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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

MENOMINEE INDIAN TRIBE OF WISCONSIN, Plaintiff, v. U. S. ENVIRONMENTAL PROTECTION AGENCY, SCOTT PRUITT, Administrator, U. S. Environmental Protection Agency, U. S. ARMY CORPS OF ENGINEERS, MARK T. ESPER, Secretary, U. S. Army, Defendants, and AQUILA RESOURCES, INC., Defendant-Intervenor,	No. 1:18-cv-00108 -WCG PLAINTIFF'S COMBINED RESPONSE TO DEFENDANTS' AND DEFENDANT-INTERVENOR'S MOTIONS TO DISMISS

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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 sulfide mine (the "Mine") 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 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 longstanding interests in its ancestral lands.

Under the Clean Water Act, discharges to any water are prohibited unless a discharge is permitted under Section 404 of the Clean Water Act, 33 U.S.C. § 1344, ("Section 404") from the U.S. Army Corps of Engineers (the "Corps"). While the State of Michigan exercises delegated authority to issue some Clean Water Act Section 404 permits, authority to issue the Section 404 permit for the Mine was not and could not have been delegated to Michigan because the Clean Water Act forbids delegation 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 U.S. Environmental Protection Agency ("EPA"), however, denied the Menominee Tribe's request that the federal agencies assume jurisdiction of the permitting process. Instead, the federal agencies have unlawfully ceded jurisdiction over this permit to the State of Michigan. This action challenges the Corps and EPA's denial of the Tribes' request that the federal agencies assume jurisdiction of the Section 404 permitting process for the Back Forty Mine.

The Menominee Tribe has pled this action in the alternative. First, the Tribe challenges the Corps' and EPA's failure to assume jurisdiction over the Section 404 permit under the citizen suit provision of the Clean Water Act, 33 U.S.C. § 1365. The agencies have a non-discretionary duty to assume jurisdiction over the permitting process because the Act plainly prohibits delegation of permits for dredge or fill involving the Menominee River and adjacent wetlands.

In the alternative, the Menominee Tribe's Section 404 claim challenges the Corps' and EPA's failure to take jurisdiction over the permit under the Administrative Procedure Act ("APA"). If this Court finds that jurisdiction is not proper under the Clean Water Act citizen suit provision, then jurisdiction is proper under the APA. The Corps and EPA have made a final determination that they will not exercise primary authority and jurisdiction over the Section 404 permit as required by law and the Tribe has no other adequate remedy. 5 U.S.C. § 704.

Finally, the Tribe's claim is ripe for review.

The motions to dismiss should be denied.

STANDARD OF REVIEW

For motions under Rule 12(b)(6), well-pleaded facts alleged in the Complaint must be taken as true. *Killingsworth v. HSBC Bank, Nevada,* 507 F.3d 614, 618 (7th Cir. 2007). Factual allegations must state a facially-plausible claim for relief above a speculative level. *Id.*

For motions under Rule 12(b)(1), the court must first determine if the challenge is facial to the sufficiency of the pleadings, or factual. *Silha v. ACT, Inc.*, 807 F.3d 169, 173 (7th Cir. 2015). In a facial challenge, the court must accept the allegations of the complaint as true, whereas in a factual challenge, no presumption of truthfulness attaches to the allegations and the plaintiff has the burden of bringing "competent proof" of the court's jurisdiction. *Apex Digital, Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 443-44 (7th Cir. 2009). In examining a factual challenge to a court's subject matter jurisdiction under 12(b)(1), the court may look beyond the pleadings and review evidence submitted by a party to determine if subject matter jurisdiction exists. *Silha*, 807 F.3d at 173.

LEGAL BACKGROUND

Congress enacted the Clean Water Act to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In furtherance of these goals, the Clean Water Act flatly prohibits

discharge of any pollutant into waters of the United States absent compliance with the regulatory requirements of the Act. 33 U.S.C. § 1311(a). Under the Act and implementing regulations, discharges of dredged or fill material are prohibited absent a permit from the Corps ("Section 404 permits"). 33 U.S.C. § 1344(a). *See also* 33 C.F.R. § 322.2 and Pts. 323 and 325. EPA oversees the Corps' Section 404 permitting process, and is authorized to prohibit the discharge of dredge or fill material whenever EPA determines that the discharge will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fisheries, wildlife, or recreational areas. 33 U.S.C. § 1344(c). *See also* 40 C.F.R. Pt. 231.

