

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

COALITION TO SAVE THE MENOMINEE
RIVER, INC.,

Plaintiff,

v.

U.S. ENVIRONMENTAL PROTECTION
AGENCY, ANDREW WHEELER, Acting
Administrator, U.S. ARMY CORPS OF
ENGINEERS, and DR. MARK T. ESPER,
Secretary, U.S. Army,

Defendants.

Case No. _____

COMPLAINT

The Plaintiff, Coalition to SAVE the Menominee River, Inc., (the “Coalition”), alleges the following against the Defendants, U.S. Environmental Protection Agency (“EPA”), Andrew Wheeler, Acting Administrator of the U.S. EPA, in his official capacity, U.S. Army Corps of Engineers (“USACE” or “Corps”), and Dr. Mark T. Esper, Secretary of the U.S. Army, in his official capacity, (together, “Defendants”):

INTRODUCTION

1. Aquila Resources, Inc. (“Aquila”), has proposed a sulfide mining operation along the Menominee River in Menominee County, Michigan. The project is commonly referred to as the “Back Forty Mine.” Multiple permits are required for such an endeavor, and this case relates to decisions made by Defendants with respect to Aquila’s wetland permit application.

2. The proposed Back Forty Mine site is directly upon and adjacent to the Menominee River. The Menominee River is a navigable interstate water of the United States. It is the largest watershed in the Upper Peninsula of Michigan and borders Upper Michigan and Northern Wisconsin.

3. The Coalition seeks review under the Administrative Procedure Act (“APA”) of two federal agency determinations related to the Mine’s wetland permit application. First, Defendants determined that Michigan has permitting authority despite evidence of the Back Forty Mine’s impacts to the Menominee River and Wisconsin. Second, even if that determination were correct, the agencies’ decisions to withdraw their objections to the Back Forty permit were arbitrary and capricious, an abuse of discretion or otherwise not in accordance with applicable law.

PARTIES

4. The Coalition is a non-stock, non-profit corporation organized under Chapter 181 of the laws of the State of Wisconsin and subject to Section 501(c)(3) of the Internal Revenue Code. Among other things, the Coalition’s purpose is to educate and support citizens regarding environmental issues affecting the Menominee River, including the potential impacts of the proposed Back Forty Mine project described herein.

5. The officers and directors of the Coalition include individuals who live, work, and recreate in the areas impacted by the Back Forty Mine.

6. The Coalition’s President and registered agent is Dale Burie. Mr. Burie is a resident of Marinette County, Wisconsin, which is bordered by the Menominee River.

7. The Coalition is supported by and represents individuals who reside near the Menominee River and its adjacent wetlands. This area is where Coalition volunteers live, work, hunt, fish, farm and recreate.

8. The Coalition and its supporting volunteers from Wisconsin and Michigan have provided comment on the record and have consistently expressed their concerns about the impact the Mine will have on their communities.

9. The EPA is an agency of the United States charged with, *inter alia*, making wetland permit determinations pursuant to Section 404 of the Clean Water Act (“CWA”). The EPA is also responsible for oversight of state programs that assume responsibility for wetland permitting pursuant to the CWA.

10. Upon information and belief, Defendant Andrew Wheeler is the current Acting Administrator of the EPA. As Acting Administrator of the EPA, he is the federal official ultimately responsible for the EPA’s administration and implementation of its legal duties. Administrator Wheeler is sued in his official capacity.

11. The USACE is an agency of the United States that is also charged with, *inter alia*, making wetland permit determinations under Section 404 of the CWA.

12. Upon information and belief, Defendant Dr. Mark T. Esper is the Secretary of the Army and the Chief Officer of the Corps. As such, he is the federal official ultimately responsible for the Corps’ administration and implementation of its duties and authorities under Section 404 of the Clean Water Act. Secretary Esper is sued in his official capacity.

JURISDICTION AND VENUE

13. The Coalition brings claims pursuant to the Administrative Procedure Act, 5 U.S.C. § 701 et seq., and therefore jurisdiction exists pursuant to 28 U.S.C. § 1331. The APA, *inter alia*, authorizes federal courts to find unlawful and set aside final agency actions that are arbitrary and capricious, an abuse of discretion or otherwise not in accordance with applicable law.

