

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

**REPLY BRIEF OF PLAINTIFF-APPELLANT
MENOMINEE INDIAN TRIBE OF WISCONSIN**

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INTRODUCTION

In this case, the Menominee Indian Tribe of Wisconsin (the “Tribe”) seeks to protect the river that bears its name, and the Tribe’s history on that river since time immemorial, from the significant harm that Aquila’s massive Back Forty Mine would cause. Both the Clean Water Act and the National Historic Preservation Act impose substantive and procedural requirements intended to prevent such harm to the Menominee River, its adjacent wetlands, and the cultural and historical sites along its banks. Federal Defendants and Aquila seek to paint the Tribe’s claims as a late effort to revisit old decisions. They are wrong. The Tribe has timely challenged Federal Defendants’ unlawful decision to delegate authority over the Clean Water Act permit for this mine, and the district court erred in dismissing this claim. Similarly, the Tribe’s motion for leave to amend is not futile. The National Historic Preservation Act requires Federal Defendants to consult on the cultural and historical sites the mine would damage or destroy. The Tribe may also challenge EPA’s failure to follow its own regulations by withdrawing its objections to Aquila’s inadequate permit.

ARGUMENT

I. THE CORPS AND EPA LETTERS ARE FINAL AGENCY ACTIONS

The Clean Water Act prohibits EPA and the Corps from delegating Section 404 permitting authority over waters that are or could be used in interstate commerce. 33 U.S.C. § 1344(g)(1). As the Corps itself has found, the portion of the Menominee River and adjacent wetlands that the Mine will harm was, is, and could be used in interstate commerce. JA 0029-30. Accordingly, the Clean Water Act prohibits Federal Defendants from delegating to Michigan authority to issue a Section 404 permit for the Back Forty Mine.

Federal Defendants do not dispute the statutory prohibition on delegation of waters used in interstate commerce. Likewise, they do not dispute the core facts showing it applies here—

nor could they on this appeal of a motion to dismiss. Instead, they offer a host of reasons that this Court cannot do anything to address their illegal delegation of this Permit, despite the harm it causes the Tribe. Federal Defendants are wrong. The Tribe may bring this as-applied challenge to Federal Defendants' unlawful delegation of this Permit.

A. The Tribe may bring an as-applied challenge.

Federal Defendants first delegated Section 404 permitting authority to Michigan in 1984. That delegation included the portions of the Menominee River at issue here, despite the Corps' own findings that it was navigable and so could not be delegated. JA 0029-30; JA 0113-16; JA 0037-112; Tribe Br. at 4-5. *See also* 33 U.S.C. § 403; 33 C.F.R. § 329.4. Federal Defendants applied that delegation to this Permit in 2017, in letters to the Tribe stating that the 1984 delegation applies and refusing to assume jurisdiction over the Permit. Federal Defendants argue the Tribe cannot challenge their unlawful delegation of this Permit because they unlawfully delegated permitting authority over the Menominee River decades ago.

Federal Defendants are wrong. It is well-established that plaintiffs may raise claims that a rule conflicts with its authorizing statute in an as-applied challenge. *N.L.R.B. v. Fed. Labor Relations Auth.*, 834 F.2d 191, 196 (D.C. Cir. 1987) (petitioners may raise claims that a rule “*conflicts with the statute* from which its authority derives” at the time the rule is applied to them) (emphasis in original). *See also* *Commonwealth Edison Co. v. Nuclear Regulatory Comm’n*, 830 F.2d 610, 613-16 (7th Cir. 1987); *Murphy Expl. & Prod. Co. v. U.S. Dep’t of the Interior*, 270 F.3d 957, 958-59 (D.C. Cir. 2001). As the D.C. Circuit has explained, “rules and regulations are capable of continuing application; limiting the right of review of the underlying rule would effectively deny many parties ultimately affected by a rule an opportunity to question its validity.” *Functional Music, Inc. v. F.C.C.*, 274 F.2d 543, 546 (D.C. Cir. 1958).

The Tribe's challenge falls squarely under this well-established line of cases. The 2017 letters apply the 1984 delegation rule to this Permit, and the Tribe may challenge the letters as decisions that conflict with the Clean Water Act. It is no bar that the unlawful delegation of this Permit flows from the unlawful delegation of the Menominee River in 1984. The Tribe may argue in this as-applied challenge that the Clean Water Act prohibits delegation of this Permit because the Act bars delegation of the portion of the Menominee River at issue here. 33 U.S.C. § 1344(g)(1); *N.L.R.B.*, 834 F.2d at 196. The fact that the delegation has been illegal for decades does not insulate it from an as-applied challenge now.

