

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN  
Civil No. 1:18-cv-108 (WCG)

Menominee Indian Tribe of Wisconsin,

Plaintiff,

v.

United States Environmental Protection  
Agency, et al.,

Defendants.

REPLY MEMORANDUM IN  
SUPPORT OF DEFENDANTS'  
MOTION TO DISMISS

## TABLE OF CONTENTS

Table of Contents.....	i
Table of Authorities .....	ii
Introduction .....	1
Argument.....	2
I.    Count 1 Should Be Dismissed To The Extent It Asserts That The Corps Violated A Mandatory Duty.....	2
II.   Count 1 Should Be Dismissed To The Extent It Asserts That Either the Corps or EPA Violated A Mandatory Duty To Exercise Regulatory Jurisdiction.....	6
A.   There is no mandatory duty to exercise regulatory jurisdiction over a permit application. ....	6
B.   Michigan did assume permitting authority for the relevant portion of the Menominee River. ....	10
III.  Count 2 Fails To State A Claim For Judicial Review Of A Final Agency Action. ....	13
IV.  The Tribe’s Claims Are Not Ripe. ....	14
Conclusion.....	15

## TABLE OF AUTHORITIES

### Cases

<i>*Alliance To Save Mattaponi v. U.S. Army Corps of Engineers</i> , 515 F. Supp. 2d 1 (D.D.C. 2007) .....	2, 4, 5
<i>*Bennett v. Spear</i> , 520 U.S. 154 (1997) .....	7
<i>Cascade Conserv’n League v. M.A. Segale, Inc.</i> , 921 F. Supp. 692, 696-97 (W.D. Wash. 1996).....	4, 5
<i>EDF v. Thomas</i> , 870 F.2d 892 (2d Cir. 1989) .....	7
<i>*Frey v. EPA</i> , 2006 WL 2849715, No. 1:00-CV-660. (S.D. Ind. Sept. 29, 2006), <i>aff’d</i> , 751 F.3d 461 (7th Cir. 2014) .....	6, 7
<i>*Golden and Zimmerman, L.L.C. v. Domenech</i> , 599 F. Supp. 2d 702 (E.D. Va. 2009) .....	13
<i>Golden Gate Audubon Soc. v. U.S. Army Corps of Eng’rs</i> , 700 F. Supp. 1549 (N.D. Cal. 1988), <i>amended by</i> <i>Golden Gate Audubon Soc’y v. U.S. Army Corps of Eng’rs</i> , 717 F. Supp. 1417 (N.D. Cal. 1988).....	4
<i>Harris v. FAA</i> , 215 F. Supp. 2d 209 (D.D.C. 2002) .....	13
<i>*Huron Mountain Club v. U.S. Army Corps of Engineers</i> , 545 F. App’x 390 (6th Cir. 2013).....	9, 10
<i>Huron Mountain Club v. U.S. Army Corps of Engineers</i> , No. 2:12-CV-197, 2012 WL 3060146 (W.D. Mich. July 25, 2012) .....	10
<i>Indep. Equip. Dealers Ass’n v. EPA</i> , 372 F.3d 420 (D.C. Cir. 2004) .....	13

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\* Authorities chiefly relied upon are marked with an asterisk.

