

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, ANDREW WHEELER, Acting Interim
Administrator, U. S. Environmental Protection Agency, U. S. ARMY CORPS OF ENGINEERS,
MARK T. ESPER, Secretary, U.S. Army,

Defendants / Appellees,

AQUILA RESOURCES, INC.,

Intervenor-Defendant / Appellees.

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

**BRIEF AND REQUIRED SHORT APPENDIX OF PLAINTIFF-APPELLANT
MENOMINEE INDIAN TRIBE OF WISCONSIN**

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Short Caption: Menominee Indian Tribe of Wisconsin v. U.S. Environmental Protection Agency, et al.

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- ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

Not applicable.

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INTRODUCTION

Since time immemorial, the Menominee Indian Tribe of Wisconsin (the “Menominee Tribe” or “Tribe”) has hunted, fished, farmed, and lived in the areas surrounding the river that bears the Tribe’s name. Defendant-Intervenor Aquila Resources, Inc. (“Aquila”) proposes to construct and operate the Back Forty open-pit sulfide mine (the “Mine”) and processing facility on the banks of the Menominee River. The mouth of the Menominee River is the Tribe’s sacred place of origin, and there are numerous sites that are culturally, historically, and spiritually important to the Tribe along the River’s banks, including many sites on land on and near the Mine site. Aquila proposes discharges of dredge and fill material related to construction and operation of the Mine that threaten to damage and destroy areas of the River and its adjacent wetlands, harming the Tribe’s ancestral lands. Neither of the federal agencies involved in this matter, the U.S. Army Corps of Engineers (the “Corps”) or the U.S. Environmental Protection Agency (“EPA”) (collectively the “federal agencies”) have consulted with the Menominee Tribe under the National Historic Preservation Act (“NHPA”) concerning the Mine’s impacts on cultural and historic resources. These resources will be severely affected and likely damaged by the Mine. The federal agencies claim no consultation is required where the Clean Water Act permitting at issue has been delegated to the State of Michigan.

Under the Clean Water Act, discharges of dredge or fill to waters are prohibited unless the discharge is permitted by the Corps under the Section 404, 33 U.S.C. § 1344, (“Section 404 Permitting”). While the State of Michigan exercises delegated authority to issue some Section 404 permits, it did not have the authority to issue the Section 404 Permit for the Back Forty Mine, because the Clean Water Act forbids delegation of Section 404 permitting for waters that are or can be used to transport interstate commerce, such as the Menominee River. 33 U.S.C. § 1344(g). The Corps and the EPA denied the Menominee Tribe’s request that the federal

agencies assume jurisdiction of the Section 404 permitting process for the Mine, unlawfully ceding jurisdiction over the Permit to the State of Michigan.

Finally, while EPA exercised its authority over a delegated permit program and objected to the State's proposed Section 404 Permit based on concerns that it did not comply with 40 C.F.R. part 230, EPA withdrew its objections based only on promises from the State of Michigan that it would include some general, as-yet-unspecified requirements in the Permit.

This appeal seeks reversal of the District Court's Order dismissing the case for lack of jurisdiction and denying the Menominee Tribe's Motion to Amend to include claims under the NHPA and challenging EPA's withdrawal of its objections to the Permit.

JURISDICTIONAL STATEMENT

This is an appeal from a final decision in a federal question case. 28 U.S.C. §§ 1291 and 1331. The questions in this case arise under the Clean Water Act, 33 U.S.C. § 1344, the National Historic Preservation Act, 54 U.S.C. §§ 300320 and 306108, and under 40 C.F.R. pt. 230. The claims at issue are brought pursuant to the Administrative Procedure Act, 5 U.S.C. § 701 et seq.

The final decision of the District Court dismissed the Menominee Tribe's initial complaint on Motions to Dismiss under Fed.R.Civ.P. 12(b)(1) and (6) and denied as futile the Menominee Tribe's Motion to Amend its Complaint to add two additional claims under Fed.R.Civ.P. 15. The District Court entered final judgment on December 19, 2018. Dkt. #42, Joint Appendix pp. 1-19.¹ The Menominee Tribe filed this appeal on January 17, 2019.

¹Record documents cited repeatedly in this brief are included in the Joint Appendix accompanying this brief. Per the direction of the local rules, the first document in the Joint Appendix is the decision appealed from and it is attached to this brief. The remainder of the Joint Appendix documents are separately bound. Citations follow the convention of the district court docket number followed by the pages in the Joint Appendix, referenced as "JA #". Documents cited only once are not included in the Joint Appendix and will be referenced by their district court docket number only.

STATEMENT OF ISSUES

1. The District Court erred when it dismissed the Menominee Tribe's claim that the Corps' refusal to assume primary jurisdiction over the Clean Water Act Section 404 Permit for the Back Forty Mine violated the Clean Water Act, ruling that the refusal was not final agency action, but simply a restatement of the earlier decision to generally delegate Section 404 permitting to the State of Michigan.

2. The District Court erred when it denied the Menominee Tribe's Motion to Amend its Complaint to include a claim under the National Historic Preservation Act, ruling that the Amendment would be futile because the federal agencies had no obligation to consult with the Tribe on a delegated state action over which the agencies retained significant involvement and authority, despite plain language of the statute and no controlling case law.

3. The District Court erred when it denied the Menominee Tribe's Motion to Amend its Complaint to include an APA claim challenging EPA's withdrawal of its Permit objections, ruling that the Amendment would be futile because the withdrawal was committed entirely to EPA's discretion, despite a significant regulatory structure underpinning EPA's objections.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

The Menominee Indian Tribe of Wisconsin is a federally-recognized Indian tribe. Dkt. 1 at JA 23. The Menominee Tribe's ancestral territory spans the area now known as the State of Wisconsin and parts of the States of Michigan and Illinois. *Id.* In treaties with the United States in 1831, 1832, 1836, 1848, and 1854, the Menominee Tribe ceded a large portion of their ancestral territory, including the Menominee River which is currently the border between Wisconsin and the Upper Peninsula of Michigan, and areas along the River including Green Bay.

The Menominee Tribe retained a tract of land in reserve lying along the Wolf River in Wisconsin, which is the present day Menominee Indian Reservation. *Id.*

Since time immemorial the Menominee Tribe has lived, hunted, fished, gathered, farmed and otherwise occupied and used the ceded lands, including lands along and at the mouth of the Menominee River. *Id.* at JA 24. The mouth of the Menominee River where it flows into Green Bay is the Menominee Tribe's sacred place of origin. *Id.* The Menominee Tribe has also practiced, and continues to practice, cultural and religious ceremonies within reservation lands, ceded lands, and ancestral lands around the Menominee River. *Id.* Important ceremonial, cultural, and historic sites on or near the Menominee River, including burial mounds, ancient agricultural sites, dwelling sites, and cultural sites such as dance rings, are still present along the River on both the Wisconsin and Michigan banks and extending into the surrounding forested areas, all areas where the Mine and its processing facilities will be located. *Id.* Some of these sites have been identified by historians and researchers and/or by consultants for Aquila, and some are already listed as eligible or potentially eligible for listing on the National Register of Historic Places. *Id.* No one has yet conducted a truly comprehensive survey of the area to determine the full extent of Menominee ceremonial, historical, and cultural sites in the areas that will be affected by the Mine. *Id.*

The Menominee River has long been used in interstate commerce. In December 1979, consultants retained by the Corps reported that the Menominee River is an interstate water which is presently used, or susceptible to use, in its natural condition or by reasonable improvement, as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark in accord with the definition in 33 U.S.C. § 1344(g) and Section 10 of the Rivers and Harbors Act. Dkt. 1 at JA 29 and Dkt. 21-3 at JA 37-112. In January 1982, based at least in part upon

the 1979 Report and supporting research and at the direction of the commanding Colonel, the Corps' District Counsel found and recommended that the Menominee River and adjacent wetlands should be included on a list of "Section 10" waters. Dkt. 1 at JA 29. *See also* Dkt. 21-4 at JA 113-116.² The Menominee River is and continues to be used for interstate commerce, including the portions of the River at the location of, and downstream from, the proposed Mine. Dkt. 1 at JA 29.

In the early 1980s, EPA approved the delegation of Section 404 permitting under the Clean Water Act to the State of Michigan under 33 U.S.C. § 1344(g). *Id.* *See also* Dkt. 21-5 at JA 117-125, Dkt. 21-6, and Dkt. 23-2 at JA 154-162. The 1984 Memorandum of Agreement ("Agreement") between the Corps and the State of Michigan, restates the exact language of the Clean Water Act in describing that waters presently used or that could be used in their natural condition or with reasonable alteration, and their adjacent wetlands, are not delegated to Michigan for Section 404 permits. *See*, DKT. 21-5 at JA 119. The original attached list, provided during this litigation, includes the Menominee River, but specifies only the first 1.86 miles upstream of the mouth as exempted from the delegation for Section 404 permitting. Dkt. 23-3 at JA 168.

In November 2016, Aquila applied to the Michigan Department of Environmental Quality ("MDEQ") for a Clean Water Act Section 404 Permit to discharge dredge or fill material related to construction and operation of the proposed Mine and processing facility on a site adjacent to the Menominee River. These discharges would alter and/or destroy waters and

² "Section 10" is a reference to the Rivers and Harbors Act and includes interstate waters which have been used, or susceptible to use, as a means to transport interstate or foreign commerce. 33 U.S.C. § 403 and 33 C.F.R. § 329.4.

wetlands on and near the Mine site, including alterations that would affect water levels in the region and the river. Dkt. 1 at JA 30 and 31.

On August 21, 2017, the Menominee Tribe sent a letter to EPA and the Corps requesting consultation on the Mine permitting process and raising objections and concerns about the State of Michigan overseeing permitting for the Mine. Dkt. 1 at JA 31 and Dkt. 21-7 at JA 135-141. The Tribe's letter advised the agencies that the Menominee River at the location of the Mine, and the adjacent wetlands, currently meets the definition in 33 U.S.C. § 1344(g) of waters that are used in interstate commerce, requiring permitting to be done by the Corps, not the state. *Id.* The Tribe's letter noted that the 1979 navigability report prepared for the Corps found that the River and adjacent wetlands meet the criteria for Section 10 waters, meaning that the River was used in interstate commerce at that time as well. *Id.* The Tribe's letter also identified current evidence of interstate commerce on the Menominee River along its length. *Id.* The Tribe advised that the federal agencies, and not the State of Michigan, had jurisdiction over the Section 404 permit for the Mine, and asked the federal agencies to review the matter and make a jurisdictional determination. *Id.*³

On September 28, 2017, the Corps responded and declined to exercise jurisdiction over the Section 404 permit for the Mine. Dkt. 21-8. The Corps pointed to the State of Michigan as the delegated authority issuing the Mine's Section 404 permit. Dkt. 1 at JA 42 and Dkt. 21-8 at JA 142-43. In the Corps' response, the Corps described the permitting process as it is conducted when delegated to a state and made clear that this was the applicable permitting process for the Section 404 Permit for the Back Forty Mine. *Id.* On October 13, 2017, EPA responded to the

³ In a 60-day notice letter, sent by the Menominee Tribe to the federal agencies on November 6, 2017, the Tribe resubmitted and provided additional information concerning past and current use of the Menominee River in interstate commerce. Dkt. 21-10 at JA 147-153.

Tribe's letter by offering to "consult" with the Tribe, but did not define what it meant by "consult" and did not agree to federal jurisdiction over the Section 404 permit. Dkt. 1 at JA 42; Dkt. 21-9 at JA 144-46.

As required by 33 U.S.C. § 1344(j) for delegated permits, Michigan submitted the proposed final Permit to EPA for review on December 8, 2017. On March 8, 2018, EPA objected to the Permit on a number of grounds including:

- Failure to adequately describe the Mine project such that the extent of the Mine's impacts on aquatic resources could not be adequately assessed;
- Because the impacts on aquatic resources could not be assessed, there was also a failure to determine whether or not those impacts had been minimized or could be avoided as required by EPA's rules;
- Failure to demonstrate that the Mine's discharges to the Menominee River and related wetlands will meet applicable water quality standards as required by the Clean Water Act and EPA rules, including a failure to provide sufficient information for monitoring locations, minimization measures, or adaptive management procedures to prevent leaching of toxic compounds from mine facilities and pit;
- Failure to adequately characterize the Mine's secondary impacts on area wetlands as required by EPA rule, because it lacked information on how the Mine's water drawdown of approximately 125,000 gallons per day will affect surrounding wetlands;
- Failure to adequately investigate and properly assess the proposed wetland mitigation measures as required by EPA rules.

See Dkt. 35-3 and 35-4 at JA 195-205. ("Objections"). EPA directed that in order to address its Objections, Michigan shall require Aquila to provide additional information on the Mine project, including:

- Adequate characterization of wetland impacts, including secondary wetland and stream impacts;
- Additional detailed information regarding monitoring, impact criteria, and specific adaptive management mechanisms sufficient to demonstrate avoidance

and minimization of impacts to aquatic resources and preventions of contamination;

- Demonstration with supporting documentation that the Mine site is protective of water quality in the Menominee River and other waters throughout the area for both the life of the Mine and post-mine closure;
- Additional documentation for assessing Menominee River bank stability and erosion potential in order to assess and demonstrate mine integrity;
- Additional documentation necessary to demonstrate that the proposed preservation area meets the requirements of federal mitigation requirements.

Id. MDEQ had 90 days to address and correct EPA's objections. 33 U.S.C. § 1344(j).

On May 3, 2018, EPA issued a preliminary response to MDEQ and Aquila's response to EPA's objections. Dkt. 35-5 at JA 206-208. MDEQ provided a revised draft permit to EPA on May 25 2018 and on June 1, 2018 EPA formally withdrew its Objections. *See* Dkt. 41-1 at JA 209-210. EPA claimed that EPA's Objections had been satisfied based in large part on the State of Michigan agreeing to place general provisos in the Permit that will require future actions, reviews, and approvals to occur after the final permit is issued and without public input. *Id.* Few details of the future actions, reviews, and approvals have been specified or disclosed by EPA.⁴ Neither the May 3, 2018 letter nor the June 1, 2018 letter cites to record evidence supporting EPA's decision. *See generally*, Dkt. 35-5 and 41-1. Nor do the letters provide any analysis, detail, or explanation of why future promises or conditions that will not be specified or imposed until after some unspecified time after the final permit was issued would address EPA's Objections to the Section 404 Permit under EPA's Section 404 Guidelines. *Id.* Upon withdrawal of EPA's Objections, Michigan issued the final Permit on June 4, 2018. Dkt. 26.

