

No. 19-1130

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UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

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MENOMINEE INDIAN TRIBE OF WISCONSIN,  
Plaintiff-Appellant,

v.

ENVIRONMENTAL PROTECTION AGENCY and  
UNITED STATES ARMY CORPS OF ENGINEERS,  
Defendants-Appellees,

and

AQUILA RESOURCES, INC.,  
Intervenor-Defendant-Appellee.

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Appeal from the United States District Court  
for the Western District of Wisconsin  
No. 1:18-cv-00108-WCG (Hon. William C. Griesbach)

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**RESPONSE BRIEF FOR THE FEDERAL APPELLEES**

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## INTRODUCTION

More than three decades ago, the State of Michigan assumed authority under Section 404 of the Clean Water Act to issue permits for the discharge of dredged or fill material into some waters within its boundaries. With this shift, the duties of the federal agencies formerly responsible for issuing and reviewing Section 404 permits shifted as well. The U.S. Environmental Protection Agency (EPA) gained discretionary authority to object to state-proposed permits, and the authority of the U.S. Army Corps of Engineers (Corps) to issue permits for discharges into the waters under Michigan's jurisdiction was suspended.

In 2016, Aquila Resources (Aquila) sought a Section 404 permit from Michigan to discharge dredged and fill materials into waters of the United States during construction of a mine. Plaintiff the Menominee Tribe of Wisconsin (the Tribe), concerned that such construction would harm historical and cultural resources important to it, urged the Corps and EPA to "take over" the permitting process. In letters to the Tribe, the agencies explained that Michigan had assumed responsibility for issuing Section 404 permits but offered to consult with the Tribe about the process. In the meantime, review of Aquila's permit application proceeded before the State. EPA lodged objections to the permit Michigan proposed to issue, the State resolved those objections to EPA's satisfaction, and the State issued the permit.

The Tribe sued the Corps and EPA, alleging that the federal agencies' letters responding to the Tribe's take-over request were final decisions refusing to exercise permitting authority and that those decisions were arbitrary and capricious. The Tribe later sought to amend its complaint to add two new claims. The district court correctly dismissed

the Tribe's initial complaint for failure to state a claim and correctly denied the Tribe's motion to amend as futile. The district court's judgment should be affirmed.

### **STATEMENT OF JURISDICTION**

(a) The district court had jurisdiction under 28 U.S.C. § 1331 because the Tribe's claims arise under federal statutes, namely, the Clean Water Act, 33 U.S.C. § 1344; the National Historic Preservation Act, 54 U.S.C. §§ 300320, 306108; and the Administrative Procedure Act, 5 U.S.C. §§ 701-706. Joint Appendix (JA) 20-36.

(b) The district court's judgment was final because it resolved all of the Tribe's claims. JA 1-19. This Court has jurisdiction under 28 U.S.C. § 1291.

(c) The district court entered judgment on December 19, 2018. JA 1-19. The Tribe filed its notice of appeal on January 17, 2019, or 31 days later. The appeal is timely under Federal Rule of Appellate Procedure 4(a)(1)(B).

### **STATEMENT OF THE ISSUES**

1. Whether the district court properly dismissed the Tribe's claim that the agencies arbitrarily refused to take over review of the Aquila permit application, where the Tribe failed to identify a reviewable final agency action under the Administrative Procedure Act.

2. Whether the district court properly denied the Tribe's motion to amend its complaint as futile because EPA's assessment of a revised state permit is not reviewable under the Administrative Procedure Act and because the consultation requirement in Section 106 of the National Historic Preservation Act does not apply here.



## STATEMENT OF THE CASE

### A. Statutory and regulatory background

#### 1. Clean Water Act (CWA)

The CWA prohibits the discharge of pollutants into “waters of the United States” unless authorized by a CWA permit or exception. 33 U.S.C. §§ 1311(a), 1344(a), 1362(7). Discharges of dredged or fill material into waters of the United States, including certain wetlands, require a permit under CWA Section 404. *Id.* § 1344. The Secretary of the Army, acting through the Corps, is authorized to issue Section 404 permits. *Id.* § 1344(a), (e). A state may, however, seek EPA’s approval to administer a Section 404 permit program “for the discharge of dredged or fill material into [certain] navigable waters . . . within its jurisdiction.” *Id.* § 1344(g); *see also* 40 C.F.R. Part 233 (EPA regulations governing state permitting programs). A state administering its own program must ensure that the program complies with applicable portions of Section 404 and the Section 404(b)(1) Guidelines, 40 C.F.R. Part 230, which are regulations developed jointly by the Corps and EPA. 33 U.S.C. § 1344(g), (h); *accord* 40 C.F.R. § 233.70 (regulation identifying terms of Michigan’s Section 404 program). Even if a state has assumed permitting authority under Section 404, the Corps retains authority to permit discharges into waters that are “presently used, or are susceptible to use . . . as a means to transport interstate or foreign commerce . . . including wetlands adjacent thereto.” 33 U.S.C. § 1344(g)(1).

Once a state’s permit program is approved, the Corps’ authority to issue Section 404 permits for discharges into waters under the state’s jurisdiction is suspended. *Id.* § 1344(h). Nevertheless, EPA retains the authority to object to state permits in certain circumstances.

*Id.* § 1344(j); 40 C.F.R. § 233.50. Accordingly, the state must provide EPA with copies of any permit applications that it receives and any permits that it intends to issue, and EPA may object if it determines that a proposed permit is “the subject of an interstate dispute” or if it does not comply with the CWA, the Part 233 regulations, or the Section 404(b)(1) Guidelines. 33 U.S.C. § 1344(j); 40 C.F.R. § 233.50(e). If EPA objects to issuance of the proposed permit, it must provide reasons and “the conditions which such permit would include if it were issued by [EPA].” 33 U.S.C. § 1344(j); *accord* 40 C.F.R. § 233.50(e).

Upon receipt of objections from EPA, the state has several options. It may (1) issue a revised permit that resolves EPA’s objection; (2) deny a permit; or (3) request a public hearing. 33 U.S.C. § 1344(j); 40 C.F.R. § 233.50(f), (g). If the state fails to take any of these actions within 90 days after receiving EPA’s objection (and if no public hearing is held), Section 404 permitting authority passes to the Corps, and the permitting process continues. 33 U.S.C. § 1344(j); 40 C.F.R. § 233.50(i). If the state requests a public hearing, EPA must conduct the hearing, and then “reaffirm, modify, or withdraw the objection or requirement for a permit condition” after the hearing. *Id.* § 233.50(h). If EPA does not withdraw its unaddressed objection, the state has 30 days to issue a permit that has been revised to satisfy EPA’s reaffirmed or modified objection or to notify EPA of its intent to deny the permit. 33 U.S.C. § 1344(j); 40 C.F.R. § 233.50(h)(2). If the state fails to take either action within the 30-day time period, permitting authority transfers to the Corps by operation of law. *See* 33 U.S.C. § 1344(j); 40 C.F.R. § 233.50(j).

