

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN  
GREEN BAY DIVISION

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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.

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Case No. \_\_\_\_\_

**COMPLAINT**

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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.<sup>1</sup> 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.

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<sup>1</sup> 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 13<sup>th</sup> day of November, 2018.

*s/Ted. A. Warpinski*

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5

77 WEST JACKSON BOULEVARD

CHICAGO, IL 60604-3590

**MAR 08 2018**

REPLY TO THE ATTENTION OF:

WW-16J

Ms. Colleen O'Keefe  
Land and Water Management Division  
Michigan Department of Environmental Quality  
P.O. Box 30028  
Lansing, Michigan 48909

Re: Public Notice No. 2NN-5PE0-MT3W, Aquila Resources Inc.

Dear Ms. O'Keefe:

The United States Environmental Protection Agency appreciates the opportunity to provide comments on the above-referenced Michigan Department of Environmental Quality's (MDEQ) December 8, 2017 public notice in which Aquila Resources, Inc., proposes to develop a new polymetallic mineral mine known as the "Back Forty" Project.

The U.S. Army Corps of Engineers (Corps) and the U.S. Fish and Wildlife Service (FWS) provided comments to the EPA on the proposed project and permit application. We provide these combined agency comments pursuant to Section 404(j) of the Clean Water Act (CWA), the regulations in 40 C.F.R. § 233, and as further prescribed in the Memorandum of Agreement (MOA) between the State of Michigan and EPA for implementation of the 404 permit program.

The federal agencies have identified specific concerns with the project as proposed. Our concerns include the deficiencies in the impacts analysis, the significance of aquatic resource impacts, alternatives analysis, and the demonstration of adequate compensation for wetland and stream impacts. Therefore, this project does not comply with the CWA Section 404(b)(1) Guidelines, and EPA objects to the issuance of a permit for this project as proposed.

Our detailed comments and objections; reasons for those comments and objections; and the steps that the MDEQ must take to eliminate the objections are enclosed. The comments and objections cover the following general concerns:

- 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. The proposed site layout is not consistent with the approved state Permit to Mine. Nor are all impacts of the project identified in the application, including impacts caused by any planned underground mining, a power plant, and mining water management systems. Without this information, the reviewing agencies cannot adequately assess the extent of the proposed mine's impact on aquatic resources as

**EXHIBIT**

**A**

required by the CWA, and or determine whether the applicant has minimized and avoided aquatic resource impacts, as required.

- The mine pit is located next to a bluff above the Menominee River and the application currently lacks information that would allow the reviewing agencies to ensure mine pit integrity with respect to the boundary of the river and associated flood plain, including an analysis of slope stability and erosion at the river bank. The application lacks information regarding how the project will include means to stabilize these features, including to address U.S. Fish and Wildlife (and EPA) concerns regarding potential risks to the project and the river from heavy rains. Lack of this information means the reviewing agencies cannot understand the project's potential impact to aquatic resources.
- The application states that the project will not adversely affect 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, a concern EPA shares with the Corps.
- 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.
- The application does not contain adequate support for the applicant's determination that offsite upland alternatives for some mine features (e.g., tailings storage) are not practicable.
- 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.
- We note that the applicant has not provided the information requested by MDEQ in letters of January 19, 2018, and March 2, 2018. Responses to these letters should significantly clarify outstanding concerns regarding the application.

In order to address EPA's objections, the MDEQ shall require the applicant to provide following:

- Complete responses to the questions concerns outlined in MDEQ's January 19, 2018 and March 2, 2018, letters;
- Adequate characterization of wetland impacts, including any secondary wetland or stream impacts;
- Additional details regarding monitoring, impact criteria, and specific adaptive management mechanisms sufficient to demonstrate avoidance and minimization of

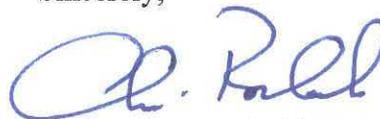
impacts to aquatic resources and prevention of contamination and unanticipated discharges;

- Demonstration and supporting documentation that the mine site plan is protective of water quality throughout the life of mine and post-closure;
- Additional documentation of Menominee River bank stability/erosion potential to demonstrate mine integrity;
- Additional supporting documentation demonstrating that the preferred-alternative is the least environmentally damaging practicable alternative, e.g., documenting off-site alternatives for waste rock storage including cost-analysis; and
- Additional support documentation demonstrating that the proposed preservation area meets the requirements of the 2008 Federal Mitigation Rule.

This letter constitutes a federal objection to the issuance of a permit for this project. Pursuant to CWA § 404(j) and the CWA 404 MOA Section 5(d)-(e), the MDEQ has 90 days from the date of this letter to work with the applicant to resolve the issues raised above or deny the permit. The MDEQ may request a public hearing on EPA's objection. If the State does not satisfactorily resolve this objection within 90 days after the date of this letter, or within 30 days after the completion of the hearing if one is held, authority to process the CWA Section 404 permit transfers to the Corps by operation of law.

Thank you for the opportunity to provide comments on this application. We look forward to working with you to resolve the issues discussed in this letter. Please contact Melanie Burdick at (312) 886-2255 with any questions you may have.

Sincerely,



Christopher Korleski  
Director, Water Division

Enclosure

Enclosure:  
Combined EPA, FWS, and Corps comments on the  
Michigan Wetlands and Inland Lakes and Streams Application for the Back Forty Project  
March 7, 2018

**Background**

The proposed project is located in Sections 1, 11, and 12 of Township 35 North, Range 29 West; Sections 4-9 of Township 35 North, Range 28 West; Section 2 of Township 35, Range 27; Sections 2 and 3 of Township 34, Range 28, Section 27 of Township 36, Range 27, and Sections 32-26 of Township 36 North, Range 28, Lake Township, Menominee County, Michigan.

As described in the public notice and the application, the purpose of the proposed project is to develop and mine a new polymetallic resource containing zinc, gold, silver, and copper. The project includes an open-pit mine with above-ground tailings disposal and rock management facilities, onsite wastewater management facilities, and operations and stormwater management facilities. Aquila proposes to fill 5.9 acres of wetlands and 253 linear feet of stream channel, and to discharge riprap to construct an outfall in the Menominee River, which acts as the boundary between Michigan and Wisconsin. Other impacts associated with the proposed project include dredging 5.3 acres of wetlands, and hydrologic impacts to 17.2 acres of wetlands and 297 linear feet of stream channel.