⁴ For some of EPA's Objections, the May 3, 2018 letter simply states that Aquila had provided information that "resolved" EPA's concerns without additional detail, analysis or explanation. *See*, Dkt. 35-5 at JA 206.

Throughout the Section 404 permitting process, no federal or state agency has consulted with the Menominee Tribe as required by the National Historic Preservation Act (“NHPA”). On August 21, 2017, the Menominee Tribe described to EPA and the Corps the application of NHPA requirements that would be and are part of the Corps’ and EPA’s responsibilities as federal agencies for the cultural and historic sites along the Menominee River which would be affected by the Section 404 Permit for the Mine. *See* Dkt. 21-7 at JA 136 and 141. In its October 13, 2017 response to the Tribe, EPA offered to “consult” with the Tribe regarding the Section 404 permit process, but it did not specify under which legal obligation, if any, it was offering to do so, nor did it specify topics on which it would “consult.” Dkt. 21-9 at JA 144-46. EPA did not mention NHPA obligations and no consultation under the NHPA has occurred with either EPA or the Corps (or, for that matter, with the State of Michigan) concerning the Menominee Tribe’s cultural and historic sites near the Mine that will or may be adversely affected by the Section 404 Permit. In this litigation, EPA and the Corps have argued they have no obligation to engage in NHPA consultation with the Menominee Tribe.

II. PROCEDURAL HISTORY

The Menominee Tribe filed its original complaint on January 22, 2018 challenging the EPA and Corps’ refusal to assume jurisdiction over the Clean Water Act Section 404 permit for the proposed Back Forty Mine on the Menominee River. Dkt. 1 at JA 20-36. In lieu of Answers, the federal agencies and Aquila filed Motions to Dismiss, Dkt. 6 and 14, which were heard by the Court on August 1, 2018. At the request of the District Court, the parties submitted Supplemental Briefs on the Motions to Dismiss in August and September of 2018. Dkt. 31, 32, and 33.

On September 10, 2018, while the Motions to Dismiss were pending, the Menominee Tribe filed its Motion to Amend the Complaint to add two claims that had ripened when MDEQ

issued the final Permit in June of 2018. Dkt. 34 and 35. The Menominee Tribe sought to add a claim that the federal agencies violated the NHPA by failing to consult the Tribe concerning the historic and cultural sites affected by the Mine. Dkt. 35 and 35-1 at JA 192. The Tribe also sought to add a claim that EPA's withdrawal of its Objections, leading to the final permit, was arbitrary and capricious, contrary to law, and contrary to or unsupported by the record. Dkt. 35-1 at JA 191. On October 25, 2018, the federal agencies and Aquila objected to the Motion to Amend, Dkt. 38 and 39, and the Tribe replied on November 1, 2018. Dkt. 40.

On December 19, 2018, the District Court issued its order and final judgment, dismissing the original Complaint and denying leave to amend to add claims. Dkt. 42 at JA 1-19. On January 17, 2019, the Menominee Tribe filed its Notice of Appeal, Dkt. 44, and this appeal is now pending.

SUMMARY OF ARGUMENT

The District Court erred in dismissing Count II of the Menominee Tribe's Complaint and in denying the Tribe's Motion to Amend its Complaint to add claims under NHPA and to challenge EPA's withdrawal of its Permit objection.

The District Court erred in dismissing Count II because the Corps' September 2017 letter refusing to take primary jurisdiction over the Mine Permit is a final agency action and is not a reiteration of the overall decision to delegate 404 permitting to the State of Michigan. The September 2017 letter consummated the Corps' decision-making on whether to assume primary permitting jurisdiction over the Section 404 Permit for the Back Forty Mine and the Corp's decision had legal consequences for the Tribe. Contrary to the District Court's finding, Count II is an as-applied challenge to the Corps' refusal to exercise jurisdiction over this specific Section 404 Permit for this Mine on the Menominee River and as such it is a final agency action, challengeable by the Tribe under the APA.

The District Court also erred in denying the Tribe's request to Amend its Complaint, because the Tribe's Motion to Amend is not futile. The District Court acted contrary to the case law of this Circuit which directs that futility is a narrow concept that should be applied sparingly and that it should not be applied where law is unsettled.

Here, the law with respect to NHPA obligations to consult with Indian tribes on actions taken within a federal program that has been delegated to a state is not settled. First, it has not been addressed in this Circuit nor any district courts in this Circuit outside of this case. Second, the District Court relied on a single case from the D.C. Circuit that the Tribe submits was wrongly decided because it is contrary to the plain language of the statute and the stated intent of Congress.

With respect to the Motion to Amend to challenge EPA's withdrawal of its Objection, the District Court erred when it ruled that the amendment would be futile because the EPA had complete discretion and there would be "no law to apply" by the court in determining the claim. There is law to apply. Under the case law of this Circuit, a court will presume an agency decision is reviewable and will look to statute as well as an agency's own rules and guidelines in assessing whether there is law to apply to guide a court's decision. Here, the Clean Water Act directs EPA to develop guidelines for 404 permitting, and it authorizes EPA to prohibit placement of dredge or fill wastes when EPA determines that a discharge may have certain specified adverse effects. EPA has developed extensive rules and guidelines for Section 404 permitting and it applied and cited to those rules and guidelines in objections to the Mine Permit here, objections that EPA then arbitrarily withdrew.

STANDARD OF REVIEW

This Court applies *de novo* review of a ruling on a Motion to Dismiss under Rules 12(b)(1) and 12(b)(6), Fed. R. Civ. P., accepting a plaintiff's allegations as true and drawing all

permissible inferences in the plaintiff's favor. *West Bend Mut. Ins. Co. v. Schumacher*, 844 F.3d 670, 675 (7th Cir. 2016); *Johnson v. Orr*, 551 F.3d 564, 567 (7th Cir. 2008), and *Hay v. Ind. State Bd. of Tax Comm'rs*, 312 F.3d 876, 879 (7th Cir. 2002).

If the denial of a Motion to Amend is based on the futility of the amendment, this Court will also apply a *de novo* standard of review to assess the claimed futility of the Motion to Amend. *Runnion ex rel. Runnion v. Girl Scouts of Greater Chicago*, 786 F.3d 510, 524 (7th Cir. 2015). *See also, O'Boyle v. Real Time Resolutions, Inc.*, 910 F.3d 338, 347 (7th Cir. 2018).

ARGUMENT

I. THE DISTRICT COURT ERRED IN DISMISSING THE MENOMINEE TRIBE'S CLAIM THAT THE FEDERAL AGENCIES MUST EXERCISE PRIMARY JURISDICTION OVER THE SECTION 404 PERMIT FOR THE MINE.

Count II of the Menominee Tribe's original Complaint asked the District Court to find that jurisdiction over the Section 404 Permit for the Mine on the Menominee River and adjacent wetlands must be with the Corps (and EPA) in the first instance, and not with the State of Michigan, under the plain language of the Clean Water Act and the facts as plead by the Tribe. The Clean Water Act, 33 U.S.C. § 1311, prohibits the discharge of pollutants to waters of the United States, absent a permit. Section 404 of the Act, 33 U.S.C. § 1344, authorizes the Corps to issue permits for discharge of dredged or fill material into waters of the U.S. subject to guidelines developed with EPA. Under 33 U.S.C. § 1344(g), EPA may authorize the delegation of Section 404 permitting to a state that meets certain minimum requirements, but there are limitations on waters where permits can be delegated. Section 1344(g) expressly prohibits the delegation of 404 permitting in any waters that "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 wetlands adjacent thereto." Under Count II of its Complaint, the Menominee Tribe argues that the Corps' decision to refuse primary federal jurisdiction over the

Section 404 Permit for the Mine is arbitrary and capricious and contrary to law because the Permit is not properly delegated to the State of Michigan. The Menominee River at the location of and downstream of the Mine is used and is susceptible to use in interstate commerce. The District Court erred when it dismissed Count II finding that there was no final agency action reviewable under the APA.

A. Final Agency Action Is Reviewable By Courts Under The Administrative Procedure Act.

Under the APA, a court will reverse a final agency action that is arbitrary and capricious and contrary to law where the agency relies on factors Congress did not intend it to consider, entirely fails to consider an important aspect of the problem, offers an explanation for its decision that is counter to the evidence, or is so implausible that it could not be ascribed to a difference in view or agency expertise. 5 U.S.C. § 706(2); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Courts have long recognized that, while not all-encompassing, judicial review of agency action has a broad sweep. *F.T.C. v. Standard Oil Co. of California*, 449 U.S. 232, 238, n. 7 (1980); *Whitman v. American Trucking Ass'ns.*, 531 U.S. 457, 478 (2001). One limitation is that the agency action under review must be final agency action. 5 U.S.C. § 706.

An agency action is “final” and subject to review when two conditions are satisfied. *U.S. Army Corps of Engineers v. Hawkes Co., Inc.* ___ U.S. ___, 136 S.Ct. 1807, 1813 (2016) (citing *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)) (citations omitted). First, the action must mark the consummation of the agency’s decision process; it must not be tentative or interlocutory in nature. *Id.* Second, the action must be one by which rights or obligations have been determined or from which legal consequences flow. *Id.* In *Hawkes*, the Supreme Court noted that the possibility that an agency action may be revised in the future based on additional or new

information does not defeat the finality and reviewability of a decision. *Hawkes*, 136 S.Ct. at 1814. The Court found that even though the action under consideration in *Hawkes* had not resulted in an enforcement action or other affirmative negative consequences, a jurisdictional determination by the Corps does alter rights or ultimately have legal consequences for the party, potentially by narrowing the range of options or recourse for the party. *Id.* Finally, the fact that the party had other avenues for seeking relief or avoiding negative consequences, did not defeat finality and reviewability of the Clean Water Act jurisdictional determination at issue. *Id.* at 1815-16.

Agency action need not take a particular form in order to meet the two conditions for finality set forth in *Bennett* and reiterated by *Hawkes*. Overall, courts apply the finality test in a “flexible and pragmatic” way. *Id.* at 1815; *Ciba-Geigy Corp. v. U.S. Ent’l Pro. Agency*, 801 F.2d 430, 437 (D.C.Cir. 1986) (citing *Abbot Laboratories v. Gardner*, 387 U.S. 136, 149-50 (1967)). *See also, Havasupai Tribe v. Provencio*, 906 F.3d 1155, 1162-63 (9th Cir. 2018) (where the court finds an agency Mineral Report was a practical requirement to continued operation of an existing mine, constituting final agency action subject to review). Specific to this case, courts have repeatedly found that a letter from an agency can constitute final agency action as long as the two conditions are met. *See, e.g., Western Ill. Home Health Care v. Herman*, 150 F.3d 659, 662-63 (7th Cir. 1998). *See also, City of Dania Beach v. Fed’l Aviation Admin.*, 485 F.3d 1181, 1187-88 (D.C.Cir. 2007) and *Ciba-Geigy Corp. v. U.S. Ent’l Pro. Agency*, 801 F.2d at 435-37.

B. The Corps’ September 2017 Letter Is Final Agency Action On The Issue Of Corps Jurisdiction Over The Section 404 Permit For The Back Forty Mine.

The Corps’ refusal to assume jurisdiction over the Permit in the Corps’ September 2017 Letter, was final agency action reviewable under to the APA, 5 U.S.C. § 704. In August of 2017, the Tribe wrote to the Corps and to EPA regarding the Mine and the Section 404 Permit that was

in process at that time. Dkt. 21-7 at JA 135-41. The Menominee Tribe's letter noted that while Section 404 permitting could be delegated to states, and that it had generally been delegated to Michigan in the 1980s, the Clean Water Act excluded state permitting on certain waters and their adjacent wetlands. *Id.* at JA 136-39. Specifically, the Tribe pointed out to the Corps, with evidence, that the proposed Back Forty Mine Section 404 Permit would affect wetlands and the Menominee River, the interstate boundary between Michigan and Wisconsin, along a stretch of the river that had been and was currently used in interstate commerce. *Id.* at JA 138-39. The Tribe informed the Corps that the Mine posed a threat to the many Menominee historic and cultural sites that have been, over time, identified and mapped throughout the area of the proposed Mine, and that the Mine would be near and have effects on the site of the creation of the Menominee People (the mouth of the Menominee River). *Id.* at JA 136.

The Tribe also detailed a number of legal consequences and rights for the Tribe that are affected by the Corps' failure to assume and exercise jurisdiction over the Section 404 permitting process for the Mine, including protections under the National Environmental Protection Act ("NEPA") and NHPA. 42 U.S.C. § 4332; 54 U.S.C. §§ 300320 and 306108. With the Corps as the permitting entity, those federal statutes would apply requiring an Environmental Impact Statement under NEPA and formal consultation with the Tribe regarding impacts to cultural and historic resources under NHPA. With the State of Michigan permitting, the Tribe lost rights and protections under both of those statutes.⁵ The Tribe requested a jurisdictional determination regarding the Mine Permit on the Menominee River from the Corps and requested consultation. *Id.*

⁵ As set forth in Part II below, the Menominee Tribe argues that NHPA should apply even to the delegated program and that the Tribe is thereby still entitled to consultation, but the Corps, EPA, and Aquila strongly dispute this claim.

With its September 2017 Letter, the Corps made a final determination on whether the Corps would assume primary jurisdiction over the Permit for the Back Forty Mine from the State of Michigan. Dkt. 21-8 at JA 142-43. The Corps refused to take jurisdiction over the permitting process from the State, despite evidence of current use of the Menominee River in interstate commerce at and near the site of the Mine. *Id.* The Corps also ignored the Tribe's evidence of adverse impacts to the Tribe's rights. The Corps explained that the only circumstance under which it would take over the Permit would be if EPA objected to the State-issued permit, the State then failed to respond to EPA objections, and EPA ultimately referred the Permit to the Corps. *Id.* This process is one in which the Corps only assumes permitting authority over a state-delegated permit and is not the process whereby the Corps is actually the primary permitting entity for waters on which permits cannot be delegated. *Id.*

Plainly, the September 2017 Letter represented the consummation of the Corps' decision-making on the Tribe's request that the Corps be the primary permitting entity on the Permit for the Back Forty Mine. The Corps made clear that it refused to assume primary jurisdiction and the State would remain the permitting entity and that the state-delegated process would be the only process available on the Permit.