14. Venue is appropriate in the Eastern District of Wisconsin under 28 U.S.C. § 1391(e) as the defendants are officers and agencies of the United States Government, and the Coalition and its President are residents of Wisconsin. Further, the Menominee River forms the border between Michigan and Wisconsin, and the Section 404 permit at issue and the Back Forty Mine will affect the Menominee River and the wetlands and waters on both sides of the river.

APPLICABLE STATUTORY AND REGULATORY BACKGROUND

The Clean Water Act

15. The Clean Water Act was enacted by Congress to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a).

16. In furtherance of this goal, a permit must be obtained in order to discharge dredged or fill materials into waters of the United States. 33 U.S.C. § 1344(a). These permits are commonly known as “Section 404 permits.”

17. The Corps reviews Section 404 permit applications and has promulgated rules for executing its Section 404 permit responsibilities.

18. The EPA is also charged with reviewing Section 404 permit applications, and the EPA has promulgated rules for executing its Section 404 authority and obligations. 40 C.F.R. Pt. 231.

State Assumption of Section 404 Permitting Authority Under the CWA

19. Under the CWA, individual states may apply to the EPA to assume the authority to administer a Section 404 permitting program for the discharge of dredged or fill material into the navigable waters “within its jurisdiction.” 33 U.S.C. § 1344(g).

20. In addition to the waters being within its jurisdiction, the scope of what a state may assume is limited by the language of the delegation provision, which provides that delegable waters do not include “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.” *Id.*

21. A state that has assumed Section 404 permitting authority must still transmit any Section 404 permit application to the EPA. *See* 33 U.S.C. § 1344(j). The EPA consults with the Corps and other federal agencies in reviewing and commenting on permit applications within delegated states. If the EPA objects to a permit transmitted by a state with delegated authority, the state may not issue the Section 404 permit unless the applicant addresses the EPA’s objections. If the EPA’s objections are not resolved in a timely manner, then the Corps assumes permitting authority for the Section 404 permit.

22. In 1984, the EPA approved a delegation program for Section 404 permitting to the State of Michigan.

23. The Michigan Department of Environmental Quality (“MDEQ”) is the State of Michigan’s agency responsible for Section 404 permits properly delegated to it under the 1984 agreement.

24. The EPA, in conjunction with the Corps, developed guidelines for Section 404 permitting (the “Guidelines”). *See* 40 C.F.R. pt. 230. The Section 404 permits must comply with the Guidelines, which apply to permits issued both by the EPA and by the delegated states. *Id.*

The Administrative Procedures Act

25. The APA allows for federal court review of federal agency actions, except to the extent (1) a statute precludes judicial review or (2) the agency action is committed to agency discretion. 5 U.S.C. § 701.

26. Under the APA, a final agency action for which there is no other adequate remedy is subject to judicial review. 5 U.S.C. § 704.

27. Under judicial review, a court may hold unlawful and set aside agency actions, findings, and/or conclusions that the court determines to be arbitrary and capricious, an abuse of discretion or not otherwise in accordance with the law.

FACTUAL BACKGROUND

28. The Back Forty project is a proposed open-pit zinc, copper and gold mine located in Menominee County, Michigan, approximately 50 yards from the banks of the Menominee River, that will ultimately cover over 80 acres and be 750 feet deep.

29. The process of extracting the ores can contaminate local waters and soils because the process of crushing the sulfide ores, while using cyanide, produces sulfuric acid. The sulfuric acid leaches out toxic heavy metals that can seep out along the pit walls or in surface water runoff into the rivers and other aquifers in the area, in perpetuity. For this reason, such mining is often referred to as sulfide mining.

30. In January 2016, Aquila applied to MDEQ for a Section 404 permit, which would allow Aquila to discharge dredged or fill material related to the construction and operation of the Mine into the waters and wetlands on and near the Mine and possibly alter, destroy and/or eliminate such waters and wetlands.

31. Aquila completed an Environmental Assessment (“EA”) document as part of its Section 404 permit application and in conjunction with other necessary permits.

32. The EA provided that the Mine would adversely affect a number of area wetlands. It also provided that the Mine would affect the water table throughout the entire area and that this would affect the Menominee River itself, as well as the wetlands area on both the Michigan and Wisconsin sides of the river.

33. The EA concluded that the Mine's pit will alter the hydrology of the entire geographical area while the Mine is in operation and will continue to alter the area during the years that follow.