Nor does the fact that the delegation has been illegal for decades convert the Tribe's claim to a facial challenge. The Tribe does not ask this Court to set aside the 1984 delegation. Nor does the Tribe ask this Court to address jurisdiction over any future permit or any other body of water. Instead, the Tribe seeks relief specific to this Permit. JA 0035-36. Aquila argues that the Tribe's challenge must be facial because a ruling in the Tribe's favor would have implications for other permits on the Menominee River. Aquila Br. at 19. The fact that a holding on this Permit might ultimately be applied to future cases does not make this a facial challenge; that is simply how precedent works. Aquila's characterization is incorrect. *See, e.g., Murphy Expl. & Prod. Co.*, 252 F.3d 473, 477 (D.C. Cir.), *opinion modified on denial of reh'g sub nom.* 270 F.3d 957 (D.C. Cir. 2001) (suit was not a facial challenge where plaintiffs' complaint did not challenge regulations directly); Tribe Br. at 22-23.

Federal Defendants concede that an as-applied challenge is appropriate at the time an agency applies a prior decision. Fed. Br. at 19. But they too argue that the Tribe is actually bringing a facial challenge, because their delegation of the Menominee River "is not specific to the Aquila permit." *Id.* Again, it is well-established that the Tribe may argue in a challenge to

the delegation of this specific Permit that the delegation of this portion of the Menominee River conflicts with the Clean Water Act. *N.L.R.B.*, 834 F.2d at 196. Notably, Federal Defendants cite no authority to support their attempt to narrow the scope of an as-applied challenge. Fed. Br. at 19. Instead, the sole case Federal Defendants cite, *Dunn-McCampbell Royalty Interest, Inc. v. National Park Service*, holds that a plaintiff may challenge an agency's statutory authority for a rule at the time it is applied to them, even if the statute of limitations to challenge the rule has run. 112 F.3d 1283, 1287 (5th Cir. 1997) ("we have held that when an agency *applies* a rule, the limitations period running from the rule's publication will not bar a claimant from challenging the agency's statutory authority") (emphasis in original). Here, the Tribe timely brought this challenge to the 2017 letters applying the 1984 delegation to this Permit.¹

B. Neither reiteration nor reopening bar this as-applied challenge.

Federal Defendants rely on two inapplicable lines of cases in arguing that the Tribe has no avenue to challenge their unlawful delegation of this Permit. First, cases dealing with reiteration address whether an agency has changed its prior position through a subsequent action, such as a guidance document or letter. If the action does mark a change in position, then plaintiffs may challenge it as a new rule if it has binding effect (among other requirements). *See General Motors Corp. v. EPA*, 363 F.3d 442, 448-49 (D.C. Cir. 2004).

Second, cases dealing with reopening address whether an agency has opened the door to challenges to a rule it has decided not to change. Where an agency indicates that it is

¹ The Tribe has not waived its claims against EPA. At multiple points in its opening brief, the Tribe discusses the letters it sent to both the Corps and EPA and their responses. *E.g.*, Tribe Br. at 6-7; *id.* at 12 (jurisdiction "must be with the Corps (and EPA)"); *id.* at 14 (Tribes' letters to EPA and the Corps); *id.* at 18 (arguing that the district court erred by dismissing claims against "the Corps and EPA"). The Tribe discusses the Corps' letter in more detail because the Corps is the agency that must issue the permit, 33 U.S.C. § 1344(a), and the Corps' letter provides slightly more information than the minimal response from EPA.

considering changing a rule—such as through a notice of proposed rulemaking or response to a petition—then the agency’s decision can be challenged even if the agency ultimately decides to leave the existing rule untouched. *See Independent Equipment Dealers Ass’n v. EPA*, 372 F.3d 420, 428 (D.C. Cir. 2004) (“our ‘reopening doctrine’ specifically spells out the circumstances when an agency’s discussion of its existing regulations *can* ripen into an ‘opportunity for renewed comment and objection’ to those regulations”) (quoting *Ohio v. EPA*, 838 F.2d 1325, 1328 (D.C. Cir. 1988)) (emphasis in original).

Federal Defendants argue that the 2017 letters neither changed nor reopened the 1984 delegation decision. But neither change nor reopening form the basis for the Tribe’s challenge here.² As explained above, a long line of precedent establishes that plaintiffs may argue in an as-applied challenge that a rule exceeds the agency’s statutory authority. *See N.L.R.B.*, 834 F.2d at 196. Under this line of cases, the Tribe may challenge the 2017 letters that apply the 1984 delegation to this Permit. Nothing in the reiteration or reopening doctrines precludes such as-applied challenges.

