

No. 19-1130

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MENOMINEE INDIAN TRIBE OF WISCONSIN,

Plaintiff-Appellant

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, et al.,

Defendants-Appellees

v.

AQUILA RESOURCES INC.,

Intervenor-Defendant-Appellee.

On Appeal from the United States District Court for the Eastern District of Wisconsin
Docket No. 1:18-cv-00108-WCG
The Honorable William C. Griesbach

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Dated: May 6, 2019

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Civil Procedure 26.1 and Seventh Circuit Rule 26.1, Intervenor-Defendant-Appellee makes the following disclosure:

1. The full name of every party that the attorneys represent in the case:

Aquila Resources Inc.

2. The names of all law firms whose partners or associates have appeared for the party in the case (including in the district court or before an administrative agency) or are expected to appear for the party in this court:

Warner Norcross + Judd LLP

DeWitt LLP

3. If the party or amicus is a corporation:

- i. Identify all its parent corporations, if any; and
- ii. list any publicly held company that owns 10% or more of the party's or amicus's stock:

Hudbay Minerals Inc.

Osisko Gold Royalties Ltd.

Dated: May 6, 2019

By /s/ Daniel P. Ettinger

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JURISDICTIONAL STATEMENT

Appellant's jurisdictional statement is complete and correct.

STATEMENT OF THE ISSUES

The Administrative Procedures Act (“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. However, the APA cuts off review of administrative actions that are not considered final or that are committed to agency discretion by law. *Home Builders Ass’n of Greater Chicago v. U.S. Army Corps of Eng’rs*, 335 F.3d 607, 614 (7th Cir. 2003); 5 U.S.C. § 701.

1. The district court correctly dismissed Count II of the Tribe’s complaint on the basis that the Corps 2017 letter in which the Corps stated that it did not have authority over the Section 404 permitting process for the Back Forty Mine was not a final agency action because it did not mark the consummation of the agency’s decisionmaking process and instead merely reiterated the 1984 decision in which Michigan assumed permitting authority over the Menominee River.

2. The district court correctly determined that Count IV of the proposed amended complaint was futile because the Tribe failed to establish that the Federal Defendants had a mandatory, nondiscretionary duty to engage in consultation under Section 106 of the National Historic Preservation Act, and therefore, did not state a viable claim under the APA.

3. The district court correctly determined that Count III of the proposed amended complaint was futile because EPA has broad discretion in administering the 404 program, including the decision to object to a permit or assess whether its objections are resolved, and therefore, Count III was unreviewable under the APA.

INTRODUCTION

The Menominee Indian Tribe of Wisconsin (the “Menominee Tribe” or the “Tribe”) is an active opponent of Aquila Resources Inc.’s (“Aquila”) mining project proposed along the Menominee River in Michigan’s Upper Peninsula, and has filed multiple actions at the state and federal levels in an effort to block the project. In this case, the Tribe challenges the Environmental Protection Agency’s (“EPA”) and the Army Corps of Engineers’ (“Corps”) refusal to assert jurisdiction over the Clean Water Act (“CWA”) Section 404 permitting process assumed by Michigan in 1984, and the fact that the agencies did not consult with the Tribe under Section 106 of the National Historic Preservation Act (“NHPA”). But Aquila initiated the Section 404 permit process with the Michigan Department of Environmental Quality (“MDEQ”)¹ in November 2015 because MDEQ has authority under the assumed program, and received a permit from MDEQ in June 2018 after resolving objections made by EPA. Indeed, the Tribe has exercised its right to challenge the permit in a contested case hearing (essentially a bench trial), which will take place in June 2019 before an administrative law judge, and the decision there is further challengeable in state court. Despite all of this, the Tribe seeks to fundamentally change the process after the fact and force Aquila to start the permitting process all over again with the Corps.

While the Tribe seeks to upend Michigan’s decades-old permitting program based on a 2017 Corps letter rejecting the Tribe’s demand to exercise authority over Aquila’s permit, the Corps’ letter is not reviewable under the APA because it merely reiterates the 1984 decision that Michigan would assume permitting authority. It does not represent the consummation of a

¹ MDEQ was recently reorganized and renamed the Michigan Department of Environment, Great Lakes, and Energy (“EGLE”). To avoid confusion and ensure consistency with the district court opinion, this brief will continue to refer to the agency as MDEQ.

decision-making process, and therefore, is not a final agency action. Nor can the Tribe force EPA and the Corps to engage in Section 106 consultation under NHPA. The law is clear that Section 106 only applies to activities that are federally funded or federally licensed. Aquila's project is neither. The Corps and EPA had no duty to engage in Section 106 consultation. Finally, because EPA's oversight role in the assumed program is left entirely to EPA's discretion, the Tribe cannot subject EPA's decision to submit objections to MDEQ and the resolution of those objections to judicial review. The district court properly determined that the Tribe's complaint and proposed amended complaint did not set forth any viable claims for these reasons. This district court's December 19, 2018 order and judgment should be affirmed.²

STATEMENT OF THE CASE

Relevant statutory background

The CWA generally prohibits the discharge of pollutants into navigable waters without a permit. 33 U.S.C. § 1311(a). However, the Secretary of the Army, acting through the Corps, may issue a Section 404 permit for the discharge of dredged or fill material into navigable waters if certain requirements are met. 33 U.S.C. § 1344(a).

Under the CWA, a state may request permission from EPA to administer its own Section 404 permit program for the discharge of dredged or fill material into "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 . . . including

² As the government's internal policies prohibit the sharing of brief drafts, the parties could not file a joint brief or otherwise adopt parts of each other's briefs as specified in this Court's January 18, 2019 order. However, counsel for Aquila and counsel for the Federal Defendants conferred by telephone prior to filing their briefs to avoid filing redundant and duplicative briefs to the greatest extent possible. Moreover, while some arguments may overlap, Aquila, as an intervening party and the permittee, has different interests to protect than the federal government.

wetlands adjacent thereto.” 33 U.S.C. § 1344(g)(1). Under the CWA and its regulations, a state that administers the Section 404 program can adopt more stringent requirements, but they cannot be less stringent than federal requirements. *See* 40 C.F.R. § 233.1(c). Once EPA approves a state’s Section 404 program, that state assumes jurisdiction over the permitting process and the federal program is suspended. 33 U.S.C. § 1344(h). However, the federal government oversees the state’s process by reviewing any action the state takes with respect to Section 404 permits. 33 U.S.C. § 1344(j). The state must provide EPA with a copy of every permit application it receives as well as a copy of the permit the state intends to issue. *Id.* EPA must then notify the state if it intends to submit any comments on the application and/or object to issuance of the permit within 30 days of receiving the application, and submit such comments or objections within 90 days of receiving the application. *Id.*; 40 C.F.R. § 233.50(d)-(e). If EPA objects, then the state has 90 days from the date of the objection to submit a permit to EPA that resolves EPA’s objections. 40 C.F.R. § 233.50(f),(i). If the federal objections cannot be resolved within that time frame, the state is prohibited from issuing a wetland permit under its assumed authority, and the Corps takes over the process; the applicant must begin the process anew by applying to the Corps for the wetland permit. *Id.* § 233.50(j).