34. In May 2016, in accordance with the EPA's regulations for state-delegated Section 404 permitting programs, the MDEQ provided the EPA with a copy of Aquila's Section 404 permit application.

35. On August 15, 2016, the EPA objected to the proposed Section 404 permit for the Mine because Aquila had not complied with the EPA's Guidelines on matters such as completeness, stream and wetland impacts, cultural resources, mitigation and monitoring plans.

36. In a letter dated August 26, 2016, MDEQ provided Aquila a list of information required to clarify and amplify the permit application and to address federal agency objections.

37. Aquila withdrew its Section 404 permit application in September 2016.

38. On January 17, 2017, Aquila submitted another Section 404 permit application to the State of Michigan.

39. In a January 26, 2017 letter, MDEQ notified Aquila that this application was also incomplete and listed information that was needed for completion.

40. By letter dated August 21, 2017, the Menominee Indian Tribe of Wisconsin cautioned the EPA, the Corps and the MDEQ that the EPA and the Corps—and not MDEQ—are the proper permitting authorities for the Mine's Section 404 permit application. Among other things, the Menominee Tribe's letter pointed to 1979 research by the Corps that determined that the Menominee River and its surrounding wetlands constitute an interstate water, and that in January 1982, the Counsel for the Corps' Detroit Office had recommended that the Menominee

River and its adjacent wetlands be subject to Section 10 of the River and Harbors Act.¹ In doing so, the Corps declared that the Menominee River and its adjacent wetlands are waters that have been, currently are or may be susceptible to use for interstate commerce. 33 C.F.R. § 329.4. Under the CWA, the EPA and the Corps may not delegate its Section 404 permitting authority over waters used for interstate commerce to a state. 33 U.S.C. § 1344(g). The Tribe's letter articulated that under the Corps' own research and analysis, the Corps retained jurisdiction over Section 404 permitting authority over the Menominee River and its adjacent wetlands because, as waters used for interstate commerce, authority could not be delegated to Michigan.

41. The Menominee Tribe's August 2017 letter requested that the EPA and the Corps review Aquila's Section 404 permit application and exercise primary jurisdiction over it.

42. On August 18, 2017, Wisconsin Senator Tammy Baldwin wrote the Corps and requested that the EPA and the Corps exercise primary jurisdiction over Aquila's Section 404 permit application.

43. On August 25, 2017, the Corps declined Senator Baldwin's request.

44. On September 28, 2017, the Corps responded to the Menominee Tribe that it would not exercise jurisdiction over Aquila's Section 404 permit application because Michigan had been delegated authority. Instead, the EPA would exercise its authority to review, comment and potentially object to the proposed permit at a later date. The Corps did not address the Corps' 1979 report.

¹ Section 10 of the Rivers and Harbors Act requires a permit from the USACE before the construction of any structure in or on a navigable water of the United States. 33 U.S.C. § 401. The RHA defines navigable waters as waters that currently are or may be susceptible to use for interstate or foreign commerce. 33 C.F.R. § 329.4. This definition is identical to the CWA's definition of the type of water over which the EPA cannot delegate its Section 404 permitting authority to a state. *Compare* 33 C.F.R. § 329.4 (RHA definition) with 40 C.F.R. § 230.3(o)(1)(i) (CWA definition).

45. On December 8, 2017, MDEQ stated that Aquila's Section 404 permit application was administratively complete. Yet a little over one month later, the MDEQ requested clarification and/or amplification from Aquila regarding a number of significant issues within the application.

46. Despite having requested additional information from Aquila, MDEQ scheduled a public hearing on the permit application for January 23, 2018. Over 3,400 written comments, including comments from the Coalition and its supporting volunteers, were submitted by February 2nd, including technical comments raising substantial questions about the accuracy and completeness of Aquila's Section 404 permit application.

47. On March 2, 2018, MDEQ forwarded a summary of the public comments to Aquila and invited a response.

48. On March 8, 2018, the EPA formally exercised its authority under Section 404, and objected to the proposed permit, which triggered a 90-day deadline for its objections to be resolved or jurisdiction would be transferred from the State of Michigan to the Corps.