None of the cases Federal Defendants cite are to the contrary. Each address whether agency actions may be challenged as rules, and none bar as-applied challenges such as the Tribe’s claim here. In *General Motors*, the D.C. Circuit held that letters could not be challenged *as a new rule* because they “reflect neither a new interpretation nor a new policy,” but instead reiterated the agency’s previously-established interpretation of its rules. 363 F.3d at 449. The court also held that the agency had not reopened its prior rule by responding to petitioners’ letters. *Id.* at 449-50. Finally, the court found that an as-applied challenge was not yet ripe. *Id.*

² The Tribe discussed the reopening doctrine in its opening brief because it provides important context for the reiteration cases the district court cited. The Tribe is not arguing that the 2017 letters reopened the 1984 delegation decision.

at 451-52. In short, petitioners were both too late and too early: too late to challenge the interpretation as a new rule when it was first announced, and too early to challenge it as applied to them. *Id.* at 453. The Tribe does not assert that the 2017 letters are a new rule, and nothing in *General Motors* precludes the as-applied challenge the Tribe brings here.

In *Clayton County, Georgia v. Federal Aviation Administration*, the court found that an agency letter that reiterated an interpretation established years earlier could not be challenged *as a new rule*. 887 F.3d 1262, 1266-67 (11th Cir. 2018). The court also noted that petitioners could bring an as-applied challenge if the agency eventually applied the interpretation to them. *Id.* at 1270. Like the petitioners in *General Motors*, the court held that petitioners' challenge came "both too late and too early": too late to challenge the interpretation as a new rule and too early to challenge its application to them. *Id.*

Similarly, in *Independent Equipment Dealers*, the D.C. Circuit addressed a claim that an agency's letter had unlawfully amended its existing rules without first providing notice and opportunity for comment. 372 F.3d at 425. The court found instead that the letter reiterated the agency's longstanding interpretation of its rules. *Id.* at 427-28. Since the agency had not changed its rules, notice and comment was not required. *Id.* The court distinguished the letter at issue, which restated the agency's interpretation "in an abstract setting," from a decision applying that interpretation, such as an enforcement proceeding, or a decision denying relief. *Id.*

None of these cases bar the Tribe's as-applied challenge. The Tribe has not alleged in its complaint that the 2017 letters changed or reopened the 1984 delegation decision. Nor does the Tribe argue that the 2017 letters are a new rule or rule amendment. Instead, the Tribe brings this as-applied challenge because the 2017 letters apply the 1984 rule to the Permit at issue here. *General Motors*, *Independent Equipment Dealers*, and *Clayton County* all distinguish their

holdings on reiteration and reopening from challenges brought at the time an agency applies its rule to a specific set of facts. While such challenges were not yet ripe in the cases Federal Defendants cite, the Tribe's as-applied challenge is ripe here. Federal Defendants do not assert that there is any action left for them to take or any decision they have yet to make. If the Tribe has any opportunity to challenge Federal Defendants' unlawful delegation of this Permit, it must be now. *See generally Abbott Labs. v. Gardner*, 387 U.S. 136, 140-41 (1967) (finding a strong presumption in favor of judicial review of agency actions).

C. The 2017 letters are final agency actions.

The 2017 letters from the Corps and EPA stating that the 1984 delegation applies and refusing to exercise jurisdiction over the Permit meet both prongs of the test for final agency action. *See Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). First, the 2017 letters are final—they are not tentative or interlocutory. *See id.* Federal Defendants do not claim they are still considering this issue, nor do they assert that there is any decision on this Permit they have yet to make. Instead, they argue that the letters are not final because they are not a decision at all. Fed. Br. at 13-15. This argument simply circles back to Federal Defendants' unfounded assertion that the Tribe's only avenue for judicial review was to challenge the 1984 delegation rule. But the Tribe may bring an as-applied challenge, and Federal Defendants have made clear that the 2017 letters are their final word as to whether they will exercise jurisdiction over this Permit. *See Home Builders Ass'n of Greater Chicago v. U.S. Army Corps of Engineers*, 335 F.3d 607, 615 (7th Cir. 2003) (action is final where agency has "completed its decisionmaking process") (internal quotes and citations omitted).

Second, the 2017 letters have legal consequences for the Tribe. The Federal Defendants' unlawful decision to delegate this Permit means that the procedural protections of the National

Environmental Policy Act and the National Historic Preservation Act do not apply.³ The Federal Defendants concede that the loss of these protections has significant legal consequences for the Tribe, but argue that these consequences flow from the 1984 delegation, rather than the 2017 letters. Again, Federal Defendants confuse the nature of this as-applied challenge. The fact that they unlawfully delegated this portion of the Menominee River in 1984 does not prevent the Tribe from challenging its application to this Permit. This specific Mine threatens to damage or destroy historically and culturally significant sites on the Tribe's ancestral lands and degrade the River that bears the Tribe's name. Federal Defendants' lack of consultation and environmental review for this Permit means that information on these harms may not be available until it is too late to prevent them. Federal Defendants' unlawful delegation of this specific Permit has legal consequences for the Tribe now. *See W. Illinois Home Health Care, Inc. v. Herman*, 150 F.3d 659, 662-63 (7th Cir. 1998) (holding letters were final agency action because the agency's decision had a direct effect on the parties).