Under the Clean Water Act, a state may apply to EPA to be delegated the authority to administer a Section 404 permitting program for the discharge of dredged or fill material into waters in its state, but the delegation provisions include an express limitation by Congress on which waters may be delegated. Congress directed that "waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement, as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark. . . including wetlands adjacent thereto" cannot be delegated to a state for Section 404 permitting. 33 U.S.C. § 1344(g). Jurisdiction over Section 404 permitting for those excluded waters must be retained by the Corps and EPA.

Once a state receives delegated authority, the Corps and EPA retain only a

limited role in reviewing Section 404 permits. EPA retains the authority to review and object to proposed permits, but EPA is not required to comment or object to permits and EPA may categorically waive its review authority for most types of Section 404 permits. *See* 40 C.F.R. §§ 233.50-.51. The Corps' role is even more limited. The Corps retains the authority to provide comments to EPA on proposed permits, but EPA is not required to include these in any comments it chooses to offer. *See* 40 C.F.R. 233.50. Only if EPA chooses to object to a proposed permit and if a delegated state fails to adequately respond to EPA's objection, then the Corps assumes jurisdiction of the permitting process. *Id.*

In addition to the requirements of the Clean Water Act, a Section 404 permit issued by the Corps must comply with procedural and substantive protections under other federal laws. These protections include environmental review under the National Environmental Policy Act, 42 U.S.C. § 4332, consultation under the National Historic Preservation Act, 54 U.S.C. § 306109, and consultation under the Endangered Species Act, 16 U.S.C. § 1536. These protections either do not apply or apply in a limited or significantly different fashion to Section 404 permits issued by a state exercising delegated authority.

FACTUAL BACKGROUND

The Menominee Indian Tribe of Wisconsin is a federally-recognized Indian tribe. Compl. ¶ 10. 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, comprised of the Menominee River and areas along the River including Green Bay, but 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 around the Menominee River. Compl. ¶ 11. The Menominee Tribe has also practiced 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 where the Mine and processing facilities will be located. Compl. ¶ 12. 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.*

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. Compl. ¶ 31. *See* Decl. of Lindzey Spice ("Spice Decl."), Exh. A. Based at least in part upon the 1979 Report and supporting research, in January 1982, the Corps' District Counsel, at the direction of the commanding Colonel, found that the Menominee River and adjacent wetlands should be included on a list of "Section 10" waters. Compl. ¶ 32. *See also* Spice Decl. Exh. B.[1] The Menominee River continues to be used for interstate commerce, including the portions of the River at the location of, and downstream from, the proposed Mine. Compl. ¶ 35.

In 1984, EPA approved the delegation of Section 404 permitting to the State of Michigan under 33 U.S.C. § 1344(g). Compl. ¶ 33. *See also* Spice Decl. Exhs. C and D (Memoranda of Agreement between Michigan and Corps (1984) and between Michigan and EPA (2011)). That delegation did not and could not have included the Menominee River. Compl. ¶ 34.[2]

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[1] "Section 10" is a reference to the Rivers and Harbors Act and includes interstate waters which are presently used, or susceptible to use, in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark.

[2] The 1984 Memorandum of Agreement between the Corps and the State of

In November 2016, Aquila applied to the Michigan Department of Environmental Quality for a Section 404 Permit to discharge dredge or fill material related to construction and operation of the proposed Mine and processing facility. These discharges would alter and/or destroy waters and wetlands on and near the Mine site. Compl. ¶¶ 39 and 43.

On August 21, 2017, the Menominee Tribe sent a letter to EPA and the Corps requesting consultation on the Mine permitting process. Compl. ¶ 44; Spice Decl. Exh. E. The Tribe's letter advised that the Menominee River and adjacent wetlands were not and could not be delegated to the State of Michigan under 33 U.S.C. § 1344(g). *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. *Id.* The Tribe's letter also provided more recent evidence of interstate commerce on the Menominee River. *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*.

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 the State. *See*, Spice Decl., Exh. C.

On September 28, 2017, the Corps responded that it would not exercise jurisdiction over the Section 404 permit for the Mine because the State of Michigan was delegated authority over Section 404 permitting. Compl. ¶ 47; Spice Decl. Exh. F. On October 13, 2017, EPA responded to the Tribe's letter by offering to "consult" with the Tribe, but did not agree to assume jurisdiction over the Section 404 permit. Compl. ¶ 48; Spice Decl. Exh. G.

ARGUMENT

The Menominee Tribe pleads this case in the alternative. Under either Count I or Count II, the Tribe's request for declaratory relief asks this Court to find that jurisdiction over the Section 404 permitting process for the Mine must be with the Corps and EPA, and not with the State of Michigan, because the Menominee River and its adjacent wetlands were not and could not have been delegated to the State under 33 U.S.C. § 1344(g). Count I asserts those claims under the citizen suit provisions of the Clean Water Act, 33 U.S.C. § 1365. Count II asserts the same claims under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706.