EPA approved Michigan’s Section 404 permit program in 1984, after the Corps entered into a Memorandum of Agreement with the state of Michigan on April 3, 1984. *See* 49 Fed. Reg. 38,947 (Oct. 2, 1984); *see also* JA at 117-25. The 1984 Memorandum of Agreement identifies the waters that are navigable under Section 10 of the Rivers and Harbors Act and therefore remain under the regulatory authority of the Corps after assumption of authority by Michigan. Pursuant to this agreement, 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). (JA

at 168.)³ The 1984 Memorandum of Agreement was renewed in 2011. (JA at 126-34.) As a result, MDEQ administers the program, processing wetland permit applications and issuing state permits for regulated wetland fills. Michigan manages its State 404 program under Part 303 of the Natural Resources and Environmental Protection Act (“NREPA”) and its implementing rules.

Statement of the Facts

Aquila proposes to construct an open pit mining operation and adjacent mineral beneficiation facility in Lake Township, Menominee County, Michigan, to extract and process a polymetallic zinc, copper, and gold ore-deposit (the “Back Forty Project” or the “Project”). (JA at 30.) The Project is located in a remote, sparsely populated area of Menominee County on the western side of Lake Township, just east of the Menominee River. Aquila has engaged with the Menominee Tribe (and other tribes in the project vicinity) for nearly 10 years to keep the Tribe informed of the Project and to discuss potential environmental and cultural resource concerns. Aquila has also conducted extensive cultural resource surveys of the project area. Aquila’s mine will not disturb any cultural resources identified in the project area.

Before Aquila may begin mining operations, it must obtain all permits required by applicable law. Aquila began applying for permits with the state of Michigan in November 2015, including a mining permit required under Part 632 of NREPA, which governs non-ferrous metallic mining, an air permit, a water discharge permit, and a wetland permit.

Pursuant to the assumed Section 404 program described above, Aquila initially submitted its application for a wetland permit to MDEQ on November 12, 2015.⁴ (JA at 30.) Aquila submitted its application to MDEQ because Michigan assumed the Section 404 program in 1984.

³ 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.

⁴ The Tribe’s complaint mistakenly alleges that the application was filed in November 2016.

For several years, Aquila has followed the process that a conscientious applicant would follow in attempting to comply with the law in good faith. Even though the Tribe knew that Aquila, MDEQ, and the federal government intended for Aquila to process its Section 404 permit application through MDEQ's assumed program as early as October 2015 (when the Tribe participated in a scoping meeting where that was discussed), the Tribe belatedly suggests that Aquila should have ignored the reality of Michigan's assumption and insisted that the Corps process its permit application. This is not the way a rational permitting process can or should work and it would put a responsible applicant like Aquila in an impossible position.

In May 2016, MDEQ believed the application to be administratively complete, put the application out for public notice, and transmitted a copy of the application to EPA. (JA at 31.) On August 15, 2016, EPA issued a letter notifying MDEQ of its objections to issuance of a permit. (*Id.*) After a September 2016 meeting between Aquila, MDEQ, EPA, and the Corps, the parties agreed that the best course of action was to withdraw the application and resubmit to MDEQ at a later date in order to work through remaining issues. (*Id.*)

Aquila resubmitted its Part 303 application on January 16, 2017. (*Id.*) In response to information requests by MDEQ, Aquila continued to tweak the application. (*Id.*) Aquila then filed an updated application at the beginning of September 2017.

Around this same time, nearly two years after Aquila initially submitted its application for a wetlands permit to MDEQ, the Tribe sent a letter to EPA and the Corps asserting that the wetlands adjacent to the Back Forty mine site are non-delegable waters, and therefore Michigan is not the proper permitting authority. (JA at 136-41.) EPA and the Corps responded separately to this letter. Relying on the Memorandum of Agreement between Michigan and the Corps, the Corps explained that it "does not have authority to . . . determine jurisdiction on the adjacent wetlands."

(JA at 143.) However, the Corps noted that EPA would exercise its authority to review and potentially object to the proposed permit at a later date. (*Id.*) The Corps also offered to consult with the Tribe. (*Id.*) EPA did not address Tribe's jurisdictional question, and instead merely invited the Tribe to consult with EPA. (JA at 145.)

In the meantime, MDEQ continued to process Aquila's application. In December 2017, MDEQ deemed Aquila's permit application administratively complete and issued a public notice along with a public hearing announcement. (JA at 31.) A public hearing was held on January 23, 2018, and the public comment period closed on February 2, 2018.

On March 8, 2018, EPA sent a letter to MDEQ, citing its objections to the application. (JA at 195-204.) EPA indicated that, under 40 C.F.R. § 233.50, if its objections were not resolved within 90 days, authority to process the permit would transfer to the Corps. (JA at 197.) On April 5, 2018, Aquila submitted a written response to EPA's March 8 letter. (JA at 206.) EPA and Aquila met on April 16, 2018 to discuss this information, and Aquila provided supplemental information to EPA on April 23, 2018. (*Id.*)

Subsequently, on May 3, 2018, EPA sent another letter to MDEQ, noting that based on the information EPA received from Aquila, EPA's objections identified in its March 8 letter had been resolved or otherwise could be resolved by inclusion of specific conditions in a final permit. (*Id.*) On May 25, 2018, MDEQ sent draft permit conditions to EPA to address its concerns, as well as those of MDEQ staff. (JA at 210.) On June 1, 2018, EPA confirmed that MDEQ's proposed conditions resolved its objections. (*Id.*) MDEQ issued Aquila a wetland permit on June 4, 2018. The permit is robust and contains numerous conditions that were added to resolve concerns expressed by EPA and MDEQ during the permitting process. In addition to the wetland permit, MDEQ has also issued Aquila its mining permit, air permit, and water discharge permit.

The Tribe has availed itself of the remedies afforded by Michigan law and challenged two of Aquila's permits. Specifically, on February 24, 2017, the Tribe brought a contested case petition challenging the mining permit before an administrative law judge. A 30-day contested case hearing was held between April and October of 2018, and post-hearing briefs were submitted in November and December of 2018. Much of the Tribe's case involved a challenge to whether Aquila and MDEQ have done enough to consult with the Menominee Tribe and have appropriately considered the impacts of the Project on areas of spiritual, ceremonial, or cultural significance. On May 3, 2019, the administrative law judge issued a Final Decision and Order approving the mining permit.

The Tribe has also filed a petition for a contested case hearing on Aquila's wetland permit, claiming that the permit did not comply with the requirements of Michigan's assumed program. A contested case hearing on that matter is set to begin in June 2019. At that hearing, the Tribe will have the opportunity to challenge the adequacy of Aquila's wetland permit. In both cases, the Tribe will have the opportunity to further challenge the administrative law judge's decision before an environmental review panel, and ultimately, in state circuit court, if necessary.

