters do not constitute a “final agency action” subject to review under § 706(2).	7
CONCLUSION.....	12

TABLE OF AUTHORITIES

Page

Cases

<i>Alliance To Save Mattaponi v. United States Army Corps of Engineers</i> , 515 F. Supp. 2d 1 (D.D.C. 2007)	6
<i>Ardestani v. INS</i> , 502 U.S. 129 (1991)	7
<i>Ciba-Geigy Corporation v. Environmental Protection Agency</i> , 801 F.2d 430 (D.C. Cir. 1986)	10
<i>City of Dania Beach, Florida v. Federal Aviation Administration</i> , 485 F.3d 1181 (D.C. Cir. 2007)	10
<i>Golden Gate Audubon Society Incorporated v. United States Army Corps of Engineers</i> , 700 F. Supp. 1549 (N.D. Cal.), amended 717 F. Supp. 1417 (N.D. Cal. 1988)	6, 7
<i>Home Builders Association of Greater Chicago v. United States Army Corps of Engineers</i> , 335 F.3d 607 (7th Cir. 2003)	8
<i>Huron Mountain Club v. United States Army Corps of Engineers</i> , 545 F. App'x 390 (6th Cir. 2013)	5
<i>Independent Equipment Dealers Association v. Environmental Protection Agency</i> , 372 F.3d 420 (D.C. Cir. 2004)	9
<i>National Wildlife Federation v. Hanson</i> , 859 F.2d 313 (4th Cir. 1988)	4, 5, 6, 7
<i>President Endangered Areas of Cobb's History Incorporated v. U.S. Army Corps of Engineers</i> , 87 F.3d 1242 (11th Cir. 1996)	7
<i>West Illinois Home Health Care Incorporated v. Herman</i> , 150 F.3d 659 (7th Cir. 1998)	9

Statutes

33 U.S.C. § 1344	2, 3, 6
33 U.S.C. § 1365	6
5 U.S.C. § 704	7

Rules

Fed. R. Civ. P. 12	6, 11, 12
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INTRODUCTION

The Menominee Tribe's response to the Federal Defendants' and Aquila's motions to dismiss offers little resistance to the core, fundamental legal principles that underlie the motions and require the dismissal of the Tribe's claims. The Tribe has still failed to identify any statutory provision that would create a mandatory duty for the EPA or the Corps to "exercise jurisdiction" over the State of Michigan's wetland permitting process. Nor has the Tribe identified a final agency action reviewable under Section 706(2)(A) of the Administrative Procedures Act ("APA").

Indeed, the Tribe's argument against the motions relies largely on a mischaracterization of the 1984 Memorandum of Agreement ("MOA") between the Corps and the State of Michigan (an incomplete copy of which is attached to the Tribe's response) regarding Michigan's assumption of Clean Water Act ("CWA") Section 404 responsibilities. The Tribe asserts on numerous occasions in its brief that the Menominee River and adjacent wetlands, including the portion of the river at issue in this matter, were not in fact part of Michigan's assumption of the Section 404 program approximately thirty-four years ago. But that is simply not true. The *full* 1984 MOA between the Corps and the State of Michigan (which is attached to the Federal Defendants' Reply Brief) makes clear that these sections of the Menominee River and adjacent wetlands *were* part of the program assumed by Michigan. The Tribe's claim that the EPA and the Corps had a non-discretionary duty to exercise jurisdiction over the wetlands in the vicinity of the Back Forty Mine and that the EPA and that the Corps' letters restating Michigan's assumption of the program constituted a "final agency action," therefore, cannot withstand scrutiny.

Accordingly, the Tribe has failed to state a claim on which relief should be granted, and its Complaint should be dismissed.

ARGUMENT

I. The Tribe has not identified a discrete, nondiscretionary duty that the EPA or the Corps was required to carry out under the CWA.

A. There is no requirement that the EPA or the Corps “exercise jurisdiction” over the Section 404 permitting process, particularly when authority has been assumed by the State of Michigan.

In response to the Federal Defendants’ and Aquila’s motions to dismiss, the Menominee Tribe continues to assert that the “non-discretionary duty” required under the CWA is that the EPA and the Corps must “assume jurisdiction” over the Section 404 permitting process for the Back Forty Mine. (Dkt. 21, Tribe’s Resp. at 18; *see also id.* at 11 (“The Corps and EPA have a non-discretionary duty to exercise jurisdiction over the Section 404 permit . . .”).) But the Tribe still has not identified any specific, unequivocal statutory authority for its position that the EPA or the Corps has a mandatory duty to exercise permitting authority. Instead, the Tribe cites generally to 33 U.S.C. § 1344(g) and argues that “[t]he Clean Water Act prohibits delegation of the Menominee River and its adjacent wetlands because the Menominee can be (and is) used for transport in interstate commerce.” (*Id.* at 15.)