As to Count I of the Complaint, the Corps and EPA have a non-discretionary duty to exercise jurisdiction over the permitting process under the plain language of the Clean Water Act. While Circuits are split on whether the citizen suit provision authorizes claims against the Corps, the Seventh Circuit has not addressed this question and the persuasive precedent from other Circuits supports

finding citizen suit jurisdiction here.

The Tribe pleads jurisdiction under the APA in the alternative. If this Court finds that it lacks jurisdiction under the Clean Water Act citizen suit provision, then jurisdiction is proper under the APA. The Corps and EPA have made a final decision not to exercise jurisdiction over the Section 404 permit for the Back Forty Mine, despite the fact that the Menominee River was not and could not have been delegated under the plain language of the Clean Water Act. The federal agencies' decision not to exercise jurisdiction carries significant consequences for the Tribe, as it limits the substantive and procedural protections that would be available under federal law in a federal permitting process.

Finally, the Tribe's claims are ripe. No further legal or factual development is necessary, and further delay would harm all parties.

Under either the Clean Water Act or the APA, the Tribe is entitled to challenge the federal agencies' final decision to reject jurisdiction over the Mine's Section 404 permit. The motions to dismiss should be denied.

I. JURISDICTION IS PROPER UNDER THE CLEAN WATER ACT CITIZEN SUIT PROVISION.

As noted by numerous courts, the citizen suit provisions in the Clean Water Act and other environmental laws were born out of Congress' desire to ensure that the laws will be enforced when governments are unable, or unwilling, to do so. *Natural Resources Def. Council v. Train*, 510 F.2d 692, 700 (D.C. Cir. 1975) ("the

citizen suits provision reflected a deliberate choice by Congress to widen citizen access to the courts, as a supplemental and effective assurance that the Act would be implemented and enforced."). *See also, e.g., Friends of the Earth v. Carey*, 535 F.2d 165, 173 (2d Cir. 1976); *Proffitt v. Municipal Auth. of Borough of Morrisville*, 716 F. Supp. 837, 844 (E.D. Pa. 1989). The citizen suit provision of the Clean Water Act provides broad authorization for citizens to challenge violations of the Act, explicitly including the government's failure to carry out its mandatory duties under the Act. *See* 33 U.S.C. § 1365(a)(2) ("[A]ny citizen may commence a civil action on his own behalf. . . (2) 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 Corps and EPA have a non-discretionary duty to exercise jurisdiction over the Section 404 permit because the Menominee River was not and could not have been delegated to Michigan under the plain terms of the Clean Water Act. The citizen suit provision in the Clean Water Act authorizes claims against the "Administrator." Contrary to the Federal Defendants' and Aquila's arguments that this provision limits citizen suits to claims against EPA, courts have held that citizens may bring suit against the Corps under this provision because to find otherwise would thwart Congress' intent and lead to illogical results. Jurisdiction over the Menominee Tribe's claims against the Corps and EPA is proper under the

citizen suit provision.

A. The Clean Water Act Citizen Suit Provision Authorizes Claims Against The Corps.

Circuits are split over whether the citizen suit provision of the Clean Water Act authorizes claims against the Corps, and the Seventh Circuit has not addressed this question. The better-reasoned cases find that jurisdiction over claims against the Corps furthers the intent and structure of the Clean Water Act and avoids illogical results, and this Court should so hold as well.

The Fourth Circuit Court of Appeals directly addressed this issue in *National Wildlife Federation v. Hanson*, 859 F.2d 313 (4th Cir. 1988). There, the plaintiff challenged two decisions made by the Corps regarding whether two tracts of land were wetlands subject to the Clean Water Act. The Corps argued that the court lacked jurisdiction under the citizen suit provision because the citizen suit provision only authorizes claims against EPA. *Id.* at 315.