49. The EPA's objections included, for example, the following:

- a. "The applicant has not provided a complete description of the project, including a final site plan identifying the final location of key project features, including storm water and waste management features." *See* EPA Objs., Exh. A at 1.
- b. "The application states that the project will not adversely affect [the] water quality of the Menominee River but does not explain how the project will be managed to ensure discharges will meet water quality standards, including sufficient monitoring locations, minimization measures, and adaptive management procedures to prevent leaching of toxic compounds from mine storage facilities and from the mine pit into the River" *Id.* at 2.
- c. "The application does not adequately characterize the proposed project's secondary impact on wetlands because it lacks information regarding the extent of wetlands that will

be impacted by the project and how these wetlands will be affected by the proposed project's Menominee River drawdown of some 125,000 gallons per day." *Id.*

50. In order to resolve the objections, the EPA required additional information, including:

- a. "Adequate characterization of wetland impacts, including any secondary wetland stream impacts" *Id.*
- b. "Additional details regarding monitoring, impact criteria, and specific adaptive management mechanisms sufficient to demonstrate avoidance and minimization of impacts to aquatic resources and prevention of contamination and unanticipated discharges" *Id.* at 2–3.
- c. "Demonstration and supporting documentation that the mine site is protective of water quality throughout the life of [the] mine and post-closure" *Id.* at 3.

51. On March 19, 2018, MDEQ served notice to Aquila that Aquila needed to address the EPA's formal objections, MDEQ's January 19th requests for clarification and MDEQ's March 2nd summary of the public comments.

52. On April 30, 2018, the MDEQ Water Resources Division submitted Findings of Fact and Conclusions of Law recommending denial of the permit.

53. In a May 3, 2018 letter to MDEQ, the EPA indicated that some of the objections raised in its March 8th letter had been addressed. The EPA also explained that it would consider the other open objections to be resolved if MDEQ imposed appropriate conditions.

54. On May 24, 2018, the MDEQ Water Resources Division issued a memo reiterating its previous objections but stating:

If the decision is made to issue a Wetland Permit without data necessary to evaluate potential wetlands impacts, then the following permit conditions are recommended to verify compliance with applicable regulations and to determine whether the permitted activity causes any adverse impacts to wetlands.

See MDEQ Memo, Exh. B (emphasis added).

55. The Memo's proposed conditions included requiring Aquila to collect additional information and to conduct additional modeling of the potential impacts to the Menominee River, its adjacent wetlands and the groundwater resources on both sides of the river.

56. On May 31, 2018, MDEQ provided the EPA with a draft Section 404 permit, which imposed the additional conditions.

57. On June 1, 2018, the EPA, without any opportunity for additional public notice or comment, decided that the conditions in the draft Section 404 permit resolved its objections.

58. On June 4, 2018, Michigan issued the Section 404 permit to Aquila with 28 pages of conditions.

FIRST CAUSE OF ACTION
**[Improper Determination That Michigan Has Authority Over
Aquila's Permit Application]**

59. The Coalition re-alleges and incorporates each of the preceding paragraphs.

60. The APA authorizes courts reviewing an agency action to hold unlawful and set aside a final agency action, findings and conclusions that are arbitrary and capricious, an abuse of discretion or otherwise not in accordance with the law. 5 U.S.C. § 706(2)(A).

61. When MDEQ forwarded the Back Forty Mine Section 404 permit application to the federal agencies, both the EPA and the Corps were legally required to determine whether the proposed permit was within the scope of authority delegated to Michigan.

62. The scope of delegable authority is proscribed by the CWA and it is limited to waters located within a state's jurisdiction. Upon review of the permit application, it should have been apparent to the EPA and the Corps that the proposed activity to be permitted involved the Menominee River and its adjacent wetlands, which are not located solely within the State of Michigan.

63. In addition, the Menominee River is a water that is presently used and/or could be used in its natural condition, or with reasonable improvement, to transport interstate commerce. Therefore, under the plain language of the CWA, permitting authority over the Menominee River and its adjacent wetlands could not be delegated to Michigan.

64. The EPA and the Corps wrongly determined at multiple points that the proposed Section 404 permit for the Back Forty Mine was within the scope of permitting authority delegated to Michigan: (a) in its responses to Senator Baldwin and the Menominee Tribe in August and September 2017; and (b) subsequently in March 2018, after the application was deemed complete and all information available, Defendants objected to the permit rather than asserting jurisdiction over it.

65. The EPA and the Corps' jurisdictional determination that the application was within the scope of permitting authority delegated to Michigan is a final agency action subject to review.