Federal Defendants do not argue that they are still deciding whether to assume jurisdiction over this Permit. Similarly, they do not dispute that the loss of significant procedural protections has legal consequences for the Tribe. Instead, they simply repeat their mistaken belief that there is no way for the Tribe to bring an as-applied challenge to this Permit. Federal Defendants have not offered any other argument that their 2017 letters are not final or consequential.

³ The Tribe contends that the NHPA applies even if Michigan issues the Permit, *see infra*, but the National Environmental Policy Act does not apply to state permits issued under delegated authority.

II. THE NHPA APPLIES TO THE BACK FORTY PERMIT

A. The NHPA requires Federal Defendants to consult with the Tribe.

Under the plain language of the National Historic Preservation Act (“NHPA”), Federal Defendants are required to consult with the Tribe to identify the many significant cultural and historic sites that the Mine will damage or destroy. Defendants rely heavily on out of circuit case law to argue that the NHPA does not require consultation, but a careful reading of the statutory language demonstrates that Federal Defendants must consult. *See Scherr v. Marriott Int’l, Inc.*, 703 F.3d 1069, 1077 (7th Cir. 2013) (courts begin with plain language and its context in interpreting a statute).

It is clear that the Mine is an “undertaking” as defined by Section 301 of the NHPA. 54 U.S.C. § 300320(4) (“undertaking” includes any project that is “subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency”). The Mine is subject to Michigan’s regulations administered pursuant to a delegation of Section 404 permitting authority from Federal Defendants. Defendants do not dispute that the Mine falls squarely within this definition.

Instead, Federal Defendants argue that Section 106 only requires consultation on projects that are funded or licensed by a federal agency. But the statute itself says no such thing. Section 106 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 (emphasis added). Nothing in this language limits consultation to licenses actually issued by federal agencies. Instead, federal agencies must consult before “any license” is issued if they have “authority to license” the undertaking. *Id.*

Federal Defendants have “authority to license” the Mine. The Clean Water Act grants Federal Defendants primary authority to issue Section 404 permits. 33 U.S.C. § 1344. Indeed, since Federal Defendants cannot delegate authority to issue permits affecting this portion of the Menominee River, the authority to issue a Section 404 permit here rests solely with the Federal Defendants. *See supra*. Even if Federal Defendants could delegate this Permit, however, they still retain “authority to license” the Mine because EPA retains authority to object to the Permit, and permitting authority transfers to the Corps if the state does not resolve those objections. Either way, Federal Defendants have “authority to license” the Mine. 54 U.S.C. § 306108.

Accordingly, Federal Defendants must consult “prior to the issuance of *any* license.” 54 U.S.C. § 306108 (emphasis added). “Any” license includes licenses issued by state agencies; Congress’ use of the broad word “any” does not support limiting this requirement to licenses issued by federal agencies. *See, e.g., United States v. Gonzales*, 520 U.S. 1, 5 (1997) (“the word ‘any’ has an expansive meaning”). Indeed, in other contexts, the Supreme Court has repeatedly held that the word “any” encompasses federal and state actions. *Id.* (holding that “any” term of imprisonment includes federal and state terms) (*citing United States v. Alvarez–Sanchez*, 511 U.S. 350, 358 (1994) (“any” law enforcement officer includes federal, state, and local officers) and *Collector v. Hubbard*, 12 Wall. 1, 15, 20 L.Ed. 272 (1871) (“any” court includes state and federal courts)).

The contrast between this broad language—“any license”—and the narrower language pertaining to funding further supports this reading. Congress only required consultation prior to

“the expenditure of any *Federal* funds.” 54 U.S.C. § 306108 (emphasis added). In contrast, Congress chose to omit this qualifier in requiring consultation prior to the issuance of “any license.” That choice should be read as deliberate. Defendants invite this Court to hold that consultation is only required for “any *Federal* license,” but the Court should decline to insert statutory language that Congress chose to omit. *See Loughrin v. United States*, 573 U.S. 351, 358 (2014) (“when Congress includes particular language in one section of a statute but omits it in another . . . this Court presumes that Congress intended a difference in meaning”) (internal quotes, citations, and alterations omitted).

The definition of “undertaking” and the structure of the NHPA as a whole also support reading Section 106 to require consultation on permits issued by states pursuant to delegated federal authority. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 132 (2000) (when interpreting a statute’s plain language, “a reviewing court should not confine itself to examining a particular statutory provision in isolation”); *id.* at 132–133 (“It is a ‘fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.’”) (quoting *Davis v. Michigan Dept. of Treasury*, 489 U. S. 803, 809 (1989)).

The NHPA contains limited references to “undertakings.” When this defined term appears, it either references Section 106, or has a specific application that could not encompass state actions pursuant to delegated federal authority (such as an undertaking outside of the United States). *See, e.g.*, 54 U.S.C. §§ 302702, 302705 (referencing Section 106 consultation requirement); *id.* § 307101 (international World Heritage List sites). Accordingly, interpreting the Section 106 consultation requirement to exclude state permits issued pursuant to delegated

federal authority renders meaningless Congress' explicit inclusion of such permits in the definition of "undertaking." *Id.* § 300320(4).