Further, the Corps' September 2017 Letter is a decision that carries significant legal consequences for the Menominee Tribe relative to the Mine Permit. Chief among those is that various federal statutes and requirements that would apply if the Corps was the primary permitting agency would no longer apply with the shift to the State. For example, NEPA normally requires a federal Environmental Impact Statement which would include thorough review and identification of all impacts from the Mine, including those downstream to the mouth of the River. 42 U.S.C. § 4332(c). It would also include identification of all known and

potential sites of historical and cultural significance to the Tribe. 40 C.F.R. § 1502.16(g). The State did not apply NEPA's requirements, and with the Corps' refusal to exercise permitting authority, NEPA's requirements will not be met.

Moreover, to the severe detriment of the Tribe, the Corps has not conducted NHPA consultation because of its refusal to take jurisdiction of the Section 404 permit. The Corps and EPA have made clear, particularly within this litigation, that they have no obligation to consult with the Tribe under the NHPA, when the State of Michigan is the primary permitting entity, disregarding the adverse impacts that will occur to the Tribe's sacred and historical sites. Michigan did not consult with the Tribe under NHPA. The Menominee Tribe lost significant environmental and cultural protections in the Corps' refusal to take jurisdiction over the Permit for the Mine, fundamentally altering the Tribe's rights and the legal consequences of this Permit for the Tribe.

Finally, the State of Michigan does not believe it is even issuing a delegated Section 404 permit or that Clean Water Act requirements and regulations apply, meaning that the state may refuse to even apply foundational legal requirements that would clearly apply were the Corps the permitting agency.⁶ In the state Administrative proceeding over the state-issued wetlands permit, the Administrative Law Judge stated that "we need not concern ourselves with federal law in this case." *See, In the Matter of Petitions of Thomas Boerner, et al.*, Docket No. 18-013058 Order on Motion for Stay, January 29, 2019, Daniel L. Pulter, ALJ ("The [water resources division] does not issue a § 404 permit under the CWA...this Tribunal issues a Final Decision and Order under Part 303 of the [Natural Resources and Environmental Protection Act],

⁶ The Tribe disputes the ALJ's characterization of whether the Clean Water Act applies to the Permit.

not federal wetlands law.”)⁷ The ALJ made clear that the State of Michigan is applying and administering only state laws, meaning that when the Corps refused to assume jurisdiction over the Permit, federal Clean Water Act permitting requirements would apparently not be applied by the decision-maker in the Michigan process. Again, this significantly alters the Menominee Tribe’s legal rights and the legal consequences for the Tribe.

The Corps’ September 2017 Letter to the Tribe was the consummation of the Corps’ decision regarding Corps jurisdiction over the Permit for the Mine and that decision fully altered the rights and the legal consequences for the Menominee Tribe in the 404 permitting process. Because both conditions for determining a final agency action have been met in this case, the District Court erred when it dismissed the Tribe’s APA claim against the Corps and EPA for refusing federal jurisdiction over the Permit.

C. The District Court Erred In Finding That The September 2017 Letter Was Simply A Reiteration Of The Overall Delegation Of Section 404 Permitting To The State.

Even though the September 2017 Letter meets the two conditions necessary to be a final agency action, the District Court dismissed the Tribe’s claims regarding Section 404 permitting jurisdiction because it found the Letter was a reiteration of the initial 1980s decision to delegate Section 404 permitting to the State of Michigan. But the District Court erred in making that determination, because the Corps’ rejection of the Tribe’s request to exercise federal jurisdiction over this Permit is not a decision previously made and the court misapplied cases on this point.

⁷ The Order is attached. Under Fed. R. Evid. 201(b) and *In the Matter of Lisse*, 905 F.3d 495, 496 (7th Cir. 2018) this Court may take judicial notice of the Order in the contested case.

1. *The Corps has not previously made a decision regarding federal jurisdiction over this Permit for this Mine on the Menominee River.*

The District Court wrongly conflates 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 when it found that the September 2017 Letter is simply a reiteration of the decision to delegate 404 permitting to Michigan. The District Court bases its finding solely on the fact that after EPA delegated the Section 404 program to Michigan, under 33 U.S.C. § 1344(g), the Corps' 1984 Memorandum of Agreement with Michigan refers to a 1981 list of waters that are not delegated and at that time, the list included only 1.84 miles of the Menominee River from its mouth upstream to a bridge. *See*, Dkt. 23-3 at JA 168. This same MOA repeats the plain language of the Clean Water Act that "waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvements, as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark. . . including adjacent wetlands thereto," cannot be delegated to a state for individual or general Section 404 permitting under the Clean Water Act. 33 U.S.C. § 1344(g). *Id.* at JA 164. Nothing in the 1984 MOA references specific permits.

Relying on the plain language of the Clean Water Act, the Menominee Tribe requested a jurisdictional determination from the Corps specific to the Section 404 Permit for the Mine on the Menominee River and its adjacent wetlands. In support of the request to the Corps, the Tribe put before the Corps both current and historic evidence of how the Menominee River from the mouth to the Mine site and beyond is currently used in interstate commerce and is important to two states for fishing, boating, and recreation tourism in particular. The mouth of the River always has and continues to be of commercial/industrial importance in interstate commerce.⁸

⁸ The Corps listed only the first 1.86 miles because of a single highway bridge barrier to some

Even putting aside the 1979 and 1982 documentation of the Corps' own findings that the entire length of the Menominee River was and is used in interstate commerce, Dkt. 21-3 at JA 60-63 and 66-67 and Dkt. 21-4 at JA 115-16, the Tribe squarely placed a new decision in front of the Corps with new evidence relevant to this particular Section 404 Permit for this particular Mine on lands where many historical and cultural artifacts, burial sites, and dwelling and agricultural sites have now been identified.

The Corps never made a prior jurisdiction decision on this particular Permit, and it is with this Permit that the Tribe made its request. At no point has the Tribe challenged, nor does it here challenge, the overall delegation of Section 404 permitting to the State of Michigan. The Corps' decision on this Permit for this Mine that will directly affect the interests of the Tribe is not reiteration of a decision previously made because that decision has not previously been before the Corps. The District Court erred in conflating two distinct decisions into one and thereon dismissing Count II of the Tribe's Complaint.

2. *The District Court misapplied case law regarding agency reiteration and reopening of decisions.*

First, in its discussion of cases from the D.C. Circuit concerning agency reiteration of earlier decisions, the District Court fails to discuss and apply the foundational D.C. Circuit case on this and the related point of "reopener," *Public Citizen v. Nuclear Regulatory Comm'n*, 901 F.2d 147, 151-52 (D.C. Cir. 1990).⁹ In *Public Citizen*, the court laid down the basic parameters for assessing whether an agency decision is final agency action on a new decision or simply a

large industrial ships, *see* Dkt. 21-3 at JA 60, but the Clean Water Act provides the test is whether the River "is presently used" or could be used "in its natural condition or with reasonable alteration" for interstate commerce.

⁹ It does not appear that the Seventh Circuit has had occasion to address the issue of reopener or reiteration of agency decisions.

non-reviewable reiteration of an earlier decision. The court found that to the extent an agency's action necessarily raises an issue of lawfulness of an earlier decision, even a reiteration may be reviewable—that issues with the lawfulness of agency action should not so easily escape review. *Id.* The court pointed out that agencies have an ever-present duty to make sure their actions are lawful at any point in time. *Id.* Finally, the court made clear that any party can file a petition challenging the lawfulness of an agency action and then challenge the denial of that petition. *Id.*

The case here is precisely the situation the D.C. Circuit described as a reviewable final agency action in *Public Citizen*. The Tribe petitioned the Corps and EPA to exercise jurisdiction over the Permit for the Mine, challenging the lawfulness of delegation of this Permit to the State of Michigan. The Corps and EPA refused federal jurisdiction over this Section 404 Permit, despite evidence provided by the Tribe that the Menominee River was used and was susceptible to use in interstate commerce, making delegation of the Permit process to the State unlawful under the Clean Water Act, 33 U.S.C. § 1344(g). The Tribe then challenged, in this litigation, the Corps' decision on the Tribe's specific request to refuse primary jurisdiction over the Section 404 Permit as arbitrary and capricious and contrary to law. This case fits squarely within the parameters of a final agency action, where an agency has been petitioned on a specific matter and made a decision based on that petition. The District Court erred in failing to recognize and properly apply the court's ruling and guidance in *Public Citizen*.

Second, the District Court's reliance on a handful of cases regarding reiteration is misplaced as those cases are readily distinguishable from the case here. In each of the three cases cited and relied upon by the District Court, the regulatory agency had made repeated and specific rules, regulatory findings, and/or rulings on particular points of regulatory interpretation and implementation. *General Motors, Corp. v. U.S. Ent'l Pro. Agency*, 363 F.3d 442, 446-47

(D.C. Cir. 2004) (long-standing rule definition of hazardous waste); *Indep. Equipment Dealers Ass'n v. U.S. Environmental Protection Agency*, 372 F.3d 420, 424 (D.C. Cir. 2004) (long-standing regulatory requirement for imported goods); and *Clayton Cty. Georgia v. Fed'l Aviation Admin.*, 887 F. 3d 1262, 1264-65 (11th Cir. 2018). In each of the cases, the parties challenging the agency action were subjects of those earlier, repeated and specific rules and/or regulatory findings, and they were not raising new circumstances nor challenging a particular enforcement action or permit. *Id.* Rather, the agency was regulating and developing rules for business that applied to the parties that were seeking out-of-time review of longstanding rules or official agency pronouncements on, or implementation of, those rules. Finally, in each of the cases, the court pointed out that the parties' claims were premature; that each could more-appropriately bring as-applied challenges to a future agency action if the agency applied its definitions or rules to the party, precisely the situation here and a primary reason the District Court was incorrect in relying on these cases to dismiss the Tribe's claim. *Clayton Cty.*, 887 F.3d at 1270; *Indep. Equipment Dealers*, 372 F.3d at 427-28; *General Motors*, 363 F.3d at 452.

3. *The District Court's decision incorrectly eliminated the option of an as-applied challenge, the type of challenge asserted by the Menominee Tribe.*

The District Court also erred in failing to address the fact that the Tribe is bringing an as-applied challenge specific to the agencies' refusal to exercise jurisdiction over this Section 404 Permit for the Mine on the Menominee River. The Tribe does not challenge the overall delegation of the Section 404 program to the State of Michigan which involves many waterbodies and potentially many permits. As this Court has noted, the primary difference between an as-applied and a facial challenge is the relief. *Six Star Holdings, LLC v. City of Milwaukee*, 821 F.3d 795, 803 (7th Cir. 2016) (citing *Citizens United v. FCC*, 558 U.S. 310, 331 (2010)). Where 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. This case does not require a court to engage in analysis of a hypothetical application of the law to a number of instances. *See e.g., Center for Individual Freedom v. Madigan*, 697 F.3d 464, 475 (7th Cir. 2012). In dismissing the Tribe’s APA claims regarding Corps jurisdiction over this Permit, the District Court conflated facial and as-applied challenges and incorrectly eliminated as-applied as an option for the Tribe.

The Tribe has raised a specific applied challenge, requesting that the Corps assume primary permitting jurisdiction over this Permit only given the facts specific to the Menominee River and this Section 404 Permit. The Corps issued a final decision on that point, a decision that altered the rights and consequences for the Tribe. The cases relied on by the District Court do not support dismissal of this case and in fact pointedly support precisely what the Tribe did here: request a decision on a particular application of the Corps’ jurisdiction under the Clean Water Act, a request that the Corps denied in a final agency action.

II. THE MENOMINEE TRIBE’S MOTION TO AMEND TO INCLUDE A CLAIM UNDER THE NATIONAL HISTORIC PRESERVATION ACT IS NOT FUTILE.

A. Leave To Amend Should Be Freely Given With Futility A Narrowly Applicable Concept.

Leave to amend a complaint should be freely given when justice so requires. Fed. R. Civ. P. 15(a)(2); *Foman v. Davis*, 371 U.S. 178, 182 (1962). A motion for leave to amend “shall be denied *only* upon showing of bad faith, undue delay, futility, or undue prejudice to the opposing party.” *Life Plans, Inc. v. Security Life of Denver Ins. Co.*, 800 F.3d 343, 357-58 (7th Cir. 2015) (citing *Foman*, 371 U.S. at 182) (emphasis added).

The liberal standard for amending a complaint under Rule 15(a)(2) “is *especially important* in cases where *law is uncertain*.” *Runnion*, 786 F.3d at 520 (emphasis added).

“Applying the liberal standard for amending pleadings, especially in the early stages of a lawsuit,

is the best way to ensure that cases will be decided justly and on their merits.” *Id.* Applying a liberal standard gives the parties and the Court the needed latitude to make decisions on the merits and “based on a fully-briefed dispositive motion, not on a finding of futility” made within a more-constrained motion to amend context. *Id.* Only where it is certain from the face of a complaint that an amendment would be futile, should a district court deny leave to amend. *Id.* (citing *Barry Aviation Inc. v. Land O’Lakes Municipal Airport Comm’n*, 377 F.3d 682, 687 (7th Cir. 2004)). This Court has noted that cases of clear futility at the outset of a case, especially where law is uncertain, are rare and denying a Motion to Amend on the grounds of futility must be done in only the narrowest circumstances. *Id.*

That narrow set of circumstances does not exist here. As set forth below, the Tribe’s claims are not clearly insufficient or frivolous on their face. As to the NHPA claim, the plain language of the statute itself supports the Tribe’s claims. Moreover, the law with respect to the application of NHPA to delegated programs is not well-developed, is far from certain, and has not yet been addressed in this Circuit. The District Court relied exclusively on a decision from the D.C. Circuit, *National Mining Assoc. v. Fowler*, 324 F.3d 752 (D.C. Cir. 2003), but that case is contrary to the direction and intent of Congress, wrongly decided, and based on an earlier case with tenuous assumptions that could not apply here. At a minimum, the *Fowler* decision cannot serve as the sole basis to find that it is “futile” for the Tribe to amend its Complaint to assert claims under the NHPA. The District Court erred in denying the Tribe’s Motion to Amend to include a claim under the NHPA.

B. The Plain Language Of The NHPA Directs Consultation With The Tribe On A Permit That Is Delegated To The State But Over Which Federal Agencies Retain Oversight And A Measure Of Control.

1. *1992 Amendments to the NHPA expanded the definition of actions on which agencies must consult and emphasized protections for Indian tribes.*

At issue in this case is the 1992 statutory definition of an “undertaking,” the trigger for consultation under the NHPA. The NHPA is aimed at identifying and protecting areas of historical significance and it accomplishes those goals mainly through Sections 106 and 110.