EPA objected to a wetlands permit for the Aquila Back 40 Mine in 2016, and the applicant withdrew its application. The applicant resubmitted its application in 2017. Although some issues identified in EPA's August 15, 2016, comment letter have been addressed in the current application, many have not been fully addressed, and the new application contains additional deficiencies.

MDEQ has requested significant clarification regarding the document titled "Potential Indirect Wetland Hydrology Impact of the Back Forty Project" and in response to questions and concerns identified during the public comment period (MDEQ letters dated January 19, 2018 and March 2, 2018). Both of these letters identify deficiencies in the application and describe how the applicant has not demonstrated compliance with the CWA Section 404(b)(1) Guidelines (Guidelines). EPA shares MDEQ's concerns regarding the permit application, the answers to which may also address EPA's comments.

Pursuant to the Guidelines, the applicant bears the burden of clearly demonstrating that the preferred alternative is the least environmentally damaging practicable alternative (LEDPA) that achieves the overall project purpose, minimizes impacts to the aquatic environment to the maximum extent practicable, and does not cause or contribute to significant degradation of waters of the U.S.

**Incomplete Project Description of Lack of Final Plan**

A concern highlighted in EPA's 2016 letter that has been partially addressed in the 2017 application is that the application did not contain a final site plan. A final site plan is needed to complete an impacts analysis, determine the LEDPA, and aid in review of compensatory

mitigation. The applicant has addressed this concern by including a proposed site layout associated with the preferred alternative identified in the Alternatives Analysis (Application, Section 6). However, some concerns remain. For example:

- The wetland application shows a Mine Waste Storage Area directly south of the proposed pit, while the Permit to Mine identifies that area as an overburden and soil stockpile area.
- The layout in the Wetlands Application does not include contact water management features that are in the Permit to Mine, such as perimeter ditches and liners to collect and transport contaminated water.

Even if siting these features will not influence the direct footprint of the project's aquatic resource impacts, their siting will likely affect the potential for the mine features (tailings, spoil, overburden) to have secondary impacts on water quality of the adjacent aquatic resources, including adjacent wetlands and the Menominee River.

To ensure that all impacts to aquatic resources, including water quality and other potential secondary impacts, are sufficiently evaluated, MDEQ should verify that the mine features and impact areas are the same as those approved in the Michigan Part 632 Permit to Mine.

An additional concern is that the application may not identify all work associated with the project, which is necessary to adequately assess impacts to aquatic resources and consider alternatives. The U.S. Army Corps of Engineers (Corps), in its February 27, 2018 letter to EPA, notes that activities associated with the mine not listed in the application include:

- future underground mining,
- a power plant (substation) planned east of the mine,
- contact water management features, and
- any road realignments/widening required because of the proposed project (although EPA understands there is no plan to relocate River Road).

The Corps identified some of the parcels listed in the Application at Table 1 as within the project area and which are not located contiguous to the proposed Mine. Since these areas are included as part of the Back Forty Project Area, the application should identify which activities will occur in those locations and any aquatic resource impacts associated with the activities.

### **Ensuring Mine Pit Integrity**

In response to concerns regarding the overall stability of the cut-off wall that were raised in the context of the previous application, Aquila produced and revised "Memorandum B-4," which describes the design criteria for the cut-off wall and the mine pit wall. Memorandum B-4 includes a slope stability analysis under normal conditions and during the 100-year flood.

The federal agencies have continuing concerns regarding the stability of the Menominee River bank. Comparing the Part 632 Permit approval and the current application, we note that the average width of the land between the pit and the ordinary high water mark and 100-year floodplain has decreased, resulting in siting the proposed cut-off wall closer to the river. The closer proximity of the pit to the Menominee River bank further increases the risk of impacting the Menominee River and downstream waters because there is less margin for error simply

because rivers are dynamic and flow can be unpredictable due to precipitation, snowmelt, and ice.

The U.S. Fish and Wildlife Service (FWS), in its February 27, 2018 letter to EPA, notes that an increased frequency of heavy rain events has been documented in the United States (Walsh et al. 2014) and should be considered in all project design plans. For example, FWS states that on July 12, 2016, 8 to 12 inches of rain fell in a matter of hours across northern Wisconsin, causing widespread flooding (<http://readywisconsin.wi.gov/>).

Therefore, EPA recommends that MDEQ consider the increased frequency of heavy rain events, as described by FWS, in evaluating the application. Specifically, MDEQ should require an erosion potential evaluation for the Menominee River bank that is sufficient to demonstrate that the integrity of the mine pit wall and cut-off wall would not be compromised by a greater-than 100-year flood or erosion of the land between the River and the cut-off-wall.

### **Potential Project Impacts to Water Quality**

Consistent with the Guidelines, the applicant must identify any potential adverse impacts to water quality of the adjacent aquatic resources, and verify that secondary water quality impacts to wetlands and streams have been avoided, minimized, and mitigated. The applicant has provided some data pertaining to water quality, but has not provided sufficient information to demonstrate that the Guidelines have been met.

Baseline water quality is described in Appendix B-2 for the Shakey River, Menominee River, Pike River, Squaw Creek, wetlands, and groundwater. The application also includes baseline macroinvertebrate and P-51 assessment data for the stream segments on-site (Appendix B-9). These data, along with the wetland delineation, help inform the agencies of the functional loss of aquatic resources. Appendix B-10 contains the monitoring and adaptive management plan, which includes wetland and groundwater quality metrics. However, the applicant should continue to monitor at these baseline locations throughout and after the life of mine to identify potential water quality impacts.

The Application, at Appendix B-10, also needs to include specific adaptive management metrics and impact thresholds. These should be based on the baseline data and would be the trigger for corrective actions which need to be identified in the adaptive management plan.

In addition, MDEQ should verify that water quality monitoring is sufficient to detect any leaching of toxic compounds into wetlands adjacent to mine storage facilities (e.g. additional monitoring locations may be needed).