## 2. National Historic Preservation Act (NHPA)

Section 106 of the NHPA “is a ‘stop, look, and listen’ provision that requires each federal agency to consider the effects of its programs.” *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 805 (9th Cir. 1999); *see also* 54 U.S.C. § 306108 (formerly 16 U.S.C. § 470f). The provision requires the “head of any Federal agency having direct or indirect jurisdiction over a proposed *Federal or federally assisted* undertaking and the head of any Federal department . . . having authority to *license* any undertaking” to (1) consider how the proposed “undertaking” could affect historic property, and (2) “afford the [Advisory Council on Historic Preservation] a reasonable opportunity to comment.” 54 U.S.C. § 306108 (emphasis added); *see also* 36 C.F.R. §§ 800.3-800.6 (consultation regulations). This evaluation must occur “prior to the approval of the expenditure of any Federal funds on the undertaking” or “prior to the issuance of any license.” 54 U.S.C. § 306108.

An “undertaking,” in turn, is “a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a federal agency.” *Id.* § 300320 (formerly 16 U.S.C. § 470w); *accord* 36 C.F.R. § 800.16(y). Section 301 of the NHPA includes as examples of undertakings those projects “carried out by or on behalf of the Federal agency”; projects “requiring a Federal permit, license, or approval”; and projects “subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.” 54 U.S.C. § 300320.

## 3. Administrative Procedure Act (APA)

The APA establishes a framework for judicial review of “final agency action.” 5 U.S.C. § 704. Such review is available unless precluded by statute or unless the agency action

is “committed to agency discretion by law.” *Id.* § 701(a)(2). The APA authorizes courts to set aside final agency actions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Id.* § 706(2)(A). An agency’s decision is arbitrary and capricious only if the agency “relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983).

## **B. Factual background**

The following facts are drawn largely from the Tribe’s operative complaint and other pleadings, together with the exhibits attached thereto. *See Thompson v. Illinois Dep’t of Professional Regulation*, 300 F.3d 750, 753 (7th Cir. 2002).

### **1. Michigan’s approved permit program**

Michigan is one of only two states with a federally approved Section 404 permit program. *See* 40 C.F.R. § 233.70. EPA approved Michigan’s program in 1984, 49 Fed. Reg. 38,947 (Oct. 2, 1984), after EPA and the Corps entered into memoranda of agreement with the State detailing the terms of the program, JA 154-62 (EPA 1983 agreement); JA 163-69 (Corps 1984 agreement). EPA’s approval gave the State authority to issue permits for discharges of dredged or fill material into waters of the United States that are not used (and are not susceptible to use) in interstate commerce. 40 C.F.R. § 233.70.<sup>1</sup> Those waters that are

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<sup>1</sup> Michigan does not have authority to permit discharges on “Indian Lands.” 40 C.F.R. § 233.70. The Tribe has not asserted that discharges resulting from the Back Forty Mine occur on Indian Lands within the meaning of that provision.

excluded from Michigan's permitting authority were identified in an attachment to the 1984 Corps-State memorandum of agreement. JA 167-69; 40 C.F.R. § 233.70(c). The attachment specified that the Corps would retain jurisdiction over the Menominee River from "its mouth upstream 1.86 miles to but not including the Interstate Highway Bridge (U.S. 41)." JA 168. Since then, Michigan has possessed Section 404 permitting authority on the Menominee River upstream of the 1.86 mile mark.

Michigan must ensure that its program complies with the Section 404 (b)(1) Guidelines, relevant portions of 40 C.F.R. Part 233, and its agreements with EPA and the Corps. 40 C.F.R. § 233.70; JA 127. Numerous state laws also apply to permits issued by the State, including the Water Resources Commission Act, MCL 323.1 et seq.; the Goemaere-Anderson Wetland Protection Act, MCL 281.701 et seq.; the Michigan Administrative Procedures Act of 1969, MCL 24.201 et seq.; and the Michigan Environmental Protection Act, MCL 690.1201. 40 C.F.R. § 233.70.

## **2. Permitting of the Back Forty Mine**

Aquila plans to build the "Back Forty Mine," a gold-zinc sulfide mine, on the banks of the Menominee River in Menominee County, Michigan. JA 30, 136, 198. Construction and operation of the Back Forty Mine will result in discharges of dredged or fill material into wetlands adjacent to the Menominee River, about 30 miles upstream from its mouth.<sup>2</sup> Aquila submitted its first Section 404 permit application to the State of Michigan in November 2016. JA 30. The State sent a copy of the application to EPA, and EPA objected on the

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<sup>2</sup> The Tribe's pleadings do not state precisely where the proposed mine will be located, but the Tribe's August 2017 letter to the agencies stated that it is in Lake Township, Michigan, JA 137, which is approximately 30 miles upstream from the mouth of the Menominee.

ground that Aquila had not fully complied with the Section 404(b)(1) Guidelines. JA 31.

Aquila then withdrew its application. *Id.*

Aquila submitted a second permit application in January 2017. JA 31. In March 2018, EPA objected again and requested additional information about wetland impacts, erosion, and proposed mitigation. JA 195-204. EPA also identified the steps that Michigan would have to take to resolve EPA's objections. *Id.* On May 3, EPA wrote a follow-up letter to the State explaining that Aquila had provided much of the requested information by letter and in a meeting with EPA. JA 206-08. EPA also identified several terms and conditions that any revised permit must include in order to address EPA's remaining objections. JA 207-08. On May 31, Michigan sent EPA a permit revised to address the objections, and on June 1, EPA confirmed that the revised permit satisfied its objections. JA 210. The State issued the permit on June 4, 2018.

### **3. The agencies' correspondence with the Tribe**

In August 2017—after Aquila submitted its second permit application but before EPA objected—the Menominee Tribe wrote to the Corps and EPA to express its concerns about the requested permit. JA 31-32, 136-41. The Tribe asserted that the Corps is the proper permitting authority for the Back Forty Mine because “the wetlands adjacent to the Menominee River on the Back 40 mine site constitute non-delegable waters” over which the State should not have jurisdiction. JA 137. The Tribe acknowledged that the Corps had retained permitting authority over only a portion of the Menominee River in 1984. JA 139, 168. Still, the Tribe asserted that whether jurisdiction over a particular waterway is delegable under 33 U.S.C. § 1344(g)(1) is a matter for judicial resolution. JA 140. It also cited

documents prepared by the Corps in 1979 indicating that more of the Menominee could be used in interstate commerce than had been reflected in the waters listed in the 1984 approval of the program. JA 139. The Tribe asked the agencies to “make a specific formal determination regarding the jurisdictional status of the wetlands at issue in the Aquila permit,” and it requested to consult with the agencies on the issue. JA 141.