The Tribe’s claim is under Section 106, which provides:

“The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any 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 (formerly 16 U.S.C. § 470f). Section 106 is triggered when there is an “undertaking.” In 1992, Congress amended the NHPA to include a statutory definition of the word “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 Federal 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 (formerly 16 U.S.C. § 470w) (emphasis added).

Congress delegated authority to promulgate regulations to the Advisory Council on Historic Properties (the “Council”). 54 U.S.C. § 304018(a). A federal agency undertaking that may affect historic properties requires the agency to commence Section 106 consultation early in the process and parties requesting consultation, here the Menominee Tribe. 36 C.F.R. §§

800.1(c) and 800.2(a)(4), (c), (d). The regulations provide for the assessment of adverse effects, resolution of adverse effects, and what happens with a potential failure to resolve adverse effects. 36 C.F.R. §§ 800.5-7.

An additional purpose of the 1992 Amendments was to clarify and emphasize Congress' intent to protect Indian tribes and foster protection of tribes' historic properties and sites. The 1992 NHPA statutory amendments extensively incorporated tribal involvement in historic preservation efforts by specifically establishing tribes as consulting parties under the NHPA, establishing programs to help tribes protect historic properties, encouraging coordination between tribes, federal agencies, and states in historic preservation planning, and providing an avenue to recognize tribal preservation programs. 54 U.S.C. § 302701 (formally 16 U.S.C. § 470a). Significantly and relevant here, tribes have rights to consultation off of tribal lands, in that agency officials are required to consult with tribes "that attach[] religious and cultural significance to historic properties that may be affected by an undertaking. This requirement applies regardless of the location of the historic property." 36 C.F.R. § 800.2(c)(2)(ii). The regulations also acknowledge the unique status of the relationship between tribes and the Federal government "set forth in the Constitution of the United States, treaties, statutes, and court decisions," by requiring that "[c]onsultation with Indian tribes should be conducted in a sensitive manner respectful of tribal sovereignty" and that it "must recognize the government-to-government relationship between the Federal Government and Indian tribes." *Id.* at § 800.2(c)(2)(ii)(B), (C).

Between 1992 and 2004, the Council regulations defined "undertaking" in a manner that mirrored the statute as amended in 1992. However, in 2004, in the wake of the D.C. Circuit's ruling in *Fowler*, the Council reluctantly amended its regulatory definition to remove the phrase

“those subject to State or local regulation administered pursuant to a delegation or approval by a federal agency” even though that language was consistent with the statute. 69 Fed. Reg. 40,544 (July 6, 2004). While the Council dutifully removed the phrase, the Council expressed confusion with, and antipathy to, changing the rule: “It is difficult for us to understand the basis for the proposed rule change given that the rule’s definition of ‘undertaking’ was taken verbatim from the 1992 revisions to the NHPA.” *Id.* at 40,550. It also expressed that the Council “disagrees with the [court’s] interpretation of the NHPA[.]” *Id.* As set forth below, the language of the statute must control to require formal agency consultation with the Menominee Tribe under the NHPA. The *Fowler* case is wrongly decided.

2. *Principles of statutory construction dictate that federal agencies must afford Indian tribes NHPA consultation for actions taken by states under delegated programs.*

It is a fundamental concept of statutory interpretation that a court must ensure the intent of Congress is respected and in ascertaining that intent, a court will look first to the plain language of the statute in question. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984), *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989); and *Scherr v. Marriott Intern., Inc.*, 703 F.3d 1069, 1077 (7th Cir. 2013). If the language is plain, the court’s function is “to enforce it according to its terms.” *Ron Pair*, 489 U.S. at 241. In determining the meaning of the language used, a court will look to the language itself, the specific context in which the language is used and the broader context, object, and policy of the statute as a whole. *Yates v. United States*, ___ U.S. ___, 135 S.Ct. 1074, 1081 (2015); *Commodity Futures Trading Comm’n v. Worth Bullion Group, Inc.*, 717 F.3d 545, 550 (7th Cir. 2013) (citations omitted). Courts will avoid construing statutes in a manner that runs counter to the overall statutory scheme. *Scherr*, 703 F.3d at 1077 (citing *In re Merchants Grain, Inc.*, 93 F.3d 1347, 1353-54 (7th Cir. 1996)).

Section 106 directs that federal undertakings are subject to consultation under the NHPA, with particular focus on the interests and historic and cultural concerns of Indian Tribes, even where artifacts or historic sites are on ceded lands. 54 U.S.C. § 302701. *See also*, 36 C.F.R. §800.2(c)(2)(ii). NHPA specifically defines “undertaking” per the 1992 amendment to include:

“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 Federal 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.*”

(emphasis added). Congress plainly meant to include programs like the Section 404 permitting, delegated by EPA to a state and subject to continuing EPA approval.

The legislative history of the 1992 amendments supports an interpretation that requires the consultation obligation to encompass federal authority delegated to states as in permitting programs. In the section-by-section analysis, the history indicates that the definition was added to include “rewording the definition of ‘undertaking,’ based on Advisory Council regulations, and specifically including programs carried out by States pursuant to Federal permits or funding[.]” S. Rep. 102-336 (1992) at 18. In addressing concerns that revising the term “undertaking” would disrupt current case law the Senate responded that the new definition would be consistent with case law, and that “the definition makes clear that Federal responsibility under section 106 is not waived where a State assists a Federal agency in implementing [] Federal authorities.” Cong. Rec. S17681 (Oct. 8, 1992). Congress’ intent to include federal permitting delegated to states as subject to NHPA consultation was plainly stated by Congress itself.

The language regarding delegated programs must also be read in light of Congress’ stated purpose for much of the 1992 Amendments to give added protection for tribes and its direction to protect tribes’ historic and cultural interests both on and off tribal lands. In this case, along the

river that bears the Tribe's name, there are numerous historic and cultural sites of critical importance to the Menominee Tribe and people. Further, there is no dispute that the open pit Mine and processing facility are directly within the area of those sites (and potentially on sites not yet identified in the area.) Interpreting "undertaking" to include an obligation by the Corps and EPA to consult the Menominee Tribe even if the 404 Permit is properly delegated to the State of Michigan, is in keeping with the stated purpose and intent of Congress to protect and require consultation with tribes in situations exactly like the one faced here by the Menominee Tribe.

Even if the Court finds, as apparently the *Fowler* court did, that the language is ambiguous, then additional canons of statutory construction direct that a court must give effect to all provisions in a statute ensuring that no one section or part of the statute is rendered unnecessary or superfluous because to do so would obviate Congress' intent in including that provision. *Scherr*, 703 F.3d at 1077. The District Court's finding that consultation must only occur when the activity is directly funded by the agency renders subpart (4) regarding delegated programs meaningless and superfluous because the direct funding requirement was already part of the statute before the 1992 amendments and the 1992 amendments were clearly meant to expand the existing definition of "undertaking". It would also render subpart (2) of the expanded definitions superfluous as that subpart "includes" projects receiving federal financial assistance (*i.e.* funded in part) by a federal agency as one of four things considered an "undertaking" requiring consultation. That subpart is rendered meaningless if federal licensing or funding are the only things defined as an "undertaking".

Further, if a permitting program is delegated to a state, then it is no longer a "project or program" funded in whole or in part by the 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. 40 C.F.R. § 233.11(d).¹⁰ There is no other reading that makes sense of the entire provision and that gives full effect of the intent and purpose and policy of the statute. The *Fowler* approach adopted by the District Court here effectively reads the 1992 definition out of existence.

In rejecting the Tribe's Motion to Amend the Complaint to include an NHPA claim, the District Court engaged in no statutory construction analysis and short-circuited the Tribe's claim, contrary to the express purpose and direction that the interests of tribes in particular be recognized and protected under the NHPA. Further, as set forth below, the District Court short-circuited critical analysis of the only case to address the issue, a case that on close examination appears to be wrongly-decided and at a minimum is not controlling in this Circuit.

3. *Case law from the D.C. Circuit regarding the definition of undertaking is mixed, is neither controlling nor persuasive, and does not dictate denial of a motion to amend.*

Neither the Seventh Circuit, nor any district court within the Circuit, has addressed the specific issue of whether NHPA consultation with a tribe is required for decisions made within a Section 404 program that has been delegated to a state. In fact, only the D.C. Circuit has addressed the delegated programs inclusion in the definition of an "undertaking" (and not within the Section 404 context or in a matter involving a tribe's historical artifacts) and it failed to give full effect to the language of the statute, resulting in what the Menominee Tribe asserts is an

¹⁰ Alternatively, to the extent that EPA and the Corps devote resources to review and administration of state-delegated programs, they are clearly funded, in part, by the federal agencies, meaning even under the District Court's constrained reading, the Permit for this Mine meets all the requirements for an "undertaking" requiring consultation with the Tribe.

incorrect decision. Given the confused and non-controlling nature of the case law, the District Court erred in denying the Tribe's Motion to Amend to include a claim to NHPA consultation.

Prior to the 1992 amendments, the D.C. District Court decided the issue of whether permitting decisions made by delegated states were federal undertakings pursuant to the NHPA in the affirmative. In *Indiana Coal Council, Inc. v. Lujan*, 774 F. Supp. 1385 (D.D.C. 1991), industry challenged the Office of Surface Mining ("OSM") regulations that allowed states that had been delegated primacy under the Surface Mining Control and Reclamation Act ("SMCRA"), to require historic surveys for sites that were the subject of a mining permit application and regulations to prevent or mitigate damages to those sites. *Id.* at 1387. The court rejected Industry's argument that state permit decisions under delegated authority were not undertakings, basing its reasoning on the fact that the federal agency had more than a de minimus involvement and it maintained "a powerful oversight role." *Id.* at 1401. SMCRA provided, as does the Clean Water Act here, that if a state was incapable of administering the program effectively, OSM is required to enforce the permit conditions and take over the permitting process. *Id.* Ultimately the court found that although OSM does not dictate states' decisions on individual permits, OSM retains indirect jurisdiction over the state programs and that SMCRA still required the federal agency to ensure compliance by state permitting programs. *Id.* at 1402. The court elaborated that "OSM cannot escape the duties imposed under Section 106 of the NHPA simply by delegating some of its duties to the states and yet still maintaining a powerful oversight role. Despite the indirect nature of OSM's jurisdiction in primacy states, ultimately the responsibility for compliance falls on OSM." *Id.* at 1403.

Both Industry and the federal agency appealed to the D.C. Circuit. *Indiana Coal Council, Inc. v. Babbitt*, Nos. 91-5397, 91-5405, 91-5406, 1993 WL 184022 (D.C. Cir. April 26, 1993).

The appeal was not resolved on the merits, however, because the court found Congress' 1992 NHPA amendments rendered the appeal moot. The court granted a motion to dismiss and the Circuit Court vacated the district court's opinion. *Id.* at *1. These are the amendments at issue here.

The District Court in this case relied on a subsequent, much-constrained definition of an undertaking from *National Mining Association v. Fowler*, 324 F.3d 752 (D.C. Cir. 2003), a definition contrary to the plain language of the statute, particularly the 1992 amendments, and canons of statutory construction outlined above. *Fowler* itself rests on a single case that is unlike the situation here and which employed a rather confused analysis of the 1992 amendments. The Menominee Tribe asserts that *Fowler* is wrongly decided and should not be adopted by this Circuit.

In *Fowler*, industry representatives had appealed the district court decision in *National Mining Association v. Slater*, 167 F.Supp. 2d 265 (D.D.C. 2001) where the lower court decision upheld Council regulations that adopted the 1992 statutory language including delegated programs as "undertakings" subject to NHPA consultation. The *Slater* court upheld the Council regulations finding that Congress intended to expand the definition of undertaking, formerly limited to federally funded or licensed projects, to include projects that required "merely" federal approval. *Id.* at 289-90. The court noted that this was the only way to interpret and give effect to Section 106 and the 1992 amendments. *Id.*

The D.C. Circuit in *Fowler*, however, reversed and found that the Council regulations, even though they mirror the statute as it existed after the 1992 amendments, were contrary to the statutory language in Section 106. The circuit court decided, with little discussion, that Section 106 consultation is limited to projects federally funded or licensed, the pre-existing language of

Section 106, effectively reading the 1992 amendment to include delegated programs out of existence. *Fowler* at 755.¹¹

Confusingly, both the District Court and the D.C. Circuit in *Fowler* relied on *Sheridan Kalorama Historical Association v. Christopher*, 49 F.3d 750 (D.C. Cir. 1995), another D.C. Circuit case, to reach their opposing conclusions, evidence of the somewhat cursory, at times conflicting, and certainly unsettled nature of the analysis of the NHPA issue in these cases. In *Sheridan Kalorama*, a historical association challenged the Secretary of State's failure to disapprove an application to demolish a chancery building for failure to consult under § 106. *Id.* at 753. The court's analysis of the issue rested on some assumptions, and, at-times, on internally-conflicting statements about the 1992 amendments. Further, at no point in any of these cases, did the particular rights of Indian tribes come into play.

First, the *Sheridan Kalorama* court analyzed the 1992 amendment even though it was enacted after the action complained of in the case, meaning the court was engaging in interpreting and relying on a statute that had not actually been applied to the facts underlying the case.¹² The court first said the amended definition narrowed the scope of an "undertaking," but then reasoned that doing so "would deprive the references to licensing in § 106 of any practical effect." *Id.* at 755. The court then inferred that Congress actually intended to expand the

¹¹ The *Fowler* decision doesn't make sense for a variety of reasons, not the least of which is the fact that if a project must be federally-licensed, then it obviously is not delegated to a state 404 permit program, because then it is state-licensed. Congress added language to include delegated programs over which federal agencies retain control as "undertakings" and the only logical way to read that is to encompass state licenses and permits issued under delegated programs.

¹² Plaintiffs argued for retroactive application of the 1992 amendments and rather than decide whether that was appropriate, the court simply analyzed the 1992 amendments as though they had been and should be applied. "Rather than explore the mysteries of retroactivity...we will assume for the sake of plaintiffs' argument that the 1992 definition applies..." *Sheridan Kalorama*, 49 F.3d at 755.

definition of an ‘undertaking’ – formally limited to federally funded or licensed projects – to include projects requiring a federal ‘permit’ or merely federal ‘approval.’” *Id.* This is the portion of the case that the lower court in *Fowler* understandably found supportive of applying a consultation obligation to a delegated program.