Procedural History

On November 6, 2017, after EPA and the Corps responded to the Tribe's August 2017 letter, the Tribe issued a 60-day notice of intent to file a citizen suit against EPA pursuant to Section 505 of the Clean Water Act, 33 U.S.C. § 1365(a)(2). (JA at 148.) Specifically, the Tribe asserted that EPA and the Corps "are in violation of their mandatory duties under the Clean Water Act Section 404 (33 U.S.C. § 1344), due to their failure to exercise jurisdiction and regulatory authority over navigable waters of the United States—the Menominee River and adjacent wetlands—that are not delegable to the State of Michigan under 33 U.S.C. § 1344(g)." (*Id.*)

The Tribe filed its original complaint on January 22, 2018, alleging two claims: (1) that EPA and the Corps violated their mandatory duties under CWA Section 404 due to their failure to exercise jurisdiction over the Menominee River and adjacent wetlands that are not delegable to the State of Michigan under 33 U.S.C. § 1344(g); and (2) that EPA and the Corps' responses to the Tribe's letters constitute final agency actions on the matter of exercising jurisdiction over the Section 404 permitting process that are arbitrary, capricious, and an abuse of discretion under the APA, 5 U.S.C. § 701 *et seq.* (JA at 20-36.)

On March 30, 2018, EPA and the Corps filed a motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). (Dkt. 7, Fed. Defs.' Mot. to Dismiss.) Aquila subsequently intervened in the instant lawsuit to protect its unique interests as a permittee and also filed a motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6). (Dkt. 18, Order Permitting Intervention; Dkt. 19, Aquila's Mot. to Dismiss.) Both the Federal Defendants and Aquila argued that the Tribe had not identified a discrete, nondiscretionary duty that the Federal Defendants failed to perform as required by § 1365 of the CWA, and that EPA and the Corps' 2017 letters to the Tribe were not final agency actions that could be reviewed by the federal court. This Court heard oral argument on the motions to dismiss on August 1, 2018. (*See* JA at 2.) At the hearing, the Court requested that the parties submit supplemental briefing on the motions, which the parties completed in September 2018. (*Id.*)

Also in September 2018, the Tribe filed a motion for leave to amend its complaint under Rule 15(a). (Dkt. 35, Tribe's Mot. to Amend Compl.) The Tribe sought to add two claims to its complaint: (1) that EPA and the Corps' withdrawal of its objections were arbitrary, capricious, and contrary to the record under the APA, 5 U.S.C. § 701 *et seq.*; and (2) that EPA and the Corps unlawfully withheld agency action under the APA, 5 U.S.C. § 701 *et seq.* by failing to initiate and

complete consultation required under Section 106 of NHPA, 54 U.S.C. § 306108. (JA at 170-94.) Aquila and the Federal Defendants filed briefs opposing the Tribe's motion on the basis that the proposed amendments were futile because they failed to set forth cognizable claims under the APA. (Dkt. 38, Aquila's Resp. to Mot. to Amend Compl.; Dkt. 39, Fed. Defs.' Resp. to Mot. to Amend Compl.)

On December 19, 2018, the federal district court dismissed the Tribe's case in its entirety. (JA at 19.) As to Count I, the court held that the Tribe failed to identify a discrete, nondiscretionary duty that the Federal Defendants failed to perform as required by § 1365 of the CWA.⁵ (JA at 16.) As to Count II, the court held that that EPA and the Corps' refusal to exercise jurisdiction over the Section 404 permitting process was not a final agency action that could be reviewed by the federal court. (*Id.* at 18-19.) Specifically, the court held that "[i]n essence, the Tribe seeks to challenge the underlying EPA decision made in 1984 that allowed Michigan to assume permitting authority over Section 404 permits related to the Menominee River. The 1984 decision is the final agency action, not the letters that merely reaffirm that decision." (*Id.* at 19.)

In addition, the court denied the Tribe's motion to amend its complaint as futile. As to proposed Count III, the court held that because EPA's decision to object and withdraw its objections is discretionary and therefore not reviewable under the APA, the Tribe's proposed amendment adding a claim challenging EPA's withdrawal of its objections to the wetland permit would not survive a motion to dismiss. (JA at 9.) Finally, the court also held that an amendment to the complaint adding proposed Count IV would be futile because the Federal Defendants were

⁵ The Tribe has not challenged the district court's dismissal of Count I, and has therefore waived this argument. *Int'l Union of Operating Engineers, Local 150, AFL-CIO v. Rabine*, 161 F.3d 427, 432 (7th Cir. 1998) ("[A]rguments not raised in a brief are waived.").

not required to initiate consultation with the Tribe under Section 106 as the Back Forty Project is not federally funded or federally licensed. (JA at 11.)

SUMMARY OF THE ARGUMENT

The district court properly dismissed the Tribe's complaint and denied the Tribe's motion to amend its complaint.

To state a claim for review under the APA, 5 U.S.C. § 706(A)(2), the Tribe must seek review of a "final agency action." The Corps' 2017 letter in which it informed the Tribe that it did not have authority to exercise jurisdiction over the Menominee River does not mark the consummation of an agency decision-making process. At most, this letter reiterates a decision that was made 35 years ago—that Michigan would assume CWA Section 404 permitting over the portions of the Menominee River at issue. This letter is not a final agency action and therefore not subject to review under § 706(A)(2).

Leave to amend a complaint shall be denied upon a showing of futility, such as when a proposed amendment could not survive a motion to dismiss. The Tribe's proposed NHPA claim does not state a claim for relief as the Federal Defendants have no duty to comply with Section 106 of NHPA. As every circuit to address the issue has held, under its plain language, Section 106 only applies where an activity is federally funded or federally licensed, regardless of whether the activity is an "undertaking." Because the Back Forty Project is not federally funded or federally licensed, Section 106 does not apply.

The Tribe's proposed claim regarding EPA's objections also does not state a claim for relief, as EPA's oversight role in the assumed Section 404 process is discretionary. A claim is not reviewable under the APA where an agency decision is committed to agency discretion by law. As this Court has previously held, EPA's actions of objecting to a proposed permit and determining

that its objections are satisfied as part of an assumed program are wholly within the agency's discretion. Because Section 404 contains no meaningful standards by which to assess whether EPA's objections have been satisfied, this action cannot be reviewed under the APA.

STANDARD OF REVIEW

This Court reviews de novo a district court's decision to grant a motion to dismiss. *Phelan v. City of Chicago*, 347 F.3d 679, 681 (7th Cir. 2003).

Generally, denials of leave to amend are reviewed for abuse of discretion. *Gandhi v. Sitara Capital Management, LLC*, 721 F.3d 865, 868 (7th Cir. 2013). The Tribe claims that denials of leave to amend based on futility are reviewed de novo. (Tribe's Br. at 12.) But this is incomplete. This Court has stated: "When the basis for denial is futility, this Court applies the legal sufficiency standard of Rule 12(b)(6) to determine whether the proposed amended complaint fails to state a claim." *Runnion ex rel. Runnion v. Girl Scouts of Greater Chicago & Nw. Indiana*, 786 F.3d 510, 524 (7th Cir. 2015). Accordingly, this Court's review for abuse of discretion of futility-based denials *includes* de novo review of the legal basis for the futility. *Id.*

ARGUMENT

I. The district court correctly determined that the Corps' 2017 letter to the Tribe was not a "final agency action" subject to review under § 706.