The Corps noted in its comments that the proposed work may affect water quality in the Menominee River during the life of the mine and after its closure, and that the application failed to address the potential water quality impacts of constant drawdown from and restricted release to the Menominee River. Specifically, the application estimates seepage rates at 32,500 – 125,500 gallons per day from the Menominee River to the mine pit, during the life of the mine. EPA agrees this concern must be addressed. The applicant should also address potential water quality impacts from mine seepage to the river post-closure, once pumping and water treatment cease. If there is a possibility that untreated flows could enter the river via the outfall, we recommend the applicant consider the removal of the outfall at mine closure.

### **Potential Project Impacts to Wetlands**

EPA is concerned with the accuracy of the applicant's estimate that 17.2 acres of wetlands would be impacted by changes in hydrology. Specifically, the term "upland wetlands" used in the application is not a recognized classification, and it is not clear from the soil survey information, piezometer, and monitoring well data that these wetlands are not influenced by groundwater.

The Corps' letter states that some of these wetlands contain streams and off-site surface connections to the Menominee River and Shakey Rivers, and the applicant's threshold of indirect "proximity" impacts where the project causes the loss of more than 50% of a wetland's watershed is not adequately supported. Additional documentation, and potentially additional well and soil data, are needed to demonstrate that pit dewatering will not also lower the water table within these wetlands.

The application does not address secondary impacts to wetlands, streams, and the Menominee River other than those due to dewatering. Additional secondary impacts may include, for example, fugitive dust or stormwater impacts. These may be addressed, in part, in the Michigan Part 632 Permit to Mine, but the layout in the proposed wetlands permit is different than that in the Permit to Mine. Certain measures to address potential transport of contaminants to other surface waters such as lining spoil piles and perimeter ditches are not specified in the wetlands permit and are not consistent with the Permit to Mine.

The January 19, 2018, MDEQ "Request for Clarification & Amplification" letter identifies a need for more information pertaining to secondary/indirect impacts to wetlands from changes in hydrology. MDEQ has identified discrepancies between the groundwater contours determined by the MODFLOW model, the projected contours presented in the Wetlands Application, and the measured contours. The Corps letter notes other concerns regarding dewatering, including a concern that sumps placed in constructed basins may impact the hydrology of adjacent wetlands. Also, the applicant has not supported its assertion that alteration of surface water and groundwater flows to wetlands would be minor during the spring, and larger drawdowns during the rest of the growing season would not cause more than minimal impacts to wetlands; negative impacts may occur to hydrophytic vegetation, invertebrate, and vertebrate species that rely on wetland hydrology to complete their life cycles. Answers to these technical questions are necessary for the agencies to assess and quantify wetland impacts.

### **Alternatives Analysis**

The project purpose, as described in Section 6 "Feasible and Prudent Alternatives," defines the project narrowly, limiting the consideration of off-site alternatives with fewer aquatic resource impacts. Although the alternatives analysis includes a conceptual alternative that would place the ore processing and tailings disposal off-site, the applicant does not identify or evaluate any specific potential locations. Aquila eliminated Alternative B as not being economically viable primarily due to transportation costs, but it is not clear how that was determined without consideration of a specific site, as a nearby alternative would reduce that cost. Several other alternatives were eliminated due to economic feasibility, but the application lacks sufficient documentation to demonstrate that alternatives are not practicable due to the asserted costs. The applicant needs to provide a complete alternatives analysis, including its rationale for its decision to eliminate alternatives as not being practicable.

To pursue the preferred alternative, Aquila was able to obtain additional land from private entities and through a land swap with the State of Michigan. There are other State of Michigan lands east of project boundary that contain Aquila Mineral Leases and that are comprised of mostly upland. To demonstrate that alternatives with fewer aquatic resource impacts are not practicable, Aquila must describe what consideration was given to alternative upland areas near the site, e.g., state land east of the site, or other nearby properties.

### **Monitoring and Adaptive Management**

In addition to the monitoring and adaptive management comments regarding water quality listed above, the Corps notes, and EPA agrees, that more details are needed to support the effectiveness of the proposed adaptive management to minimize and mitigate wetland impact during the life of the mine. The basic strategy proposed in the application is that the wetlands may be augmented by water from the Menominee River or groundwater withdrawals if drawdown is found to have adverse impacts on the wetlands. The applicant should verify that this would be a viable long-term strategy and include this information as a supplement to its application. The Corps also recommends that monitoring reports be submitted at least bi-annually and reference wetlands should be included in the impacts monitoring plan. The reference wetlands should be used along with the baseline data to create impact criteria to better detect impacts to wetland water levels and wetland functions.

### **Compensatory Mitigation**

Under the CWA Section 404(b)(1) Guidelines, the agencies may only consider compensatory mitigation after an applicant has demonstrated avoidance and minimization of adverse aquatic resource impacts. The applicant has not demonstrated avoidance and minimization; however, in anticipation of this demonstration, EPA provides the following preliminary comments regarding the proposed mitigation.

To compensate for aquatic resource impacts, the public notice describes the preservation of a 507.74-acre parcel of property in Lake Township, which contains 294.24 acres of wetland, 7,864 linear feet of perennial stream, and 4,794 feet of Menominee River frontage. The mitigation plan also includes wetland enhancement and stream restoration activities, but preservation makes up a majority of the compensatory mitigation being proposed.

FWS noted that although preservation of wetlands could be of conservation value, the proposed parcel does not meet the goal of no-net-loss of in-kind habitat value. The application includes the detailed site selection criteria, and describes the lack of wetland mitigation opportunities near the impact site. However, we recommend the applicant consider opportunities for stream restoration nearer to the site to compensate for the proposed stream impacts.

Additionally, the information included with the public notice is insufficient to demonstrate that the proposed preservation wetlands will meet the 2008 Federal Mitigation Rule<sup>1</sup> or MDEQ requirements to be considered as compensatory mitigation. Those requirements include that the wetlands to be preserved are under a demonstrable threat, perform exceptional physical or biological functions, and will be permanently protected. Additional support regarding the value

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<sup>1</sup> 40 C.F.R. § 230.93(h)

of lumber on the property and any real estate inquiries should be provided to support the premise that the wetlands are under demonstrable threat.