Second, the *Sheridan Kalorama* court addressed what role the federal agency actually played in the decision that may, or may not, be subject to NHPA consultation. The court was asked to impose a consultation obligation on the Secretary of State’s “failure to disapprove” Turkey’s decision to raze the building in question. *Id.* The D.C. court decided that the Secretary of State’s failure to disapprove of Turkey’s decision was not a federal undertaking under the 1992 amendments to the NHPA. “Such confusion is understandable’ for the 1992 amendment oddly appends the concepts of ‘licensing’ and ‘approval’ to the definition of ‘undertaking,’ even though the text of § 106 still applies by its terms only to federally funded or federally licensed undertakings.” *Id.* The court concluded that “however broadly the Congress or the Council define ‘undertaking,’ § 106 applies only to the original language of 106: 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.’” *Sheridan Kalorama* at 755. In baldly stating that it was disregarding “however broadly the Congress” might define “undertaking”, the Court effectively negated the 1992 amendments, applying only the definition of undertaking that existed in 106 prior to the 1992 amendments.

The D.C. Circuit in *Fowler* engaged in little discussion or analysis of how the 1992 amendments should be read or applied, instead simply citing to *Sheridan Kalorama* to find that § 106 is limited to projects that are federally funded or federally licensed, regardless of the language of the 1992 amendments. *Fowler* at 759 (citing *Sheridan Kalorama* at 755-56). The

Fowler court further repeated from *Sheridan Kalorama*, that only the statutory definition in § 106 applied “no matter how expansively Congress chose to define the word ‘undertaking.’” *Fowler* at 760. (emphasis added).

Given that the *Fowler* and *Sheridan Kalorama* cases, neither of which involved a tribe, are the only case law interpreting the 1992 amendments and given the extremely thin and questionable foundation for the decision in *Fowler* that runs counter to basic principles of statutory construction and the stated intent of Congress, it was premature and incorrect for the District Court to deny the Tribe’s Motion to Amend. The Menominee Tribe’s claim regarding NHPA consultation is plainly not futile, involving important questions of unsettled law. The Menominee Tribe requests this Court to reverse and remand to allow the Tribe to Amend its Complaint to include a claim under NHPA in order to allow the issues to be fully briefed, argued and analyzed.

III. EPA DOES NOT HAVE UNFETTERED AND UNREVIEWABLE DISCRETION TO WITHDRAW ITS OBJECTIONS TO THE SECTION 404 PERMIT.

The District Court denied the Menominee Tribe’s Motion to Amend to challenge EPA’s withdrawal of its Objections to the Permit. The court determined that amendment would be futile because the withdrawal of the Objections was consigned entirely to EPA’s discretion and therefore there was “no law for the court to apply.” Dkt. 42 at JA 9. As with the District Court’s denial of amendment as to the NHPA claim, the District Court incorrectly and too broadly applied the futility exception to amendment. EPA’s exercise of discretion is subject to Clean Water Act requirements as well as EPA’s own rules and EPA abused that discretion and acted arbitrarily and capriciously when it withdrew its Objections to the Mine Permit.

A. Agency Regulations Or Guidance, As Well As Statutory Requirements, Provide Limits On An Agency's Discretion.

Final agency action is judicially reviewable unless (1) judicial review is precluded by statute, or (2) the agency action is fully committed to agency discretion by law. 5 U.S.C. § 701(a)(1)-(2). The presumption that final agency action is judicially reviewable can only be overcome by clear and convincing evidence to the contrary. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967)). The exception for agency action committed to agency discretion by law is “a very narrow exception” and is only applicable “in those rare instances where ‘statutes are drawn in such broad terms that in a given case there is no law to apply.’” *Overton Park*, 402 U.S. at 410. The narrow exception to reviewability applies only where there are no judicially manageable standards available for judging how and when an agency should exercise its discretion, making it impossible to evaluate an agency action for ‘abuse of discretion.’ *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). *See also Overton Park*, 402 U.S. at 410 and *Vahora v. Holder*, 626 F.3d 907, 916 (7th Cir. 2010) (where this Court observes that since *Heckler*, the rule concerning “no law to apply” has been applied sparingly and limited to cases involving refusal to pursue enforcement actions or in areas of distinct policy decision of the executive).

In determining whether there is law to apply in a particular case, courts look to an agency’s own rules and guidance, as well as to the applicable statute, for an “agency’s failure to follow its own regulations has traditionally been recognized as reviewable under the APA.” *Head Start Family Educ. Program, Inc. v. Cooperative Educational Serv. Agency*, 46 F.3d 629, 633 (7th Cir. 1995). *See also, Miami Nation of Indians of Indiana, Inc. v. U.S. Dep’t of the Interior*, 255 F.3d 342, 348 (7th Cir. 2001). Finally, the Supreme Court in *Heckler* found that

once an agency does take discretionary action, as the EPA did here when it objected to the Section 404 Permit under its rules, it must not abuse its discretion. *Heckler*, 470 U.S. at 829-31.

B. There Is Law To Apply Here Where EPA Objected To The Mine's Section 404 Permit Based Upon The Clean Water Act And EPA's Own Regulations.

The District Court erred in determining there is no law to apply to cabin EPA's discretion in withdrawing objections to a Section 404 Permit. Under a state-delegated Section 404 program, a state must provide a draft of proposed permits to EPA for review. 33 U.S.C. § 1344(j). EPA is required to seek the input of the Corps and U.S. wildlife agencies. *Id.* EPA is not required to submit comments/objections, but if it does, those objections must be addressed to EPA's satisfaction before the final permit may be issued. *Id.*

Section 404 of the Clean Water Act further assigns a regulatory role to EPA in directing that each "disposal site" for permits issued under § 1344(a) shall be specified by the Corps (or by a delegated state) through the application of guidelines developed by EPA in conjunction with the Corps. 33 U.S.C. § 1344(b). EPA is authorized to prohibit the specification of disposal sites for permits issued under § 1344(a) (including the withdrawal of specification) whenever EPA determines, after notice and opportunity for hearing, that the discharge of materials into the area will have an unacceptable adverse effect on a number of benefits that the public customarily derives from wetlands and water resources. 33 U.S.C. § 1344(c).

Pursuant to the direction in 33 U.S.C. § 1344(b), EPA developed regulations governing Section 404 permitting programs. Those regulations state that "[a]ny such [permit] objection shall be based on the [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 Act, these regulations, or the 404(b)(1) Guidelines." 40 C.F.R. § 233.50(e). EPA's Section 404 permitting rules (known as the 404(b)(1) Guidelines) are detailed, extensive, and govern EPA's review of all Section 404

permits, whether issued by the Corps or a delegated state. *See* 40 C.F.R. Pt. 230. EPA's Objections to the Mine Permit cite to "the Guidelines", developed pursuant to the direction of Congress in 33 U.S.D. § 1344(b), found at 40 C.F.R. pt. 230. Dkt. 35-3 at JA 195 and Dkt 35-4 at JA 35-4 at JA 198, 200. The purpose of judicial review is to discern whether or not EPA acted arbitrarily, capriciously, or otherwise not in accordance with 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 (at 40 C.F.R. part 230) when EPA withdrew its Objections to the Permit with little to no change to the Permit absent vague assurances of general conditions that would be included at some future date. These standards outlined in both statute and regulation demonstrate that there is law to apply when EPA exercises discretion in committing final agency action, and that provides a legal framework in which to evaluate an agency for abuse of discretion.

C. Applicable Case Law Supports Allowing The Amendment To Challenge EPA's Action.

The District Court relied heavily on this Court's decision in *American Paper Inst., Inc. v. U.S. Ent'l Pro. Agency*, 890 F.2d 869 (7th Cir 1989), but that case is readily distinguishable from the case here. Further, decisions of this Court since 1989 demonstrate that where there is a regulatory structure that an agency has developed to guide its decisions, there is law to apply and the agency action is reviewable. In *American Paper*, this Court was called upon to review EPA objections to a proposed National Pollutant Discharge Elimination System (NPDES) Permit (a different program of permitting discharges under the Clean Water Act) by the pollutant discharger who did not like the conditions that Wisconsin imposed on the polluter due to EPA's objections. *Am. Paper*, 890 F.2d at 872. While the court determined it would not interfere with EPA's discretion, much of the discussion revolved around the Clean Water Act's preference for state-issued NPDES permits and a concern over creating a "bifurcated" review of agency

decisions on NPDES permits.¹³ In that discussion, this Court assumed that adequate review of permit decisions by EPA could be had in the state courts. That assumption is significantly undercut in this case by the statements of the Administrative Law Judge in the state contested case cited above. P. 18 *supra*.

Ultimately, while the Court in *American Paper* declined to review EPA's objections, it did not analyze the issue here of whether there is "law to apply" where an agency has chosen to exercise its discretion and then withdraws its Objections contrary to its own regulations. That question was not before the Court in *American Paper*. Perhaps most importantly for this case, in its discussion that proper and complete review could be had by the permittees in the state court process, this Court specifically states that EPA's objections could be thoroughly reviewed there. That is, this Court did not decide in *American Paper* that EPA's actions were not reviewable because there was "no law to apply." Rather, this Court plainly thought EPA's actions were reviewable, but that it preferred that the review occur in state court.¹⁴ *American Paper* does not stand for the principle the District Court relied on to deny the Tribe's Motion to Amend.

Further, in cases since *American Paper*, this Court has developed its assessment of whether there is law to apply in matters concerning agency discretion and abuses thereof. As noted above, this Court has plainly stated that where an agency has developed regulations around a particular question or action and is alleged to have acted contrary to that regulatory structure, the matter will be reviewable under the APA. *Head Start*, 46 F.3d at 633 (citing *Webster v. Doe*,

¹³ Of course, under the delegation system in the Clean Water Act, that possibility of "bifurcated" review is necessarily implicated because Congress plainly directed that if a state is not properly responsive to EPA objections, EPA can relieve the state of the permit and issue the permit itself. In that instance, federal courts would clearly have jurisdiction to review the EPA-issued permit, even where some of the permit may have been drafted by the state. 33 U.S.C. § 1344(j).

¹⁴ The court did not elaborate on 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.

486 U.S. 592, 602 n. 7 (1988)). In *Miami Nation*, this Court elaborated that even despite a lack of specific statutory criteria, if an agency establishes criteria that can be reviewed and applied by a court in judging the arbitrary or capricious nature of an agency's action, then a court may judge that action, again, because an agency is bound by its own rules and guidance until it changes them. *Miami Nation*, 255 F.3d at 348. The Menominee Tribe's claim against EPA falls squarely within this Court's determinations that where an agency is directed by Congress to develop regulations and where the agency has done so and applied them, the agency action is reviewable by the court.

The Sixth Circuit has held similarly in cases involving Section 404 Permits and those cases are instructive. In particular, in *Friends of the Crystal River v. U.S. Env't Pro. Agency*, 35 F.3d 1073 (6th Cir. 1994), the court addressed a situation like the one here. Environmental organizations challenged EPA's withdrawal of its objections to a state-proposed Section 404 Permit and the government moved to dismiss. The Sixth Circuit begins with the presumption that the APA favors judicial review and only where the party moving to dismiss demonstrates that Congress clearly meant to preclude review will such motion succeed. *Friends of Crystal River*, 35 F.3d at 1078. In the situation where EPA objects, and then withdraws that objection, which is the case here, EPA's decision is reviewable. *Id.* At the point in time where EPA has objected, and then withdraws its objection, EPA's action is final because no further action is necessary from the federal agency for the permit to issue. EPA has exercised its discretion, applied its regulatory guidelines, and made decisions under those guidelines that can be reviewed by a federal court. *Id.*¹⁵ The Sixth Circuit also addresses the issue with which the Court was

¹⁵ See also, *Michigan Peat v. U.S. Env't Pro. Agency*, 175 F.3d 422, 428 (6th Cir. 1999), where the Sixth Circuit reversed a district court dismissal finding that when EPA withdrew its objections to a proposed Section 404 permit by the State of Michigan, EPA's action was final

concerned in *American Paper* regarding state and/or federal court review and finds that federal and state courts often share concurrent jurisdiction over a “host” of claims under various federal statutes. *Id.* Nothing in the Clean Water Act suggests that review of EPA action in withdrawing 404 permit objections must or even should be confined to a state court process when it is EPA’s final action that is challenged and Congress clearly directed that EPA discharge oversight duties in state-delegated programs. *Id.* The reasoning and result in the *Friends of Crystal River* is sound, grounded in a thorough analysis of federal jurisdiction and the Clean Water Act, and fits squarely with the matters and questions at issue here. As such it provides useful guidance in keeping with Seventh Circuit case law and, with this Circuit’s case law, supports reversal of the District Court’s denial of Menominee Tribe’s Motion to Amend.

CONCLUSION

The District Court’s order dismissing the Menominee Tribe’s Complaint and denying the Tribe’s Motion to Amend should be reversed. The Corps and EPA took final agency action that is reviewable both when they denied federal jurisdiction over the Permit for the Mine and when EPA withdrew its Objections to the state-issued permit. That action by EPA is further reviewable because it is constrained by the Clean Water Act and EPA’s regulations thereunder. Finally, the Tribe’s claim concerning consultation obligations under the NHPA is not futile in that the claim is consistent with the plain language of the statute, there is no controlling law on the question in this Circuit and the law from the D.C. Circuit is mixed at best. The Menominee Tribe requests that this Court reverse and remand to allow reinstatement of the Tribe’s claims, to allow the Tribe to amend its Complaint and to allow for this matter to be decided on the merits.

and reviewable as statutorily, there was nothing left for EPA to do.

Dated at Seattle, Washington, this 6th day of March, 2019.

Respectfully submitted,

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CERTIFICATE OF RULE 32 COMPLIANCE

Pursuant to Rule 32(a)(7) of the Federal Rules of Appellate Procedure and Circuit Rule 32(c), I hereby certify that this brief complies with the stated type-volume limitations. The text of the brief was prepared in Times New Romans 12-point font, with footnotes in Times New Roman 12 point font. All portions of the brief, other than the Disclosure Statement, Table of Contents, Table of Authorities, and Certificates of Counsel contain 13,766 words. This certification is based on the word count function of the Microsoft Office Word processing software, which was used in preparing this brief.