The Corps and EPA responded promptly. JA 32, 143 (Corps letter), 145 (EPA letter). The Corps explained in its September 2017 letter that it lacked authority to initiate consultation or to evaluate the status of the wetlands identified by the Tribe because Michigan had assumed Section 404 permitting authority in 1984 and because “the conditions required for the Corps to review the application have not yet occurred.” JA 143. The letter explained the applicable regulatory framework for the EPA objection process. *Id.*

EPA responded to the Tribe’s letter in October 2017. JA 145. EPA invited the Tribe “to consult with [EPA] regarding the [CWA] Section 404 permit process for the proposed” mine. JA 145. The Tribe did not accept that offer. *See* JA 151. Less than a month after EPA wrote to the Tribe, the Tribe sent the agencies a 60-day notice of intent to sue. JA 148-53.

### **C. Proceedings below**

The Tribe sued EPA and the Corps in January 2018. JA 20-36. The Tribe alleged that the agencies’ September and October 2017 letters constituted decisions not to take over the Section 404 permitting process for the Back Forty Mine, and that those decisions were arbitrary and capricious. JA 21-22, 33-35. The government moved to dismiss the relevant portions of the Tribe’s complaint for failure to state a claim. ECF 7, at 1-2, 11-13.

Intervenor-Defendant Aquila also moved to dismiss. ECF 19.

After briefing on the motion to dismiss was complete, the Tribe sought leave to file an amended complaint with two new claims. JA 170-94. One claim characterized EPA's review of the revised permit as a withdrawal of its earlier objections and asserted that such review was arbitrary and capricious. JA 191-92. The other claim asserted that Section 106 of the NHPA required the federal agencies to consult with the Tribe. JA 192. The agencies opposed the Tribe's motion to amend, arguing that amendment would be futile because the amended complaint failed to state claims upon which relief could be granted. ECF 39.

The district court granted the motions to dismiss, holding that the agencies' letters "did nothing more than reiterate that the EPA had approved Michigan's permitting program in 1984 and that the Federal Defendants would not exercise jurisdiction over the permit as a result." JA 18. Thus, the letters were not reviewable final agency actions and the Tribe failed to state a claim upon which relief could be granted. JA 13-19.<sup>3</sup>

The court also denied the Tribe's motion to amend. JA 5-11. It held that amendment would be futile because EPA's review of the revised permit was committed to its discretion and therefore could not be reviewed under the APA. JA 7-9. As for the proposed NHPA claim, the court held that the NHPA is triggered only when a project is funded or licensed by a federal agency. JA 9-11. Because the Back Forty Mine will be permitted by Michigan and funded by Aquila, the NHPA does not apply. JA 11.

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<sup>3</sup> The district court also dismissed another claim in the Tribe's original complaint, which had alleged that the agencies violated a supposed nondiscretionary duty to assume authority over the permitting process. *See* 33 U.S.C. § 1365(a)(2); JA 13-17. The Tribe's opening brief does not address that ruling; therefore, the Tribe has forfeited any challenge to that portion of the judgment. *United States v. Webster*, 775 F.3d 897, 904 (7th Cir. 2015).



## SUMMARY OF ARGUMENT

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

1. The district court correctly held that the Corps' 2017 letter is not a reviewable agency action because it satisfies neither condition necessary for an agency action to be final and consequently reviewable under the APA.

a. The letter did not mark the consummation of the agency's decisionmaking process because the Corps reached no decision. Instead, the Corps merely explained that the State of Michigan assumed Section 404 permitting authority in 1984 and that the Corps' authority to issue Section 404 permits had been suspended as a result.

b. No legal consequences flowed from the Corps' letter. The State's authority to issue Section 404 permits for discharges into the Menominee River was the same before the Corps' letter as it was after.

2. The district court correctly denied the Tribe's motion to amend its complaint as futile because neither claim that the Tribe proposed to add would survive a motion to dismiss for failure to state a claim.

a. The Tribe's challenge to EPA's confirmation that EPA's objections had been resolved is not reviewable under the APA because EPA's review of state permits is committed to its discretion by law. As numerous courts have recognized, reading the CWA to grant EPA broad discretion in its review of state-proposed permits is consistent with the federal-state balance set forth in the statute. If the Tribe wishes to challenge the permit issued by Michigan, that challenge is properly brought in state court. Alternatively, the

district court could have held that amendment would have been futile because EPA's review of the revised permit was not a final agency action. In either event, the court correctly denied the Tribe's motion to amend the complaint to challenge EPA's exercise of its discretion.

b. The Tribe's claim that Section 106 of the NHPA required the agencies to consult with the Tribe would not survive a motion to dismiss. Even if the Back Forty Mine is an "undertaking" within the meaning of the NHPA, Section 106 is not triggered because the mine is not funded or licensed by a federal agency. Because the plain language of the statute makes clear that consultation is not required in this instance, the district court correctly concluded that amendment would have been futile.

The district court's judgment should be affirmed.

## **ARGUMENT**

### **I. The district court properly dismissed the Tribe's claim that the Corps arbitrarily refused to take over review of the Aquila permit.**

With exceptions not relevant here, the APA authorizes judicial review only of "final agency action." 5 U.S.C. § 704. The district court correctly held that the Corps' 2017 letter is not a final agency action under the APA and correctly dismissed the Tribe's claim on that ground. JA 17-19.<sup>4</sup>

#### **A. Standard of review**

This Court reviews de novo a dismissal for failure to state claim under Federal Rule of Civil Procedure 12(b)(6). *Vesely v. Armslist LLC*, 762 F.3d 661, 664 (7th Cir. 2014). The

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<sup>4</sup> The Tribe's opening brief does not challenge the district court's holding that EPA's letter likewise was not a final agency action. Thus, the argument is forfeited and this brief does not address it. *Webster*, 775 F.3d at 904.

Court assumes all facts in the complaint to be true and construes all reasonable inferences from those facts in the plaintiff's favor. *Id.* Review of a Rule 12(b)(6) motion is restricted to the pleadings, which include the complaint, supporting briefs, and attached exhibits.

*Thompson*, 300 F.3d at 753.

**B. The Corps' letter is not a "final agency action."**

"[T]wo conditions must be satisfied for an agency action to be 'final'" and therefore reviewable under the APA. *Bennett v. Spear*, 520 U.S. 154, 177 (1997). "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature." *Id.* at 177-78 (internal citation and quotation marks omitted). "And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* at 178 (internal quotation marks omitted). The district court correctly held that the Corps' letter satisfies neither condition. JA 17-19.