The Tribe’s argument is almost entirely based on its inaccurate claim that CWA Section 404 permitting authority for the Menominee River “*was not* and could not have been delegated to the State of Michigan.” (*Id.* (emphasis added).) In fact, the Menominee Tribe repeats some variation of the statement that the Federal Defendants did not delegate permitting authority *fourteen times* in its brief. (*Id.* at 1, 7, 9, 10, 11, 15, 16, 20, 22, 23, 29.) To support this assertion, the Tribe cites to the 1984 MOA between Michigan and the Corps regarding Michigan’s assumption of Section 404 responsibilities. (*See id.* at 7, citing Dkt. 21-5, Spice Decl., Ex. C.)

But the document attached by the Tribe as Exhibit C to the Declaration of Lindzey Spice and certified as a “true and correct copy” of the 1984 MOA is not an accurate copy of the

document. The Tribe instead offered a partially signed version of the 1984 MOA that omits a critical attachment directly contradicting the Tribe's repeated and foundational assertion. Section III of the 1984 MOA refers to Attachment A to the agreement, which identifies the waters that are navigable and therefore remain under the regulatory authority of the Corps after assumption of authority by Michigan. The omitted Attachment A (a true and correct copy of the entire 1984 MOA, including Attachment A, is attached to the Federal Defendants' Reply Brief) makes clear that Michigan did, in fact, assume permitting authority for the portions of the Menominee River and adjacent wetlands at issue in this matter. Indeed, Attachment A indicates that the Corps exercises jurisdiction over the Menominee River *only* from the mouth of the River "upstream 1.86 miles to but not including the Interstate Highway Bridge (U.S. 41)." This mile marker is well downstream of the Back Forty Project area and necessarily excludes the portion of the Menominee River near the Back Forty Project and its adjacent wetlands.

In other words, the Menominee Tribe's argument that the EPA and Corps failed to comply with their non-discretionary duty to "exercise jurisdiction" over the Section 404 permit because the Menominee River was not part of Michigan's assumption of the program is, at best, based on a misunderstanding of the MOA, and at worst, disingenuous and misleading. In fact, the Tribe went so far as to state that "the Memoranda of Agreement between Michigan and the Federal Defendants plainly restate Congress' direction in the Clean Water Act, 33 U.S.C. § 1344(g) that waters such as the Menominee River and its adjacent wetlands, *are not subject to or part of the delegation*. See, e.g., Spice Decl. Exh. C at 2." (*Id.* at 29 (emphasis added).) But, as noted above, that is not what the 1984 MOA says at all. Rather, the agreement says just the opposite. The *full* version of the MOA (which includes Attachment A) makes clear that permitting authority over the

stretch of the Menominee River near the Back Forty Project was assumed by the State of Michigan in 1984.

Ironically, the Tribe acknowledged the extent of Michigan's assumed authority in another exhibit to its brief—Exhibit E to the Declaration of Lindzey Spice, which is the Tribe's August 21, 2017 letter to the EPA and the Corps requesting consultation and the assertion of federal jurisdiction over Aquila's 404 permit. In that letter, the Tribe noted the 1979 navigability report (attached as Exhibit A to Lindzey Spice's Declaration), and then stated that "we understand that both the 1984 Memorandum of Agreement between the USACE and Michigan, and the most recent USACE Detroit District listing of Navigable Waters of the United States ("Section 10 Waters") find that only the portion of the Menominee River up to but not including the U.S. Hwy 41 bridge constitutes navigable waters of the United States." (Dkt. 21-7, Spice Decl., Ex. E at 4.) Because Michigan has assumed permitting authority for the portion of the Menominee River near the Back Forty Project, the Menominee Tribe has failed to plausibly establish that the Federal Defendants have a mandatory duty to assume jurisdiction over the Section 404 permit process.