While we understand that the Michigan Department of Natural Resources (MDNR) would be the long-term land steward, which MDEQ and EPA have approved in the past, we note that MDNR's mission for land use/conservation may differ from that of MDEQ. To ensure that the land management plan will meet the requirements for compensatory mitigation, prior to permitting, MDNR should agree to the standard MDEQ requirements for Conservation Easements, including the prohibition of logging within both the uplands and wetlands and perpetual protection from threats (including invasive species).

### **Endangered Species: Northern Long-eared Bat**

FWS notified EPA that the proposed project is within the range of the federally threatened northern long-eared bat (*Myotis septentrionalis*; NLEB), and removal of trees could impact this species. During the summer, NLEB typically roost singly or in colonies underneath bark or in cavities, crevices, or hollows of both live and dead trees (typically  $\geq 3$  inches dbh). The species has also been found roosting in structures, such as barns, sheds and bridges, occasionally. These bats roost and forage in upland and lowland woodlots, tree-lined corridors, and forested wetlands. During the winter, NLEB hibernate predominantly in caves and abandoned mine portals.

According to FWS, the proposed action is likely to be exempt from take prohibitions pursuant to the "4(d) rule" for the NLEB; therefore, any incidental take of NLEB that may occur as a result of removing trees will not be prohibited. Although not required, FWS recommends that cutting potential roost trees occur only between October 1 and March 31 while bats are not present on the landscape to avoid direct take of NLEB, and minimize any effects to bats returning after April 1.

### **Trust Responsibility Species**

In its letter to EPA, FWS documents the conditions that sustain Lake Sturgeon, and how the project may affect the trust responsibility species:

Lake Sturgeon (*Acipenser fulvescens*), inhabit large river and lake systems primarily in the Mississippi River, Hudson Bay and Great Lakes basins. Lake sturgeon are listed as either threatened or endangered by 19 of the 20 states within its original range in the United States, but they are not federally listed in Michigan. Lake sturgeon can be considered a nearshore, warmwater species with water temperature and depth preferences of low 50s to mid-60F and 15-30 feet, respectively. These fish are benthivores, feeding on small invertebrates such as insect larvae, crayfish, snails, clams, and leeches. Adult sturgeon habitually return to spawn in streams where they were born, often migrating long distances up rivers in the spring. After hatching, some young sturgeon have been observed to remain in their natal rivers for their first summer of life.

Additionally, the FWS letter describes the agency's extensive involvement in restoration efforts for lake sturgeon in the Menominee River, which include providing fish passage for sturgeon upriver and downriver around existing dams. These efforts to ensure the health and continued

recovery of the species and the river that supports them have been a high priority of FWS, involving many projects and state, tribal and local partners have been involved to ensure long-term success of the species. The goals and objectives for these efforts span a 50-year timeframe and management will be ongoing beyond meeting these goals.

As previously indicated by FWS, any development in the watershed that could potentially harm the water quality of the Menominee River and thus reduce the viability and success of sturgeon reproduction, growth, survival or health is a concern.

FWS echoes EPA's and the Corps' general concerns that MDEQ ensure the measures and adaptive management plans to prevent contamination or unanticipated discharge from the proposed project are sustainable, long-term, and are fully sufficient to impede contamination from occurring.

### **Cultural and Archeological Resources**

The Corps provided EPA the following advisory comments:

Previous archaeological surveys identified cultural resources in the project area. The applicant has not provided sufficient information to support the assertion that the proposed project would likely not impact potentially eligible or eligible resources. Historical and cultural resources should be addressed for the entire expanded project site.

EPA concurs with the Corps' recommendation that MDEQ ensure that historical and cultural resources are adequately addressed within the full extent of the expanded project site.

**MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY**

May 24, 2018

TO: Kristi Wilson, Kim Fish

FROM: Jill Van Dyke, C.P.G.   
Geology Specialist  
Water Resource Division (WRD)

SUBJECT: Aquila Back Forty Mine Wetland Permit Recommendations

**Introduction**

Foth Infrastructure & Environment, LLC (Foth) submitted a groundwater Modeling Report dated October 2015 as part of a Wetland Permit Application. The existing Aquila Back Forty Mine groundwater model provided by Foth was originally intended to, in part, assess the drawdown and groundwater inflow associated with the operation of an open-pit mine (page 1 Section 1.1). This groundwater model and report was reviewed by WRD (as detailed in Memo to File dated April 27, 2018) and determined to be insufficient to adequately predict or assess the potential impacts to the site wetlands or provide useful information for wetland water budget analyses based on the following concerns (as detailed in WRD Memo to File dated April 27, 2018):

- Inappropriate groundwater target levels were used for the steady-state calibration that ignore wetland growing season and do not represent consistent seasonal changes previously documented on-site (e.g. early June water level highs/mounding);
- Incorrect assumptions were used in the Foth groundwater model conceptual design for wetland impact determination that ignores actual site conditions in the wetlands [for example, groundwater mounding observed in early June as detailed in a September 2011 report titled *A Hydrogeology Report: Environmental Baseline Studies* for the Aquila site by Environmental Resources Management, Inc. (ERM) and generically defined river boundary cells inserted throughout the model domain that were reportedly used to balance and calibrate the groundwater model but do not reflect the site-specific conditions;
- Lack of monthly seasonal variations in the transient simulations with appropriate recharge rates needed for water level and flux estimates in and out of on-site wetlands for use in site wetland water budget analyses;
- Lack of site-specific infiltration rate information in all on-site wetlands;
- Lack of information on streamflow, availability of surface water in streams and other water bodies on-site, and site-specific hydraulic conductivity of wetland sediments in the groundwater model calibration thereby increasing the non-uniqueness and uncertainty of the model results;
- The use of MODFLOW river boundary cells defined with generic values not representative of on-site wetlands;
- The October 2015 groundwater model does not include more recent information collected from additional piezometers/borings installed since 2015;



- Not all wetlands and only portions of some wetlands identified on-site are explicitly modeled (some using river cells). Therefore, the steady-state model does not represent the site hydrological conditions that exist prior to development which makes it difficult to determine the likely changes or drawdown impacts due to the proposed mining activities.
- There is no direct connection with the definitions of the river cells to the actual on-site wetland resource or site hydrology other than the information presented in the Foth Groundwater Modeling Report (page 13) that the river cells were used to help lower the mass balance error of the groundwater model during calibration and therefore are not defined to represent actual site wetland sediments or infiltration rates;

Because of these identified issues with the existing groundwater model development as it pertains to the site wetlands and related wetland budgets, the impact to the site wetlands cannot be assessed based on the incomplete data submitted by the applicant. These issues were brought to the applicant's attention in multiple communications. In addition, a technical meeting was held with the applicant's consulting team on March 21, 2018 to specifically discuss these deficiencies with the existing groundwater model and to provide specific recommendations required to provide the information necessary to adequately assess wetland impacts. The applicant has not incorporated any WRD recommendations to address the deficiencies in the existing model.