**1. The Corps' letter does not mark the consummation of any agency decisionmaking process.**

The Corps' letter does not mark the consummation of an agency decisionmaking process because the Corps made no decision. Indeed, it had no authority to take the actions requested by the Tribe. The Corps' letter stated that the agency "does not have the authority to initiate tribal consultation . . . nor determine jurisdiction on the adjacent wetlands" because Michigan assumed the authority to issue Section 404 permits for the area in 1984. JA 143. The letter further explained that procedures applicable to state-administered Section 404 programs and EPA's review of state-issued permits were set forth in Section 404, the regulations in 40 C.F.R. Part 233, and the memoranda of agreement. JA 143. The letter

stated that permitting authority can return to the Corps only if EPA objects and subsequently determines that its objections have not been satisfied. *Id.*

The Tribe incorrectly characterizes the Corps' letter as an affirmative decision to "refus[e] to assume jurisdiction over the Permit." Op. Br. at 14. But the Corps lacked authority to make *any sort of decision* about the pending permit, including to assert its own jurisdiction over the permit application. Because Michigan has assumed permitting authority, that authority can transfer to the Corps *only* if EPA objects to a proposed permit and the State fails to address EPA's concerns. 33 U.S.C. § 1344(j); *see also id.* § 1344(h)(2) (providing that when a state has authority to issue Section 404 permits, the Corps must "suspend the issuance of [Section 404] permits"). Those triggering actions had not taken place when the Corps sent its letter, and they have not taken place since. Although approval of a state's permitting program may be revoked, only EPA—and not the Corps—has authority to revoke it. *Id.* § 1344(i) (explaining that EPA may revoke its approval if it determines, after a public hearing, that the state is not administering the program in accordance with Section 404 or the Section 404(b)(1) Guidelines and the state does not take corrective action); JA 158, 166.<sup>5</sup>

Indeed, the Tribe's own complaint acknowledges that the Corps made no new decisions: the agency merely "respond[ed that] it would not exercise jurisdiction over the Section 404 permit for the Mine because the State of Michigan was delegated authority over

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<sup>5</sup> To the extent that the Tribe challenges the 1984 decision to exclude only the first 1.86 miles of the Menominee River from Michigan's permitting authority or argues that the decision is no longer valid today, *see* Op. Br. at 15-16, 19-20, the Tribe raises substantive legal questions that were not addressed by the Corps in its letter and that are consequently not relevant to whether the letter is a reviewable final agency action.

Section 404 permitting.” JA 32. The Tribe cannot create a reviewable agency action merely by sending a letter to the Corps and eliciting a response. Thus, the responsive letter could not and did not mark the consummation of any agency decisionmaking process, and the district court’s judgment may be affirmed on that basis alone.

**2. No legal consequences flow from the Corps’ letter.**

The Corps’ letter did “not create any legal repercussions” of its own for the Tribe, and so it is not a reviewable final order for that reason as well. *Helicopters, Inc. v. NTSB*, 803 F.3d 844, 846 (7th Cir. 2015). The permitting framework challenged by the Tribe was established in 1984. EPA’s approval of the State’s program confirmed that the State would have authority to permit discharges into “all waters within the State of Michigan,” JA 164, except those certain waters identified in the agreement, JA 167-69. Thus, the State has had authority to permit discharges in all parts of the Menominee River (and nearby wetlands) except “its mouth upstream 1.86 miles” since 1984. JA 168.

The Tribe identifies a number of consequences that assertedly stem from the Corps’ letter, Op. Br. at 17-18, but it overlooks the fact that those consequences result from EPA’s 1984 approval of Michigan’s program—not from the Corps’ letter acknowledging existence of that program and the legal framework that governs it. For example, the Tribe expresses frustration that because the National Environmental Policy Act (NEPA) does not apply to the State’s permitting program, no environmental impact statement will be prepared. Op. Br. at 16-17. It also complains that the Corps has not completed a NHPA consultation. *Id.* at 17. But EPA’s 1984 approval identified the federal and state requirements applicable to the State’s permitting program and listed neither statute. 40 C.F.R. § 233.70. Moreover, as

explained below in Part II.C (pp.30-35), the plain text of the NHPA makes clear that the statute does not apply.

The Tribe further contends that the Corps' letter is consequential because these "federal statutes and requirements . . . would no longer apply with the shift to the State." Op. Br. at 16. But the shift to which the Tribe refers is nothing new—it happened decades ago. When an agency action leaves "the world just as it found it," it "cannot be fairly described as implementing, interpreting, or prescribing law or policy," and therefore no consequences flow from it. *Independent Equipment Dealers Ass'n v. EPA*, 372 F.3d 420, 428 (D.C. Cir. 2004); *see also id.* at 427 (holding that agency letter, which was "purely informational in nature" and "imposed no obligations and denied no relief" was not a final agency action); *Clayton County v. FAA*, 887 F.3d 1262, 1266-67 (11th Cir. 2018) (holding that no consequences flowed from agency letter that "merely restate[d]" a determination made years before); *General Motors Corp. v. EPA*, 363 F.3d 442, 449-51 (D.C. Cir. 2004) (explaining that agency letters "cannot accurately be characterized as the culmination of EPA's position" where they "reflect neither a new interpretation nor a new policy"); *cf. Dhakal v. Sessions*, 895 F.3d 532, 540 (7th Cir. 2018) (concluding that no consequences flowed from a challenged action because its only effect was to "keep in place the status quo").

The Tribe's claim that "the state may refuse to even apply foundational legal requirements" because it allegedly "does not believe it is even issuing a delegated Section 404 permit," Op. Br. at 17, does not advance its position on appeal. To the extent that the Tribe is arguing that the State is not currently administering its permit program in compliance with Section 404 and that its permitting authority should be withdrawn, that claim does not

transform the Corps' letter into a reviewable action for two reasons. First, the Tribe did not raise that concern in its letter to the agencies, JA 136-41, and so the Corps' letter did not address it one way or another. Second, only EPA has authority to withdraw a state's authority to administer a Section 404 program. 33 U.S.C. 1344(i). Thus, the Tribe's concerns about the State's actions do not render the Corps' letter a final agency action.

**C. The Tribe's timeliness arguments do not call the district court's finality decision into question.**

The Tribe argues that the district court failed to apply D.C. Circuit cases discussing the "reopener" doctrine, Op. Br. at 20, and "incorrectly eliminated the option of an as-applied challenge, the type of challenge asserted by the Menominee Tribe," *id.* at 22. But those two arguments address whether the Tribe's suit was *timely*. Although the district court acknowledged that the Tribe "seeks to assert an as-applied challenge under the APA," JA 17, it did not evaluate the timeliness of the Tribe's suit because it correctly held that the Tribe had not challenged a final agency action in the first place, JA 17-19. Without a final agency action, it does not matter if the suit was brought within the applicable limitations period. Therefore, this Court can affirm without addressing the Tribe's timeliness arguments. In any event, those arguments are meritless.

The D.C. Circuit's "reopener" doctrine "specifically spells out the circumstances when an agency's discussion of its existing regulations can ripen into an opportunity for renewed comment and objection to those regulations." *Independent Equipment Dealers*, 372 F.3d at 428 (internal quotation marks omitted). It applies when an agency "(1) proposed to make some change in its rules or policies, (2) called for comments only on new or changed provisions, but at the same time (3) explained the unchanged, republished portions, and

(4) responded to at least one comment aimed at the previously decided issue.” *Public Citizen v. NRC*, 901 F.2d 147, 150 (D.C. Cir. 1990); accord *Ohio v. EPA*, 838 F.2d 1325, 1328 (D.C. Cir. 1988).