In rejecting the Corps' argument, the Fourth Circuit noted that Section 404 and the citizen suit provision must be read together and that any Corps' permitting decisions must be based on EPA guidelines. *Id.* Further, the court noted that EPA is authorized to block or override the Corps' permit decisions. *Id.* The court found that under these provisions both the Corps and EPA are responsible for permits allowing dredge or fill in our nation's waters, that the Corps has a nondiscretionary duty to regulate (either with permits or through prohibition) dredged and filled

material, and that the Corps has a mandatory duty to ascertain the relevant facts, correctly construe and apply statutes and regulations, and properly apply the law to the facts. *Id.* at 316. ("Congress cannot have intended to allow citizens to challenge erroneous wetlands determinations when the EPA Administrator makes them but to prohibit such challenges when the Corps makes the determination and the EPA fails to exert its authority over the Corps' determination."). Moreover, the court interpreted the citizen suit provision in conjunction with the Rules of Civil Procedure regarding joinder to allow citizens to sue the Administrator and join the Corps when the Corps abdicates its responsibility to make reasoned wetland determinations and the EPA fails to exercise proper oversight. *Id.*

District courts within the Fourth Circuit have since applied the ruling in *Hanson* to the application of a special exemption from permitting to a particular activity in wetlands, *Envtl. Defense Fund v. Tidwell*, 837 F.Supp. 1344, 1353-54 (E.D.N.C. 1991), and to a challenge to permits issued for a highway project, *South Carolina Coastal Conservation League v. U.S. Army Corps of Engineers*, C.A. No. 2:07-3802-PMD, 2008 WL 4280376 at *5-6 (D.S.C. 2008) (attached as Appendix A). Another District Court, the Northern District of California, has similarly held that once the Corps makes a determination that a wetland is subject to Clean Water Act permitting, the Corps has an obligation to analyze and issue the permit correctly. *Golden Gate Audubon Soc., Inc. v. U.S. Army Corps of Engineers*, 700

F.Supp. 1549, 1554 (N.D.Ca. 1988). Like the Fourth Circuit in *Hanson*, the district court found that it is illogical to assume Congress intended to allow citizens to challenge erroneous wetland or other Clean Water Act determinations when EPA makes them, but not when the Corps does so under the authority conferred upon the Corps by Section 404 of the Act. *Golden Gate Audubon Soc.*, 700 F.Supp. at 1553.

The reasoning that the Corps' mandatory obligations should be subject to citizen suit applies here even more solidly here. While arguably, some of the situations described in the cases above involved some modicum of discretion by the agency (e.g. the details of a specific permit), here, the agency decision under review is not subject to such discretion or detail. Rather, it is a decision that runs counter to plain statutory instruction on when and over what resources, the Corps must exercise is discretion.

As Federal Defendants and Aquila note, other courts have declined to find Clean Water Act citizen suit jurisdiction for claims against the Corps, but the analysis in those cases starts and ends with the word "Administrator." *See, e.g., Preserve Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Engineers*, 915 F.Supp. 378, 380-81 (N.D. Ga. 1995), aff'd, 87 F.3d 1242 (11th Cir. 1996); *Alliance to Save Mattaponi v. U.S. Army Corps of Engineers*, 515 F. Supp. 2d 1, 6 (D.D.C. 2007). Under the Clean Water Act, EPA and the Corps

share authority for Section 404 permitting, and it makes little sense to find that Congress intended for citizen enforcement to turn not on the substance of the decision but on which agency made the determination.

B. The Corps And EPA Have A Non-Discretionary Duty To Exercise Jurisdiction Over Section 404 Permitting For Waters That Cannot Be Delegated.

The Corps and EPA have a non-discretionary duty to exercise jurisdiction over the Section 404 permit for the Mine because permitting authority was not and could not have been delegated to the State of Michigan. The Clean Water Act prohibits delegation of the Menominee River and its adjacent wetlands because the Menominee can be (and is) used for transport in interstate commerce. 33 U.S.C. § 1344(g). The Corps' own consultants and officers have found as much, and the Tribe has presented evidence to the Corps and EPA that the River continues to be used for transport in interstate commerce. Compl. ¶¶ 31-35, 42.

Soon after Congress passed the Clean Water Act, the D.C. district court sternly advised the Corps acted unlawfully when it defined its jurisdiction under the Act more narrowly or differently than directed by Congress. *Natural Resources Def. Council v. Callaway*, 392 F.Supp. 685, 686 (D.D.C. 1975). *See also, MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 230-32 (1994) (an agency must exercise the authority given by Congress and implement regulatory requirements integral to that governing statute's grant of authority.)

Relatedly, courts have repeatedly required EPA to implement the full mandate of the Clean Water Act, rejecting attempts by the agency to exempt polluting activities or to narrow its regulatory reach contrary to Congress' direction. *See, e.g.*, *Nat'l Cotton Council of Am. v. EPA*, 553 F.3d 927, 940 (6th Cir. 2009); *Nw. Envtl. Advocates v. EPA*, 537 F.3d 1006, 1012 (9th Cir. 2008); or *Natural Resources Def. Council v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977). These cases stand for the principle that the Corps cannot simply refuse to exercise jurisdiction over a Section 404 permit application when Congress clearly provided that jurisdiction over the Menominee River should remain with the Corps.

