UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
Civil No. 1:18-cv-108 (WCG)

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| Menominee Indian Tribe of Wisconsin,<br><br>Plaintiff,<br><br>v.<br><br>United States Environmental Protection Agency, et al.,<br><br>Defendants. | DEFENDANTS' SUPPLEMENTAL BRIEF |

Defendants file this supplemental brief to address the following questions raised during the August 1, 2018, hearing on Defendants' and Intervenor-Defendants' motions to dismiss, ECF Nos. 6, 19:

1. the relationship between Section 10 of the Rivers and Harbors Act and Section 404(g) of the Clean Water Act;

2. the relevance of a 1979 consultant's report on the navigable status of the Menominee River; and

3. the nature of further proceedings if the pending motions to dismiss are denied.

*See* ECF No. 27.

## I. Section 10 of the Rivers and Harbors Act and Section 404(g) of the Clean Water Act.

In the Rivers and Harbors Act of 1899 ("RHA"), Congress reenacted and codified several earlier statutes "designed to protect and preserve our Nation's navigable waterways." *United States v. Pa. Indus. Chem. Corp.*, 411 U.S. 655, 663 (1973). Section 1 of the RHA, 33 U.S.C. § 401, uses the phrase "navigable waters of the United States," and Section 10 makes it unlawful to "excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity" of any port, harbor, lake, or channel of any navigable water of the United States without authorization from the Corps. *Id*. § 403.

In contrast, Section 301 of the Clean Water Act ("CWA") prohibits the "discharge of any pollutant," *id*. § 1311(a), which is defined as an addition to "navigable waters." *Id*. § 1362(12). The CWA defines navigable waters as "the waters of the United States, including the territorial seas," *id*. § 1362(7), but the phrases "navigable waters" (i.e., "waters of the United States") in the CWA and "navigable waters of the United States" in the RHA each have a different scope. *See generally PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1228 (2012) ("the test for navigability is not applied in the same way" in different legal contexts); *Kaiser Aetna v. United States*, 444 U.S. 164, 170-71 (1979) (cautioning for a "careful appraisal of the *purpose* for which the concept of 'navigability' was invoked in a particular case").

The Corps' regulations define the phrase "navigable waters of the United States" for purposes of the RHA to mean "those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce." 33 C.F.R. § 329.4. This definition "does not apply to authorities under the Clean Water Act." *Id*. § 329.1. The phrase "waters of the United States" in the CWA includes "all waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide," 33 C.F.R. 328.3(a)(1), as well as other defined categories. *Id*. § 328.3(a)(2)-(7).[1]

Any person seeking to discharge dredged or fill materials, a particular type of pollutant, into "navigable waters" must obtain a permit under Section 404 of the CWA. In 1977, Congress amended the CWA to add Section 404(g), which provides for states to assume the Section 404 permitting program for certain waters. That section provides:

> The Governor of any state desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those waters which are *presently used, or are susceptible to*

[1] The definition of waters of the United States under the CWA is the subject of ongoing administrative and judicial proceedings, but for simplicity in this supplemental brief we refer only to the 1986 regulations defining "waters of the United States."

> *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 all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto) within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under state law or under an interstate compact. . .

33 U.S.C. § 1344(g)(1) (emphasis added). Section 404(g) thus addresses the broad category of "navigable waters" under the CWA and a narrower set of non-assumable waters ("retained waters"), and allows states to request permission from EPA to assume Section 404 permitting authority of all waters except retained waters. If EPA approves a state's request, the Corps remains the permitting authority for discharges of dredged or fill materials into retained waters.

As the italicized text of Section 404(g)(1) indicates, the language describing retained waters is similar, but not identical, to the Corps' definition of Section 10 waters, i.e., navigable waters under the RHA. In 2017, a subcommittee of an EPA advisory group, convened pursuant to the Federal Advisory Committee Act, issued a report with recommendations on how EPA could clarify the scope of assumable waters. On July 30, 2018, the Assistant Secretary of the Army for Civil Works, noting that uncertainty regarding the scope of assumed waters and retained waters is one reason why more states have not pursued the Section 404(g) assumption

process, issued guidance that the Corps may interpret the scope of retained waters to be generally co-extensive with the scope of Section 10 waters, some two exceptions. Specifically, the memorandum finds it appropriate for the Corps to retain waters that are jurisdictional under Section 10, provided that retained waters:

- includes tidal waters shoreward to their mean high water mark, or mean higher high water mark on the west coast;

- *excludes* navigable waters that were used for transporting commerce only in the past, but are no longer susceptible to such use; and

- *includes* certain adjacent wetlands, landward to an administrative boundary to be agreed upon between a state or tribe and the Corps. *See* Memorandum for Commanding General, U.S. Army Corps of Engineers (July 30, 2018) (attached at Ex. 1).