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.

### **Aquila Back Forty Mine Wetlands Permit Conditions – Hydrological Baseline and Wetland Impact**

The Permittee shall collect a complete round of groundwater level measurements in all existing and any newly required wells (i.e., monitor wells, piezometers, drive point wells) as identified below prior to commencing any site activities. These data shall be collected in the same sampling event as wetland/stream stage and streamflow measurements to assemble a complete hydrological baseline condition prior any site activities. Site monitoring wells and piezometers shall not be removed until this baseline sampling is completed. Based on the ERM 2011 hydrogeological information, water level data should be collected in March, mid-May, early June, July, August, September, and December for the baseline.

1. Specifically, the following groundwater level, vertical gradient, stream flow baseline assessment information shall be collected from all existing locations monitoring the Quaternary and Sandstone sediments by the Permittee before commencing any mining or site infrastructure activities. The baseline water level measurements are to include monitoring wells, piezometers, gages, flumes and other shallow water level monitoring points. The Permittee shall exercise the appropriate precautions in the construction of the deep wells to prevent leakage through any confining units separating shallow and deeper aquifers. Based on Aquila's current sampling locations, this will include at a minimum:
  - The water levels in all existing Quaternary and Sandstone site monitoring wells, piezometers shall be measured. This is currently expected to include piezometer pairs 1 through 24, monitoring wells MW-2, MW-3, MW-4, MW-5, MW-6S, MW-6D, MW-7,

- MW-8, MW-10, MW-12, MW-13S, MW-13D, MW-14, MW-15S, MW-15D, MW-16, MW-18S, MW-18D, MW-19, MW-20, FMW-1 through FMW-12, GMW-01 through 05, MW-2SS, MW-10SS, MW-11SS, MW-13SS, MW-15SS, MW-17SS, and MW19SS;
- Pressure transducers shall be used to record continuous stage of the water level in the identified wetlands that exhibit standing water. Pressure transducers used in the wetland should be referenced to a common vertical datum (e.g. NAVD88). In addition, stream gages for measuring continuous stage and discharge will be placed in the streams identified on-site. Flumes shall be installed and data shall be electronically collected in any stream that exhibits intermittent flow to determine discharge;
  - Additional vertically nested well pairs to measure water level and vertical gradients will be installed in any wetland area connected to the aquifer that is not currently being monitored. Measurement of any additional well pairs needed shall be included in the baseline monitoring;
  - The groundwater level data collected for the baseline as well as subsequent quarterly water level monitoring should be provided to WRD in print and in electronic Excel data table format. These tables should include the location name, associated wetland if applicable, latitude and longitude in decimal degrees, screen length (ft), top of screen (ft), bottom of screen (ft), date collected, water level elevation (ft) above mean sea level (AMSL), water level depth (ft) below ground level, and any other comments relevant to the data quality or monitoring events.
  - On-site vertical hydraulic conductivity of the wetland sediments, vertical and horizontal conductivity of glacial sediments adjacent to the wetlands, and vertical conductivity of river bottom sediments shall be collected if not already available for all existing wetlands currently on-site. A work plan detailing sampling methods and locations to collect this data will be developed and submitted to WRD for approval prior to sampling or any mining or infrastructure related site activities commence.
  - Streamflow measurements will be collected in all site streams that drain offsite and this updated information will be compared with the streamflow measurements conducted by ERM from 2007 to 2009 as detailed a September 2011 report titled *A Hydrogeology Report: Environmental Baseline Studies* for the Aquila Site. This information shall be used in the calibration of a MODFLOW groundwater model to assess wetland impacts.
  - Existing data from soil boring locations FSB-101 through FSB-113A, AND FSB-115A, 117, 118A through FSB-165 shall be used to define the wetlands in addition to supplemental soil borings required as part of the wetland baseline assessment.
  - The permittee shall document the baseline sampling results in a report noting any climate or physical conditions that may affect the sampling and provide this documentation to WRD within 4 weeks of the completion of data collection and prior to commencing any site mining or infrastructure activities.
  - Water level and vertical gradient monitoring shall be collected monthly with a report documenting the data, any water level or vertical trends observed, print and electronic data table presenting site measurements. This report shall be submitted on an annual basis by no later than December 31 each year.
2. A revised MODFLOW groundwater model using appropriate methods for defining wetland cells shall be developed that will incorporate site-specific groundwater hydrogeology and geology information (e.g., horizontal and vertical conductivity of the glacial, wetlands, and streambed sediments) to be used to integrate the site wetland, stream, and groundwater level data to assess the aquifer interconnection to the wetlands. The goal of the revised groundwater model will be to aid in the interpretation of

the hydrologic processes and assess the evaluation of any potential effects of drawdown/dewatering that the mining operations may have on the site wetlands. The permittee shall complete the revised MODFLOW model prior to any site activities related to mining and infrastructure and present the groundwater modeling report in conjunction with the wetland drawdown analysis to WRD for review and approval. At a minimum, this revised groundwater model shall include:

- The revised calibrated steady-state model representing initial conditions prior to mining operations shall include all site wetlands (not just the wetlands expected to be impacted by site operations) to obtain an appropriate estimate of initial conditions so that changes in water levels associated with site operations can appropriately be assessed.
- Site-specific horizontal and vertical hydraulic conductivity data collected from each wetland identified on-site and from the adjacent glacial sediments will be used in the conceptual model design;
- Revised transient models that include a scaled monthly recharge rate based on the average annual recharge rate for the area and seasonal trends observed for the site data. The models shall estimate the monthly water level changes and flux changes in and out of each wetland;
- Revised transient models for post-closure of mining activities shall be developed;
- Appropriate boundary cell definitions shall be documented for each wetland based on the connection to the aquifer as established by on-site soil boring and water level measurements in each wetland (e.g. drain, lake, river, or stream boundary condition, or general);
- Provide justification for the definitions used to represent each wetland on-site. This could include the use of either drain, lake, or river boundary cells for example, as appropriate.
- The wetland boundary cell type selected for each wetland will be defined using the site-specific data collected from the site area including information provided in site soil borings such as sediment type, aquitard presence, wetland thickness determination, stage data, flow data, vertical conductivity, and horizontal conductivity of the wetland and adjacent glacial sediments.
- Model calibration and verification results table and map showing a comparison of the measured and simulated calibration targets and residuals with a description of procedures;
- A table showing the results of sensitivity analyses showing the range of adjusted model parameters and resulting change in the hydraulic heads or groundwater flow rates;
- Iso-contour maps showing the measured and simulated hydraulic-head distribution in feet;
- Iso-contour maps of the top and bottom elevation of the aquifer(s) in feet;
- Drawdown contour maps extending to a minimum of a 0.5 foot contour shall be provided;
- A map showing the model area distribution of the hydraulic conductivity for each layer and the leakance or vertical conductivity used for each layer in feet/day;
- A table showing the aquifer parameters used for each layer in the revised model and how these were determined for each model component [measured wetland vertical conductivity, thickness of the wetland sediments/depth to confining layer (if any), adjacent glacial sediment horizontal and vertical conductivity];

- A map showing the model grid with locations of different boundary conditions used in the model (feet);
  - Maps clearly illustrating locations, water level predictions, drawdown contours as noted above, and all wetlands, streams, lakes, rivers included in the model;
  - All figures presented in the report should be drawn to the same scale (feet or miles as appropriate) and datum based on the data illustrated (e.g., all drawdown contour maps at the same scale and datum, all regional water level maps at the same scale and datum, etc.);
  - A discussion of the limitations of the model's representation of the actual hydrologic system and the impact those limitations have on the results and conclusions presented in the report;
  - Submission of an updated standard Groundwater Modeling Report (including Model Conceptualization, Model Calibration, History-Matching, Sensitivity and Uncertainty Analysis, Parameter Estimation, Predictive Simulations, Recommendations and Conclusions) shall be submitted;
  - Electronic data files for all data tables (e.g., Excel, .csv); maps (.pdf and shapefile or .mxd files); and all software input and output files shall be provided. The datasets for the different simulations (model calibration, history matching, and predictive simulations) need to be supplied in digital format.
  - The flux information generated from this revised calibrated groundwater model shall be used to assist with the development of wetland budgets (that include data consistent with water levels observed during the growing season (mid-May through end of September) to provide the information necessary to assess the potential wetland impacts.
3. Following the baseline data collection, the Permittee shall monitor the water levels at each Quaternary and Sandstone groundwater monitoring well or piezometer generally on a quarterly basis with measurements collected in June, September, December, and March plus a data collection event in mid-May (the start of the growing season) at a minimum. The monitoring results are to be submitted in print and electronic format on an annual basis. At the end of each year period the permittee will provide an analysis of water level trends observed and identify any areas where additional monitoring points are needed, locations that could be revised, or potential impacts identified (drawdown and dewatering). The Permittee shall provide an action plan to mitigate any potential wetlands impacts identified that includes proposed action timelines for WRD review and approval.
  4. Site groundwater level, stream/wetland stage and streamflow data measurements shall be used to validate the revised MODFLOW groundwater model developed to assess wetland impacts and provide a report that details the findings including any need to revise the existing model based on the new data. The effectiveness of the groundwater model shall be reviewed on an annual basis.
  5. The permittee shall provide a mitigation plan to address identified impacts should the drawdown or water level declines observed in the monitoring data exceed what is predicted based on the updated wetland groundwater model and site measurements.
  6. Should the data not support the revised groundwater model, the conceptual model shall be reviewed and recommended changes along with a schedule for completion shall be submitted in writing to WRD for approval.

7. The Permittee shall submit a Quality Assurance Project Plan (QAPP) and Work Plan to the WRD. The Work Plan for installation of the vertical nested wells, water level measurements, and collection of vertical and horizontal hydraulic conductivity data, shall provide details on specific location, screen lengths, screen elevations, screened interval, and construction details for the nested well pairs. The QAPP shall include all methods used, equipment used, monitoring frequency, equipment calibration, staff qualifications, data and document reporting, and method references. This permit does not authorize the installation of scientific measuring devices.
8. A PART 327 registration shall be obtained by the Permittee if the rated pump capacity for all pumps used on the site to remove water (dewatering pumps, potable water wells, process water wells, or wetland augmentation pumps) at the site equal or exceed a rate of 70 gallons per minute before proceeding with the installation and use of such pumps.
9. Within 60 days of WRD approval of a final groundwater model, the permittee is required to submit a comprehensive assessment of potential impacts to private wells in Michigan and Wisconsin that may result from the mining operations.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5  
77 WEST JACKSON BOULEVARD  
CHICAGO, IL 60604-3590

MAY 03 2018

REPLY TO THE ATTENTION OF

WW-16J

Ms. Teresa Seidel, Director  
Water Resources Division  
Michigan Department of Environmental Quality  
P.O. Box 30473  
Lansing, Michigan 48909-7973

RECEIVED

MAY 04 2018

Dear Ms. Seidel:

**U.P. Office**

I am writing in follow-up to my March 8, 2018 letter to Ms. Colleen O'Keefe, which provided federal comments on, and objections to, the issuance of a Clean Water Act Section 404 permit for the proposed Back Forty project. As required by the Clean Water Act, Section 404(j), if the Michigan Department of Environmental Quality (MDEQ) neither satisfies EPA's objections nor denies the permit within 90 days (i.e., by June 6, 2018), authority to process the permit application transfers to the U.S. Army Corps of Engineers by operation of law.

In a letter dated April 5, 2018, the applicant, Aquila Resources (Aquila), provided information to EPA related to the objections. On April 16, 2018, at the request of the applicant, EPA met with Aquila to discuss this information, and Aquila subsequently provided supplemental information to EPA on April 23, 2018.