The Corps took none of those steps. The agency did not propose to change the State’s Section 404 permitting program (indeed, the Corps had no authority to do so); it did not call for comments on the program; and it did not confirm any previously reached decisions. In short, the Corps cannot be said to have “reopened, reexamined, [or] reaffirmed” any decision. *Public Citizen*, 901 F.2d at 151. Instead, the Corps merely explained that, given a decision made in 1984, it lacked the authority that the Tribe wished it to exercise. JA 143.

This case does not, as the Tribe contends, present “precisely the situation the D.C. Circuit described as reviewable final agency action in *Public Citizen*.” Op. Br. at 21. There, the Nuclear Regulatory Commission (NRC) issued a policy statement explaining the agency’s “temporary decision not to engage in rulemaking, but to monitor the success of [particular] programs over a two-year period.” *Public Citizen*, 901 F.2d at 149. Three years later, the NRC reviewed the programs, decided not to make any changes, and “instead republished the Policy Statement with some minor amendments.” *Id.* Public Citizen petitioned for review of the original policy statement, and the D.C. Circuit held that the challenge was timely because the NRC’s subsequent “action reexamined [the original statement] and made it permanent.” *Id.* at 151. Those circumstances are not present here: EPA’s 1984 approval of Michigan’s permitting program was not temporary; by statute, it will last until EPA revokes it for cause



or until the State decides to terminate its program. JA 158, 166. The Corps' letter did not reexamine or reevaluate that decision—indeed, the agency had no power to do so.

That the Tribe casts its claim “as an as-applied challenge specific to the agencies’ refusal to exercise jurisdiction over this Section 404 Permit,” Op. Br. at 22-23, also does not make the claim reviewable. A purely facial challenge must be brought within six years of the challenged agency action, and an as-applied challenge can be brought later as long as the plaintiff can identify “some direct, *final agency action* involving the particular plaintiff within six years of filing suit.” *Dunn-McCampbell Royalty Interest, Inc. v. Nat’l Park Service*, 112 F.3d 1283, 1287 (5th Cir. 1997) (emphasis added). Thus, without a final agency action, it does not matter whether the Tribe’s challenge is facial or as-applied.

Even if the Corps had authority to take over permitting authority from the State, and even if its letter could somehow be construed as a final decision not to do so, the Tribe’s challenge is not “as-applied.” The Tribe claims that the Corps erred because the State should not have authority to permit discharges into the Menominee River near the Back Forty Mine. *See* Op. Br. at 19-20. But any decision by the Corps to “allow” the State to exercise that authority was not specific to review of the proposed Aquila permit. The agencies decided that Michigan should have jurisdiction over discharges beyond the first 1.86 miles of the Menominee River in 1984, long before Aquila submitted its application. That decision is part of Michigan’s Section 404 program; it is not specific to the Aquila permit. Thus, the Tribe’s claim amounts to a facial challenge, brought decades too late.

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The district court properly granted the government's motion to dismiss because the Corps' letter is not reviewable final agency action. The Tribe's assertion that its lawsuit was nevertheless timely does not change that result.

## **II. The district court correctly denied the Tribe's motion to amend its complaint.**

### **A. Standard of review**

"[C]ourts may deny a proposed amended pleading if . . . the amendment would be futile." *Gandhi v. Sitara Capital Management, LLC*, 721 F.3d 865, 868-69 (7th Cir. 2013). Denial of a motion to amend on futility grounds is reviewed de novo. *Rivas-Melendrez v. Napolitano*, 689 F.3d 732, 736 (7th Cir. 2012). The reviewing court "appl[ies] 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*, 786 F.3d 510, 524 (7th Cir. 2015).

### **B. Amending the complaint to allow the Tribe to challenge EPA's review of the revised permit would have been futile.**

As elaborated below, EPA's review of state-proposed permits is committed to its discretion by law.<sup>6</sup> Thus, the district court correctly held that it would have been futile for the Tribe to amend its complaint to challenge EPA's confirmation that the revised permit satisfied its objections. JA 6-9. Alternatively, the district court could have denied the Tribe's motion because EPA's review of the revised permit was not a final agency action.

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<sup>6</sup> The Tribe characterizes EPA's review of the revised permit as a "withdrawal" of its objections, but that characterization is incorrect. A withdrawal occurs when EPA submits objections and later decides to rescind them, even though they were not addressed. *See* 40 C.F.R. § 233.50(h); *see, e.g., Friends of Crystal River v. EPA*, 35 F.3d 1073 (6th Cir. 1994). Here, EPA objected to the proposed permit and the State revised the permit to accommodate EPA's objections. EPA then reviewed the revised permit and confirmed that the revised permit satisfied its objections.

**1. EPA's review of state-proposed permits is committed to its discretion by law.**

The APA does not authorize review of actions “committed to agency discretion by law.” 5 U.S.C. § 701(a)(2). This exception applies “where statutes are drawn in such broad terms that in a given case there is no law to apply,” or where “the statute is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion.” *Heckler v. Chaney*, 470 U.S. 821, 830 (1985); *accord Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971). After all, “if no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for ‘abuse of discretion.’” *Heckler*, 470 U.S. at 830.

No law or regulation provides a “meaningful standard against which to judge” EPA’s confirmation that the revised permit satisfied its objections. *Id.* Section 404 explains only that, if EPA “intends to provide written comments to [the] State,” it must notify the State no later than 30 days after it receives a proposed permit from the State. 33 U.S.C. § 1344(j); *accord* 40 C.F.R. § 233.50(d) (“If [EPA] intends to comment upon, object to, or make recommendations,” it must notify the State within 30 days.). Likewise, if EPA decides to object, and if the State revises a proposed permit to accommodate the objections, no part of Section 404 or the regulations specifies how EPA should review the revised permit. Section 404(j) provides only that the State must submit a “permit revised to meet [EPA’s] objection” to avoid having permitting authority transfer to the Corps. 33 U.S.C. § 1344(j). Similarly, the Part 233 regulations provide that if a State neither “satisfies EPA’s objections . . . nor denies the permit, the [Corps] shall process the permit application.” 40 C.F.R. § 233.50(j); *accord id.*

§ 233.50(h). Thus, both the initial decision to object and any subsequent review of a revised permit are left to EPA's discretion.

The Part 233 regulations provide additional information about how EPA's objections must be structured should the agency decide to object, but they create no meaningful standard against which to judge either EPA's decision to object in the first place or EPA's subsequent review of permits revised to satisfy its objections. Section 233.50(e) specifies only that if EPA decides to object, "[a]ny such objection shall be based" on EPA's determination that "the proposed permit is (1) the subject of an interstate dispute under § 233.31(a) and/or (2) outside requirements of the [CWA], these regulations, or the 404(b)(1) Guidelines." Courts have rejected the argument that there is "law to apply," *Chaney*, 470 U.S. at 830, merely because EPA must base any objections on particular grounds. *See, e.g., Save the Bay, Inc. v. EPA*, 556 F.2d 1282, 1294-95 (5th Cir. 1977) (addressing process for EPA to object to a state-proposed Section 402 permit). In any event, the cited provisions say nothing about how EPA should evaluate revised permits.