<i>Lekas v. Briley</i> , 405 F.3d 602 (7th Cir. 2005) .....	11
<i>MCI Telecom. Corp. v. ATT</i> , 512 U.S. 218 (1984) .....	8
<i>Murray Energy Corp. v. EPA</i> , 861 F.3d 529 (4th Cir. 2017) .....	5, 7
<i>Nat'l Cotton Council of Am. v. EPA</i> , 553 F.3d 927 (6th Cir. 2009) .....	8, 9
<i>Nat'l Wildlife Fed'n v. Hanson</i> , 623 F. Supp. 1539 (E.D.N.C. 1985).....	3
<i>Nat'l Wildlife Fed'n v. Hanson</i> , 859 F.2d 313 (4th Cir. 1988) .....	2, 3, 5
<i>Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs</i> , 404 F. Supp. 2d 1015 (M.D. Tenn. 2005) .....	4, 5
<i>NRDC v. Calloway</i> , 392 F. Supp. 685 (D.D.C. 1975).....	8
<i>NRDC v. Costle</i> , 568 F.2d 1369 (D.C. Cir. 1977) .....	9
<i>Nw. Env'tl. Advocates v. EPA</i> , 537 F.3d 1006 (9th Cir. 2008) .....	9
<i>Nw. Env'tl. Def. Ctr. v. U.S. Army Corps of Eng'rs</i> , 118 F. Supp. 2d 1115 (D. Or. 2000) .....	4
<i>*Preserve Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Engineers</i> , 87 F.3d 1242 (11th Cir. 1996) .....	3, 4, 5
<i>*Scott v. City of Hammond</i> , 741 F.2d 992 (7th Cir. 1984) .....	1, 12

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\* Authorities chiefly relied upon are marked with an asterisk.

<i>U.S. Army Corps of Eng’rs v. Hawkes Co., Inc.</i> , 136 S. Ct. 1807 (2016) .....	5
<i>U.S. Dep’t of Energy v. Ohio</i> , 503 U.S. 607 (1992) .....	2
<i>Walther v. United States</i> , No. 3:15-cv-21, 2015 WL 9700347 (D. Alaska July 27, 2015) .....	4
<i>Wisconsin’s Environmental Decade, Inc. v. Wisconsin Power &amp; Light Co.</i> , 395 F. Supp. 313 (W.D. Wis. 1975) .....	12
<i>Wroblewski v. City of Washburn</i> , 965 F.2d 452 (7th Cir. 1992) .....	11

## **Statutes**

33 U.S.C. § 1344(g)(1) .....	7
33 U.S.C. § 1344(h)(1) .....	7

## **Federal Register**

49 Fed. Reg. 38,947 (Oct. 2, 1984) .....	13
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\* Authorities chiefly relied upon are marked with an asterisk.

## INTRODUCTION

The essence of the Tribe's complaint is that the Clean Water Act precludes the State of Michigan from administering the Section 404 permitting program for discharges into the Menominee River and its adjacent wetlands. In Count 1 the Tribe pleads that argument as a mandatory duty claim, but Count 1 fails for three reasons: (1) it seeks relief against the Corps (as well as EPA), but the Corps is not a proper defendant in a claim under 33 U.S.C. § 1365(a)(2); (2) it asserts that the Corps and EPA both violated a statutory duty to exercise federal permitting authority, but the statute imposes no such duty on either agency; and, most importantly, (3) it challenges the substance of an agency action, *i.e.*, the scope of Michigan's assumption of the Section 404 program. Under the Seventh Circuit's decision in *Scott v. City of Hammond*, 741 F.2d 992 (7th Cir. 1984), which the Tribe does not acknowledge, a challenge to the substance of an agency action is beyond the scope of a mandatory duty claim.

In Count 2 the Tribe pleads its argument by asserting that letters to a U.S. Senator and to the Tribe itself are final agency actions, the substance of which can be reviewed under the APA. But these letters are not the consummation of the agencies' decision-making process on whether and to what extent Michigan would assume Section 404 permitting authority over the Menominee River, nor do these letters have any legal effect. The final agency action regarding Section 404 permitting authority on the Menominee River was made in 1984, as part of EPA's approval of Michigan to assume the Section 404 permit program. Under the terms of that decision, the Corps

retained Section 404 permitting authority on the lower 1.86 miles of the River, while Michigan assumed permitting authority for the rest of the river, which includes the site of Aquila's proposed project.

The Tribe believes that 1984 decision was wrong, and the Corps should have retained permitting authority over the entire River. But regardless of how the Tribe argues its claims, both counts of the Complaint should be dismissed.

