



November 6, 2017

By Certified Mail, Return Receipt Requested

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Robert A. Kaplan
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Re: 60 Day Notice of Intent to Sue; Notice of Violation of Non-Discretionary Duty to Exercise Section 404 Regulatory and Permitting Jurisdiction Over Permit Application for Back Forty Mine, Aquila Resources, Menominee River and Adjacent Wetlands; 33 U.S.C. §§ 1344 and 1365(a)(2)

Dear Sirs:

On behalf of the Menominee Indian Tribe of Wisconsin (the “Menominee Tribe”), we ask that you take immediate action to remedy ongoing violations of a non-discretionary duty under the Clean Water Act (“CWA”). As fully described below, the U.S. Army Corps of Engineers (the “Corps”) and the U.S. Environmental Protection Agency (“EPA”) are in violation of their mandatory duties under the Clean Water Act Section 404 (33 U.S.C. § 1344), due to their failure to exercise jurisdiction and regulatory authority over navigable waters of the United States—the Menominee River and adjacent wetlands—that are not delegable to the State of Michigan under 33 U.S.C. § 1344(g). This letter constitutes a 60-day notice of intent to file a citizen suit against EPA pursuant to Section 505 of the CWA, 33 U.S.C. § 1365(a)(2).

I. BACKGROUND

The CWA prohibits all discharges of pollutants to waters of the United States absent a permit. 33 U.S.C. § 1311(a). The CWA provides that the Corps may issue permits that allow for the discharge of dredge and fill after notice and opportunity for public hearing. 33 U.S.C. § 1344(a). (“Section 404 Permits”). The Corps oversees and issues Section 404 Permits pursuant to its rules at 33 C.F.R. § 320.3(f). EPA retains oversight and implements its authority over Section 404 Permits pursuant to its rules at 40 C.F.R. Pt. 230.

EPA has previously approved delegation of Section 404 permitting to the State of Michigan. 40 C.F.R. § 233.70. In accordance with the limitations on delegation set forth in 33 U.S.C. § 1344(g), the delegation does not include (and cannot 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.” *See also*, 40 C.F.R. § 233.70.

Aquila Resources, Inc. (“Aquila”) has proposed a sulfide minerals mine named the “Back Forty Project” on the banks of the Menominee River in Lake Township, Menominee County Michigan.¹ As part of the Back Forty Project proposal, Aquila intends to fill, dredge, dewater, alter, or otherwise adversely affect wetlands at and/or near the mine location which wetlands are adjacent to the Menominee River.² Aquila must obtain a Section 404 Permit under the CWA in order to proceed with its proposal to discharge to and/or fill the river and wetlands. In recognition of CWA requirements and the application of Section 404 obligations, Aquila has applied to the State of Michigan for a Section 404 Permit for the Back Forty Project. The State of Michigan is exercising regulatory control, authority, and/or jurisdiction over Aquila’s Section 404 Permit application. The Corps has not exercised jurisdiction, authority, or control over the Section 404 Permit application and has pointedly refused to do so.

¹ The location is described as occupying at least, in whole or in part, Sections 1, 11, and 12 of Township 35 North, Range 29 West; Sections 4-9 of Township 35 North, Range 28 West; and Section 32 of Township 36 North, Range 28, all in Lake Township, Menominee County, Michigan.

² It appears from the Environmental Impact Assessment prepared for the Back Forty Project that the mine will also affect groundwater levels throughout the mine site. It also indicates that it will affect wetlands and groundwater across the river in Wisconsin, as well as potentially altering water levels in the Menominee River itself. Altering water levels will adversely affect the river and adjacent wetlands in both states.

II. THE CORPS AND EPA ARE IN VIOLATION OF A NON-DISCRETIONARY DUTY BY FAILING TO EXERCISE JURISDICTION OVER THE SECTION 404 PERMIT APPLICATION AND PERMITTING PROCESS FOR THE PROPOSED BACK FORTY MINE ON THE MENOMINEE RIVER AND ADJACENT WETLANDS.

The Menominee Tribe informed the Corps and EPA, by letter dated August 21, 2017, that the State of Michigan does not have jurisdiction or authority over the Section 404 permit application and does not have authority to oversee or issue the Section 404 permit for the Back Forty Project. The Menominee Tribe further informed EPA and the Corps that the State of Michigan lacked jurisdiction because Section 404 permitting for the Menominee River and its adjacent wetlands cannot be delegated to a State under 33 U.S.C. § 1344(g).³ *See* copy of letter attached and enclosed with this Notice. The Menominee River for its entire length is an interstate river, forming the border between the States of Wisconsin and Michigan and is a water which is presently used, or is susceptible to use, in its natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to its ordinary high water mark including wetlands adjacent thereto. The Corps' own study in 1979 and subsequent recommendation by its counsel finds this to be true, beginning with extensive use of the Menominee River and its tributaries for commerce associated with logging and power generation through present day use for recreation, tourism and fishing.⁴ The entirety of Menominee River and its adjacent wetlands are not delegable, nor could they have been delegated, to the State of Michigan for Section 404 permitting and therefore the State of Michigan cannot exercise Section 404 jurisdiction for the Back Forty Project permitting.