The Fourth Circuit found in *Hanson*, "[t]he Corps has a mandatory duty to ascertain the relevant facts, correctly construe the applicable statutes and regulations, and properly apply the law to the facts. The EPA is ultimately responsible for the protection of wetlands." 859 F.2d at 315–16. The Fourth Circuit's reasoning should apply with equal or greater force here, where the Tribe challenges the Federal Agencies' decision to allow the State of Michigan to conduct a permitting process for waters that were not and could not have been delegated under strict limits in the Clean Water Act. 33 U.S.C. § 1344(g); Compl. ¶¶ 31-35, 42. The Corps and EPA lack discretion under the Act to delegate permitting for waters that Congress specified could never be delegated, and the Corps and EPA's failure to exercise jurisdiction over the permit for the Back Forty

Mine constitutes a failure to take an action that is not discretionary with the agencies. This failure is properly the subject of a citizen suit. 33 U.S.C. § 1365(a)(2).

In arguing to the contrary, Defendants primarily rely on an unpublished decision from the Sixth Circuit, *Huron Mountain Club v. U.S. Army Corps of Engineers*, 545 Fed. Appx. 390 (6th Cir. 2013), but that case does not govern here. First, *Huron Mountain Club* does not concern the issue of whether a water has been delegated to the State of Michigan for Section 404 permitting and does not concern a Section 404 permit at all. Rather, the mine at issue in *Huron Mountain Club* was an underground mine that did not require a Section 404 permit.

The State issued mining, groundwater discharge, and air-use permits under state, not delegated Section 404, permitting programs. *Huron Mountain Club*, 545 Fed. Appx. at 391. Second, the mining company had not applied for a Section 404 permit to either the State of Michigan or the Corps meaning there was no dispute concerning the proper permitting authority for the waterbody in question. *Id.* Third, the plaintiffs did not bring a citizen suit under the Clean Water Act, but rather a mandamus action against the Corps seeking to compel the Corps to "fulfill its permitting responsibilities" by requiring the mining company to submit a permit application—something the Corps does not do even when it is exercising jurisdiction. *Id.* (Rather, a party chooses to submit a permit application or

proceeds at its own risk). In judging the mandamus action, the D.C. District Court found only that Section 404 of the Clean Water Act does not compel the Corps to issue permits but simply provides that the Corps may issue permits. *Id.*

Here, Aquila has applied for a Section 404 permit and the permitting process is underway under State control. The Mine will dredge and/or fill waters adjacent to the Menominee River and may affect the River itself. There is no dispute that the Mine is required to obtain a 404 permit under the Clean Water Act in order to proceed. The Tribe is not asking the Corps to force a company to submit an application; instead, the Tribe asks the Corps and EPA to exercise jurisdiction over an existing permitting process that cannot lawfully be delegated under the plain terms of the Clean Water Act. The Corps and EPA have denied the Tribe's request that they assume jurisdiction, and instead the federal agencies have advised that they will act only in their oversight roles for Michigan's permitting process. Compl. ¶¶ 46-48. It is that action that is under review here and that is markedly different from the situation in *Huron Mountain Club*. *Huron Mountain Club* is a poor fit and provides little guidance on the legal issue before the Court here.

The Corps' and EPA's refusal to assume jurisdiction over the Section 404 permitting process for the Mine constitutes a failure to perform a mandatory duty under the Act and is properly the subject of a citizen suit. The Menominee Tribe requests that the Court deny the Motions to Dismiss Count I of the Complaint.

II. IN THE ALTERNATIVE, JURDISCITION OVER THE FEDERAL DEFENDANTS' FINAL DECISION IS PROPER UNDER THE APA.

If this action is not properly before the Court as a citizen suit under the Clean Water Act, it can be maintained under Count II as a challenge to final agency action under the APA. *See* 5 U.S.C. § 704. The Supreme Court has clearly held that where an action is not reviewable under a citizen suit provision, it may still be reviewable under the APA. *Bennett v. Spear*, 520 U.S. 154, 179 (1997).

As the Federal Defendants and Aquila correctly note, a suit against an agency under the APA must be a challenge to a "final agency action" for which there is no other adequate remedy in court. 5 U.S.C. § 704. A court will reverse an agency decision as arbitrary, 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).