## **ARGUMENT**

### **I. Count 1 Should Be Dismissed To The Extent It Asserts That The Corps Violated A Mandatory Duty.**

The Tribe does not dispute that the CWA's citizen suit provision, 33 U.S.C. § 1365(a)(2), is a limited waiver of sovereign immunity, nor does the Tribe dispute that courts must construe such waivers narrowly and may not expand waivers beyond their express terms. *See Alliance To Save Mattaponi v. U.S. Army Corps of Eng'rs*, 515 F. Supp. 2d 1, 5 (D.D.C. 2007); *U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 615 (1992). Instead, the Tribe argues that this Court should follow a minority view that despite section 1365(a)(2)'s plain language, the statute authorizes mandatory duty claims against the Corps. Pl. Combined Resp. to Def. and Def.-Intervenor's Motions to Dismiss ("Pl. Resp."), ECF No. 21, at 12-15.

The Tribe asks the Court to follow the Fourth Circuit's reasoning in *Nat'l Wildlife Fed'n v. Hanson*, 859 F.2d 313 (4<sup>th</sup> Cir. 1988). The plaintiffs in *Hanson* had filed a mandatory duty claim under section 1365(a)(2) to challenge a jurisdictional

determination by the Corps, *i.e.*, a formal determination that a tract of land is (or is not) a wetland subject to the Clean Water Act's permit requirements. *Nat'l Wildlife Fed'n v. Hanson*, 623 F. Supp. 1539, 1540, 1544 (E.D.N.C. 1985). The district court adjudicated the mandatory duty claim by applying the APA's standard and scope of review, *id.* at 1544, holding that the Corps' jurisdictional determination was arbitrary, *id.* at 1548, and found that both the Corps and EPA had therefore failed to perform their statutory duties, the Corps by failing to regulate discharges into wetlands and EPA by failing to "prevent the Corps from ... abdicating its duties." *Id.* at 1544.

On appeal of an award of attorneys' fees, the Fourth Circuit held that the Corps and EPA share responsibility for permitting and enforcement under the CWA, that the Corps has a nondiscretionary duty to regulate dredged or fill material, and that "to fulfill that duty [the Corps] must make reasoned wetland determinations," *i.e.*, that the Corps has a mandatory duty to "properly apply the law to the facts." 859 F.2d at 315-16. The court recognized that section 1365(a)(2) only allows a mandatory duty claim against EPA, but decided that "Congress cannot have intended to allow citizens to challenge erroneous wetlands determinations when [EPA] makes them but to prohibit such challenges when the Corps makes the determination and EPA fails to exert its authority over the Corps' determination." *Id.* at 316.

In contrast, in *Preserve Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Eng'rs* ("P.E.A.C.H."), the Eleventh Circuit addressed the same question and reasoned that the citizen suit provision does not apply to EPA's authority to overrule the



Corps' decisions because that is a discretionary authority, not a mandatory duty, and that even if there were a mandatory duty, Congress' express decision to allow such claims against EPA but not against the Corps must be respected. 87 F.3d 1242, 1249-50 (11th Cir. 1996).

In the twenty-plus years since *P.E.A.C.H.*, district courts in five different jurisdictions have followed the Eleventh Circuit's lead and no court (other than district courts within the Fourth Circuit) have followed *Hanson*. See *Cascade Conservation League v. M.A. Segale, Inc.*, 921 F. Supp. 692, 696-97 (W.D. Wash. 1996); *Nw. Env'tl. Def. Ctr. v. U.S. Army Corps of Eng'rs*, 118 F. Supp. 2d 1115, 1119-20 (D. Or. 2000); *Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 404 F. Supp. 2d 1015, 1021-22 (M.D. Tenn. 2005); *Alliance To Save Mattaponi*, 515 F. Supp. 2d at 6; *Walther v. United States*, No. 3:15-cv-21, 2015 WL 9700347, at \*4-5 (D. Alaska July 27, 2015).<sup>1</sup>

Although the Tribe acknowledges that there is a split in authority, the Tribe fails to mention how one-sided that split has become.