The Tribe argues that the cases cited in Section I.B of its brief "stand for the principle that the Corps cannot simply refuse to exercise jurisdiction over a Section 404 permit application when Congress clearly provided that jurisdiction over the Menominee River should remain with the Corps." (Dkt. 21, Tribe's Resp. at 16.) But again, Congress did not clearly provide that jurisdiction over the Menominee River should remain with the Corps; rather, the State of Michigan, under the CWA, assumed wetlands permitting authority. Therefore, the cases cited by the Tribe are inapposite. The Tribe cites to *National Wildlife Federation v. Hanson*, 859 F.2d 313 (4th Cir. 1988), but that case dealt with an award of attorneys fees under the CWA; the court only mentioned the Corps' so-called "mandatory duty" under the CWA in passing. And the court seemed to

conflate the review provisions of the APA with the citizen's suit provisions of the CWA, suggesting that the Corps had a mandatory duty to not make arbitrary and capricious jurisdictional determinations. Even assuming *arguendo* that such a duty exists pursuant to the CWA, any decision by the Corps about its jurisdiction over the Menominee River, including the stretch at issue here, was made over three decades ago as part of the 1984 MOA and there is no legal basis to require the Corps to revisit that decision now. *Hanson* simply does not stand for the proposition that the Corps and the EPA have a non-discretionary duty to “exercise jurisdiction” over Section 404 permitting when such authority has been properly assumed by a state and no federal permit application has been submitted.

Because Michigan has assumed authority over the Section 404 permitting process, the Tribe is essentially asking the Corps to “initiate the permit process” or to “force permitting requests” to the Corps. This is the exact argument that failed in *Huron Mountain Club v. U.S. Army Corps of Engineers*, 545 F. App'x 390 (6th Cir. 2013) because, as the court correctly held, the Corps has no “non-discretionary duty under the CWA to administer the CWA permitting program.” *Id.* While the Tribe attempts to distinguish this case by noting that the plaintiff in *Huron Mountain Club* did not bring a citizen suit claim against the Corps, this argument is unavailing since the court's analysis under the APA and the Mandamus Act involved essentially the same question as presented here: whether the Corps “has a non-discretionary duty under the CWA to administer the CWA permitting program.”¹ *Id.* at 394.

Importantly, the Menominee Tribe also wholly fails to address the statutory language of the CWA, which unequivocally states that the EPA has no permitting authority. *See* 33 U.S.C. §

¹ The Tribe's argument that *Huron Mountain Club* “does not concern a Section 404 permit at all” is also unavailing given that the plaintiff's entire claim in *Huron Mountain Club* was that the mining company should have applied for a Section 404 permit and that Corps should be required to “fulfill its permitting responsibilities” under the CWA. *Id.* at 392.

1344(a),(e) (authorizing the “Secretary” to issue permits, not the “Administrator”). The Menominee Tribe has identified no statutory language to contradict this argument or otherwise suggest that the CWA has created a clear-cut, specific, unequivocal command that the EPA must exercise permitting authority, particularly when such authority has already been assumed by a state. Accordingly, this claim should be dismissed under Rule 12(b)(6).

B. The Tribe has not met its burden to show that the CWA’s citizen suit provision applies to its claims against the Corps.

The Tribe relies heavily on *Hanson*, a case from the Fourth Circuit, to support its argument that the citizen suit provision of the CWA authorizes claims against the Corps.² In so doing, the Tribe entirely fails to address the language of the statute itself, which is controlling. As noted in both the Federal Defendants’ and Aquila’s initial briefs, the language is plain and unambiguous. The CWA authorizes citizen suits against “the Administrator” for the violation of a mandatory duty. 33 U.S.C. § 1365(a)(2). The Administrator is defined as the Administrator of EPA, not as the Corps or its officials. *Id.* § 1251(d) (“Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency (hereinafter in this chapter called ‘Administrator’) shall administer this chapter.”).

This is precisely the conclusion reached by the court in *Alliance To Save Mattaponi v. U.S. Army Corps of Engineers*, 515 F. Supp. 2d 1, 6 (D.D.C. 2007). Directly addressing the holding in *Hanson*, the court noted that the court in *Hanson* appeared to have been “puzzled” by the statute. *Id.* The court went on to note that “*Hanson* is contrary to a series of other cases” and “is also unpersuasive” given that the express terms of the statute dictate a different result and that waivers

² The Tribe also relies on *Golden Gate Audubon Soc., Inc. v. U.S. Army Corps of Engineers*, 700 F. Supp. 1549, 1554 (N.D. Cal.), *amended* 717 F. Supp. 1417 (N.D. Cal. 1988). However, this case is unpersuasive given that the *Golden Gate* order cited by the Tribe was amended one month after being issued. The amended order removed the entire discussion of whether the citizen suit provision of the CWA authorizes claims against the Corps. *See Golden Gate Audubon Soc., Inc. v. U.S. Army Corps of Engineers*, 717 F. Supp. 1417, 1419 (N.D. Cal. 1988).