The Tribe asserts otherwise, Op. Br. at 37-39, but it identifies no provisions in either the CWA or the regulations that could guide judicial review of EPA's action. It cites Section 404(c) for example, *id.* at 37, but that provision grants EPA authority to restrict discharges on particular sites if it determines that the discharges "will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas . . . , wildlife, or recreational areas." 33 U.S.C. § 1344(c); *accord Mingo Logan Coal Co. v. EPA*, 714 F.3d 608, 612 (D.C. Cir. 2013) (explaining that Section 404(c) grants "EPA a broad environmental 'backstop' authority over the [Corps'] discharge site selection"). The provision does not

apply to EPA's review of state-proposed permits. Likewise, the Section 404(b)(1) Guidelines do not, as the Tribe asserts, "govern EPA's review of all Section 404 permits, whether issued by the Corps or a delegated state." Op. Br. at 37-38. Instead, they specify the details that Section 404 permits must include, 40 C.F.R. § 230.12; how impacts should be evaluated, 40 C.F.R. Part 230, Subpart C; and how adverse effects should be minimized, *id.* Subpart H.

In short, if the Tribe believes that the revised permit does not comply with the CWA, the Section 404(b)(1) Guidelines, or the Part 233 regulations, then it should challenge the state-issued permit in state court as provided by Michigan law. Neither Section 404 nor the regulations anticipate having federal courts review challenges to state permits through the lens of whether EPA's review of the permit was reasonable. *See American Paper Institute, Inc. v. EPA*, 890 F.2d 869, 874-75 (7th Cir. 1989) (discussing "clear and convincing evidence of legislative intent to preclude federal review of state-issued permits").

Indeed, making the state permit—and not EPA's discretionary review of it—the focus of judicial review is consistent with the CWA's goal to make the *states* responsible for managing water pollution. The CWA was designed to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution," and Congress intended to have the states "implement the permit programs under [CWA] sections [402] and [404]." 33 U.S.C. § 1251. When a state assumes Section 404 permitting authority, EPA retains the ability to review proposed permits, but the State is responsible for ensuring that its permits comply with the applicable regulatory framework. As a result, EPA may waive its opportunity to review certain categories of state-issued Section 404 permits. 33 U.S.C. § 1344(k). And if EPA does intend to object, Section 404(j) requires the agency to act

promptly; otherwise, the State is authorized to issue the permit without EPA's review. *Id.* § 1344(j) (requiring EPA to notify the state within 30 days if it plans to object).

Although few courts have had occasion to evaluate EPA's review of state-proposed CWA Section 404 permits, several courts (including this one) have rejected attempts to obtain judicial review of EPA's review of state-issued permits under CWA Section 402, 33 U.S.C. § 1342, which governs discharges of pollutants from point sources. EPA's review of those permits mirrors its review of Section 404 permits, *compare* 33 U.S.C. § 1342(b)-(e) *with id.* § 1344(j); thus, the reasoning in those cases applies here too.

In *American Paper Institute*, EPA objected to a Section 402 permit proposed by the State of Wisconsin, and the State revised the permit in response. 890 F.2d at 872. The permit applicants, who disagreed with the modifications, petitioned for review of EPA's objections, arguing that EPA lacked authority to object to the proposed permits because they allegedly already complied with the CWA. *Id.* This Court recognized that "federal courts should leave EPA with its discretion to review state-issued permits," and it held that EPA's decision to object to a state Section 402 permit is an unreviewable action committed to its discretion. *Id.* at 875. Accordingly, this Court dismissed the case, explaining that "EPA's objections to state permits could arguably be challenged . . . under the APA," were "it not for the strong congressional scheme of state water pollution regulation." *Id.* Where EPA has approved a state's Section 402 program, "it seems beyond argument that we should construe the [CWA] to place maximum responsibility for permitting decisions on the states." *Id.* at 874. Thus, because the CWA "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 . . . . federal courts should leave EPA with its discretion to review state-issued permits.” *Id.* at 875. The Court ultimately held that the exception for agency actions committed to agency discretion applied. *Id.* (citing 5 U.S.C. § 701).

The Tribe selects passages from *American Paper Institute* that assertedly support its position, Op. Br. at 38-39, but its efforts are unpersuasive. The Tribe cites, for example, this Court’s acknowledgement that “state courts may examine challenges to any pertinent EPA objections,” *American Paper Institute*, 890 F.2d at 875, and asserts that federal courts must be able to evaluate EPA’s review of Section 404 permits proposed by a state, Op. Br. at 39. But the cited passage merely explained that the *content* of an EPA objection could be reviewable in state court when the “objection causes a state permit to issue in other than its proposed form” and a party takes issue with the modifications. 890 F.2d at 875. The notion that a regulated party should be able to obtain review of a permit’s content is unremarkable, and it does not support the Tribe’s effort to obtain judicial review of EPA’s objections here. *Id.* In any event, the Tribe’s observation that the Court did not elaborate “how EPA could be sued in state court and/or how EPA’s actions could be reviewed by the state court if EPA would not be there to defend its decisions,” Op. Br. 39 n.14, confirms its misinterpretation of the Court’s conclusion. The Court did not need to explain “how EPA could be sued in state court” because it envisioned only the state permit being the focus of judicial review. 890 F.2d at 875.

Other courts have also held that EPA’s review of state Section 402 permits is committed to its discretion. The D.C. Circuit, for example, held that EPA’s “decision not to review or to veto a state’s action on [a Section 402] permit application” is “committed to

agency discretion by law,” because “[g]ranting federal court review . . . would upset the federal-state balance struck by Congress: it would allow parties to create a basis for federal jurisdiction where federal involvement is merely secondary.” *District of Columbia v. Schramm*, 631 F.2d 854, 861 (D.C. Cir. 1980). Indeed, the D.C. Circuit recognized that although “[c]ertain guidelines” apply to the state Section 402 permitting process, they “do not bind the [EPA] in its supervisory role of monitoring state permits.” *Id.* And, as explained below (p.27), the Sixth Circuit acknowledged in *Friends of Crystal River v. EPA*, 35 F.3d 1073, 1079 (6th Cir. 1994), that EPA’s decision not to object to a state-proposed Section 402 permit “is within the sole discretion of the agency.”

This Court’s decision in *Miami Nation of Indians of Indiana, Inc. v. U.S. Department of Interior*, 255 F.3d 342 (7th Cir. 2001), lends no support to the Tribe’s argument that EPA’s actions are reviewable. *See* Op. Br. at 40. There, the Court determined that the political question doctrine did not bar its review of Interior’s denial of a tribe’s petition for federal recognition because Interior had promulgated regulations to guide its action. 255 F.3d at 345-46, 348. Here, EPA regulations identify the grounds on which EPA may object should it decide to do so, but they do not guide EPA’s initial decision to object; nor do they guide EPA’s review of permits revised to satisfy any objections that it does lodge. Furthermore, the political question doctrine is not at issue here. Thus, much of *Miami Nation* is inapposite.