More importantly, the Tribe fails to grapple with the reasoning in any of these cases, simply concluding that the better reasoned decisions find a cause of action against the Corps. Pl. Resp. at 12. In fact, the Fourth Circuit's reasoning in *Hanson* is

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<sup>1</sup> One district court outside of the Fourth Circuit has reached the same conclusion as *Hanson*, but, like *Hanson* itself, predates *P.E.A.C.H.* and mis-interprets section 1365(a)(2), and has since been amended to remove the discussion the Tribe relies on. See *Golden Gate Audubon Soc'y v. U.S. Army Corps of Eng'rs*, 700 F. Supp. 1549 (N.D. Cal. 1988), amended by *Golden Gate Audubon Soc'y v. U.S. Army Corps of Eng'rs*, 717 F. Supp. 1417 (N.D. Cal. 1988).

flawed. As *P.E.A.C.H.* and other courts have pointed out, *Hanson* ignores the clear and express terms and definitions in the statute, and fails to construe the waiver of sovereign immunity narrowly. See, e.g., *Alliance To Save Mattaponi*, 515 F. Supp. 2d at 6 (Congress' presumed intent is not the question); *Cascade Conservation League*, 921 F. Supp. at 697 (courts must presume Congress says what it means and means what it says). *Hanson* also errs by importing APA standards into a mandatory duty claim. *Nat'l Wildlife Fed'n*, 404 F. Supp. 2d at 1021-22 (citing *Scott*, a mandatory duty claim can address the failure to take any action whatsoever but not an argument that the defendant "made the wrong decision," i.e., acted arbitrarily). See generally *P.E.A.C.H.*, 87 F.3d at 1249-50.<sup>2</sup>

The *Hanson* court's reasoning also fails to account for a subsequent change in the law. In *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1813, 1815 (2016), the Supreme Court held that a wetland determination is a final agency action under the APA, and an interested party can challenge allegedly arbitrary determinations. The *Hanson* court's concern that limiting section 1365(a)(2) to claims against EPA would "prohibit such challenges [to erroneous wetlands determinations] when the Corps makes the determination," is therefore not valid. 858 F.2d at 316.

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<sup>2</sup> The Fourth Circuit itself might decide *Hanson* differently today. See *Murray Energy Corp. v. EPA*, 861 F.3d 529, 535-36 (4th Cir. 2017) (noting that the Clean Air Act's analogous citizen suit provision must be read narrowly and in a similar manner to mandamus cases, which normally require a precise, definite act).

Because a cause of action under the APA is available, there is no reason to look to section 1365(a)(2) to provide a cause of action against the Corps.

Count 1 must therefore be dismissed as to the Corps.

**II. Count 1 Should Be Dismissed To The Extent It Asserts That Either the Corps or EPA Violated A Mandatory Duty To Exercise Regulatory Jurisdiction.**

More fundamentally, the Tribe is incorrect when it argues that the CWA imposes a mandatory duty “to exercise jurisdiction over the Section 404 permit,” because “permitting authority was not and could not have been delegated” to Michigan. Pl. Resp. at 15.<sup>3</sup> The Tribe is wrong both legally and factually.

**A. There is no mandatory duty to exercise regulatory jurisdiction over a permit application.**

As a matter of legal interpretation, the Tribe misconstrues what is a mandatory (or non-discretionary) duty enforceable under section 1365(a)(2). In *Frey v. EPA*, No. 1:00-cv-660, 2006 WL 2849715, at \*6 (S.D. Ind. Sept. 29, 2006), *aff’d*, 751 F.3d 461 (7th Cir. 2014), the court examined an analogous provision under CERCLA and examined whether the statute uses terms such as “shall,” which “connote an obligation.” The court also asked whether the statutory task is “amenable to a

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<sup>3</sup> Although the Tribe refers to a delegation of authority by EPA, the CWA and its applicable implementing regulations provide for a state to assume the Section 404 program. *See generally* 33 U.S.C. §§ 1344(g), (h), (i) and 40 C.F.R. Part 233. A delegation of authority involves an entity such as a state administering a federal program under the federal statute and regulations, whereas states administer the CWA Section 404 program under their own statutory authorities.