DATED this 6th day of March, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2019, I caused a true and correct copy of the foregoing to be electronically filed with the Clerk of the Court of the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

DATED this 6th day of March, 2019.

s/ Janette K. Brimmer

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Attachment

**STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM**

IN THE MATTER OF:**Docket No.: 18-013058**

**Petitions of Thomas Boerner,
Menominee Indian Tribe of
Wisconsin and Coalition to
SAVE the Menominee River on
the permit issued to Aquila
Resources, Inc. (consolidated
cases)**

Agency No.: WRP017785

**Part(s): 31, Floodplain Regulatory
Authority
301, Inland Lakes and Streams
303, Wetlands Protection**

**Agency: Department of Environmental
Quality**

Case Type: Water Resources Division

/

**Issued and entered
this 29th day of January 2019
by: Daniel L. Pulter
Administrative Law Judge**

ORDER ON MOTION TO STAY

This contested case concerns an Application submitted by Aquila Resources Inc. (Permittee) for a permit under Part 31, Floodplain Regulatory Authority; Part 301, Inland Lakes and Streams; and Part 303, Wetlands Protection, of the Natural Resources and Environmental Protection Act (NREPA), 1994 PA 451, as amended. MCL 324.3104; MCL 324.30101, *et seq.*; MCL 324.30301, *et seq.* The Water Resources Division (WRD) of the Department of Environmental Quality (DEQ) issued a permit on June 4, 2018. That agency action was challenged by Tom Boerner by filing a Petition for Contested Case Hearing on June 11, 2018. On August 1, 2018, the Coalition to SAVE the Menominee River, Inc. (Coalition) also filed a Petition for Contested Case Hearing under Docket No. 18-016280. On August 3, 2018, a third Petition for Contested Case Hearing was filed by the Menominee Indian Tribe of Wisconsin (Menominee) under Docket No. 18-016422. On September 27, 2018, a Stipulated Order was entered, consolidating the three contested cases with this case, and granting the Permittee's intervention in the consolidated cases.

On December 21, 2018, the Coalition filed a Motion to Stay and to Hold Proceeding in Abeyance. Responses to this Motion were filed by the WRD and by the Permittee. No response was filed by Menominee or Mr. Boerner. A Reply was, however, filed by the Coalition.

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By way of background, this contested case relates to the Permittee's Back Forty Project, which is a proposed gold, silver, zinc, copper, and lead mine to be located in Lake Township, Menominee County, Michigan. A contested case under Part 632 was commenced by Mr. Boerner and Menominee on February 24, 2017. The thirty-day contested case hearing was conducted before the undersigned and was completed on October 15, 2018. A Final Decision and Order has not yet been entered in such case, which is under advisement with the undersigned. This contested case concerns the mine's application for a permit under Parts 31, 301, and 303.

In its Motion, the Coalition urges three grounds for a stay. First, the Coalition notes that Menominee filed a lawsuit in federal court against the United States Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (USACE), "seeking review of, among other things, the federal agencies' failure to assert jurisdiction over the mine's proposed wetland permit."¹ Coalition's Brief at p 5. As its first ground for a stay, the Coalition contends that federal court is the proper venue for deciding jurisdictional issues. As its second ground, the Coalition contends that judicial economy and efficiency urge a stay. As its third ground, the Coalition contends that the wetland permit should be adjudicated concurrently with the mining permit. Each of these grounds will be addressed *infra*.

1. Federal Court Jurisdiction

The Coalition contends that Michigan's authority to adjudicate claims under Part 303 is based on the delegation of authority from the EPA under the Clean Water Act (CWA). 33 USC §§ 1251-1387. Specifically, the coalition points to § 404 of the Act, which delegates to the states authority to administer their own general permit programs for wetlands protection. 33 USC § 1344(g). The Coalition thus contends that the federal courts are the appropriate venue for deciding CWA issues and that this case should be stayed pending resolution of its federal lawsuit.

In its Motion, the Coalition confuses the dual regulatory schemes of § 404 of the CWA and Part 303 of the NREPA. The Court of Appeals has explained:

At the federal level, the Clean Water Act (CWA) provides for the regulation and protection of wetlands, while Michigan's wetland protection act (WPA) serves the same purpose for this state. Our Legislature made clear that it enacted the WPA to benefit all the people of this state. The act provides

¹ That lawsuit was dismissed by the United States District Court for the Eastern District of Wisconsin on December 19, 2018. Apparently, the Coalition also filed a lawsuit on November 13, 2018, seeking identical relief as sought by Menominee in its dismissed lawsuit. See Permittee's Brief at p 7.

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that “[t]he legislature finds that ... [w]etland conservation is a matter of state concern since a wetland of 1 county may be affected by acts on a river, lake, stream, or wetland of other counties. M.C.L. §324.30302(1)(a).

K & K Const, Inc. v Department of Env'tl Quality, 267 Mich App 523, 529-530; 705 NW2d 356 (2005). The Coalition incorrectly argues that, because an applicant files a “joint application,” the WRD issues a “joint state and federal wetlands permit...” Coalition’s Reply at 4. The WRD issues a permit under Part 303 of the NREPA, formerly known as the Wetlands Protection Act (WPA).² See Exhibit A attached to the Coalition’s Petition. The WRD does not issue a § 404 permit under the CWA. Moreover, this Tribunal issues a Final Decision and Order under Part 303 of the NREPA, not federal wetlands law. MCL 324.1317(1). In fact, the Michigan Supreme Court has recognized that when addressing Part 303, there is no need to reach a decision based on federal law. *Huggett v Department of Natural Resources*, 464 Mich 711, 722; 629 NW2d 915 (2001). The Court held that, “[b]ecause we can discern the Legislature’s intent on this question from the wetland provisions themselves, we need not concern ourselves with federal law in this case.” *Id.* The *Huggett* decision was followed by the Court of Appeals in *Department of Env'tl Quality v Gomez*, 318 Mich App 1, 43; 896 NW2d 39 (2016). See also *Garg v Macomb County Community Mental Health Serv*, 472 Mich 263, 284; 696 NW2d 646 (2005), amended 473 Mich 1205 (2005) (“While federal precedent may often be useful as guidance in this Court’s interpretation of laws with federal analogues, such precedent cannot be allowed to rewrite Michigan law.”). Based on such decision, this Tribunal may proceed in this case under Part 303 unimpeded by the pending federal lawsuit. For such reason, the Coalition’s Motion that this contested case be stayed pending resolution of its federal lawsuit is without merit.

2. Judicial Efficiency and Economy

In its second argument regarding judicial efficiency and economy, the Coalition does not address judicial efficiency and economy. Instead, it once again re-argues the effect of the delegation under § 404 of the CWA. For example, the Coalition contends that “this Court will need to address whether Michigan’s rules regarding supplementation of the record after permitting decision is made by the MDEQ complies with the CWA.” Coalition’s Brief at p 10, citing *National Wildlife Fed’n v Department of Env'tl Quality* (No. 2), 306 Mich App 369, 379; 856 NW2d 394 (2014). In *National Wildlife Fed’n*, the Court of Appeals held that this proceeding – which is litigated under Michigan’s Administrative Procedures Act (APA), 1969 PA 306, MCL 24.201, *et seq.* – is “an extension of the initial application process for the purpose of arriving at a single final agency decision on the application.” 306 Mich App at 379. As such, this contested case is not an appeal so

² The WPA was repealed in 1995, but its provisions were recodified in Part 303 of the NREPA. See *Huggett v Department of Natural Resources*, 464 Mich 711, 715 n 1; 629 NW2d 915 (2001).

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additional evidence outside of the application may be submitted into the record. Rather, the agency's preliminary decision on a permit application becomes final 61 days after the issuance of the decision when a Petition for Contested Case Hearing is not filed. See, e.g., R 792.10303(2) requiring that a Petition for contested case be filed within sixty days from the date of the department's decision to be timely. If a Petition for contested case is filed, the decision of the agency becomes final when a Final Decision and Order is issued (assuming no Petition for Review is filed), or when the environmental permit panel renders its decision. MCL 324.1317(1) & (4).

In addressing the facts in this case about judicial economy, it is helpful to review the Coalition's Reply. Therein, it contends that "the mine is a single project and the various permit applications should be adjudicated together."³ Coalition's Reply at p 7. However, the contested case covering Part 632 was conducted over 30 days. It generated a record in excess of 4,300 pages of transcript with testimony from 31 witnesses. The record contained 153 admitted Exhibits, including a 40,000-page application. The Mining Team who reviewed the 40,000-page application was comprised of ten (10) individuals, while only one of which was a specialist in wetlands (Kristi Wilson). The decision on the mining permit application under Part 632 was made by the Oil, Gas and Minerals Division (OGMD) of the DEQ. In rendering a decision, Part 632 provides that the OGMD is required to issue a permit if it determines that (1) the permit application meets the requirements of Part 632; and (2) the proposed mining operation will not pollute, impair, or destroy the air, water, or other natural resources or public trust in those resources. MCL 324.63205(11). Finally, Rule 602(1) provides that, "[u]nless waived by the parties, the department shall issue a final decision on a petition for a contested case hearing within 6 months after receiving the petition." R 425.602.

On the other hand, the instant Part 303 case is easily distinguished from the Part 632 case. Specifically, a separate application is required to be filed under Part 303. Hence, the 40,000-page Part 632 mining application does not apply to a Part 303 case. The Part 303 application was reviewed by the WRD – a division of the DEQ with different expertise from the OGMD. Therefore, the witnesses involved in the decision-making process are different than many of the witnesses involved in the Part 632 case. Moreover, many portions of Part 632 application and the testimony of many the OGMD employees who reviewed the Part 632 application will be irrelevant in the Part 303 case. Contrary to Part 632, a decision under Part 303 is to determine whether the issuance of a permit is in the public interest; the permit is necessary to realize the benefits derived from the activity; and the activity is otherwise lawful. MCL 324.30311(1). Despite the fact that a Part 303 case is more streamlined and is limited to the strictures of § 30311, the parties indicated at the Pre-Hearing Conference that this case will take 10 days to adjudicate. See Scheduling Order entered on November 26, 2018. Simply stated, if the

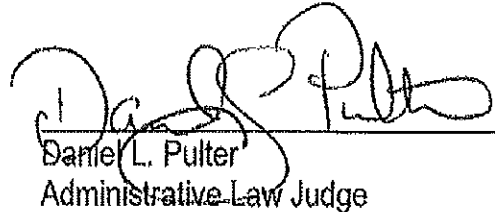
³ Similarly, as its third ground for a stay of this case, the Coalition contends that, "given the overlapping issues, the wetland permit review should be adjudicated concurrently with the mining permit." Coalition's Motion at p 12.

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Part 632 case and the Part 303 case were adjudicated together, it would take this Tribunal months – if not years – to render a Final Decision and Order due to the size of the combined record.

Therefore, this Tribunal is employing its broad powers granted under § 80 of the Administrative Procedures Act. MCL 24.280. That provision provides the administrative law judge with broad powers to “regulate the course of the hearings....” *Id.* In regulating the course of the hearings under Part 632 and Part 303, it makes most sense to adjudicate the different applications in separate administrative proceedings. Since the undersigned is the administrative law judge in both cases, the parties may further streamline this case by eliminating preliminary matters which merely explain the proposed project to this Tribunal. Therefore, contrary to the Coalition’s suggestion, judicial efficiency and economy compels this Tribunal to hear the two contested cases separately. For this additional reason, the Coalition’s Motion for a stay on the grounds of judicial efficiency and economy is without merit.

For each of foregoing reasons, the Coalition’s Motion for a Stay of this case is **DENIED**.



Daniel L. Pultor
Administrative Law Judge

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PROOF OF SERVICE

I hereby state, to the best of my knowledge, information and belief, that a copy of the foregoing document was served upon all parties and/or attorneys of record in this matter by Inter-Departmental mail to those parties employed by the State of Michigan and by UPS/Next Day Air, facsimile, and/or by mailing same to them via first class mail and/or certified mail, return receipt requested, at their respective addresses as disclosed below this 29th day of January 2019.



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STIPULATED JOINT APPENDIX (Separate Volume I)		
Complaint for Declaratory and Injunctive Relief dated January 22, 2018	Dkt. 1, Pgs. 1 - 17	JA 0020-0036
1979 Report of Consultants to Army Corps of Engineers dated December 1979 (Attached as Exhibit A to the Declaration of Lindzey Spice)	Dkt. 21-3, Pgs. 1 - 76	JA 0037-0112
1982 Memorandum of Corps Counsel dated January 1982 (Attached as Exhibit B to the Declaration of Lindzey Spice)	Dkt. 21-4, Pgs. 1 - 4	JA 0113-0116
1984 Memorandum of Agreement between The State of Michigan and The Department of the Army dated March 27, 1984 (Attached as Exhibit C to the Declaration of Lindzey Spice)	Dkt. 21-5, Pgs. 1-9	JA 0117-0125
2011 Memorandum of Agreement Between Department of Environmental Quality and the United States Environmental Protection Agency, Region 5 dated November 9, 2011 (Attached as Exhibit D to the Declaration of Lindzey Spice)	Dkt. 21-6, Pgs. 1-9	JA 0126 - 0134
Letter from the Menominee Indian Tribe of Wisconsin to the U.S. Army Corps of Engineers and U.S. EPA Region 5 dated August 21, 2017 (Attached as Exhibit E to the Declaration of Lindzey Spice)	Dkt. 21-7, Pgs. 1-7	JA 0135-0141
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Letter from the U.S. EPA Region 5 to Menominee Indian Tribe of Wisconsin dated October 13, 2017	Dkt. 21-9, Pgs. 1-3	JA 0144-0146

Document Title	Dkt. Page Nos.	JA Page Nos.
(Attached as Exhibit G to the Declaration of Lindzey Spice)		
60-Day Clean Water Act notice letter dated November 6, 2017 (Attached as Exhibit G to the Declaration of Lindzey Spice)	Dkt. 21-10, Pgs. 1-7	JA 0147-0153
1983 Memorandum of Agreement between the State of Michigan Department of Natural Resources and the United States Environmental Protection Agency dated December 9, 1983	Dkt. 23-2, Pgs. 1-9	JA 0154-0162
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Letter from U.S. Environmental Protection Agency to the State of Michigan Department of Environmental Quality dated June 1, 2018 (Attached as Exhibit A to the Declaration of Stephanie Tsosie)	Dkt. 41-1, Pgs. 1-2	JA 0209-0210

CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Circuit Rule 30(d), all required materials as outlined within the scopes of Circuit Rule 30(a) and (b) are included in this Joint Appendix.

DATED: March 6, 2019

s/ Janette K. Brimmer

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

MENOMINEE INDIAN TRIBE OF WISCONSIN,

Plaintiff,

v.

Case No. 18-C-108

U.S. ENVIRONMENTAL PROTECTION AGENCY and
UNITED STATES ARMY CORPS OF ENGINEERS,

Defendants,

and

AQUILA RESOURCES INC.,

Intervenor-Defendant.

