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Menominee Indian Tribe of Wisconsin v. EPA—The EPA's Refusal to Revisit Delegation of Permitting Authority under the Clean Water Act Did Not Constitute Final Agency Action Subject to APA Review

Two States, Michigan and New Jersey, have been delegated dredge-and-fill permitting authority under the Clean Water Act pursuant to 33 U.S.C.A. § 1344(g)-(h) as to waterways that cannot be used for commercial activity. *See* 40 C.F.R. §§ 233.70, 233.71. The Environmental Protection Agency retains veto power over issuance state permits. The Menominee Indian Tribe of Wisconsin became aware of a mining project (the "Back Forty") for which Aquila Resources, Inc., had received the requisite permit from the Michigan—as to which the EPA had initially objected but later let stand after amendments. Because the project will affect various tribal historical, cultural and religious interests, the Tribe sent letters to EPA and the U.S. Army Corps of Engineers in 2017 arguing, in part, "that circumstances had changed since the 1984 delegation [to Michigan]. In the past 35 years, the Tribe explained, the Menominee River had experienced a growth of commercial activity, including riverboat tourism." It requested under their trust responsibility for "the EPA and Corps to revisit whether they—as opposed to the state of Michigan—should exercise authority over Aquila's Back Forty permit application" or, at least, for consultation "with the EPA and Corps before Michigan made any decision about the Back Forty project." However, "[t]he agencies responded [in letters] by reinforcing—but not revisiting—the 1984 delegation." The Tribe then "turned to the courts and filed this lawsuit in the Eastern District of Wisconsin, naming the EPA, Army Corps, and the agencies' secretaries as defendants" and subsequently "challenged the permit in Michigan's administrative system." The federal district court dismissed the case for lack of subject matter jurisdiction because the letters were not final agency actions under the Administrative Procedure Act; it also denied on futility grounds leave to file an amended complaint. On appeal, the Seventh Circuit affirmed the district court judgment. *Menominee Indian Tribe of Wisconsin v. EPA*, ___ F.3d ___, 2020 WL 416079 (7th Cir. Jan. 27, 2020). The state proceeding remains pending.

The panel viewed the appeal as posing two questions: "The first is whether the agency action here is judicially reviewable. The broader question asks what legal avenue is available for the Tribe to seek review of the state delegation of the permitting process for the part of the Menominee River affected by the Back Forty project in light of changed circumstances." As to the first,

> [t]he EPA and Corps's responses did little but restate what the Tribe already knew—that Michigan, as a result of the 1984 delegation, had permitting authority over the section of the Menominee River near the Back Forty site. A letter "purely informational in nature" is not a final agency action because it "impose[s] no obligations and denie[s] no relief." ... Letters restating earlier interpretations likewise do not carry legal consequences for purposes of the "final agency action" requirement.

As to the second, the panel found itself "at a loss to understand" why the agencies' letters failed to explain, as they asserted at oral argument "that the Tribe could have sought the requested relief by filing a petition for rulemaking under 5 U.S.C. § 553(e)." The court added that while it "saw nothing standing in the way of the Tribe's ability to file a § 553(e) petition at this point, it may be too late for any rulemaking to affect the dredge-and-fill permit at issue in this case. This further adds to our sense that the Tribe got the runaround here." That said, it also saw a potential abstention issue:

> Even if we could somehow treat the agency responses as reflecting final decisions, our next step would be far from clear given parallel proceedings ongoing in Michigan. In addition to filing suit in federal court, the Tribe contested Aquila's Section 404 permit before the Michigan Department of Environmental Quality. To our knowledge that proceeding (which is called a contested case hearing) is pending before Michigan's Administrative Hearing System. ... And, if it does not prevail, the Tribe can seek review of the outcome of the contested case hearing in state court. ... [¶] Duplicative litigation in state and federal courts can cause coordination problems, interfere with effective government functioning, and lead to conflicting judgments.

"Nothing has been brought to our attention," the panel concluded, "to suggest that the Tribe cannot receive full and fair review in a Michigan court."

The panel further agreed that the district court properly denied leave "to add two Administrative Procedure Act claims—one contending that the EPA's withdrawal of its objections to Michigan's issuance of the permit, and a second alleging that the agencies failed to consult with the Tribe about the Back Forty mine as Congress required under the National Historic Preservation Act." It deemed the APA claim outside judicial review because the EPA's action was "committed to agency discretion" under 5 U.S.C.A. § 701(a)(2): "The Tribe does not point to any regulations governing the withdrawal of objections. We searched too and came up empty, finding no statute, regulation, or guideline that instructs the EPA how to decide whether a state has tendered a satisfactory resolution to a previous permitting objection." Instead,

> [i]f the EPA finds a shortcoming in the state's response to a particular objection, the agency must again make a judgment call about whether to maintain the objection. The decision may depend on many factors, including the EPA's judgment about not only the materiality of the concern that gave rise to the initial objection and the sufficiency of the state's responsive measures, but also whether the agency's limited time and resources are best used to persist with an objection pertinent to one project when others likewise call for federal attention.

The NHPA-based claim foundered on the shoals of the statute's limitation "to undertakings that are '[f]ederal or federally assisted.'" 54 U.S.C.A. § 306108. Thus, "[b]ecause the Back Forty mine is privately funded and state-licensed, the Preservation Act's consultation requirement is not triggered here."

One panel member concurred but wrote "separately (a) to highlight the problem with the statutory standard that allows the federal government to delegate Clean Water Act permitting to the State of Michigan and (b) to emphasize that the Tribe can still pursue its challenges to the Back Forty mine under Section 404 of the Act ... through the EPA and the Michigan state courts." The statutory difficulty lay in the fact that "[a] delegation of Clean Water Act permitting authority to a state under 33 U.S.C. § 1344(g) must, as a practical matter, reflect a fairly long-term commitment. The practical problem with the statutory standard is that the state's permissible jurisdiction over waters depends on facts that can change over time." Consequently, "as uses of particular stretches

of waterways may change, so may the legality of a federal delegation of authority to a state"—a phenomenon that that the Tribe contended had occurred with the Menominee River. The concurrence continued on to discuss the two possible remedial routes to address such a change in circumstance. "First, the Tribe may petition the EPA to reassume federal permitting authority over this stretch of the Menominee River as an amendment to a rule." Second, the Tribe could attack the Michigan's permitting jurisdiction under § 1344(g)(1) in state court. "If the Tribe were to prevail in state court on its jurisdictional argument, such a decision would deprive Michigan environmental officials of 'adequate authority to carry out' the state program on this stretch of river" and "would presumably require the EPA to reassume federal authority, exercising its power under § 1344(i) if necessary."

Decision link: http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2020/D01-27/C:19-1130:J:Hamilton:con:T:fnOp:N:2464851:S:0