Based on the information EPA has received from Aquila, a number of objections identified in EPA's March 8 letter have been resolved. In addition, we believe that there is a ready pathway for the resolution of EPA's remaining objections through MDEQ's inclusion of specific conditions in a final permit issued by June 6, 2018.

**Objections that EPA considers resolved:**

1. **Description of the project:** Based on the information Aquila provided, EPA concerns regarding the demonstration of avoidance and minimization of impacts within the footprint are resolved. However, we anticipate that MDEQ will include a condition in the final permit that prohibits discharges prior to the revision of the Part 632 permit.
2. **Impacts on River Road:** The applicant has provided additional information related to River Road which resolves EPA's concern. Should it become necessary to do road work outside the footprint of the project which involves discharges of dredged or fill material to waters of the U.S., a CWA Section 404 permit would be required.
3. **Questions regarding the terminology "upland wetlands":** Aquila provided information to address EPA's questions.



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MAY 04 2018

U.P. Office

4. **Water withdrawal from Menominee River:** Aquila provided additional clarification which resolves EPA's concern.
5. **Potential impacts from proposed sumps:** Based on information provided by Aquila that the sumps are located within lined basins, and therefore are not in contact with groundwater, EPA considers this concern resolved.

EPA understands that MDEQ may have outstanding questions or concerns regarding these or other matters, and we encourage you to continue to discuss these with the applicant.

**Objections that would be resolved through appropriate terms and conditions in a final 404 permit issued by MDEQ:**

1. **Potential Water Quality Impacts:** EPA had expressed concerns about potential water quality impacts from the project. Aquila has described a number of water quality monitoring and management plans which are intended to address such concerns, including:
  - Spill Prevention Control and Countermeasure Plan;
  - Pollution Incident Plan; and
  - Cyanide Management Plan.

EPA expects that these and other water quality monitoring and management plans required by a Part 632 Permit would be reviewed and approved by MDEQ before any discharges take place. MDEQ's inclusion of conditions in the final permit that prohibit any discharges until the plans are reviewed and approved by MDEQ would resolve EPA's objection.

EPA also expressed a concern that the proposed project may have adverse impacts to water quality at mine closure. According to Aquila, the closure plan would not be developed until after the pit was excavated, allowing the use of the mineralogy data from the pit walls to factor into the plan. The permit should require that the final closure plan be reviewed and approved by MDEQ to assure there would be no adverse impacts to surface water at mine closure and post mine closure. Inclusion of such a condition would resolve EPA's objection.

2. **Underground Mine Question:** EPA had concerns about whether Aquila had addressed potential secondary and cumulative impacts related to underground mining at the site. Aquila assured EPA that underground mining was not planned at this time. However, to address the potential that underground mining may be pursued in the future, a permit condition may be included. This condition would require Aquila to determine if additional secondary and cumulative impacts to wetlands from drawdown would result from the pit being active for a longer period of time, and demonstrate compliance with CWA Section 404(b)(1) guidelines for any such impacts. Such a condition included in a final issued permit would resolve EPA's objection.
3. **Secondary Wetland Impacts:** EPA had raised concerns that Aquila had not adequately identified secondary impacts to wetlands due to changes in hydrology. Aquila indicated it is working with MDEQ to address concerns regarding the assessment of secondary wetland impacts using modeling and water budgets. MDEQ could include conditions in

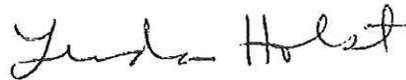
the final permit that would require Aquila to complete and obtain MDEQ approval on its secondary impacts assessment and adaptive management and monitoring plans, and that would prohibit any discharges from occurring prior to this approval. Such conditions included in a final permit would resolve EPA's objection.

4. **Mine Pit Integrity:** EPA had raised concerns regarding mine pit integrity. EPA will defer to the MDEQ's review and approval of the structural stability of the cut-off wall to ensure these concerns are addressed. EPA recommends that MDEQ include a permit condition prohibiting discharges until all engineering plans are approved by MDEQ. The inclusion of such a condition in a final permit would resolve EPA's objection.
5. **Mitigation:** 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 EPA's objection.
6. **Potential Dust Deposition in Wetlands:** EPA had raised a concern that dust from the mining operations would adversely affect nearby wetlands. A permit condition in the final permit that requires visual inspection and adaptive management, as needed, would resolve this concern.

In order to assure that proposed permit conditions fully address EPA's objections, we request that MDEQ share these with EPA for review prior to permit issuance.

We would be happy to discuss this matter further. Please feel free to contact me or Peter Swenson at (312) 886-0236.

Sincerely,



Christopher Korleski  
Director, Water Division

cc: Aquila Resources

**RECEIVED**

MAY 04 2018

**U.P. Office**

# CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

Place an "X" in the appropriate box (required):  Green Bay Division  Milwaukee Division

### I. (a) PLAINTIFFS

(b) County of Residence of First Listed Plaintiff \_\_\_\_\_  
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)  
Ted A. Warpinski (SBN:1018812) Christopher M. Meuler (SBN:1037971)  
Davis & Kuelthau, s.c. Davis & Kuelthau, s.c.  
318 South Washington Street, Suite 300 111 East Kilbourn Avenue, Suite 1400  
Green Bay, WI 54301 Milwaukee, WI 53202  
Ph: 920-431-2255 Ph: 414-276-0200

### DEFENDANTS

County of Residence of First Listed Defendant \_\_\_\_\_  
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

### II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
- 2 U.S. Government Defendant
- 3 Federal Question (U.S. Government Not a Party)
- 4 Diversity (Indicate Citizenship of Parties in Item III)

### III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- |   |                            |                            |   |                            |                            |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
|   | <b>PTF</b>                 | <b>DEF</b>                 |   | <b>PTF</b>                 | <b>DEF</b>                 |
| Citizen of This State                   | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State     | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State                | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation  | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

### IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: [Nature of Suit Code Descriptions.](#)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 485 Telephone Consumer Protection Act <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>CIVIL RIGHTS</b> <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	<b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act	<b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark	<b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act
	<b>PRISONER PETITIONS</b> <b>Habeas Corpus:</b> <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <b>Other:</b> <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement	<b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))	<b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	