Count II of the Tribe's complaint alleged that the Corps' 2017 letter in which it stated that it did not have authority to exercise jurisdiction over the Back Forty Project was arbitrary and capricious because permitting authority over the Menominee River could not have been assumed by the State of Michigan.⁶ But because this letter did not constitute a final agency action subject

⁶ In its complaint, the Tribe challenged both EPA and the Corps' letters as arbitrary and capricious. In its brief on appeal, the Tribe has waived its claim against EPA. *See* Tribe's Br. at 12; *see also Int'l Union of*

to review under the APA, the district court properly dismissed Count II of the Tribe's complaint. 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 was one that was made decades ago—the decision that Michigan would assume CWA Section 404 permitting over the Menominee River. The district court thus properly determined that the letter from the Corps did not constitute a "final agency action" because it does not reflect the consummation of a decision-making process concerning the scope of Michigan's authority over the 404 permitting process for the Menominee River. (JA at 19.) Indeed, this letter does not contain any mandatory language or directives, does not describe itself as guidance, and does not purport to impose new obligations on the Tribe or announce a new interpretation of the prior assumption of Section 404 authority. Instead, the letter merely reiterates the fact that Michigan already assumed permitting authority under Section 404.

Specifically, the letter from the Corps refers back to the 2011 Memorandum of Agreement (which reiterated the 1984 Memorandum of Agreement under which Michigan assumed permitting authority over the portion of the Menominee River at issue in this case as well as other waters in

Operating Engineers, 161 F.3d at 432. While Aquila will address only the Corps' letter in this brief, the same legal issues discussed in this section apply equally to EPA's letter.

Michigan), and merely informs the Tribe that “the Corps does not have the authority to . . . 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].” (JA at 143; *see also* JA 117-25; JA 126-134.) Even the Tribe acknowledges as much. Per the Tribe’s own allegations in its complaint, 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.” (JA at 21-22, 32.) The Tribe thus conceded in its own complaint that the Corps’ letter does not make any factual or legal determinations at all regarding the jurisdictional status of the waters at issue. (JA at 32.)

As the district court concluded, 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); *see also Clayton Cty., Georgia v. FAA*, 887 F.3d 1262, 1267 (11th Cir. 2018); *Gen. Motors Corp. v. EPA*, 363 F.3d 442, 449-51 (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 letter from the Corps.⁷ Simply put, the Corps' letter does not reflect the consummation of a decision-making process.

The Tribe takes issue with the district court's reliance on *Independent Equipment Dealers* and argues that the court should have instead analogized this case to *Public Citizen v. Nuclear Regulatory Comm'n*, 901 F.2d 147 (D.C. Cir. 1990). The Tribe asserts that *Public Citizen* is controlling because it stands for the proposition that "to the extent an agency's action necessarily raises an issue of lawfulness of an earlier decision, even a reiteration may be reviewable." (Tribe's Br. at 20-21.) Not only does the Tribe misread the holding of *Public Citizen*, but the Tribe's comparison of *Public Citizen* to this case is flawed for several reasons.

In *Public Citizen*, the Nuclear Regulatory Commission ("NRC") republished a 1985 regulation in 1988 that encouraged civilian nuclear power plant licensees to create training programs. The petitioners petitioned for review of the 1988 NRC decision as well as the 1985 regulation. *Id.* at 150. The respondents claimed the petition was untimely because it was not filed within the deadline for challenging the NRC's promulgation of the original rule in 1985. *Id.* The court rejected the respondents' argument, holding that the petition was timely and that the 1985 decision was subject to a renewed challenge. *Id.* at 151. In reaching this holding, the "crucial question" to the court was whether the agency "ha[d] in fact *reopened* an issue, explicitly or implicitly," which would permit the petitioner to present a renewed challenge to the underlying

⁷ While the Tribe is correct that letters can in some circumstances constitute final agency actions, the cases on which the Tribe relies 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). Likewise, both *City of Dania Beach, Fla. v. F.A.A.*, 485 F.3d 1181, 1188 (D.C. Cir. 2007), and *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 437 (D.C. Cir. 1986), involved situations where EPA sent a letter imposing a *new* interpretation or requirement. Here, however, the Corps' letter did not establish "new" marching orders regarding the Section 404 permitting authority. It merely reiterated a decision that Michigan would assume Section 404 permitting authority that was made decades ago.

rule or policy. *Id.* at 150 (emphasis added). To determine whether the agency had in fact reopened the issue, the court examined the entire context of the rulemaking for language evidencing reconsideration of the issue. *Id.*

After examining the entire context for the 1988 rulemaking, the court concluded that the issue had been reopened, thus subjecting the original 1985 to renewed challenge. *Id.* The court based its holding on several details. First, the 1985 action was itself not a final decision on the legality of the training requirements, as it was described as only a temporary decision that would expire after two years. *Id.* Additionally, before the 1988 decision was made, the NRC noted its intention to “revisit the entire training issue.” *Id.* at 151. As a result, the court held that the record “could not be clearer that the Commission’s 1985 action represented a temporary decision not to engage in rulemaking on mandatory training standards, and that the 1988 action reexamined this choice and made it permanent.” *Id.* Thus, the temporary nature of the 1985 decision in conjunction with the fact that the 1988 decision reexamined the entire issue allowed the petitioner to reach back and examine the lawfulness of the 1985 decision on which the 1988 decision necessarily depended.

Here, however, it is undisputed that the 1984 delegation was not a temporary action that was reopened, reexamined, or otherwise made permanent by the Corps’ 2017 letter. Quite the opposite. The Corps’ letter simply relied on (and even cited back to) the prior decisions on Michigan’s permitting authority. (*See* JA at 143.) In relying on *Public Citizen*, then, the Tribe fails to recognize the crucial distinction between agency actions that merely *reiterate* earlier decisions—which are not final agency actions under the holding of *Independent Equipment Dealers*—and agency actions that *reopen* and *reconsider* earlier decisions—which are final agency actions under *Public Citizen*. The 2017 letter falls squarely within the former category. *See Am.*

Iron & Steel Inst. v. U.S. E.P.A., 886 F.2d 390, 398 (D.C. Cir. 1989) (“The ‘reopening’ rule . . . is not a license for bootstrap procedures by which petitioners can comment on matters other than those actually at issue, goad an agency into a reply, and then sue on the grounds that the agency had re-opened the issue.”). *Public Citizen* does not control.

The Tribe’s reliance on *Public Citizen* is improper for a second, independent reason as well. While the Tribe is correct that *Public Citizen* made clear that a party can file a petition challenging the lawfulness of an agency action and then challenge the denial of that petition, the Tribe is mistaken that this is precisely what occurred in this matter. (Tribe’s Br. at 21.) The “petition” to which *Public Citizen* refers is a term of art. *See* 5 U.S.C. § 553(e). The Tribe’s letters to EPA and the Corps do not qualify as “petitions” within the meaning of *Public Citizen*. *See Env’t Protection Info. Ctr. v. Pacific Lumber Co.*, 266 F. Supp. 2d 1101, 1121 (N.D. Cal. 2003) (holding that the petitioner’s last-minute correspondence requesting the Regional Board to issue permits to [respondent] for its discharges does not satisfy” the requirement of formally petitioning the agencies.) Thus, the district court was correct in not applying the holding in *Public Citizen*.