**DECISION AND ORDER DENYING PLAINTIFF'S MOTION TO AMEND
AND GRANTING DEFENDANTS' MOTIONS TO DISMISS**

Plaintiff Menominee Indian Tribe of Wisconsin filed this action for declaratory and injunctive relief against the United States Environmental Protection Agency and the United States Army Corps of Engineers (Federal Defendants). The Tribe challenges the Federal Defendants' refusal to exercise jurisdiction over a permit submitted pursuant to Section 404 of the Clean Water Act (CWA), 33 U.S.C. § 1344, relating to Intervenor-Defendant Aquila Resources Inc.'s proposal to construct the Back Forty Mine in Menominee County, Michigan. Instead of the EPA, the Michigan Department of Environmental Quality (MDEQ) is overseeing the permitting process. In its initial complaint, the Tribe asserted two separate claims: First, the Tribe claimed that the Federal Defendants had a mandatory duty under the CWA to assume jurisdiction over the Section 404 permit process, which the Tribe could enforce pursuant to the CWA's citizen suit provision, 33 U.S.C. § 1365. Second,

the Tribe claimed that the Federal Defendants' refusal to assert jurisdiction over the permit process is arbitrary and capricious in violation of the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A).

The defendants filed motions to dismiss pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction and Rule 12(b)(6) for failure to state a claim. The court held oral argument on the motions on August 1, 2018, and the parties submitted supplemental briefing on the matter. On September 11, 2018, the Tribe filed a motion to amend the complaint, seeking to add two new claims. In its proposed amended complaint, the Tribe asserts, first, that the EPA's withdrawal of its objections to the permit was arbitrary and capricious and contrary to law under the APA and, second, that the EPA's failure to consult with the Menominee Tribe pursuant to the National Historic Preservation Act (NHPA), 54 U.S.C. § 300101, *et seq.*, before the permit for the mine was issued was also arbitrary and capricious and contrary to law under the APA. For the reasons explained below, the motion to amend will be denied, the motions to dismiss will be granted, and the case will be dismissed.

BACKGROUND

A. Statutory and regulatory background

The Clean Water Act was enacted in 1972 "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Although the Act generally prohibits the discharge of pollutants into navigable waters without a permit, 33 U.S.C. § 1311(a), 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. § 1344(a). The EPA retains oversight of the Section 404 permitting program and may veto the Corps' approval of a permit when the

dredged or fill material would have “an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas . . . , wildlife, or recreational areas.” § 1344(c).

Under the Act, a state may request permission from the EPA to administer its own individual and general 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 wetlands adjacent thereto.” § 1344(g)(1). Once the EPA approves a state’s Section 404 permit program, that state assumes jurisdiction over the permitting process and the federal program is suspended. § 1344(h). Even with its program suspended, the federal government acts as an overseer of the state’s process by reviewing any action the state takes with respect to Section 404 permits. § 1344(j).

Pursuant to § 1344(j), the state must provide the EPA with a copy of every permit application it receives as well as a copy of the permit the state intends to issue. The EPA Administrator then provides copies of the application to the Corps and notifies the state within 30 days if it intends to comment on the state’s handling of the application. The EPA must submit its comments to the state within 90 days. Once a state is notified that the EPA intends to comment on the application, it may not issue a permit until it has received the EPA’s comments or the 90-day commenting period has passed. If the EPA objects to the application, the state “shall not issue such proposed permit” and may either issue a revised permit that resolves the EPA’s objections, deny the permit application, or request a public hearing. *Id.* Permitting authority only transfers back to the Corps if the state does not take any action in response to the EPA’s objection. *Id.* To date, only Michigan and New Jersey have been federally approved to administer Section 404 permit

procedures. The 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); ECF No. 23-3.

B. Allegations contained in the complaint

The Menominee Indian Tribe of Wisconsin is a federally-recognized Indian tribe with ancestral territory spanning the state of Wisconsin as well as parts of Michigan and Illinois. Compl. ¶ 10, ECF No. 1. Although the present-day reservation is located on a tract of land in reserve along the Wolf River, the Tribe has lived and practiced cultural and religious ceremonies within reservation lands, ceded lands, and ancestral lands around the Menominee River. *Id.* ¶¶ 10–11.

Aquila Resources, Inc. applied to the MDEQ for a Section 404 permit to construct the Back Forty Mine on the banks of the Menominee River in Lake Township, Michigan. *Id.* ¶ 36. The MDEQ provided the EPA with a copy of the permit application in May 2016, and the EPA subsequently notified the MDEQ of its objections to the proposed permit. Aquila withdrew its application and reapplied for the Section 404 permit on January 17, 2017. *Id.* ¶¶ 42–43.

On August 18, 2017, Senator Tammy Baldwin of the state of Wisconsin wrote to the Corps, requesting “that the federal agencies take jurisdiction of the Section 404 permitting for the Mine.” *Id.* ¶ 45. The Tribe later wrote to the Corps and the EPA on August 21, 2017, advising the Federal Defendants that they were the proper authorities over the Section 404 permit. It explained that the Menominee River is used in interstate commerce, and as a result, the “River and adjacent wetlands were not and could not be delegated to the State of Michigan in 1984 under 33 U.S.C. § 1344(g)” because the River is used in interstate commerce. *Id.* ¶¶ 35, 46.

The Corps answered Senator Baldwin's letter in August 2017 and the Tribe's in September 2017, expressing that it would not exercise jurisdiction over the Section 404 permit because Michigan assumed authority over the permitting process. It noted that the EPA would exercise its authority to review and potentially object to the proposed permit at a later date. *Id.* ¶ 47. On October 13, 2017, the EPA offered to consult with the Tribe regarding the Section 404 permit process. *Id.* ¶ 48. The Tribe notes that neither response addresses the Menominee River's status as an interstate water used for the transport of interstate commerce.

On March 8, 2018, the EPA issued a letter objecting to the MDEQ's revised proposal. ECF No. 35-3. In response, Aquila provided information to the EPA related to the objections. In a May 3, 2018 letter to the MDEQ, the EPA noted that the information provided by Aquila resolved a number of its objections and that a "pathway" existed "for the resolution of EPA's remaining objections through MDEQ's inclusion of specific conditions in a final permit issued by June 6, 2018." ECF No. 35-5. On June 4, 2018, the MDEQ issued a permit that the EPA believed satisfied its remaining objections.

ANALYSIS

A. Motion to amend

The court begins with the Menominee Tribe's motion for leave to amend the complaint. After the opportunity to amend the pleadings as a matter of course has passed, a party may amend a complaint only with the consent of the opposing party or leave of the court. Fed. R. Civ. P. 15(a). Generally, motions to amend pleadings are treated favorably under Rule 15's liberal amendment policy. *Id.* Leave to amend should be "freely given," absent considerations such as "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by

amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, and futility of amendment.” *Forman v. Davis*, 371 U.S. 178, 182 (1962).

The defendants oppose the motion to amend only on the ground that the proposed amendment to the complaint is futile. An amendment is futile if the amended pleading would not survive a motion to dismiss. *McCoy v. Iberdrola Renewables, Inc.*, 760 F.3d 674, 685 (7th Cir. 2014). To survive a motion to dismiss, the amended complaint must “contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* at 685 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Before denying a motion to amend, however, it should be “clear” that the proposed amended complaint “is deficient” and would not survive such a motion. *Johnson v. Dossey*, 515 F.3d 778, 780 (7th Cir. 2008); *see Runnion ex rel. Runnion v. Girl Scouts of Greater Chi. & Nw. Ind.*, 786 F.3d 510, 519–20 (7th Cir. 2015) (“Unless it is *certain* from the face of the complaint that any amendment would be futile or otherwise unwarranted, the district court should grant leave to amend.” (quoting *Barry Aviation Inc. v. Land O’Lakes Mun. Airport Comm’n*, 377 F.3d 682, 687 (7th Cir. 2004))). “The liberal standard for amending under Rule 15(a)(2) is especially important where the law is uncertain.” *Runnion*, 786 F.3d at 520. “In the face of uncertainty, applying the liberal standard for amending pleadings, especially in the early stages of a lawsuit, is the best way to ensure that cases will be decided justly and on their merits.” *Id.* (citing *Forman*, 371 U.S. at 181–82). The court will analyze each claim in turn.

1. APA claim regarding the EPA’s withdrawal of its objections to the proposed permit

The Tribe asserts in the proposed amended complaint that the EPA’s decision to withdraw its objections to the assumed Section 404 permit was arbitrary, capricious, and contrary to law under the APA. The APA authorizes suit by “a person suffering legal wrong because of agency action, or

adversely affected or aggrieved by agency action . . . to judicial review thereof.” 5 U.S.C. § 702. The APA allows a district court to “hold unlawful and set aside” any agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” § 706(2)(A). The APA precludes judicial review of agency actions that are “committed to agency discretion by law.” § 701(a)(2). The “committed to agency discretion” exception applies only “in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply,” or when “the statute is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion.” *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (quotation marks and citations omitted); *Heckler v. Chaney*, 470 U.S. 821, 830 (1985).

The Tribe asserts that the EPA’s ultimate conduct in withdrawing its objections is judicially reviewable final agency action that is not committed to agency discretion by law. It maintains that once the EPA objected and inserted itself into the permitting process, its decision to withdraw the objections cannot be arbitrary and capricious or contrary to law. The defendants contend that the EPA’s decision to withdraw its objections is not reviewable because it was an action committed to the EPA’s discretion.

At issue in this case, then, is whether the EPA’s decision to withdraw its objections to a Section 404 permit proposal is an action committed to the EPA’s discretion and thus unreviewable by this court. The Seventh Circuit touched on this issue, albeit in the context of a different permitting program, in *American Paper Institute, Inc. v. United States Environmental Protection Agency*, 890 F.2d 869 (7th Cir. 1989). There, the EPA authorized the Wisconsin Department of Natural Resources (WDNR) to issue permits to point sources, or pollutant dischargers, in Wisconsin under the National Pollutant Discharge Elimination System (NPDES), 33 U.S.C. § 1251, *et seq.* The

WDNR proposed to issue thirteen permits to paper and pulp mills in Wisconsin. The EPA notified the WDNR that it objected to all of the permits proposed, allowed comments on the objections, and provided a public hearing on the objections. The EPA later modified some of its objections but reaffirmed its remaining objections to eleven permits. The WDNR subsequently modified the permits. American Paper Institute and four paper and pulp mill owners challenged the EPA's authority to object to the NPDES permits proposed by the WDNR. *Am. Paper*, 890 F.2d at 872.

The Seventh Circuit held that it lacked subject matter jurisdiction to hear the appeal and dismissed the petition. *Id.* at 878. The court noted that, while "EPA objections could arguably be challenged in district court under the Administrative Procedure Act," such review is unavailable because the CWA precludes federal review of state-issued permits and an EPA objection is an agency action committed to agency discretion. *Id.* at 875. The court recognized that the CWA "reflects 'the desire of Congress to put the regulatory burden on the states and to give the [EPA] broad discretion in administering the program.'" *Id.* (alterations in original) (quoting *District of Columbia v. Schramm*, 631 F.2d 854, 860 (D.C. Cir. 1980)). 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," the court concluded "federal courts should leave EPA with its discretion to review state-issued permits." *Id.*

In this case, much like the NPDES permitting program, the state permitting process under Section 404 gives state officials primary responsibility to review and approve permits and allows the EPA to exercise broad discretion in overseeing the program, which includes the decision of whether to object to the permit and withdraw those objections once it determines the objections have been resolved. Indeed, Section 404 and the EPA's corresponding regulations do not contain language

requiring that the EPA object to or comment on a proposed permit. Although the regulations indicate that permit objections “shall be based on the Administrator’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 Act, these regulations, or the 404(b)(1) Guidelines,” 40 C.F.R. § 233.50(e), the initial decision to object remains within the Administrator’s discretion. And once the EPA objects, there is nothing in the CWA or the regulations specifying that the Administrator is stripped of the discretion to decide whether to later withdraw those objections. In short, the EPA’s discretionary decision to object and subsequently withdraw those objections is not reviewable under the APA, as the statute is drawn in such broad terms that there is no clear law to apply and there is no meaningful standard against which to judge the agency’s exercise of discretion. The Tribe therefore fails to state a claim upon which relief can be granted, and any amendment to the complaint to add such a claim would be futile.

2. APA claim regarding the Federal Defendants’ violation of the NHPA

The Tribe’s proposed amended complaint asserts a second claim under the APA, alleging that the Federal Defendants violated § 106 of the NHPA when they failed to consult with the Tribe. The APA permits courts to “compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1). A claim under § 706(1) can only proceed, however, “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 All.*, 542 U.S. 55, 64 (2004). The court finds that the Federal Defendants were not required to consult with the Tribe about the Back Forty Mine Project because § 106 only applies when a project is federally funded or federally licensed.

The NHPA comprises “a series of measures designed to encourage preservation of sites and structures of historic, architectural, or cultural significance.” *Penn Cent. Transp. Co. v. City of New*

York, 438 U.S. 104, 108 n.1 (1978). It “requires each federal agency to take responsibility for the impact that its activities may have upon historic resources, and establishes the Advisory Council on Historic Preservation . . . to administer the Act.” *Nat’l Mining Ass’n v. Fowler*, 324 F.3d 752, 755 (D.C. Cir. 2003). Section 106 states:

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any 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. The head of the Federal agency shall afford the Council a reasonable opportunity to comment with regard to the undertaking.

54 U.S.C. § 306108.

The Tribe asserts that the Back Forty Mine Project is an undertaking, noting that the NHPA’s definition of “undertaking” includes “a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including . . . those subject to State or local regulation administered pursuant to a delegation or approval of a Federal agency.” 54 U.S.C. § 300320(4). Even if the Back Forty Mine Project is an “undertaking” as defined by § 300320, 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.” § 306108. Stated differently, unless a project is federally funded or federally licensed, § 106 does not apply. *See Fowler*, 324 F.3d at 760 (Section 106 “applies by its terms only to *federally funded* or *federally licensed* undertakings . . . and not to undertakings that are merely subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.” (internal quotation marks and citations omitted)).