The Supreme Court has explained that a final agency action must mark the consummation of the agency's decision-making process on the issue in question—it must not be tentative or interlocutory. *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, __ U.S. __, 136 S.Ct. 1807, 1813 (2016). Second, the action must be one by which rights or obligations have been determined or from which legal

consequences will flow. *Id.* (quoting *Bennett v. Spear*, 520 U.S. at 177-78.) *See also Abbot Laboratories v. Gardner*, 387 U.S. 136, 151-52 (1967).

This Court has jurisdiction over this case under the APA because the Corps and EPA made a final decision to deny the Tribe's request that they take primary jurisdiction over the Section 404 permit for the Back Forty Mine, and this decision deprives the Tribe of substantive and procedural protections under federal law that would apply to a permit issued by the federal agencies.

A. The Corps' And EPA's Letters To The Menominee Tribe Declining To Take Primary Jurisdiction Over The Back Forty Mine 404 Permit Are Final Agency Action.

On August 21, 2017, the Menominee Tribe wrote to EPA and the Corps demonstrating that the Menominee River was used and had been used in interstate commerce, and that the Corps was advised of this fact by its own consultants in 1979 and again by the Corps' counsel in 1982. *See* Compl. ¶¶ 31-35, 44; Spice Decl. Exh. A, B, and E. In that letter, the Tribe asserted that the Menominee River was not and could not have been delegated to the State of Michigan, and requested that the Corps exercise jurisdiction over the Mine's Section 404 permit. Compl. ¶ 44; Spice Decl., Exh. E. [3]

On September 28 and October 13, 2017, the Corps and EPA, respectively,

[3] The Tribe reiterated this request and again provided the relevant support in the 60-day Notice Letter required as a prerequisite to a citizen suit, dated November 6, 2017. Spice Decl. Exh. H.

responded to the Menominee Tribe's August 21, 2017 letter. Spice Decl., Exh. F and G. In each, the Corps and EPA acknowledged receipt of the Tribe's letter. *Id.* The Corps stated that "at this time" it did not have authority to initiate consultation with the Tribe nor determine jurisdiction over wetlands (an action that is part of a Section 404 permit process) because "the conditions required for the Corps to review the application have not yet occurred." *Id.* The Corps cited to the provisions of the Clean Water Act and implementing regulations that limit the Corps' role in commenting on permits issued by states exercising delegated authority. *Id.* The Corps advised that EPA would retain oversight of the state permitting program, but the Corps would only assume control of the permitting process if EPA objects to the permit and the objection is not resolved, per the process laid out by the Act for delegated permits. *Id.* *See also supra* (Legal Background).[4]

For its part, EPA simply refused to respond on this specific issue, instead broadly offering to "consult" with the Menominee Tribe, but not as to any particular thing or in accordance with any particular obligation. Spice Decl. Exh. G. EPA was copied on the Corps' letter and offered no objection or difference of opinion from the Corps. In short, the Corps and EPA both made clear in their

[4] *See also,* Aquila Mot. to Intervene at 9 ("The Army Corps explained that it did not have authority to assume the lead over permitting because EPA had authorized Michigan to administer the Clean Water Act permitting program. . .").

responses to the Tribe that they are denying the Tribe's request that the federal agencies assume jurisdiction over the permit, and instead will allow the State to issue the Section 404 permit for waters that were never delegated. This decision constitutes final agency action on the specific issue in this case.

Courts have repeatedly found that a letter can be final agency action reviewable under the APA. *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. EPA*, 801 F.2d 430, 435-37 (D.C.Cir. 1986). Courts apply the finality test in a "flexible and pragmatic way." *Ciba-Geigy*, 801 F.2d at 437 (citing *Abbott Laboratories*, 387 U.S. at 149-50).

Here, the Corps and EPA have made a final decision that they will not assume jurisdiction over the Section 404 permit for the Back Forty Mine. Notably, in their motion to dismiss, the Federal Defendants do not contend that they are still considering the Menominee Tribe's request; they never allege that any further decision or process is forthcoming. Instead, they seek to paint their letters as a "reminder" of the terms of the agencies' delegation of Section 404 Permitting to the State of Michigan. Def. Mot. at 12-13. But the terms of that delegation could not and did not include the portion of the Menominee River and adjacent wetlands at issue here. Compl. ¶¶ 33-35. And the Tribe could not challenge the agencies'

unlawful application of that delegation to the Back Forty Mine permit decades before the Mine was ever proposed. The Corps and EPA have made a final decision to cede jurisdiction over permitting for waters that cannot be and never were delegated, they have communicated that decision to the Tribe via letter, and even in their filings now they never claim that they are still considering the Tribe's request. The Corps and EPA's decision not to assume jurisdiction over the permit, communicated to the Tribe via letter, is the consummation of the agencies' decision making process and is challengeable as final agency action here.