The Tribe further argues the district court “wrongly conflate[d] the original decision to delegate the entire 404 permitting program to Michigan with the specific denial of primary federal jurisdiction over this Permit for this Mine.” (Tribe’s Br. at 19.) Specifically, the Tribe claims that the Corps’ 2017 letter was a new decision because it was a “jurisdictional determination” on the permitting authority related to this particular permit. (*Id.* at 20.) In essence, the Tribe claims that this “determination” is similar to the judicial determination made in *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807, 1813–14 (2016), that was held to be a final agency action. (*Id.* at 13-14, 19-20.) But a comparison of that case to this one shows precisely why the Corps’ letter

does not qualify as a “jurisdictional determination,” and why the Tribe’s allegations in this regard are inadequate to state a claim for review under § 706(2)(A).

In *Hawkes*, a peat mining company sought a Section 404 permit from the Corps to mine its 530-acre tract. 136 S. Ct. at 1812-13. In the course of the permitting process, the Corps issued an approved jurisdictional determination (“JD”) stating that the property contained “waters of the United States” under the CWA because the wetlands had a significant nexus to the Red River of the North 120 miles away. *Id.* at 1813. The United States Supreme Court granted certiorari to decide whether the JD qualified as “final agency action” under APA § 706(2). *Id.* The Court concluded that the approved JD satisfied both of the above conditions for “final agency action.” *Id.* at 1814-1815. Relevant to this matter, the court ruled that approval of a JD qualifies as a consummation of the Corps’ decision-making process on the question of jurisdiction because it (1) is issued after extensive fact-finding, (2) is typically not revisited during the permitting process, (3) is described in the Corps’ regulations as “final agency action,” and (4) binds the Corps for five years. *Id.* at 1813-14.

Unlike the approved JD in *Hawkes*, the Corps’ letter does not bear any of the indicia of an approved JD or a “final agency action.” Approved JD is a term of art that means “a Corps document stating the presence or absence of waters of the United States on a parcel or a written statement and map identifying the limits of waters of the United States on a parcel.” 33 C.F.R. § 331.2. Further, “[a]ll JDs will be in writing and *will be identified as either preliminary or approved.*” *Id.* (emphasis added). The Corps’ letter is not identified as an approved JD and was not issued after extensive-fact finding. Nor does it state the presence or absence of waters of the United States on the Back Forty Mine. The Tribe admits that this letter does not even express an opinion as to whether delegation to the State of Michigan was correct. (JA at 32.) To the contrary,

the Corps' letter specifically relies on the prior assumption and states that "the Corps does not have the authority to . . . determine jurisdiction on the adjacent wetlands." (JA at 143.) Thus, unlike a JD, there is no indication that this letter is a consummation of the Corps' decision-making process on the question of jurisdiction. Consequently, the Tribe is incorrect that the Corps made a "new" jurisdictional determination rather than merely reiterating the original 1984 decision about the scope of Michigan's assumption.

To this end, the Tribe is also incorrect that the district court's decision improperly eliminated the option for an as-applied challenge because "[a]t no point has the Tribe challenged, nor does it here challenge, the overall delegation of Section 404 permitting to the State of Michigan." (Tribe's Br. at 20.) Indeed, the Tribe notes that "[w]here the remedy sought is limited to the specific circumstances before the court and will not apply more broadly, the challenge is properly characterized as an "as-applied," not facial, challenge and should be addressed as such. (*Id.* at 23.) But the Tribe is, and always has been, seeking an order requiring the Federal Defendants "to assume control and exercise jurisdiction" over Aquila's wetlands permit based on its argument that "*the Menominee River* has not been, and could not have [been], delegated . . . under applicable law." (JA at 29 (emphasis added).) Even in its brief on appeal, the Tribe has claimed that "the Menominee River *from the mouth to the Mine and beyond* is currently used in interstate commerce." (Tribe's Br. at 17 (emphasis added).) In reality, then, the Tribe is seeking a determination that the *entire* Menominee River is navigable—not just the portion adjacent to the Back Forty Mine—and is therefore subject to federal authority under CWA Section 404. The ultimate effect of such a determination would be to revoke Michigan's assumption of permitting

authority as it relates to the Menominee River that has been in place since 1984. Any such determination would not just affect Aquila's project, but any Section 404 permit along the river.⁸

In any event, the Tribe cannot escape the applicable statute of limitations⁹ by trying to couch its claim as an as-applied challenge.¹⁰ Regardless of whether a party raises a facial or as-applied challenge, the party must still demonstrate some direct, final agency action involving the particular plaintiff within six years of filing suit; a party cannot evade the final agency action requirement simply by labeling the claim an as-applied APA challenge. *See Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv.*, 112 F.3d 1283, 1287 (5th Cir. 1997). As discussed above, the Tribe cannot demonstrate that the 2017 letter from the Corps reiterating the 35-year-old position regarding the scope of Michigan's assumption is a "final agency action" reviewable under the APA. Accordingly, the district court properly dismissed Count II of the Tribe's complaint.

II. The district court correctly concluded that amending the Tribe's complaint was futile because EPA and the Corps had no mandatory duty to consult with the Tribe under Section 106.

The district court did not err in concluding that the Tribe's proposed amendment alleging that EPA and the Corps violated NHPA by failing to consult with the Tribe was futile. Under Rule 15(a) of the Federal Rules of Civil Procedure, after a responsive pleading is served, a

⁸ Indeed, if a permit opponent could federally challenge Michigan's jurisdiction under the assumed program every time a permit application is filed, it would upend the entire program.

⁹ Challenges to agency rulings under the APA are governed by the statute of limitations provided for in 28 U.S.C. § 2401(a), and must be brought within six years of publication in the Federal Register. *Bennett v. U.S. Dep't of Labor*, 717 F.2d 1167, 1169 (7th Cir. 1983).

¹⁰ In support of its argument, the Tribe cites to *Six Star Holdings, LLC v. City of Milwaukee*, 821 F.3d 795 (7th Cir. 2016) and *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010), both of which are inapplicable as they address the standard for an as-applied *constitutional* claim, which has no bearing on an APA claim. *See Six Star Holdings*, 821 F.3d at 795 (alleging that licensing ordinances for businesses offering nude or partially nude entertainment violated First Amendment); *Citizens United*, 558 U.S. at 331 (alleging that statute barring corporate expenditures for electioneering communications violated First Amendment).

party may amend his or her complaint only by leave of court or by written consent of the adverse party. Fed. R. Civ. P. 15(a); *Glick v. Koenig*, 766 F.2d 265, 268 (7th Cir. 1985). Leave to amend shall be denied upon a showing of bad faith, undue delay, undue prejudice to the opposing party, or futility. *Foman v. Davis*, 371 U.S. 178, 182 (1962). “The liberal amendment rules under Rule 15(a) do not require the courts to indulge in futile gestures.” *Glick*, 766 F.2d at 268–69. A proposed amendment is a “futile gesture” if it could not withstand a motion to dismiss. *Id.* at 268.

In Count IV of its proposed amended complaint, the Tribe alleged that it was entitled to “an order declaring EPA and the Corps in violation of the NHPA, and their failure to consult to be agency action unlawfully withheld, and/or arbitrary, capricious, an abuse of discretion, and/or agency action short of statutory right.” (JA at 192.) While the APA permits a party to compel agency action that is “unlawfully withheld or unreasonably delayed,” 5 U.S.C. § 706(1), claims against an agency for a failure to act are available “only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*,” *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004) (emphasis in original); *see also* 5 U.S.C. § 701(a)(2) (judicial review unavailable where the “agency action is committed to agency discretion by law”). Here, as the district court appropriately determined, neither EPA nor the Corps had a mandatory duty to engage in Section 106 consultation because the Project is not federally funded or federally licensed. Therefore, Section 106 does not apply.