If *Miami Nation* is relevant, it is only so because it supports application of the exception for actions committed to agency discretion by law. The Court explained 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.”



*Id.* at 349. Instead, it “depends on what the regulation says.” *Id.* If a regulation does “not set forth sufficiently law-like criteria to provide guideposts for a reasoned judicial decision,” then the action remains unreviewable. *Id.* Here, no “law-like criteria . . . provide guideposts” for review of EPA’s decision to object in the first place or to confirm that its objections have been resolved. Section 404 and the regulations leave those decisions to EPA’s discretion.

The Sixth Circuit’s decision in *Friends of Crystal River* likewise does not help the Tribe. *See* Op. Br. at 40-41. There, the court considered whether EPA had authority to withdraw its unaddressed objections to a state-proposed Section 404 permit *after* permitting authority had transferred to the Corps. 35 F.3d at 1076-77. The court treated EPA’s action as a decision to “revoke[] the authority of another federal agency to exercise” authority granted by the CWA. *Id.* at 1079. That action was reviewable because the “transfer of authority to the Army Corps is not so discretionary that there is no law to apply.” *Id.* at 1079 n.12. Indeed, the transfer is not discretionary at all—it happens by operation of law. 33 U.S.C. § 1344(j). The court was careful to distinguish cases “stand[ing] for the broad proposition that an EPA decision to object does not constitute final agency action, while a decision not to object is within the sole discretion of the agency.” 35 F.3d at 1078-79 (citing *American Paper Institute*, 890 F.2d at 875, and *Champion Int’l Corp. v. EPA*, 850 F.2d 182, 187-88 (4th Cir. 1988)). EPA’s action here is more like the actions the court agreed were *un*reviewable than the action it held reviewable.

**2. Alternatively, EPA’s review of the revised permit is not a final agency action.**

The district court correctly held that EPA’s confirmation that the revised permit satisfied its objections was a conclusion committed to its discretion by law. It could just as correctly have held that the confirmation was not a reviewable “final agency action” under 5 U.S.C. § 704 because it is not the “consummation of the agency decisionmaking process” or a decision “from which legal consequences will flow.” *Bennett*, 520 U.S. at 177-78. This Court could affirm on that alternative ground as well.

First, EPA’s review of the revised permit did not consummate the relevant decisionmaking process, i.e., the process that resulted in issuance of a Section 404 permit. As the Sixth Circuit has explained, the “CWA establishes one continuous application process to obtain a Section 404 permit.” *Marquette County Road Commission v. EPA*, 726 Fed. Appx. 461, 467 (6th Cir. 2018), *cert. denied*, 139 S. Ct. 1290 (2019). Thus, the decisionmaking process ends when a permit is issued, and the “decision points” along the way “do not equal . . . separately reviewable permit processes.” *Id.*<sup>7</sup> As the Ninth Circuit has similarly explained, EPA’s review of a “draft state permit is merely an interim step in the state permitting process.” *Southern California Alliance of Publicly Owned Treatment Works v. EPA*, 853 F.3d 1076, 1081 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 1042 (2018). In the Section 402 context, as here, “EPA may decide to withdraw the objection . . . , or the state may revise a draft permit to remedy EPA’s objection and issue the permit. . . . In either case, the permitting decision

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<sup>7</sup> In *Marquette County*, the permitting process had transferred to the Corps, and the Sixth Circuit’s holding rested in part on the fact that the Corps had not yet issued a permit. 726 Fed. Appx. at 467. *Marquette County* remains applicable here even though a permit has issued because the permit was issued by the State, and not by the Corps.

remains the state's." *Id.* Here, the relevant decisionmaking process was consummated only when Michigan issued the permit, and EPA's review of the permit was merely interlocutory.

Second, no legal consequences flow from EPA's review of the revised permit. As the government explained in the district court, "[w]here a state administers the CWA Section 404 permit program, the rights, obligations, and legal consequences flow from the state's decision to issue or to deny a permit, not from EPA's objection." ECF 39, at 7 n.4. The only consequence of EPA's review of the revised permit is that the state may proceed with the permitting process; the review does not automatically result in or otherwise require issuance of a Section 404 permit. 33 U.S.C. § 1344(j). If the state decides to issue a permit, then the legal consequences flow from that action alone.

The Sixth Circuit's decision in *Michigan Peat v. EPA*, 175 F.3d 422 (6th Cir. 1999), *cited in* Op. Br. at 40 n.15, does not require a different result. There, EPA objected to a state-proposed Section 404 permit, and the State revised the permit to satisfy EPA's objections. 175 F.3d at 425. After EPA agreed that its objections were satisfied, the State issued the permit. *Id.* Rather than sign the permit, however, the permittee sought judicial review. *Id.* at 426. The court held that the permit was reviewable even though it "specifically stated that it was not final or valid until signed and accepted by the permittee and returned to the [State]," and the permittee had taken neither step. *Id.* at 428. Although the court referred to the finality of EPA's actions, *id.*, the precise question was whether the permit incorporating EPA's objections was reviewable, *see id.* at 427-28 (acknowledging the parties' conflicting positions on whether "issuance of the [proposed] permit was a final agency action and

therefore subject to judicial review”). The court did not hold that EPA’s satisfaction with the permit was a reviewable final agency action.

**C. Amending the complaint to add the Tribe’s NHPA claim would have been futile.**

The district court properly determined that amending the complaint to add an NHPA claim would have been futile because the defendant agencies are not required to consult with the Tribe under Section 106 of the NHPA. JA 9-11.

Section 106 applies only when an undertaking is funded or licensed by a federal agency. The plain text of Section 106 makes this clear: only federal agencies with “direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking” or “authority to license any undertaking” must engage in consultation. 54 U.S.C. § 306108. Although the NHPA and associated regulations do not explicitly define the phrase “Federal or federally assisted,” Section 106 confirms that it refers to the power to approve or otherwise control the expenditure of federal funds on an undertaking. Indeed, Section 106 provides that if a “Federal or federally assisted” undertaking is proposed, consultation must occur “prior to the approval of the expenditure of any Federal funds.” *Id.* Consequently, this Court and other federal courts have interpreted the plain language of Section 106 to require consultation only when an undertaking is funded or licensed by a federal agency.

In *Old Town Neighborhood Association Inc. v. Kauffman*, 333 F.3d 732, 735 (7th Cir. 2003), for example, the Court recognized that Section 106 “sets conditions on the expenditure of federal funds and the issuance of federal licenses.” Applying that rule, the Court held that the defendant municipality could pursue a road-widening project without Section 106

consultation only if it could confirm that it would not receive federal reimbursement for it.  
*Id.* at 736.