of sovereign immunity must be strictly construed. *Id.* (citing *Ardestani v. INS*, 502 U.S. 129, 137 (1991) (waivers “must be strictly construed in favor of the United States”)). The Eleventh Circuit likewise “respectfully disagree[d]” with *Hanson* and held that because the statute “does not clearly and ambiguously [sic] waive sovereign immunity in regard to the Army Corps of Engineers . . . [w]e must conclude that Congress did not intend to waive sovereign immunity in regard to suits against the Army Corps of Engineers under the Clean Water Act.” *See Pres. Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Engineers*, 87 F.3d 1242, 1249 & n.5 (11th Cir. 1996). Other than citing to *Hanson* and *Golden Gate*, the Tribe has not even attempted to distinguish the cases cited by the Federal Defendants and Aquila.

Accordingly, the Tribe’s claim against the Corps under the CWA should be dismissed for this additional reason.

II. Count II should be dismissed because the EPA and the Corps’ letters do not constitute a “final agency action” subject to review under § 706(2).

In the alternative, the Tribe claims that the letters from the EPA and the Corps amount to a “final agency action” that is reviewable under 5 U.S.C. § 704. Specifically, the Tribe argues that “the Corps and EPA both made clear in their responses to the Tribe that they are denying the Tribe’s request that the federal agencies assume jurisdiction over the permit, and instead will allow the State to issue the Section 404 permit for waters that were never delegated. This decision constitutes final agency action on the specific issue in this case.” (Dkt. 21, Tribe’s Resp. at 21-22.) The Menominee Tribe’s claim fails for several reasons.

First and foremost, as with Count I, the Tribe’s APA claim is again based on its misleading assertion that “the terms of that [1984] delegation could not and *did not* include the portion of the Menominee River and adjacent wetlands at issue here.” (*Id.* at 22.) As discussed above, this is untrue. Because Michigan *did* assume permitting authority for the portions of the Menominee

River and adjacent wetlands at issue in this matter under the 1984 MOA, it is clear that the letters from the EPA and the Corps merely *reiterated* the decision that had been made over thirty years earlier, rather than serving as a separate, final decision on the issue of jurisdiction.

The letters from the EPA and the Corps cannot constitute a “final agency action” because they do not reflect the consummation of a decision-making process concerning the jurisdictional issue. *See Home Builders Ass’n of Greater Chicago v. U.S. Army Corps of Eng’rs*, 335 F.3d 607, 614 (7th Cir. 2003). Indeed, as noted in Aquila’s initial memorandum in support of its motion to dismiss, the Tribe admits in its Complaint that neither letter makes any factual or legal determinations at all regarding the jurisdictional status of the waters at issue. Compl. ¶¶ 47–48. Rather, the letter from the Corps merely informs the Tribe that “the Corps does not have the authority to initiate tribal consultation . . . , nor determine jurisdiction on the adjacent wetlands as the conditions required for the Corps to review the application have not yet occurred [i.e. the permit had not become federalized due to the inability of the State to resolve the EPA’s objections to the proposed state permit].” (Dkt. 21-8, Spice Decl., Ex. F, 9/28/17 Corps Ltr.) Likewise, by the Tribe’s own admission, the letter from the EPA “simply refused to respond on this specific issue, instead broadly offering to ‘consult’ with the Menominee Tribe.” (Dkt. 21, Tribe’s Resp. at 21.) Thus, these letters do not contain any mandatory language or directives, do not describe themselves as guidance, and do not purport to impose new obligations on the Tribe or announce a new interpretation of the prior MOA. Instead, the letters merely express recognition of the fact that Michigan already assumed permitting authority under Section 404.

It is well-settled that agency action that merely reiterates an earlier agency decision and does not otherwise alter the status quo is not considered a “final agency action.” *See Indep. Equip.*

Dealers Ass'n v. E.P.A., 372 F.3d 420, 427 (D.C. Cir. 2004). For instance, in *Independent Equipment Dealers*, the D.C. Circuit held that an EPA letter was not a final agency action where

the EPA Letter merely restated in an abstract setting - for the umpteenth time - EPA's longstanding interpretation of the Part 89 certificate of conformity regulations. The Letter neither announced a new interpretation of the regulations nor effected a change in the regulations themselves. The Letter was purely informational in nature; it imposed no obligations and denied no relief. Compelling no one to do anything, the letter had no binding effect whatsoever - not on the agency and not on the regulated community. It was, as EPA describes it, "the type of workaday advice letter that agencies prepare countless times per year in dealing with the regulated community."