The Tribe based its claim in proposed Count IV on its assertion that the Back Forty Mine is an “undertaking” as defined in Section 301 of NHPA and the corresponding regulations. Indeed, like the plaintiffs in the seminal case of *Sheridan Kalorama Historical Association v. Christopher*, the Tribe “proceed[s] as if the review provision of § 106 automatically applies once a project is

deemed an ‘undertaking.’” 49 F.3d 750, 755 (D.C. Cir. 1995). As a result, the Tribe spends the entirety of its argument in its brief on appeal focusing on the history of the 1992 amendments to Section 301 and the interpretation of “undertaking” as defined in Section 301 and the regulations. (See Tribe’s Br. at 25-30.) But the Tribe’s lengthy discussion of Section 301’s legislative history and purpose wholly ignores the relevant statutory language in Section 106 on which the district court correctly based its decision. To determine whether EPA and the Corps had a nondiscretionary duty to engage in Section 106 consultation in this matter, this Court need look no further than the plain language of Section 106 itself. *McCoy v. Gilbert*, 270 F.3d 503, 510 n. 4 (7th Cir. 2001) (“We need never consider legislative history when interpreting an unambiguous statute.”).

Under Section 106, all federal agencies “having indirect or direct jurisdiction over a proposed *Federal or federally assisted undertaking* . . . [or] having authority *to license an undertaking*, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property.” 54 U.S.C. § 306108 (“Section 106”) (emphases added). NHPA defines an “undertaking” as a “project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency” including: “(1) those carried out by or on behalf of the agency; (2) those carried out with Federal financial assistance; (3) those requiring a Federal permit, license, or approval; and (4) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.” 54 U.S.C. § 300320 (“Section 301”). The Advisory Council on Historic Preservation (the “ACHP”), which is vested with authority under the statute to implement Section 106 through appropriate regulations, likewise defines “undertaking” as “a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of

a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.” 36 C.F.R. § 800.16(y).

While the Tribe is correct that Section 106 refers to “undertakings” as defined by Section 301, the Tribe errs by ending its analysis there. Pursuant to the plain language of Section 106, only *certain* types of undertakings are covered: “proposed Federal or federally assisted undertaking[s]” and undertakings licensed by the head of any Federal department or independent agency. 54 U.S.C. § 306108. In other words, to determine whether Section 106 applies, it is not enough to determine that an activity qualifies as an “undertaking”; the undertaking must also be federally funded or federal licensed for Section 106 to apply.

This was precisely the conclusion reached by the D.C. Circuit in *Sheridan Kalorama*. In that case, the court analyzed the relationship between Section 106 and the then-recently amended definition of “undertaking” in Section 301. *Sheridan Kalorama*, 49 F.3d at 755. Focusing on the plain language and jurisdictional reach of Section 106, the court concluded that, even if an activity qualifies as an “undertaking” under Section 301, the “undertaking” at issue still may not be one to which Section 106 applies. *Id.* Specifically, the court stated: “however broadly the Congress or the ACHP define ‘undertaking,’ § 106 applies only to: 1) ‘any Federal agency having . . . jurisdiction over a proposed Federal or federally assisted undertaking’; and 2) ‘any Federal . . . agency having authority to license any undertaking.’” *Id.* (quoting 16 U.S.C. § 470f). As a result, the court concluded that, notwithstanding the definition of undertaking in Section 301, unless the project at issue was “either federally funded or federally licensed, § 106 simply does not apply.” *Id.* at 756.

The Court in *National Mining Association v. Fowler*, 324 F.3d 752, 760 (D.C. Cir. 2003), reaffirmed and expanded on this holding. In that case, the D.C. Circuit considered the precise question at issue in this case—the interplay between subsection (4) of Section 301 and the plain language of Section 106. Noting that Congress’s intent in amending Section 301 was to broaden its scope, the court nonetheless held that “Congress’s 1992 broadening of section 301 did not override section 106’s requirement that the project be federally funded or licensed.” *Id.* at 759. The court further explained: “*Sheridan Kalorama* therefore concludes that amended section 301 must be interpreted as being at least as broad as section 106. . . . [S]ection 301 is in fact broader, since no matter how expansively Congress chooses to define the word ‘undertaking,’ section 106 confers on the Council jurisdiction over ‘*federally funded or federally licensed* undertakings’ only.” *Id.* at 759–60.¹¹

Other courts have examined the same statutory language and have reaffirmed this conclusion. For instance, the Second Circuit expounded on the discussion in *Fowler* and *Sheridan Kalorama* by examining the purpose of Section 106’s federal funding or licensing requirement. *Bus. & Residents All. of E. Harlem v. Jackson*, 430 F.3d 584, 592 (2d Cir. 2005). In that case, the court concluded that the text of Section 106 itself “provides an important clue” as to the scope of the statute’s applicability:

In stating that “[t]he head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any state...shall, prior to the approval of the expenditure of any Federal funds on the undertaking ... take into account the effect of the undertaking,” 16 U.S.C. § 470f (emphasis added), the text indicates that to have a qualifying level of jurisdiction over the undertaking, the federal agency must have some degree of power to approve or otherwise control the expenditure of federal funds on that undertaking. Indeed, the evident

¹¹ Contrary to the Tribe’s assertion, it is of no consequence that *Fowler* and *Sheridan Kalorama* did not involve a tribe, as those cases merely interpreted the plain language of Section 106.

purpose of Section 106 is to ensure that before federal funds are expended on an undertaking, the federal agency has taken into account the undertaking's potential impact on surrounding historic resources. . . . If the federal agency has no direct or indirect power to effectuate the results of the Section 106 review by making a resultant funding decision, then such a review will be merely an empty exercise.

Id. (citations omitted).

The district court's decision was therefore exactly in line with the statutory text of Section 106 and the holdings of both the D.C. Circuit and the Second Circuit. Indeed, relying on the decisions in *Fowler* and *Sheridan*, the court held that “[e]ven if the Back Forty Mine Project is an ‘undertaking’ as defined by § 300320 [Section 301], Section 106 applies only to (1) ‘any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking’; and (2) ‘any Federal department or independent agency having authority to license any undertaking.’” (JA at 10 (quoting 54 U.S.C. § 306108).) Because the Tribe did not allege in its proposed amended complaint that the Back Forty Project was federally funded or federally licensed—indeed, it could not because the record reflects that the Project will be funded by Aquila and its investors and that the State of Michigan has jurisdiction over the Section 404 permitting process—the district court correctly concluded that the Federal Defendants had no duty to engage in Section 106 consultation. (JA at 11.)