B. The Corps And EPA's Decision Carries Legal Consequences For The Menominee Tribe.

The Corps and EPA's final decision not to assume jurisdiction over the permit has legal consequences that directly affect the Menominee Tribe. *Bennett*, 520 U.S. at 178. If the Corps exercised jurisdiction over the Section 404 permit for the Mine on the Menominee River, the permitting process would be subject to the substantive and procedural protections of several other federal laws, including environmental review under the National Environmental Policy Act, 42 U.S.C. § 4332, consultation obligations with the Tribe under the National Historic Preservation Act, 54 U.S.C. § 306109, and potentially Endangered Species Act consultation, 16 U.S.C. § 1536. Compl. ¶ 23. These obligations either do not attach at all to a purely state action, or attach in only a limited or different way. The absence of these substantive and procedural protections carries significant

legal consequences that directly affect the Menominee Tribe by limiting the Tribe's ability to protect its interests in the Menominee River, the Tribe's ancestral lands, and the culturally, spiritually, and historically significant sites along the River.

The Corps' and EPA's refusal to exercise jurisdiction over the Section 404 permitting process for the Mine is a final agency action reviewable by this Court under the APA. The Menominee Tribe requests that the Court deny the Motions to Dismiss Count II of the Complaint.

III. THE MENOMINEE TRIBE'S CLAIMS ARE RIPE.

Finally, the Federal Defendants assert that the Menominee Tribe's claims are not yet ripe. The Federal Defendants argue that the Tribe must wait to challenge the final permit once it is issued by the State of Michigan—but it the state permitting process, not the permit itself, that the Tribe challenges here. The Menominee Tribe's claims are ripe, and further delay would only harm all parties.

Ripeness is predicated on the principle that courts should not render decisions absent a genuine and real dispute; that courts should not issue advisory opinions. *Wisconsin Cent., Ltd. v. Shannon*, 539 F.3d 751, 759 (7th Cir. 2008). Ripeness and standing are often considered within the same analysis, but while standing speaks to the status of the parties, ripeness speaks to the timing of consideration of the issues in the case. A claim is unripe when parties point only to

disputes that are hypothetical, speculative, or illusory. *Id.*

As the Seventh Circuit has held, the inquiry into ripeness examines whether the facts alleged show a substantial controversy between parties having adverse legal interests, that is of sufficient immediacy to warrant declaratory judgment. *Id.* (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007) (internal quotations and citations omitted)). *See also WS Packaging Grp., Inc. v. Glob. Commerce Grp., LLC*, 505 F. Supp. 2d 561, 565 (E.D. Wis. 2007). Where the issues involve questions of law, courts more easily find a matter ripe. *Wisconsin Cent., Ltd.*, 539 F.3d at 759-60 and 761. Where a matter involves significant factual issues, the court will examine whether the record has been sufficiently developed for the court to resolve the case. *Id.* The fact that a government party may take some action in the future that might fix the problem that underlies the dispute does not render a case unripe for judicial review. *Arrington v. Elections Bd.*, 173 F. Supp. 2d 856, 863-64 (E.D. Wis. 2001). Finally, the court will consider hardship to the parties of withholding judicial consideration. *Wisconsin Cent. Ltd.*, 539 F.3d at 760 (quoting *Abbott Laboratories*, 387 U.S. at 149).

This dispute is ripe. As set forth above, the Corps and EPA have taken final action refusing to exercise jurisdiction over the Section 404 permit for the Back Forty Mine, on grounds that the matter has been delegated to the State of Michigan. The Menominee Tribe's challenge presents a question of law that will

not get any riper. The core factual issues that this dispute turns on need no further development. Delaying review would result in hardship to all parties.

As a matter of law, the Clean Water Act plainly provides that waters that are presently used or that could be used in their natural condition or with reasonable improvement as a means to transport interstate commerce, and their adjacent wetlands, cannot be delegated to a state for Section 404 permitting. 33 U.S.C. § 1344(g). The Corps and EPA now argue that they may authorize what the Act forbids. The dispute concerning the correct interpretation of the Clean Water Act's plain language and the extent of EPA's delegation to the State of Michigan is ripe for this Court to decide.