Federal Defendants do not point to where this prong of Congress' definition of "undertaking" might apply under their interpretation. Instead, they tacitly acknowledge that their narrow interpretation renders part of the statute meaningless and argue that this "tension is for Congress" to resolve. Fed. Br. at 33. But the plain language of Section 106 hardly compels this Court to adopt an interpretation that reads a different section of the Act out of existence. Instead, by requiring consultation on "*any* license" so long as a federal agency has "authority to issue" it, Congress required consultation on state permits issued under delegated authority. This reading gives effect to the plain language of both Section 106 and the statutory definition of "undertaking" in Section 301, and it must prevail over Defendants' narrow reading that edits portions of the statute out of existence. *See Scherr*, 703 F.3d at 1077 (courts should avoid interpretations rendering text "meaningless, redundant, or superfluous").

Because the plain language of the NHPA demonstrates that Federal Defendants must consult, the Court need not look to legislative history. If the Court finds the plain language ambiguous, however, the legislative history of the 1992 NHPA amendments shows that Congress expanded the definition of undertaking to "specifically include[e] programs carried out by States pursuant to Federal permits or funding[.]" S. Rep. 102-336 (1992) at 18. *See also* Tribe Br. at 28-29. Similarly, the Advisory Council on Historic Properties, the agency with delegated authority to implement the NHPA, interpreted these provisions to require consultation on state permits issued pursuant to delegated authority. Tribe Br. at 26-27. Federal Defendants do not identify any legislative history or authoritative agency interpretation that might warrant a

contrary interpretation of ambiguous language, and so have conceded that if the text is ambiguous it must be interpreted to require consultation on this Permit.

There is no merit to Federal Defendants' suggestion that consultation would be an "empty exercise" because they lack authority to require changes to the project. Fed. Br. at 33-34. EPA has authority, in consultation with the Corps, to object to Section 404 permits, and permitting authority transfers to the Corps if the state does not resolve these objections. 33 U.S.C. § 1344(j); *infra* Section III. The regulations that govern EPA's objections to state permits specifically direct EPA to consider impacts to historic monuments and similar sites as well as broader aesthetic impacts, 40 C.F.R. §§ 230.53 -.54, and EPA's objections to this Permit included comments that Aquila had not adequately addressed impacts to historical and cultural sites. JA 0204 ("Previous archaeological surveys identified cultural resources in the project area. The applicant has not provided sufficient information to support the assertion that the proposed project would likely not impact potentially eligible or eligible resources.").

Through the objection process, Federal Defendants have the opportunity to require modifications to a project that would damage or destroy invaluable cultural and historical sites. Indeed, Federal Defendants argue that their authority to object is so unbounded that it is committed to their discretion by law. Fed. Br. at 21-27. Federal Defendants fail to explain how their authority to object can be simultaneously so unbounded that there is no law to apply, yet also so constrained that they lack any opportunity to impact the project. While the Tribe disagrees with Federal Defendants' overbroad interpretation of their discretion to withdraw objections, *see infra*, the authority to object certainly carries with it the power to influence the project to minimize damage to historically significant sites on the Tribe's ancestral lands.

Finally, Aquila's concern that consultation poses an administrative burden runs contrary to Congress' intent in imposing this procedural requirement. Aquila Br. at 27 n.12. Congress imposed the consultation requirement to protect historically and culturally significant sites, and protecting Tribes was paramount to Congress' decision to expand the reach of the Act. *See* Tribe Br. at 26. Procedural requirements such as consultation always take time, and in Congress' judgment, the limited additional time they require is justified by the opportunity they offer to preserve irreplaceable historical and cultural sites.

B. Case law from other circuits does not justify ignoring the plain language of the NHPA.

Federal Defendants argue that the plain language of the NHPA precludes consultation without any parsing of the statutory text. Instead, they rely on case law to support their plain language argument. The Seventh Circuit has never addressed this question, and many of the statements they quote from other courts are dicta. While the D.C. Circuit has adopted the interpretation Defendants urge here, this Court should not adopt the holding in those cases.

The Seventh Circuit has not addressed whether a state license issued pursuant to delegated federal authority triggers NHPA consultation. Federal Defendants cite *Old Town Neighborhood Association Inc. v. Kauffman*, 333 F.3d 732 (7th Cir. 2003), but that case addressed funding, not licenses—specifically, the court considered whether a local project that would allegedly receive federal reimbursement after its completion required consultation. Because there was no license (federal or state) at issue, the Court's passing remark that the NHPA applies only to “the issuance of federal licenses” is dicta. *Id.* at 735.