It is thus the Tribe's interpretation—not that of the district court—that runs contrary to the language of the statute and the holdings of each court that has addressed this issue. And contrary to the Tribe's claim, these holdings are not questionable or inconsistent, as every court has reached the same conclusion—that Section 106 review applies only to undertakings that are *federally funded* or *federally licensed*. See *Sheridan*, 49 F.3d at 755; *Fowler*, 324 F.3d at 760; *Bus. & Residents All.*, 430 F.3d at 592. The Tribe has cited no cases to the contrary. In fact, the lone case the Tribe does cite *supports* this conclusion. In that case, the court held that the activity (which

was subject to permitting under a delegated program) was subject to Section 106 review in large part because “the state permitting programs are federally funded: The development, administration, and enforcement costs of each state program are funded by federal grants in the amount of fifty to eighty percent.” *Indiana Coal Council, Inc. v. Lujan*, 774 F. Supp. 1385, 1401 (D.D.C. 1991), *order vacated in part sub nom. Indiana Coal Council, Inc. v. Babbitt*, No. 91-5397, 1993 WL 184022 (D.C. Cir. Apr. 26, 1993). Thus, even if that case had been decided after the 1992 amendments, it would not contradict the holdings in *Sheridan Kalorama* and *Fowler*. The Tribe’s attempt to rely on this case to support its assertion that its motion to amend should not have been denied as futile because it “involv[es] important questions of unsettled law” falls flat. (See Tribe’s Br. at 24, 35.)

It is worth noting that the holding in *Indiana Coal* also undermines the Tribe’s own contention that subpart (4) of Section 301 would be rendered superfluous under the district court’s finding that Section 106 only applies when an activity is federally funded. (Tribe’s Br. at 29.) On this point, the Tribe claims that “if a permitting program is delegated to a state, then it is no longer a ‘project or program’ funded in whole or part by a federal agency. In fact, in determining whether a state may be delegated the Section 404 permitting program, EPA examines whether the state has adequate staff and funding to fully take over the permitting.” (*Id.* (citing 40 C.F.R. § 233.11(d).) But the state permitting program described in *Indiana Coal* reveals the error of this statement. The fact that a state takes over the entire permitting program—funding and all—when it assumes permitting authority under Section 404 simply means that *the Section 404 program* is not subject to Section 106 review once assumed by a state because it is not federally funded. It does not mean, however, that *every* delegated program is deprived of federal funding and therefore not subject to Section 106 review, as evidenced by the state program described in *Indiana Coal*.

Because the Back Forty Project is not a federally funded or federally licensed activity, it is not subject to Section 106 review regardless of whether it qualifies as an “undertaking.”¹² Thus, the Tribe cannot establish that EPA or the Corps violated a discrete, nondiscretionary duty to engage in NHPA consultation under Section 106. Accordingly, the district court properly dismissed the Tribe’s proposed Count IV as futile.

III. The district court correctly concluded that amending the Tribe’s complaint was futile because EPA’s oversight role in the Section 404 process is committed to agency discretion.

Proposed Count III—the Tribe’s claim that EPA’s “withdrawal” of its objections to the assumed Section 404 permit was arbitrary and capricious—is unreviewable under the APA because EPA’s assessment that its objections were resolved is discretionary.¹³ Judicial review is unavailable under the APA where the challenged “agency action is committed to agency discretion by law.” 5 U.S.C. § 701(a)(2). Agency action is committed to agency discretion by law if the statute does not provide a “meaningful standard against which to judge the agency’s exercise of discretion.” *Heckler v. Chaney*, 470 U.S. 821, 830-32 (1985).

¹² Indeed, federal agencies have never been required to conduct NHPA review for state-assumed NPDES or 404 programs; imposing such a requirement would upend these permitting programs and create a substantial administrative burden.

¹³ Contrary to the Tribe’s assertions, EPA did not affirmatively “withdraw” its objections to the permit application, nor did it need to for MDEQ to issue its permit. Rather, EPA simply confirmed to MDEQ that the additional information provided by Aquila and MDEQ’s permit conditions satisfied EPA’s objections. The concept of “withdrawal” of objections to a Section 404 permit application under the assumed program only applies under the CWA if a public hearing is held on the objections (which did not happen here). Where no public hearing is held, if EPA lodges objections to a permit application, MDEQ must *resolve* those objections within 90 days in order to issue a state permit. 33 U.S.C. § 1344(j); 40 C.F.R. § 233.50(f)-(j). If EPA’s objections are not resolved in that timeframe, MDEQ is prohibited from issuing a permit under its assumed authority and the Corps takes over the permitting process. 40 C.F.R. § 233.50(j). Here, they were resolved. (*See* JA at 210.)

Section 404 of the CWA and its corresponding regulations lack language compelling EPA to object to, comment on, or maintain objections to a proposed permit. *See* 33 U.S.C. § 1344(j); 40 C.F.R. § 233.50. Rather, Section 404 and its rules include language that explicitly leaves the objection process (including the assessment that objections have been resolved) to EPA's discretion. *Id.* For example, both the statute and rules provide that *if* the Administrator intends to comment on or object to a permit application or proposed permit, he must notify the state within 30 days. 33 U.S.C. § 1344(j); 40 C.F.R. § 233.50(d). Likewise, the regulations give the Administrator broad discretion to determine how EPA's objections will be resolved. 40 C.F.R. § 233.50(f) (noting that when EPA objects, a state cannot issue a permit unless it "has taken the steps required *by the Regional Administrator* to eliminate the objection." (emphasis added)). And neither the statute nor the rules contains an objective standard by which to judge EPA's assessment that its objections have been resolved. Instead, the rules merely state "[i]n the event that the Director neither satisfies EPA's objections or requirement for a permit condition nor denies the permit, the Secretary shall process the permit application." 40 C.F.R. § 233.50(j). At most, the regulations set forth the *process* by which EPA objects to a permit application and resolves those objections (if it decides to object in the first place); they do not, however, create a *standard* by which EPA makes the decision to object or determines that its objections have been resolved.

Even the Tribe has acknowledged the discretionary nature of EPA's role in the Section 404 permitting process when it has been assumed by a state: "EPA *may* review and comment on a proposed permit. Further, the EPA *may* object to a proposed Section 404 permit." (JA at 182.) In its brief on appeal, the Tribe similarly acknowledges that if EPA objects to a particular permit, "those objections must be addressed *to EPA's satisfaction* before the final permit may be issued." (Tribe's Br. at 37 (emphasis added).)

Notably, this Circuit previously rejected a similar APA claim involving EPA objections to a state National Pollutant Discharge Elimination System (“NPDES”) permit on the basis that EPA’s involvement in the analogous state-assumed permitting process is discretionary. *Am. Paper Inst., Inc. v. U.S. E.P.A.*, 890 F.2d 869, 875 (7th Cir. 1989). There, the court noted that the CWA expresses a clear intention to “preclude federal review of state-issued permits” and “to put the regulatory burden on the states and to give the [EPA] broad discretion in administering the program.” *Id.* (citation omitted). The court went on to say that the statute “demonstrates an intent for the EPA and the states to work through differences in permitting decisions, and the EPA needs a range of discretion to accomplish this goal.” *Id.* In other words, “[t]he federal courts should leave EPA with its discretion to review state-issued permits.” *Id.* Any other result, according to the court, “would create an undesired bifurcated system whereby both state and federal district courts would hear challenges to state NPDES permits issued after EPA objection.” *Id.*