Rather than taking control of the Section 404 process, the Corps has refused to exercise authority or jurisdiction over the process. *See* copy of Corps September 28, 2017 letter. In its September 28 letter, the Corps failed to respond to the evidence and arguments regarding navigability. The Corps' letter also claimed the Corps "lacked authority" to determine or exercise jurisdiction over, or to consult on, the Section 404 Permit for the Back Forty Project because EPA had not invoked federal jurisdiction in the Corps.⁵

³ The Menominee Tribe, in its August 21 letter, also submitted evidence of the use of the Menominee River for fishing and recreation in interstate commerce. *See* attached copy of August 21 letter. *See also*, enclosed copies of example materials demonstrating interstate commercial use from fishing and boating recreational businesses.

⁴ Moreover, 33 U.S.C. § 1344(g) plainly provides that waters that are "susceptible to use in their natural condition or by reasonable improvement" as a means of transport in interstate or foreign commerce are not delegable. The Menominee is plainly susceptible in its natural condition to use in interstate commerce.

⁵ The Corps responded similarly to Wisconsin Senator Baldwin by letter dated August 25, 2017, stating the Corps lacked authority over the Back Forty Section 404 Permit application unless directed to exercise jurisdiction by EPA.

EPA has also failed to specifically respond to the jurisdictional and navigability issue. Instead, in a letter dated October 13, 2017 and received by the Menominee Tribe on October 18, 2017, EPA offered only a telephone “consultation” regarding the “Section 404 permit process” for the mine (but not, apparently on a permit or other issues surrounding the mine project proposal and permitting.)

The Corps and EPA have a mandatory duty under 33 U.S.C. §§ 1311 and 1344 to regulate and exercise permitting jurisdiction over the Aquila Section 404 Permit application for the Back Forty Project. The language of the CWA plainly provides the Menominee River could not be and was not delegated for purposes of Section 404 permitting. Further, the Corps and EPA cannot allow a state to authorize dredge and fill under the CWA where the state has no jurisdiction or authority to do so. Both the Corps’ own analysis and the Menominee Tribe’s proffered evidence demonstrate the Menominee River’s navigability and use in interstate commerce. EPA and the Corps thus have a mandatory duty to assume jurisdiction over Aquila’s pending Section 404 Permit application for the Back Forty Project. EPA and the Corps are in violation of a statutory duty for failing to do so. *See, Nat’l Wildlife Federation v. Hanson*, 859 F.2d 313, 315-16 (4th Cir. 1988). *See also, Natural Res. Defense Council, Inc. v. Callaway*, 392 F.Supp. 685, 686 (D.D.C. 1975) (Corps cannot define away and refuse to exercise jurisdiction under the Clean Water Act.)

The Corps and EPA must immediately:

1. inform the permit applicant Aquila Resources, Inc. that its application is insufficient, because it is not addressed to the Corps and doesn’t otherwise meet Corps procedures;
2. inform the State of Michigan that the Corps is assuming full federal jurisdiction and authority over the Back Forty Project Section 404 Permit Application; and
3. assume full primary control and jurisdiction over the Back Forty Project Section 404 Permit Application and permitting process.

III. IDENTITY AND ADDRESSES OF PARTY GIVING NOTICE:

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CONCLUSION

EPA and the Corps are in continuing violation of the Clean Water Act, 33 U.S.C. §§ 1311 and 1344. The Menominee Indian Tribe of Wisconsin hereby provides this Notice for the continuing violation outlined above, including if the violation continues subsequent to the date of this Notice. This Notice is given pursuant to 33 U.S.C. § 1365.

Unless this violation is cured within sixty days by the Corps and EPA assuming jurisdiction and control over the Back Forty Project's Section 404 Permit application and processing, the Menominee Tribe reserves the right to take appropriate legal action to compel the Corps and EPA to comply with the Clean Water Act and applicable regulation to protect the Menominee Tribe, the Menominee River, and wetlands adjacent to the river.

Please contact the undersigned should you have any questions.

Sincerely,



Janette K. Brimmer
Stephanie Tsosie
*Earthjustice, Counsel for Menominee Indian Tribe
of Wisconsin*

Enclosures
cc:

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