The Tribe has not alleged that the Back Forty Mine Project is federally funded or licensed. To the contrary, the record reflects that the project was proposed by and will be funded by Aquila and its investors and the state of Michigan has jurisdiction over the Section 404 permitting process. Because the Back Forty Mine Project is neither federally funded nor federally licensed, the project has not met the requirements of § 306108. As a result, the court need not decide whether the project satisfies § 300320's definition of "undertaking." *See Sheridan Kalorama Historical Ass'n v. Christopher*, 49 F.3d 750, 756 (D.C. Cir. 1995) ("[H]owever broadly the Congress or the ACHP define 'undertaking,'" the text of § 106 "still applies by its terms only to *federally funded* or *federally licensed* undertakings."). The Federal Defendants were therefore not required to initiate consultation with the Tribe pursuant to § 106. The Tribe has failed to state a claim upon which relief can be granted as to its NHPA contention, and any amendment to the complaint to add such a claim would be futile. Accordingly, the motion to amend is denied.

B. Motions to dismiss

In its original complaint, the Menominee Tribe asserts that the Federal Defendants failed to assume jurisdiction over the Section 404 permit pursuant to the CWA's citizen suit provision and that the Federal Defendants violated the APA when they refused to assert jurisdiction over the permit process. The defendants have moved to dismiss the complaint pursuant to Rule 21(b)(1) for lack of subject matter jurisdiction and Rule 12(b)(6) for failure to state a claim.

A motion to dismiss under Rule 12(b)(1) challenges the jurisdiction of this court of the subject matter related in the complaint. Fed. R. Civ. P. 12(b)(1). The plaintiff bears the burden of establishing that the jurisdictional requirements have been met. *Schaefer v. Transp. Media, Inc.*, 859 F.2d 1251, 1253 (7th Cir. 1988). If material factual allegations are contested, the proponent of

federal jurisdiction must “prove those jurisdictional facts by a preponderance of the evidence.” *Meridian Sec. Ins. Co. v. Sedowski*, 441 F.3d 536, 543 (7th Cir. 2006). When the moving party “launches a factual attack against jurisdiction, the district court may properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists.” *Apex Digital, Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 444 (7th Cir. 2009) (internal quotation marks and citations omitted).

A motion to dismiss under Rule 12(b)(6) challenges the sufficiency of the complaint to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). Rule 8 mandates that a complaint need only include “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). The Supreme Court has held that a complaint must contain factual allegations that “raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While a plaintiff is not required to plead detailed factual allegations, he or she must plead “more than labels and conclusions.” *Id.* A simple, “formulaic recitation of the elements of a cause of action will not do.” *Id.* In evaluating a motion to dismiss, the court must view the plaintiff’s factual allegations and any inferences reasonably drawn from them in a light most favorable to the plaintiff. *Yasak v. Ret. Bd. of the Policemen’s Annuity & Benefit Fund of Chi.*, 357 F.3d 677, 678 (7th Cir. 2004).

Under the incorporation-by-reference doctrine, a court may consider documents attached to a Rule 12(b)(6) motion if “they are referred to in the plaintiff’s complaint and are central to his claim.” *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 690 (7th Cir. 2012). In other words, the parties may submit documents mentioned in the plaintiff’s complaint without converting the motion to dismiss into a motion for summary judgment. The doctrine “prevents a plaintiff from

‘evad[ing] dismissal under Rule 12(b)(6) simply by failing to attach to his complaint a document that prove[s] his claim has no merit.’” *Id.* (alterations in original) (quoting *Tierney v. Vahle*, 304 F.3d 734, 738 (7th Cir. 2002)). With these standards in mind, the court turns to the motions to dismiss.

1. CWA claim

The Menominee Tribe challenges the Federal Defendants’ failure to assume jurisdiction over the Section 404 permit pursuant to the CWA’s citizen suit provision, 33 U.S.C. § 1365. Section 1365 allows any citizen to “commence a civil action on his own behalf . . . against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.” § 1365(a)(2). The CWA defines “Administrator” as the Administrator of the EPA. § 1251(d) (“Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency (hereinafter in this chapter called ‘Administrator’) shall administer this chapter.”). Because the CWA’s definition of “Administrator” includes only the Administrator of the EPA and not the Corps or its officials, the Federal Defendants contend § 1365 does not unequivocally authorize citizen suits against the Corps, and therefore the Tribe may not maintain its CWA claim against it.

Citing *National Wildlife Federation v. Hanson*, 859 F.2d 313 (4th Cir. 1988), the Menominee Tribe asserts that the waiver of sovereign immunity must include the Corps to effectuate Congress’ intent. In *Hanson*, a number of environmental groups filed an action under the CWA’s citizen suit provision, asserting the Corps failed to make a proper wetlands determination. The government asserted the plaintiffs could not maintain a citizen suit against it under § 1365(a)(2). The Fourth Circuit held that the EPA and the Corps are proper defendants in CWA citizen suits alleging violations of the Section 404 permitting process, reasoning that “Congress could not have

intended to” consent to a suit against the EPA but not against the Corps when both entities are responsible for issuing permits under the CWA and enforcing their terms. *Id.* at 315–16. It concluded that § 1365(a)(2) should be interpreted in conjunction with “Civil Procedure Rule 20 (joinder) to allow citizens to sue the Administrator and join the Corps when the Corps abdicates its responsibility . . . and the Administrator fails to exercise the duty of oversight imposed by section 1344(c).” *Id.* at 316.

While the Seventh Circuit has not yet addressed this issue, a number of courts have rejected the holding in *Hanson* and concluded the express terms of § 1365 do not waive the Corps’ sovereign immunity. For instance, in *Preserve Endangered Areas of Cobb’s History, Inc. v. United States Army Corps of Engineers*, the plaintiff brought a citizen suit against the Corps and others, challenging a proposed highway construction project in Cobb County, Georgia. 87 F.3d 1242 (11th Cir. 1996). The Eleventh Circuit found that the district court properly dismissed the plaintiff’s claim against the Corps for lack of jurisdiction. The court observed that the CWA’s citizen suit provision clearly and unambiguously waives sovereign immunity with respect to the Administrator, but not the Corps. As a result, the court concluded Congress did not intend to waive sovereign immunity in regard to CWA citizen suits against the Corps. *Id.* at 1249.

Similarly, the district court in *Cascade Conservation League v. M.A. Segale, Inc.*, 921 F. Supp. 692 (W.D. Wash. 1996), concluded that § 1365(a)(2) does not waive the Corps’ sovereign immunity. It recognized that “construction of a waiver of sovereign immunity begins and ends with the express terms of the statute. The Court must rely on plain meaning interpretation to the extent possible, and must resolve any ambiguities against a finding of waiver.” *Id.* at 697. Under this principle, the court found that the waiver of sovereign immunity was limited to the Administrator

under the clear terms of the statute, and it was “not at liberty to rewrite the statute in accordance with extrinsic delegations of duty.” *Id.* at 696. The court therefore concluded that it could not entertain a CWA citizen suit against the Corps. *Id.*; *see also Walther v. United States*, No. 3:15-cv-0021-HRH, 2015 WL 9700347, at *6 (D. Alaska July 27, 2015) (“Section 505(a)(2) only waives sovereign immunity as to the suits against the Administrator. . . . Because Section 505(a)(2) does not waive immunity for suits against the Corps, the court lacks subject matter jurisdiction over plaintiff’s CWA claim.”); *All. to Save Mattaponi v. U.S. Army Corps of Eng’rs*, 515 F. Supp. 2d 1, 6 (D.D.C. 2007) (“*Hanson* is contrary to a series of other cases. . . . However puzzled the court [in *Hanson*] may have been by the statute, and even if the court were correct that ‘Congress cannot have intended to’ waive sovereign immunity as to EPA but not as to the Corps, Congress’s presumed intent is not the question when a court interprets a sovereign immunity waiver.”).

I find the reasoning of these cases and the weight of this authority persuasive. “The United States, as sovereign, is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court’s jurisdiction to entertain that suit.” *United States v. Sherwood*, 312 U.S. 584, 586 (1941). A waiver of sovereign immunity must be clear and unambiguous. *See Lane v. Pena*, 518 U.S. 187, 192 (1996) (“A waiver of the Federal Government’s sovereign immunity must be unequivocally expressed in statutory text.” (citing *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 33–34 (1992))). A court must narrowly construe a statute waiving sovereign immunity. *See Sossamon v. Texas*, 563 U.S. 277, 292 n.10 (2011); *United States Dep’t of Energy v. Ohio*, 503 U.S. 607, 614 (1992). Section 1365(a)(2) only contemplates the waiver of sovereign immunity as to suits against the Administrator of the EPA—it does not clearly and unambiguously waive immunity for suits against the Corps. Because “a waiver of the Government’s

sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign,” *Lane*, 518 U.S. at 192, the court declines to presume that Congress intended something beyond what the statute states. *See Cascade*, 921 F. Supp. at 697 (“[C]ourts must assume that a legislature says in a statute what it means and means in a statute what it says there.” (quoting *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992))). There is no need to imply a cause of action here because relief is available to the Tribe under the APA. *See Scott v. City of Hammond, Indiana*, 741 F.2d 992 (7th Cir. 1984). The court therefore finds that it lacks subject matter jurisdiction over the Menominee Tribe’s CWA claim against the Corps.

Even if the court had jurisdiction over the Corps, the Tribe’s CWA claim must be dismissed in its entirety because the Tribe failed to identify a nondiscretionary duty that the Federal Defendants have not performed as required by § 1365. *See* 33 U.S.C. § 1365(a)(2) (“[A]ny citizen to commence a civil action on his own behalf . . . against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.”). The Federal Defendants assert that the CWA does not create a mandatory duty for either the Corps or the EPA to administer the Section 404 permitting program. As an initial matter, the statute makes clear that the EPA does not have a mandatory duty to assume a permit-writing function under the CWA. Indeed, it is the Secretary of the Corps, not the Administrator of the EPA, that may issue permits “for the discharge of dredged or fill material into the navigable waters at specified disposal sites.” § 1344(a). In this case, the Tribe challenges the Corps’ decision to decline oversight of the permit process for the Back Forty Mine because, in the Corps’ view, it did not have the jurisdiction to do so. Even if the Corps is mistaken, a citizen suit “cannot be employed to challenge the substance or content of an agency action.” *Scott*, 741 F.2d at 996

(citation omitted). Thus, any disagreement the Tribe may have with the EPA's decision to allow Michigan to assume authority of the Section 404 permitting process would have to be challenged under the APA, not via citizen suit. In sum, the Menominee Tribe has failed to state a claim under the citizen suit provision of the CWA.

2. APA claim as to the decision declining to take primary jurisdiction over the permit

The Menominee Tribe also seeks to assert an as-applied challenge under the APA. An as-applied challenge “‘must rest on final agency action under the APA,’ taken within six years of the filing of the complaint.” *Nat’l Wildlife Fed’n v. EPA*, 945 F. Supp. 2d 39, 43 (D.D.C. 2013) (quoting *Dunn-McCampbell Royalty Interest, Inc. v. Nat’l Park Serv.*, 112 F.3d 1283, 1288 (5th Cir. 1997)); *see also* 5 U.S.C. § 704 (The APA provides for judicial review of “final agency action for which there is no other adequate remedy in a court.”). To be “final” and subject to review under the APA, an agency action must generally satisfy two conditions:

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.

U.S. Army Corps of Eng’rs v. Hawkes Co., Inc., 136 S. Ct. 1807, 1813 (2016) (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (internal quotation marks and citations omitted)).

The Tribe asserts that it may challenge the Federal Defendants’ decision declining to take primary jurisdiction over the Mine’s Section 404 permit under the APA because the Federal Defendants’ letters to the Tribe constitute final agency action. On August 21, 2017, the Tribe wrote a letter to the Corps and the EPA, requesting that the Federal Defendants make a specific formal determination regarding the jurisdictional status of the wetlands at issue in the permit. It explained

that “a thorough review of the current status of interstate commerce on the Menominee River adjacent to the wetlands at issue, as well as a study of its susceptibility for future use in interstate commerce, will lead to the conclusion that the CWA does not allow for Michigan’s assumption of jurisdiction pursuant to § 404(g)(1).” ECF No. 21-7 at 7. The Corps responded to the Tribe’s letter on September 28, 2017, expressing that, because Michigan assumed jurisdiction over the Section 404 permitting program, the Corps does not have the authority to initiate tribal consultation regarding Aquila’s permit application as “the conditions required for the Corps to review the application have not yet occurred.” ECF No. 21-8. The Corps observed that the EPA retains oversight over all Section 404 permits:

[T]he EPA has authority to object to a project that does not conform to Section 404 and in particular, the 404(b)(1) Guidelines. If the objection is not resolved, and MDEQ does not deny the permit, Section 404 authority transfers to the Corps.

Id. The EPA responded to the Tribe’s letter on October 13, 2017, offering to consult with the Tribe regarding the permit process for the proposed Back Forty Mine. ECF No. 21-9.

Although courts have found certain letters constitute final agency action, “agency action that merely reiterates or affirms an earlier agency decision and does not affect the rights or alter the status quo of the complaining party is not considered a ‘final agency action.’” *Harris v. FAA*, 215 F. Supp. 2d 209, 213 (D.D.C. 2002). In this case, the Federal Defendants’ responses were purely informational in nature and did not make any factual or legal determinations about the waters at issue or about jurisdiction. The letters did nothing more than reiterate that the EPA approved Michigan’s permitting program in 1984 and that the Federal Defendants would not exercise jurisdiction over the permit as a result. In other words, the Tribe was left with the remedies available to it under Michigan law.

In 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. The Federal Defendants' letters "tread no new ground. [They] left the world just as [they] found it, and thus cannot be fairly described as implementing, interpreting, or prescribing new law or policy." *Clayton Cty., Georgia v. FAA*, 887 F.3d 1262, 1267 (11th Cir. 2018) (quoting *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 422–25 (D.C. Cir. 2004)); *see also Gen. Motors Corp. v. EPA*, 363 F.3d 442, 449–51 (D.C. Cir. 2004) (holding that a letter from an agency that reflected "neither a new interpretation nor a new policy" did not "impose new obligations"). In short, the Federal Defendants' responses do not constitute "final agency action" and are not reviewable by this court. *See Indep. Equip. Dealers Ass'n*, 372 F.3d at 428 (finding that EPA letter was not reviewable agency action when it restated "for the umpteenth time" its longstanding interpretation of certain regulations). The Tribe has therefore failed to state a claim raising an as-applied challenge under the APA.

CONCLUSION

For these reasons, the Menominee Tribe's motion to amend (ECF No. 34) is **DENIED**, the Federal Defendants and Aquila's motions to dismiss (ECF Nos. 6, 19) are **GRANTED**, and the case is dismissed. The Clerk is directed to enter judgment accordingly.

SO ORDERED this 19th day of December, 2018.

s/ William C. Griesbach

William C. Griesbach, Chief Judge
United States District Court