On the facts, none of the core factual issues in this case would benefit from further development. There is no dispute that Aquila needs a Section 404 permit to construct and operate the Back Forty Mine and that Aquila has applied for such a permit from the State of Michigan. Intervenor's Mot. to Dismiss at 3; Defs. Mot. to Dismiss at 5; Compl. ¶ 39. There is no dispute that the Corps and EPA have refused to exercise primary jurisdiction over the permitting process, on the grounds that permitting authority has been delegated to the State of Michigan. Spice Decl. Exh. F and G. *See also*, Aquila Mot. to Intervene at 9 ("The Army Corps explained that it did not have authority to assume the lead over permitting because EPA had authorized Michigan to administer the Clean Water Act permitting

program. . .”). There is no dispute that the Section 404 permit at issue concerns the Menominee River and its adjacent wetlands. Defs. Mot. to Dismiss at 5; Compl. ¶ 3. The Corps has not disputed (nor even mentioned) the 1979 and 1982 documents evidencing the Corps’ own acknowledgment that the Menominee River is and has been used in interstate commerce, nor the additional evidence provided by the Tribe that the River continues to be used in interstate commerce. These facts will not be developed or even addressed in the state permitting process. The facts necessary for this Court to address the dispute in this case are ripe now.

The Federal Defendants argue in part that the Menominee Tribe’s claims are not ripe because EPA has objected to the permit or could submit further comment. However, EPA recently withdrew its objections to the State-issued Section 404 Permit, conditioned on promises by Aquila and the State of Michigan that issues will be addressed by unspecified conditions in a later-issued permit. Spice Decl. Exh. I. There is now no path for the Corps to assume primary jurisdiction over the permitting process, and the Tribe’s challenge to the permitting process cannot get any riper.

Further, the hardship to the Menominee Tribe, and to Aquila per their own assertions, will increase significantly should the Tribe be forced to wait for the conclusion of the State permitting process to bring this action. Waiting to resolve this issue will waste limited resources on a permitting process the State is not

authorized to conduct. It will also introduce delays for Aquila and prolong uncertainty for all parties. Most importantly, waiting until the State issues a final permit will make it more difficult for the Menominee Tribe to protect the River resources and their cultural and historic sites in the area. Once the Section 404 permit is issued and construction is imminent or ongoing, the Tribe may be forced to request emergency injunctive relief in order to protect its cultural and historic resources pending the outcome of the litigation. Currently, this Court can resolve this dispute without the need (at the moment) for interim injunctive relief.

The issues in this case will not become ripe by waiting for the process that is itself the problem to play out. The Menominee Tribe asks the Court to deny the Motions to Dismiss.

IV. THE MENOMINEE TRIBE'S CLAIMS ARE NOT A CHALLENGE TO THE DELEGATION ITSELF.

Claims cannot be both too late and unripe. Yet this is what the Defendants seem to argue. As set forth above, the Menominee Tribe's claims are ripe for judicial review. But, the Federal Defendants also appear to suggest that the Tribe's claims are a challenge, too late, to the delegation of the Section 404 permitting program itself. This is an incorrect reading or mischaracterization of the Menominee Tribe's claims.

The Tribe does not challenge the delegation itself. The Tribe does not seek to have the delegation revoked or to have the federal agencies exercise jurisdiction

generally over any waters or projects that are not this Section 404 permit for this Mine on the Menominee River. Further, the Memoranda of Agreement between Michigan and the Federal Defendants plainly restate Congress' direction in the Clean Water Act, 33 U.S.C. § 1344(g) that waters such as the Menominee River and its adjacent wetlands, are not subject to or part of the delegation. *See, e.g.*, Spice Decl. Exh. C at 2. The claims here arise because the Corps' refusal to assume jurisdiction over the Section 404 permit for this Mine on the Menominee River was *not* part of the delegation to the State of Michigan by operation of law and the language of the delegation citing the law. Finally, the delegation occurred after the Corps itself made clear that the Menominee River met Congress' definition of waters that are not and cannot be delegated to a state for Section 404 permitting. Spice Decl. Exh. A and B. Any suggestion that the Tribe's claims here are an out-of-time challenge to the overall delegation should be rejected.

CONCLUSION

This matter is properly before this Court and this Court has subject matter jurisdiction under either the citizen suit provisions of the Clean Water Act, 33 U.S.C. § 1365, (Count I) or pursuant to the review provisions of the APA, 5 U.S.C. § 706 (Count II). The federal agencies have taken final action that has real legal consequences for the Tribe, and the issues in this case are ripe for review. The Menominee Tribe respectfully requests that the Court deny the Motions to Dismiss.

Respectfully submitted this 11th day of May, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of May, 2018, I will electronically file the *Plaintiff's Combined Response To Motions To Dismiss Of Defendants And Defendant-Intervenor* with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing to all registered participants in this case.

s/Janette K. Brimmer
Janette K. Brimmer