Many of the other cases Federal Defendants cite likewise do not deal with delegated programs at all. Fed. Br. at 30-31. *Business and Residents Alliance v. Jackson*, 430 F.3d 584, 592 (2d Cir. 2005), concerned federal funding and not a permit or license. *Waterford Citizens'*

Association v. Reilly, 970 F.2d 1287, 1292 (4th Cir. 1992), held that federal agencies do not have an ongoing obligation to consult years after a federal undertaking is complete. *Monumental Task Committee, Inc. v. Foxx*, 240 F. Supp. 3d 487, 496-97 (E.D. La. 2017), similarly held that the prior use of federal funds to move a monument did not obligate federal agencies to consult on a decision to remove the monument decades later. In short, none of these cases address the question at issue here: whether state permits issued pursuant to federally-delegated authority require NHPA consultation.

The D.C. Circuit has held that state licenses issued under delegated federal authority do not require consultation. *Nat'l Mining Ass'n v. Fowler*, 324 F.3d 752 (D.C. Cir. 2003). *Fowler* is wrongly decided. The court in *Fowler* believed itself bound by a prior panel opinion in *Sheridan-Kalorama Historical Association v. Christopher*, 49 F.3d 750 (D.C. Cir. 1995), but the *Fowler* court mistakenly relied on dicta without examining the actual holding of that case.

In *Sheridan-Kalorama*, the D.C. Circuit considered whether the Secretary of State's decision not to disapprove Turkey's decision to rebuild its chancery under the Foreign Missions Act is a "license" triggering NHPA consultation. Before beginning its analysis, the court first quoted Section 106 and then summarized it as applying to projects that are "either federally funded or federally licensed." 49 F.3d at 756. This summary is dicta—the court did not have a state-issued permit before it and so cannot have held that such permits never trigger consultation. Instead, the court considered whether a federal agency's *failure to disapprove* a license is itself a license, and held that it is not. *Id.* at 754-57. *See also* 54 U.S.C. § 300320(3).

Fowler mistakenly treats this dicta from *Sheridan-Kalorama* as a binding holding. *Fowler*, 324 F.3d at 759-60. The *Fowler* court did not offer any new analysis of the statute because it believed itself bound by the prior panel opinion. *Id.* at 760 (*Sheridan-Kalorama*

“relieves us of the need—indeed authority—to perform our own statutory analysis”). The *Fowler* court did not explain how the summary of Section 106 in *Sheridan-Kalorama* could be a holding on delegated state permits when none was before the court.

This Court is not bound by *Fowler* and should not adopt its flawed holding here. *Fowler* does not contain any detailed analysis of the plain language of Section 106, and the court believed itself bound by dicta in *Sheridan-Kalorama* to adopt an interpretation that renders part of the statutory text meaningless and flies in the face of Congress’ intent. Instead, the plain language of the NHPA, established rules of statutory construction, and legislative history all point to the conclusion that consultation is required on state permits issued pursuant to delegations of federal authority. 54 U.S.C. §§ 306108, 300320(4). This Court should hold that the NHPA requires Federal Defendants to consult on the historical sites the Mine will damage or destroy on the Tribe’s ancestral lands.

III. EPA’S WITHDRAWAL OF ITS OBJECTIONS TO THE PERMIT IS REVIEWABLE

A. The Clean Water Act and EPA regulations provide the law to apply.

The Clean Water Act directs EPA to issue regulations governing Section 404 discharge permits, and to prohibit discharges that will have unreasonable adverse effects. *See* 33 U.S.C. § 1344(b), (c). EPA’s regulations, the “404(b)(1) Guidelines,” 40 C.F.R. Pt. 230, implement this statutory requirement.⁴ The 404(b)(1) Guidelines apply to all permits for discharges to waters of the United States, including both federal and delegated state permits. 40 C.F.R. § 230.2(a).

The Section 404(b)(1) Guidelines include comprehensive criteria EPA must consider to determine whether a proposed discharge will have an unreasonable adverse effect and to guide

⁴ While EPA calls these regulations “Guidelines,” they are promulgated through notice and comment rulemaking, published in the Code of Federal Regulations, and bind EPA as well as applicants. Federal Defendants do not contend otherwise.

permit requirements. The regulations direct that no discharge “shall be permitted” if there is a less environmentally harmful alternative or if the discharge would contribute to “significant degradation” of the waters of the United States. *Id.* § 230.10(a), (c). EPA “shall” base such findings on factors detailed in the regulations, *id.*, including impacts to the aquatic ecosystem and impacts related to human use, as measured by mandatory evaluation and testing procedures. *Id.* §§ 230.11; 230.20 - 230.54; 230.60 – 230.61. These “law-like criteria” provide ample “guideposts” to measure whether a proposed permit complies with the Guidelines. *Miami Nation of Indians of Indiana, Inc. v. U.S. Dep’t of the Interior*, 255 F.3d 342, 349 (7th Cir. 2001).