Other courts have interpreted Section 106 the same way. *See, e.g., Businesses & Residents Alliance v. Jackson*, 430 F.3d 584, 591-92 (2d Cir. 2005) (explaining that even if a particular project were an undertaking, “Section 106 itself still applies only to two types of entities,” namely, federal agencies with jurisdiction over a federal or federally assisted undertaking, and federal agencies with authority to license an undertaking); *Sheridan Kalorama Historical Ass’n v. Christopher*, 49 F.3d 750, 755 (D.C. Cir. 1995) (“[T]he text of § 106 still applies by its terms only to *federally funded or federally licensed undertakings*.”); *see also National Mining Ass’n v. Fowler*, 324 F.3d 752, 759-60 (D.C. Cir. 2003) (applying *Sheridan Kalorama*); *Waterford Citizens’ Ass’n v. Reilly*, 970 F.2d 1287, 1291 (4th Cir. 1992) (explaining that the NHPA is “aimed solely at discouraging federal agencies from ignoring preservation values in projects they initiate, approve funds for or otherwise control” (internal quotation marks omitted)); *Monumental Task Committee, Inc. v. Foxx*, 240 F. Supp. 3d 487, 496 (E.D. La. 2017) (“Unless the City’s efforts to remove the Liberty Place Monument are either federally funded or federally licensed, Section 106 does not apply.”).

The Back Forty Mine is neither funded nor licensed by a federal agency. It is undisputed that Aquila will not receive federal funds to construct it, and that the project will be licensed by the State of Michigan. Still, the Tribe suggests that the Back Forty Mine must be federally funded because “EPA and the Corps devote resources to [the] review and administration of state-delegated programs.” Op. Br. at 30 n.10. The Tribe is mistaken: that federal agencies spent resources on review of the State’s Section 404 program and the

proposed permit does not mean that they funded either the program or the relevant undertaking, i.e., the Back Forty Mine. The Tribe identifies no authority to the contrary.

The Tribe's argument that consultation is required because the Back Forty Mine is allegedly an "undertaking" under Section 301 of the NHPA, Op. Br. at 25-35, also misses the mark. The Tribe focuses on the part of Section 301 that was amended in 1992, which includes within the definition of undertakings those activities "subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency." 54 U.S.C. § 300320. The Tribe contends that the Back Forty Mine falls within that definition and that Section 106 must therefore apply. Op. Br. at 25-27, 31-32. The Tribe puts the cart before the horse: even if the Back Forty Mine were an undertaking, it is not an undertaking funded or licensed by a federal agency, and so the NHPA does not apply. 54 U.S.C. § 306108.

The D.C. Circuit has twice before rejected the argument made by the Tribe here. In *Sheridan Kalorama*, 49 F.3d at 754, the court examined the plain language of Section 106 and held that "no tenable reading" of Section 106 would support it. The plaintiffs had argued that consultation was required on a project that was neither federally funded nor federally licensed because the proposed project was an undertaking under Section 301. *Id.* at 753-55. The D.C. Circuit disagreed, stating: "plaintiffs proceed as if the review provision of § 106 automatically applies once a project is deemed an 'undertaking.'" *Id.* at 755. But even though the definition of "undertaking" was expanded in 1992, "the text of § 106 still applies by its terms only to *federally funded or federally licensed* undertakings." *Id.* Thus, no matter how broadly Congress defines "undertaking," "unless [the undertaking] is federally funded or federally licensed, § 106 simply does not apply." *Id.* at 755-56.

In *National Mining Association v. Fowler*, the D.C. Circuit once again rejected an argument that Section 106 applies to all undertakings defined in Section 301. Reviewing regulations issued by the Advisory Council on Historic Preservation, which required consultation for all undertakings—even those not funded or licensed by a federal agency—the court concluded that the regulations were inconsistent with Section 106 and therefore invalid. 324 F.3d at 759. It rejected the Council’s argument that the regulations “lawfully implement[] section 106,” explaining that the court completed an “unambiguous analysis of the relationship between sections 106 and 301” in *Sheridan Kalorama* and held there that “Congress’s 1992 broadening of section 301 did not override section 106’s requirement that the project be federally funded or licensed.” 324 F.3d at 759-60.

The same reasoning applies here. Even if the Back Forty Mine is an undertaking under Section 301, it does not trigger consultation under Section 106 because it is not an undertaking funded or licensed by a federal agency. 54 U.S.C. § 306108. The Tribe makes much of the fact that there appears to be some tension between the relatively broad Section 301 and the far narrower Section 106, and it urges this Court to reach a result different from the D.C. Circuit. Op. Br. at 29-30, 33-34. But any tension between the two provisions does not demand a different result here for two reasons. First, because the plain language of Section 106 specifies that only federal funding or licensure triggers consultation, any tension is for Congress—and not the courts—to resolve. *Lewis v. City of Chicago*, 560 U.S. 205, 217 (2010) (“[I]t is not our task to assess the consequences of each approach and adopt the one that produces the least mischief. Our charge is to give effect to the law Congress enacted.”). Second, as the Second Circuit has reasoned, 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 [a NHPA] review will be merely an empty exercise.” *Businesses & Residents Alliance*, 430 F.3d at 592. The Tribe does not explain how NHPA review would proceed here, where the federal agencies have no funding or license to withhold.

The Tribe’s reliance on *Indiana Coal Council, Inc. v. Lujan*, 774 F. Supp. 1385 (D.D.C. 1991), *cited in* Op. Br. at 31-32, is also misplaced. To start, the district court there applied the pre-amendment version of the NHPA, and the decision was vacated when issuance of the 1992 amendments mooted the case on appeal. No. 91-5397, 1993 WL 184022, at \*1 (D.C. Cir. Apr. 26, 1993). In any event, the case is readily distinguishable. There, the court held that a state permitting process triggered Section 106 because (1) the permitting program was federally funded; and (2) a federal agency was required to periodically inspect permitted operations and issue violation orders. 774 F. Supp. at 1401. That “degree of authority” rendered the defendant agency responsible for ensuring compliance with the NHPA. *Id.* at 1402. Here, Michigan’s Section 404 program is not federally funded, and the State, not EPA, is responsible for ensuring compliance with the permits it issues. 33 U.S.C. § 1344(h). Thus, *Indiana Coal* is not relevant.

Finally, the Tribe argues that special attention should be given to its interests, Op. Br. at 26-29, but it identifies no hook in Section 106 for its contention that undertakings that are not funded or licensed by a federal agency require NHPA consultation as long as a tribe’s interests are at issue. Nor does it identify cases that interpret the plain language of Section 106 to require consultation here. The government understands the importance to the Tribe in ensuring that potential threats to its historic and cultural resources are given due



consideration. But the parties and this Court are bound by Section 106, which currently does not apply to undertakings that are not funded or licensed by a federal agency.

\* \* \*

Thus, the district court properly denied the Tribe's motion to amend the complaint.

### CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

I certify that this brief complies with the type-volume limits of Federal Rule of Appellate Procedure 32(a)(7) and Seventh Circuit Rule 32(c) because it contains 10,333 words, exclusive of portions of the brief described in Federal Rule of Appellate Procedure 32(f). The word-count feature in Microsoft Word was used to make this determination.

The brief further complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in 13-point Garamond, a proportionally spaced typeface.

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**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit using the Appellate Electronic Filing system on May 6, 2019. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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