quantitative and somewhat objective definition.” *Id.* at \*4. *See generally Bennett v. Spear*, 520 U.S. 154, 172 (1997) (omission of a required procedure is a violation of a mandatory duty); *Murray Energy Corp. v. EPA*, 861 F.3d 529, 535-36 (4th Cir. 2017) (concluding provisions of the Clean Air Act that lack “start-dates, deadlines, or any other time-related instructions” and that fail to “impose . . . a specific and discrete duty” are not amenable to review under that statute’s analogous citizen suit provision); *EDF v. Thomas*, 870 F.2d 892, 899 (2d Cir. 1989) (the Clean Air Act’s mandatory duty provision allows a district court to compel EPA “to perform purely ministerial acts”).

The portion of the statute at issue here does contain some mandatory or non-discretionary obligations. For example, the statute provides a mandatory timeframe for EPA to determine whether the state’s program meets certain criteria. *See* 33 U.S.C. § 1344(h)(1). But the Tribe does not identify any such mandatory language regarding the scope of retained or assumed waters. Instead, the Tribe points to language in the statute which limits the scope of the waters for which permit authority can be assumed, *i.e.*, a state may assume permitting authority over “navigable waters (other than those 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 . . .).” *Id.* § 1344(g)(1).

An agency decision that ignores or contravenes the limitations on the scope of assumable waters may or may not be arbitrary, depending on the agency’s reasons and

the administrative record. But this language does not impose a non-discretionary duty under *Bennett* and *Frey*.

In response, the Tribe points to *NRDC v. Calloway*, 392 F. Supp. 685, 686 (D.D.C. 1975), for the proposition that the Corps acts “unlawfully when it [defines] its jurisdiction under the [Clean Water Act] more narrowly or differently than directed by Congress.” Pl. Resp. at 15. But that is not the point – if the Corps or EPA acted unlawfully, then under *Scott* the proper cause of action is an APA claim for judicial review of an agency decision, not a mandatory duty claim. Simply “acting unlawfully” does not mean the statute imposes a mandatory duty that can be enforced through section 1365(a)(2).<sup>4</sup>

The Tribe also cites cases that purport to hold 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.” Pl. Resp. at 16. But none of those cases help the Tribe because none of them address whether the statute imposes a mandatory duty. In *Nat’l Cotton Council of Am. v. EPA*, 553 F.3d 927 (6<sup>th</sup> Cir. 2009), the court held that the CWA forecloses EPA’s ability to issue a regulation exempting from CWA permit requirements pesticides that are applied in accordance with the Federal Insecticide, Fungicide, and

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<sup>4</sup> The Tribe also cites *MCI Telecomm. Corp. v. ATT*, 512 U.S. 218, 230-32 (1984), Pl. Resp. at 15, but that case is even farther afield, dealing with the scope of the FCC’s ability to “modify” a requirement under the terms of its statute. *Id.* at 225.

Rodenticide Act, but that case was a petition for review in the court of appeals, filed under section 1369(b)(1)(F), and says nothing about whether such a claim can be brought under 1365(a)(2) when there is no formal rulemaking at issue. *See* 553 F.3d at 933. In *Northwest Env'tl. Advocates v. EPA*, 537 F.3d 1006, 1021 (9<sup>th</sup> Cir. 2008), the court held that because the “text of the statute clearly covers” certain marine discharges, EPA lacks the authority to exempt those discharges from permit requirements. Notably, that case was an APA challenge to EPA’s decision to deny a petition for rulemaking, *i.e.*, a final agency action, it was not a mandatory duty claim. *Id.* at 1013-14. And in *NRDC v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977), the court reached the same conclusion, that EPA cannot exempt categories of point sources from permit requirements, but that was not a mandatory duty claim, either.<sup>5</sup>

The Tribe also points to *Hanson*, Pl. Resp. at 16, which as discussed above is based on the faulty assumption that there is a mandatory duty to properly administer the CWA. That theory is contradicted by *Scott*, because the manner in which an agency carries out its functions cannot be the subject of a mandatory duty claim.