These regulations govern EPA’s objections to state issued permits. 40 C.F.R. § 233.50(e) (“[a]ny such [permit] objection shall be based on the [EPA’s] determination that the proposed permit is . . . (2) outside requirements of the Act, these regulations, *or the 404(b)(1) Guidelines.*”) (emphasis added).⁵ Federal Defendants acknowledge these requirements but contend that they are purely procedural, and argue that there is no law to apply to the substance of EPA’s decision to withdraw its objections. Not so. Both the procedural requirements in the Part 230 regulations and the substantive requirements in the 404(b)(1) Guidelines provide law to apply in assessing EPA’s decision to withdraw its objections here. *See Head Start Family Educ. Program, Inc. v. Cooperative Educ. Serv. Agency*, 46 F.3d 629, 633 (7th Cir. 1995) (holding that an agency’s own regulations can provide the law to apply that renders an agency’s action reviewable).

⁵ Federal Defendants’ contention that the Guidelines do not govern EPA’s review of state-issued permits is baffling. Fed. Br. at 23. The regulations plainly require EPA to base any objections to delegated permits on specific findings, including a finding that the permit is “outside requirements . . . of the 404(b)(1) Guidelines.” 40 C.F.R. § 233.50(e).

B. EPA failed to follow its own regulations when it withdrew its objections here.

The 404(b)(1) Guidelines formed the basis for EPA's objections to this Permit. In EPA's "written statement" explaining its objections and reasons for them, *see* 40 C.F.R. § 233.50(e), EPA repeatedly noted that Aquila had failed to provide information sufficient to demonstrate that the Mine will not have an unacceptable adverse impact on wetlands and water resources. *See, e.g.*, JA 0200 ("The applicant has provided some data pertaining to water quality, but has not provided sufficient information to demonstrate that the Guidelines have been met."); JA 0198 ("[p]ursuant to the Guidelines, the applicant bears the burden of clearly demonstrating that the preferred alternative is the least environmental damaging practicable alternative that...minimizes impacts to the aquatic environment...and does not cause or contribute to significant degradation of waters of the U.S."); JA 0202 (noting that "[u]nder the CWA Section 404(b)(1) Guidelines, the agencies may only consider compensatory mitigation after an applicant has demonstrated avoidance and minimization of adverse aquatic resource impacts" and that the applicant had failed to supply information required under the 2008 Federal Mitigation Rule).

After issuing these objections, EPA decided to withdraw them. Rather than require that this Permit include requirements showing EPA's objections were satisfied, EPA instead simply asked that Aquila meet the permit application requirements at some point *after* the state issued the final permit. *See* JA 0207-08. EPA characterizes its action as a finding that its objections were satisfied, Fed. Br. at 22, but it is that point that the Tribe challenges as contrary to law and arbitrary and capricious. EPA cannot rationally conclude that its objections have been resolved by conditions that have not yet been proposed (and may never be) and information that has not yet been provided (and may never be). Instead, EPA withdrew its objections without requiring Aquila or the state to remedy the violations of the Guidelines that EPA had identified. Nothing in the Clean Water Act or EPA's implementing regulations allows EPA to do so. *Friends of*

Crystal River v. EPA, 35 F.3d 1073, 1079-80 (6th Cir. 1994). *See also* 40 C.F.R. § 233.50(e) (EPA objections shall include actions that “must” be taken by the state to resolve them).⁶

Federal Defendants rely heavily on cases holding that EPA has discretion *not* to object to permits even where they fail to meet statutory or regulatory requirements. *See District of Columbia v. Schramm*, 631 F.2d 854, 861 (D.C. Cir. 1980); *Save the Bay v. Admin., EPA*, 556 F.2d 1282, 1294-95 (5th Cir. 1977). But as the Sixth Circuit has held, while EPA may choose not to object in the first instance, once EPA *does* object, its decision to withdraw those objections is reviewable. *See Friends of Crystal River*, 35 F.3d at 1079; *Mich. Peat v. EPA*, 175 F.3d 422, 428 (6th Cir. 1999).

Federal Defendants attempt to distinguish *Michigan Peat* on the grounds that plaintiffs there challenged a final permit. Fed. Br. at 29-30. But the plaintiff’s claims against EPA all stemmed from EPA’s decision to require modifications to the state permit through the objection process. 175 F.3d at 427. The court specifically considered “whether the EPA committed a final agency action” when EPA “ultimately withdrew [its objections] and agreed to the proposed 1995 permit that the [state] sent to the [permit applicant],” and held that EPA’s decision to “sign[] off” on the permit was final and reviewable. *Id.* at 428.