Id. The same is true of the letters from the EPA and the Corps. This conclusion makes sense given that accepting the Menominee Tribe's argument "would quickly muzzle any informal communications between agencies and their regulated communities — communications that are vital to the smooth operation of both government and business." *Id.*

While the Menominee Tribe cites several cases to support its assertion that "[c]ourts have repeatedly found that a letter can be final agency action reviewable under the APA" (Dkt. 21, Tribe's Resp. at 22), these cases are readily distinguishable from the present action. For instance, *W. Illinois Home Health Care, Inc. v. Herman* involved a situation where, after an extensive investigation of the plaintiff's overtime practices, the Department of Labor Deputy Director sent a letter that included "a determination that *establishe[d]* the legal obligation of" the plaintiff. 150 F.3d 659, 663 (7th Cir. 1998) (emphasis added). Here, however, the letters from the EPA and the Corps did not "establish" that they will not assume jurisdiction over the Section 404 permit for the Back Forty Mine—again, that decision was made over thirty years ago when Michigan assumed authority for the Section 404 process (including the portions of the Menominee River at issue in this matter).

For the same reason, *City of Dania Beach, Fla. v. F.A.A.*, 485 F.3d 1181, 1188 (D.C. Cir. 2007), is also inapplicable. In *Dania Beach*, the court based its determination that a letter regarding the Federal Aviation Administration's authority to use "all available runways" was a "final agency action" in large part on the fact that the letter was "a *new* interpretation of the noise compatibility program." *Id.* at 1184, 1188. Indeed, the court noted that "the FAA's 2005 letter provides new marching orders about how air traffic will be managed at FLL." *Id.* at 1188. Likewise, *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 437 (D.C. Cir. 1986), also involved a situation where the EPA sent a letter imposing a "new labeling requirement" on a chemical products manufacturer and requiring immediate compliance with the EPA's novel interpretation. But again, here, neither the EPA's letter nor the Corps' letter provided "new" marching orders regarding the Section 404 permitting authority. Rather, these letters merely reiterated a decision that Michigan would assume Section 404 permitting authority that was made decades ago.

The Menominee Tribe states in its brief that it "does not challenge the delegation itself," and "does not seek to have the delegation revoked or to have the federal agencies exercise jurisdiction generally over any waters or project that are not this Section 404 permit for this Mine on the Menominee River." (Dkt. 21, Tribe's Resp. at 28-29.) But the Tribe is asking this Court to order the Federal Defendants "to assume control and exercise jurisdiction" over Aquila's wetlands permit based on its argument that the "*the Menominee River* was not and could not have been delegated to Michigan under the plain terms of the Clean Water Act." (Dkt. 21, Tribe's Resp. at 11 (emphasis added).) So in reality, the Tribe is seeking a determination from this Court that the Menominee River is navigable and therefore subject only to federal authority under CWA Section 404, not just the portion adjacent to the Back Forty Mine. But any such determination would not just affect Aquila's project, but any Section 404 permit along the river. So the ultimate effect would

be to revoke the Michigan's assumption of permitting authority as it relates to the Menominee River that has been in place since 1984.

The Tribe argues that it is not challenging the delegation itself because the time for challenging that decision has long since passed. While the Tribe claims that it “could not challenge the agencies’ unlawful application of that delegation to the Back Forty Mine permit decades before the Mine was ever proposed” (Dkt. 21, Tribe’s Resp. at 22-23), this argument is unavailing given the Tribe’s repeated assertions in both its Complaint and response brief that the Menominee River and the surrounding area is of the utmost importance to them. (*See, e.g.*, Compl. ¶ 11 (“The Menominee Tribe’s connection to the Menominee River is existential as the Menominee Tribe’s origin story takes place at the mouth of the Menominee River.”); Compl. ¶ 29 (“Protection of the Menominee Tribe’s cultural heritage is of supreme importance to the Menominee Tribe.”); *see also* Dkt. 21, Tribe’s Resp. at 1, 6.) Presumably, the Menominee Tribe’s interest in the federal government retaining jurisdiction over wetland permitting decisions along the Menominee River would have been just as strong in 1984, even before this specific mine was at issue.

Because the Menominee Tribe has failed to plausibly allege that the letter from either agency is a “final agency action” reviewable under the APA, Count II should be dismissed under Rule 12(b)(6) as well.

CONCLUSION

For the reasons given above and set forth in Aquila's initial brief in support of its motion to dismiss, Aquila respectfully requests that the Court dismiss all of the Tribe's claims under Rule 12(b)(6).

Respectfully Submitted,

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Dated: June 1, 2018

By /s/ Ashley G. Chrysler

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