In contrast, in *Huron Mountain Club v. U.S. Army Corps of Eng'rs*, 545 F.App’x 390 (6<sup>th</sup> Cir. 2013), the Sixth Circuit did address the relevant question: whether the Corps “has a non-discretionary duty under the CWA to administer the CWA

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<sup>5</sup> The *Costle* case was brought in district court as a declaratory judgment action and the court did discuss the basis for its jurisdiction but there was no discussion of a mandatory duty.

permitting program.” *Id.* at 394. *See also Huron Mtn. Club v. U.S. Army Corps of Eng’rs*, No. 2:12-cv-197, 2012 WL 3060146 at \*4 (W.D. Mich. July 25, 2012) (plaintiff asserts the Corps has “congressionally mandated responsibilities” to administer the CWA permitting program “when the facts prove the Corps’ jurisdiction has been triggered”); *id.* at \*8 (asserting that the Corps “cannot delegate its CWA § 404 permitting authority” to Michigan because the waters at issue are “beyond the scope of waters that are subject to state delegation”).

The Tribe asserts that *Huron* is distinguishable because a Section 404 permit was not required there, Pl. Resp. at 17-18, but that is not a relevant distinction. The issue in *Huron* and in this case is the same, and the Sixth Circuit’s analysis under the Mandamus Act involves essentially the same standard as whether there is a mandatory duty enforceable under section 1365(a)(2). 545 F. App’x at 391-92. The Sixth Circuit concluded that there is no mandatory duty to administer the CWA permitting program, *id.* at 396, and the Court should reach the same conclusion here.

**B. Michigan did assume permitting authority for the relevant portion of the Menominee River.**

In addition to arguing that Michigan “could not” assume permitting authority over the portion of the river at issue, *i.e.*, that the scope of the assumption was arbitrary and capricious because it violates section 1344(g), the Tribe also argues that as a factual matter Michigan did not assume permitting authority. Pl. Resp. at 7 (the memoranda of agreement “did not and could not have included the Menominee

River”); *id.* at 22 (“the terms of that delegation could not and did not include the portion of the Menominee River and adjacent wetlands at issue here”). *See also id.* at 1, 9, 15, 20, 29.

This argument is contradicted by the very documents to which the Tribe cites. While a plaintiff is entitled to have the allegations of its complaint presumed as fact when a motion to dismiss is reviewed, those same allegations need not be ignored when they undermine one of the plaintiff’s own claims or arguments. *See Wroblewski v. City of Washburn*, 965 F.2d 452, 459 (7th Cir. 1992). In other words, a plaintiff can plead himself out of court. *Lekas v. Briley*, 405 F.3d 602, 613-614 (7th Cir. 2005).

Here, the Tribe cites to and attaches the 1984 Memorandum of Agreement between the State of Michigan and the Department of the Army (“1984 Michigan-Corps Agreement”). *See* Spice Decl. Ex. C, ECF No. 21-5. But the copy that the Tribe provides is incomplete in a critical respect: it does not include the attachment that lists the specific waters for which Michigan assumes permitting authority. *See* 1984 Michigan-Corps Agreement at III.A (Spice Decl. Ex. C, ECF No. 21-5):

Consistent with the provisions of [section 1344(g)], all waters within the State of Michigan shall be regulated by [Michigan] as part of this program OTHER THAN those 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. **These waters are specifically identified in ATTACHMENT A – “Navigable Waters of the United States in U.S. Army Engineer District, Detroit, November 1981”, attached to this Memorandum of Agreement**, which will be regulated by [Michigan]



and [the Corps] under applicable state and Federal statutes. (Bold emphasis added.)

A complete copy of the 1984 Michigan-Corps Agreement, which includes Attachment A, is attached as Exhibit 2 to the Declaration of Charles M. Simon. On its second page, Attachment A lists the Menominee River “[f]rom its mouth upstream 1.86 miles to but not including the Interstate Highway Bridge (U.S. 41)”.

Thus, Michigan did in fact assume permitting authority over the Menominee River, except for the final 1.86 miles.<sup>6</sup> Whether that decision was arbitrary or not in accordance with law, or whether it was reasonable, could be adjudicated in a properly brought APA claim, but not as a mandatory duty claim.