Federal Defendants’ attempt to distinguish *Friends of Crystal River* also fails. Fed. Br. at 27. Federal Defendants argue that case only addressed EPA’s unlawful decision to transfer permitting authority from the Corps back to the state. But the first issue the court addressed was “whether the Clean Water Act precludes judicial review of the EPA’s withdrawal of its objections.” 35 F.3d at 1077. On this question, the court held that “EPA’s withdrawal of its

⁶ While EPA may withdraw its objections after a public hearing, 40 C.F.R. § 233.50(h), EPA did not hold a public hearing here, and the regulations do not provide any other avenue for EPA to withdraw objections without the state addressing them. *See id.* § 233.50(e).

objections is a final decision that, if unreviewed, will terminate the federal government's role in this case.” *Id.* at 1079. While the court also held that EPA cannot transfer permitting authority from the Corps back to a state, *id.* at 1080, this transfer is not the only agency action the court addressed. *See also id.* at 1079 (holding that federal court review was appropriate “where the EPA has allegedly abandoned its supervisory role, and has, at the same time, revoked the authority of another federal agency to exercise the same.”).

In short, EPA cannot show that its decision to withdraw its objections falls within the “very narrow exception” to the presumption that agency action is reviewable. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971). EPA’s own regulations create procedural and substantive criteria that govern EPA’s objections to a Section 404 permit. *See* 40 C.F.R. Pt. 233. Once EPA chooses to object, EPA’s decision to withdraw those objections is reviewable, and where EPA has arbitrarily ignored the requirements of its own implementing regulations, that decision can be set aside. *Friends of Crystal River*, 35 F.3d at 1079; *Mich. Peat*, 175 F.3d at 428. EPA’s decision here to withdraw its objections despite the fact that the state did not modify the Permit to satisfy the Section 404(b)(1) Guidelines is reviewable.⁷

C. EPA’s decision to withdraw its objections is final agency action.

Federal Defendants argue in the alternative that EPA’s decision to withdraw its objections is not final agency action. Again, they are wrong. Federal Defendants principally argue that only the permit itself is reviewable because it is the consummation of the permitting process. But courts look to whether an action is the consummation of the *agency’s* decision-

⁷ Federal Defendants claim that Congress intended for states to have primary responsibility for managing water pollution. Fed. Br. at 23. But in the 1977 amendments to the Clean Water Act, Congress also intended to “expand federal oversight” of states’ lenient permit programs. *Friends of Crystal River*, 35 F.3d at 1078 (internal quotes and citations omitted).

making process. As the Sixth Circuit noted in holding that EPA's decision to withdraw its objections to a Section 404 permit was final agency action, "[s]tatutorily, there was nothing left for the EPA to do once it signed off on the proposed permit." *Mich. Peat*, 175 F.3d at 428. The fact that a different, state agency issued the permit does not make EPA's decision to withdraw its objections any less final. Instead, it is the culmination of EPA's decision-making process regarding the proposed permit.

Federal Defendants are also wrong to argue that no legal consequences flow from EPA's decision to withdraw its objections. Once EPA has objected to a permit, the Clean Water Act and implementing regulations bar a state from issuing the permit until those objections have been resolved. 33 U.S.C. § 1344(j) (a state "shall not issue" a permit if EPA has objected); 40 C.F.R. § 233.50(f) ("When the [state] has received an EPA objection..., he shall not issue the permit unless he has taken the steps required by [EPA] to eliminate the objection."). EPA's decision to withdraw its objections has the legal consequence of removing this bar.

Federal Defendants point to cases holding that EPA's decision to object to a permit is not final. *See Am. Paper Inst. v. EPA*, 890 F.2d 869 (7th Cir. 1989)⁸; *Marquette Country Road Comm'n v. EPA*, 188 F. Supp. 3d 641, 647-48 (W.D. Mich. 2016). EPA's decision to object marks the beginning of a process between EPA, the applicant, and the state to resolve those objections. In contrast, EPA's decision to withdraw its objections is final and reviewable

⁸ *American Paper* also suggests that review is precluded because Congress did not intend for federal courts to have a role in reviewing state issued permits. But as the court in *Friends of Crystal River* noted, it is common for federal and state courts to share jurisdiction over claims that present questions of federal law. 35 F.3d at 1079. Accordingly, "a more defensible basis for determining EPA objections to be non-reviewable lies in the fact that such decisions are non-final." *Id.* at 1080 n.11.

because it terminates EPA's role in the permitting process and removes the legal bar to the state-issued permit. *See Friends of Crystal River*, 35 F.3d at 1079.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's order dismissing the Tribe's challenge to the Federal Defendants' unlawful decision to delegate authority over this Permit to the state. This Court should also reverse the district court's order denying the Tribe's motion to amend its complaint to include claims that Federal Defendants' failure to consult violates the National Historic Preservation Act, and Federal Defendants' decision to withdraw their objections to the Permit violates the Clean Water Act and implementing regulations.

Dated at Seattle, Washington, this 6th day of June, 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 6965 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 June, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on June 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 June, 2019.

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