The Tribe takes issue with the district court’s reliance on *American Paper*, stating that the case is “readily distinguishable” from the instant action. (Tribe’s Br. at 38.) Specifically, the Tribe claims that *American Paper* focused on concerns over creating a bifurcated system of review and did not decide “that EPA’s actions were not reviewable because there was ‘no law to apply.’” (*Id.* at 39.) The Tribe misreads the holding in *American Paper*. While it is true that this Court focused much of its discussion on whether federal review would create an undesirable bifurcated system of review,¹⁴ the Court also held that federal review was unavailable because EPA’s actions—*i.e.*

¹⁴ The Tribe claims that *American Paper*’s discussion of the adequacy of state court review of EPA’s objections is undercut by the ALJ’s determination that the contested case hearing does not involve questions of federal law. (Tribe’s Br. at 39.) But the Tribe’s argument in this regard is a red herring. Because EPA objections are often resolved by conditions that are incorporated into a final permit, even if the ALJ does not apply federal law directly, the propriety of EPA’s objections and the substantive manner in which they were resolved can be reviewed indirectly by state courts and in state administrative proceedings (as is the case in the pending contested case proceeding in Michigan).

objecting to a NPDES permit and determining that its objections were satisfied—were committed to agency discretion. *Am. Paper*, 890 F.2d at 875 (“The APA . . . cuts off review of administrative actions to the extent that a statute precludes judicial review or that agency action is committed to agency discretion. 5 U.S.C. § 701. We find *both* exceptions to be applicable to this case.” (emphasis added)).

This is equally true of the state permitting process under Section 404. The NPDES program and the Section 404 program contain nearly identical regulations with respect to objecting to and resolving objections to proposed permits. *Compare* 40 C.F.R. § 123.44, *with* 40 C.F.R. § 233.50. And, like the NPDES program, once a state has assumed jurisdiction over the Section 404 program, EPA is given broad discretion to oversee the program—including the decision of whether to object to the permit and the assessment that EPA’s objections have been adequately resolved. Thus, as with the analogous NPDES program, there is no meaningful standard by which to judge EPA’s exercise of discretion in determining whether its objections have been satisfied.¹⁵ The district court therefore appropriately relied on and followed the holding in *American Paper*.

Rather than applying the holding in *American Paper*, the Tribe instead asks this Court to rely on *Head Start Family Educ. Program, Inc. v. Coop. Educ. Serv. Agency*, 46 F.3d 629 (7th Cir. 1995), *Miami Nation of Indians of Indiana, Inc. v. U.S. Dep’t of the Interior*, 255 F.3d 342, 348 (7th Cir. 2001), and *Friends of Crystal River v. U.S. E.P.A.*, 35 F.3d 1073 (6th Cir. 1994), because, according to the Tribe, these cases stand for the proposition that if the agency develops regulations and applies them, the agency action is reviewable by the court. (Tribe’s Br. at 39-40.) A closer

¹⁵ For this reason, the Tribe’s reliance on *Michigan PEAT v. U.S. EPA*, 175 F.3d 422, 428 (6th Cir. 1999) is misplaced. *Michigan PEAT* did not deal with the discretionary nature of EPA’s objections under 5 U.S.C. § 701(a)(2), and instead addressed only the question of whether a decision to withdraw objections is an interlocutory, pre-enforcement decision or a final decision. *Michigan PEAT*, 175 F.3d at 428; *see also* 5 U.S.C. § 704. And even then, the plaintiff was not really seeking review of EPA’s withdrawal of objections, but instead the permit itself.

reading of these cases suggests that the Tribe's interpretation is too broad. Indeed, in *Miami Nation*, this Court noted that "as the 'law to apply' provision of the APA makes clear, the fact that a regulation has been promulgated *doesn't* automatically make compliance with the regulation a justiciable issue. It depends on what the regulation says; it may not set forth sufficiently law-like criteria to provide guideposts for a reasoned judicial decision." *Miami Nation*, 255 F.3d at 349 (emphasis added). In other words, the mere fact that an agency has developed regulations around a particular issue does not mean the agency action at issue is reviewable under the APA. (*Contra* Tribe's Br. at 39-40.) Rather, there must be a meaningful standard in the regulations by which to judge the agency's action. *Cf. Head Start*, 46 F.3d at 632-33 (holding that there was a meaningful standard by which to judge the Secretary's discretion to select a Head Start grantee because the relevant statute "sets forth nine factors which the Secretary 'shall consider' in determining the effectiveness of each applicant to provide Head Start services" and the relevant regulations "contain additional selection procedures, program performance standards, and staffing requirements").

Friends of the Crystal River is distinguishable from the present action for precisely this reason—because there was a clear standard in the regulations against which the challenged agency action could be judged. In that case, after the state failed to resolve EPA's objections within 90 days, permitting authority was transferred to the Corps by operation of law. *Friends of the Crystal River*, 35 F.3d at 1077; *see also* 40 C.F.R. § 233.50(j). Nevertheless, EPA went outside the scope of its authority in Section 404 and transferred authority back to the state despite the fact that the regulations specifically prohibit this action. *Friends of the Crystal River*, 35 F.3d at 1077. As a result, the court held that "the transfer of authority to the Army Corps is not so discretionary that there is no law to apply." *Id.* at 1079 n.12.

By contrast, here, the Tribe's proposed amended complaint did not point to any meaningful standard in the regulations that EPA allegedly violated in determining that its objections were resolved. Though the Tribe claims broadly that the law as outlined in 33 U.S.C. § 1344(j), 40 C.F.R. § 233.50 *et seq.*, and the 404(b)(1) Guidelines (40 C.F.R. part 230) provides the meaningful standard against which to judge EPA's determination that its objections were satisfied (Tribe's Br. at 37-38), the Tribe has never identified a particular rule, regulation, statute, or standard that EPA supposedly violated in determining that its objections were satisfied. The proposed amended complaint instead stated—in vague terms—that “EPA's withdrawal of its objections failed to conform to EPA's own regulations regarding the requirements to issue Section 404 permits and failed to conform to EPA's own regulations regarding factual determinations and findings for Section 404 permits.” (JA at 191.) This does not constitute a “meaningful” standard. The proposed amended complaint further alleged that EPA's letter determining that its objections had been resolved was deficient because it “does not cite to any record evidence nor does it provide any analysis, detail, or explanation” as to why the permit conditions satisfy EPA's objections. (*Id.*) But there is no requirement in Section 404 or its corresponding regulations that EPA cite to record evidence or provide any analysis when it determines that its objections are satisfied. Rather, as noted above, the regulations simply state that if EPA objects, the state must issue the permit in such a way that satisfies EPA's objections. 40 C.F.R. § 233.50(i). That the Tribe cannot point to any particular standard EPA supposedly violated is precisely why this claim is unreviewable under 5 U.S.C. § 701(a)(2).

Because EPA has broad discretion in administering the Section 404 program, including the decision to object to a permit or assess whether its objections are resolved, the district court

correctly determined that proposed Count III did not set forth a viable claim under the APA, and the Tribe's proposed amendment was therefore futile.

CONCLUSION

For the reasons stated above, this Court should affirm the district court's December 19, 2018 order and judgment.

Respectfully Submitted,

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This certifies that Intervenor-Defendant-Appellee's Brief was served on May 6, 2019, by electronic mail using the Seventh Circuit's Electronic Case Filing system on: Sommer H. Engels, Janette K. Brimmer, and Lindzey A. Spice.

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