## II. The 1979 Consultant's Report on the Navigable Status of the Menominee River.

As support for its merits argument that Michigan should not have assumed Section 404 permitting authority on the relevant portion of the Menominee River in 1984, the Tribe points to a 1979 report by a Corps consultant, which documented extensive past commercial use along the Menominee River. That report noted that the present use of the river upstream of the U.S. 41 bridge is "primarily recreational" and that the potential for use in interstate commerce above that point "appears to be limited." Report at 21 (attached at Ex. A to the Tribe's

opposition, Doc. 21-3). Although the Corps' consultant recommended extending "Section 10 jurisdiction" to the river's source, *id.* at 27, and this recommendation was forwarded by the District Engineer to the Commander of the Corps' North Central Division, this recommendation was not acted upon. *See* Doc. 21-4 (attached as Ex. B to the Tribe's opposition). Thus, at the time EPA approved Michigan's assumption of the Section 404 permit program in 1984, the limit of the Corps' Section 10 jurisdiction remained the U.S. 41 bridge, and the 1984 Michigan-Corps Agreement explicitly described and incorporated that same limit for retained waters. Def. Reply at 11-12 (Doc. 23), and Ex. 2 to the Decl. of Charles Simon (Doc. 23-3). Before EPA approved Michigan's Section 404 program, EPA published in the Federal Register notice of EPA's receipt of Michigan's application. 49 Fed. Reg. 14,185 (Apr. 10, 1984). EPA then held a public meeting, and in the notice approving Michigan's program, EPA incorporated the 1984 Michigan-Corps Agreement into the approval. 49 Fed. Reg. 38,947, 38,948/2 (Oct. 2, 1984).

Whether EPA or the Corps acted reasonably in 1984 is a merits question, and the merits are not relevant either to whether the Tribe has identified a statutory non-discretionary duty (Count One) or whether the Tribe has identified a judicially reviewable final agency action (Count Two). Furthermore, the merits of the 1984 decisions are not relevant to the pending motions to dismiss because the Tribe does

not directly argue that these 1984 decisions were arbitrary and capricious or not in accordance with law. Instead, the Tribe argues that letters written in 2017 are reviewable because, according to the Tribe, those letters represent a renewed decision on the scope of Michigan's assumption. We disagree, and explained in our papers why the 2017 letters do not reopen those decisions and are not reviewable final agency actions.

III. Further proceedings if the pending motions to dismiss are denied.

At the August 1 oral argument, we explained if Count Two were to survive the motions to dismiss, we would certify the administrative record, to the extent there is one, the parties would file cross motions for summary judgment, and if the Tribe were to prevail on the merits, the proper remedy would be to remand the 2017 letters to the federal agencies.

As the Court recognized, however, a remand would not affect Aquila's permit. Michigan is not a party to this case, and the Tribe is not challenging in this case the permit that Michigan has issued. Furthermore, neither the Corps nor EPA have any mechanism at this point to take over the Michigan permit proceedings, which as Aquila informed the Court are now final, subject to Michigan's administrative and judicial appeal process. The only relief the Tribe could obtain under Count Two would be a remand to one or both federal agencies to reconsider the 2017 letters. The Court cannot "remand" the Michigan permit.

For these reasons and the reasons set forth at argument and in the Defendants' written submissions, the Court should grant Defendants' motion to dismiss.

Respectfully submitted,

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90-5-1-4-21220

**CERTIFICATE OF SERVICE**

I hereby certify that on August 22, 2018, I electronically filed the foregoing DEFENDANTS' SUPPLEMENTAL BRIEF with the Clerk of the Court by using the CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

s/ Daniel R. Dertke
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