Count 1 thus amounts to a challenge to the merits of EPA’s approval for Michigan to assume the Section 404 permitting program for the relevant portion of the Menominee River. The Tribe’s real complaint is with the outcome of that decision, *i.e.*, which waterbodies or portions of waterbodies were excluded when Michigan assumed the permitting program. However, a citizen’s suit under section 1365(a)(2) cannot be used as a vehicle to challenge the substance or merits of an agency action, only whether or not it was performed. *Scott*, 741 at 995; *see also Wisconsin’s Emtl. Decade, Inc. v. Wisconsin Power & Light Co.*, 395 F. Supp. 313, 321

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<sup>6</sup> The Tribe’s pleadings do not indicate precisely where the proposed mine will be located but the Tribe’s August 21, 2017, letter to the agencies notes that it is in Lake Township. *See* Spice Decl. Ex. E, ECF 21-7, at page 3 of 7. Lake Township is approximately 30 miles upstream of the mouth of the river.

(W.D. Wis. 1975). Thus, the Tribe's arguments about the merits of EPA's decision are not properly the subject of Count 1. Because Count 1 is premised on the theory that the Corps and EPA have a mandatory duty to exercise CWA permitting authority, but the statute imposes no such duty, Count 1 fails to state a claim.

### **III. Count 2 Fails To State A Claim For Judicial Review Of A Final Agency Action.**

The Tribe's alternative argument is that letters written in 2017 are final agency actions because they represent "a final decision that [the agencies] will not assume jurisdiction over the Section 404 permit" for the Mine. Pl. Resp. at 22. However, as explained in Defendants' opening memorandum, these letters did no more than remind the Tribe that the relevant agency action occurred decades earlier, when EPA approved Michigan's program. *See* 49 Fed. Reg. 38,947 (Oct. 2, 1984) (approving Michigan's program); *id.* at 38,948/2 (explicitly referencing the 1984 Michigan-Corps Agreement listing waters for which Michigan did not assume permitting authority).

The Tribe does not address our point that agency action "that merely reiterates or affirms an earlier agency decision and does not affect the rights or alter the status quo of the complaining party is not considered a 'final agency action.'" *Golden and Zimmerman, L.L.C. v. Domenech*, 599 F. Supp. 2d 702, 710 (E.D. Va. 2009) (*quoting Harris v. FAA*, 215 F. Supp. 2d 209, 213 (D.D.C. 2002)). *See also Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 427-28 (D.C. Cir. 2004) (an EPA letter was not

reviewable agency action when it merely restated “for the umpteenth time” the agency’s longstanding interpretation of certain regulations).

Instead, the Tribe asserts that it is not challenging the 1984 decision, but instead the more specific “decision” not to take over this particular permit application. Pl. Resp. at 28-29. But the 1984 decision resolved the issue. In 2017 the federal agencies merely noted that Michigan administers the Section 404 permitting program by virtue of the 1984 decision. *See, e.g.*, Compl. ¶ 4.

Because none of the agencies’ letter responses are final agency actions reviewable under the APA, Count 2 fails to state a claim upon which relief may be granted.

#### **IV. The Tribe’s Claims Are Not Ripe.**

As Defendants explained in our opening memorandum, EPA on March 8 objected to Aquila’s project as proposed. EPA thereafter withdrew its objection. Pl. Resp. at 27. Although Michigan has not yet issued a permit, it appears that the permit process will conclude shortly after Defendants’ motion is briefed, and if that occurs then Defendants will withdraw their ripeness challenge.

## CONCLUSION

For the foregoing reasons, as well as those in our opening memorandum, the Court should grant Defendants' motion to dismiss.

Respectfully submitted,

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JUNE 1, 2018  
90-5-1-4-21220

## **CERTIFICATE OF SERVICE**

I hereby certify that on June 1, 2018, I electronically filed the foregoing brief with the Clerk of the Court by using the CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

s/ Daniel R. Dertke  
DANIEL R. DERTKE