66. The EPA and the Corps' jurisdictional determination is contrary to the CWA because the proposed Section 404 permit for the Back Forty Mine involves the Menominee River and its adjacent wetlands, which fall within the class of waters of the United States over which permitting authority cannot be delegated.

67. The Coalition has been harmed, is being harmed, and will be harmed by the EPA and the Corps' failure to exercise federal jurisdiction over the Section 404 permitting of the Back Forty Mine.

SECOND CAUSE OF ACTION

[The EPA's June 2018 Withdrawal of its Objections to the Section 404 Permit Was Arbitrary and Capricious, an Abuse of Discretion and Contrary to the Law]

68. The Coalition re-alleges and incorporates each preceding paragraph.

69. The EPA's June 1, 2018 withdrawal of its objections was a final agency action subject to judicial review.

70. When it exercised its authority to object to the permit, the EPA undertook a duty to determine that the proposed permit would satisfy the requirements of the CWA and conform to EPA's own regulations.

71. By its very objections, the EPA determined (a) that there was inadequate characterization of wetland impacts, including a lack of any secondary wetland stream impacts, (b) insufficient details regarding monitoring, impact criteria and specific adaptive management mechanisms sufficient to demonstrate avoidance and minimization of impacts to aquatic resources and prevention of contamination and unanticipated discharges, and (c) no demonstration and supporting documentation that the mine site is protective of water quality throughout the life of the mine and post-closure.

72. The EPA's withdrawal of its objections was arbitrary and capricious, an abuse of discretion and otherwise not in accordance with law for several reasons, including but not limited to the fact that it relied upon the imposition of permit conditions to satisfy the most material and fundamental requirement of the CWA—that there be no adverse impacts to wetlands and aquatic resources.

73. The EPA withdrew its objections without citing any record evidence or providing any analysis, detail or explanation of why or how the reliance on conditions satisfies the requirements of the CWA.

74. The EPA further erred when it failed to provide an opportunity for public notice and comment on its objections, on the information purportedly provided by Aquila to resolve the objections or on the conditions to be imposed to purportedly satisfy those objections.

75. The EPA's withdrawal of its objections relied upon information to be provided at a later point in time, yet it did not require opportunity for public notice and comment of these subsequent plans or solutions.

76. For example, in its March 2018 Objections, the EPA stated that the "application has not provided needed information to determine whether some 500 acres of wetlands and uplands that were selected for preservation meet statutory requirements to be used as wetland and stream mitigation." *See* Exh. A at 2.

77. In withdrawing its objection, the EPA stated:

Based on the information provided by Aquila, EPA believes the proposed mitigation approach is generally acceptable. However, given the uncertainty regarding the scope of secondary impacts, a final permit may include conditions requiring a final mitigation plan and additional mitigation for additional secondary impacts. The permit condition should prohibit discharges until the plan is approved. Such conditions included in a final permit would resolve the EPA's objection.

See Letter Withdrawing EPA Objs., Exh. C at 3. By withdrawing its objection without a mitigation plan established, the EPA deprived the public from opportunity for notice and comment on said mitigation plan.

78. The EPA's withdrawal of its objections was not based on substantial evidence or supported by the record. The withdrawal lacks an explanation of its legal justification and is arbitrary and capricious, an abuse of discretion and contrary to applicable law.

WHEREFORE, the Plaintiff, Coalition to SAVE the Menominee River, Inc., prays for judgment in its favor and against the Defendants, U.S. Environmental Protection Agency, Administrator Andrew Wheeler, U.S. Army Corps of Engineers, and Dr. Mark T. Esper, as follows:

A. A declaration that the Aquila Mine’s Section 404 permit application is beyond the scope of authority delegated to Michigan and that jurisdiction for such a permit lies with the Corps;

B. Alternatively, a declaration that the EPA acted arbitrarily and capriciously and contrary to the record and law in withdrawing its objections to the Mine’s Section 404 permit application and, because the time has lapsed to resolve the objections, a declaration that jurisdiction over such permit now lies with the Corps;

C. An award of the Coalition’s costs and attorneys’ fees as determined appropriate under the Equal Access to Justice Act; and

D. Any such further relief as the Court deems just and equitable.

Dated this 13th day of November, 2018.

s/Ted. A. Warpinski

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