### V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding
- 2 Removed from State Court
- 3 Remanded from Appellate Court
- 4 Reinstated or Reopened
- 5 Transferred from Another District (specify)
- 6 Multidistrict Litigation - Transfer
- 8 Multidistrict Litigation - Direct File

### VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

Brief description of cause:

### VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$ \_\_\_\_\_

CHECK YES only if demanded in complaint:  
JURY DEMAND:  Yes  No

### VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE \_\_\_\_\_

DOCKET NUMBER \_\_\_\_\_

DATE \_\_\_\_\_

SIGNATURE OF ATTORNEY OF RECORD \_\_\_\_\_

### FOR OFFICE USE ONLY

RECEIPT # \_\_\_\_\_ AMOUNT \_\_\_\_\_ APPLYING # \_\_\_\_\_ JUDGE \_\_\_\_\_ MAG. JUDGE \_\_\_\_\_

**INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44**

## Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here. United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box. Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: [Nature of Suit Code Descriptions](#).
- V. Origin.** Place an "X" in one of the seven boxes.  
Original Proceedings. (1) Cases which originate in the United States district courts.  
Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441.  
Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing  
Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.  
Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.  
Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C.  
Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.  
**PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7.** Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.  
Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.  
Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

**Date and Attorney Signature.** Date and sign the civil cover sheet.

UNITED STATES DISTRICT COURT
for the
Eastern District of Wisconsin

RIVER, INC.,
Plaintiff(s)
v.
Civil Action No.
U.S. ENVIRONMENTAL PROTECTION AGENCY,
et. al.,
Defendant(s)

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address)

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you receive it) – or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12(a)(2) or (3) – you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or the plaintiff's attorney, whose name and address are:

Ted A. Warpinski, Esq.
Christopher M. Meuler, Esq.
Davis & Kuelthau, s.c.
318 South Washington Street, Suite 300
Green Bay, WI 54301

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

STEPHEN C. DRIES, CLERK OF COURT

Date:

Signature of Clerk or Deputy Clerk

Civil Action No. \_\_\_\_\_

**PROOF OF SERVICE**

*(This section should not be filed with the court unless required by Fed. R. Civ. P. 4(l))*

This summons and the attached complaint for *(name of individual and title, if any)*:  
\_\_\_\_\_

were received by me on *(date)* \_\_\_\_\_.

I personally served the summons and the attached complaint on the individual at *(place)*:  
\_\_\_\_\_

\_\_\_\_\_ on *(date)* \_\_\_\_\_ ; or

I left the summons and the attached complaint at the individual's residence or usual place of abode with *(name)*

\_\_\_\_\_, a person of suitable age and discretion who resides there,

on *(date)* \_\_\_\_\_, and mailed a copy to the individual's last known address; or

I served the summons and the attached complaint on *(name of individual)* \_\_\_\_\_

who is designated by law to accept service of process on behalf of *(name of organization)* \_\_\_\_\_

\_\_\_\_\_ on *(date)* \_\_\_\_\_ ; or

I returned the summons unexecuted because \_\_\_\_\_ ; or

Other *(specify)*: \_\_\_\_\_

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ \_\_\_\_\_

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_

\_\_\_\_\_  
*Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc.:

UNITED STATES DISTRICT COURT
for the
Eastern District of Wisconsin

RIVER, INC.,
Plaintiff(s)
v.
Civil Action No.
U.S. ENVIRONMENTAL PROTECTION AGENCY,
et. al.,
Defendant(s)

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address)
ANDREW WHEELER, Acting Administrator
U.S. Environmental Protection Agency
Office of the Administrator, 1101A
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you receive it) – or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12(a)(2) or (3) – you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or the plaintiff's attorney, whose name and address are:

Ted A. Warpinski, Esq.
Christopher M. Meuler, Esq.
Davis & Kuelthau, s.c.
318 South Washington Street, Suite 300
Green Bay, WI 54301

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

STEPHEN C. DRIES, CLERK OF COURT

Date:

Signature of Clerk or Deputy Clerk

Civil Action No. \_\_\_\_\_

**PROOF OF SERVICE**

*(This section should not be filed with the court unless required by Fed. R. Civ. P. 4(l))*

This summons and the attached complaint for *(name of individual and title, if any)*:  
\_\_\_\_\_

were received by me on *(date)* \_\_\_\_\_.

I personally served the summons and the attached complaint on the individual at *(place)*:  
\_\_\_\_\_

\_\_\_\_\_ on *(date)* \_\_\_\_\_ ; or

I left the summons and the attached complaint at the individual's residence or usual place of abode with *(name)*

\_\_\_\_\_, a person of suitable age and discretion who resides there,

on *(date)* \_\_\_\_\_, and mailed a copy to the individual's last known address; or

I served the summons and the attached complaint on *(name of individual)* \_\_\_\_\_

who is designated by law to accept service of process on behalf of *(name of organization)* \_\_\_\_\_

\_\_\_\_\_ on *(date)* \_\_\_\_\_ ; or

I returned the summons unexecuted because \_\_\_\_\_ ; or

Other *(specify)*: \_\_\_\_\_

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ \_\_\_\_\_

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_

\_\_\_\_\_  
*Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc.:

UNITED STATES DISTRICT COURT
for the
Eastern District of Wisconsin

RIVER, INC.,

Plaintiff(s)

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,

et. al.,

Defendant(s)

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address)

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you receive it) – or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12(a)(2) or (3) – you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or the plaintiff's attorney, whose name and address are:

Ted A. Warpinski, Esq.
Christopher M. Meuler, Esq.
Davis & Kuelthau, s.c.
318 South Washington Street, Suite 300
Green Bay, WI 54301

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

STEPHEN C. DRIES, CLERK OF COURT

Date:

Signature of Clerk or Deputy Clerk

Civil Action No. \_\_\_\_\_

**PROOF OF SERVICE**

*(This section should not be filed with the court unless required by Fed. R. Civ. P. 4(l))*

This summons and the attached complaint for *(name of individual and title, if any)*:  
\_\_\_\_\_

were received by me on *(date)* \_\_\_\_\_.

I personally served the summons and the attached complaint on the individual at *(place)*:  
\_\_\_\_\_

\_\_\_\_\_ on *(date)* \_\_\_\_\_ ; or

I left the summons and the attached complaint at the individual's residence or usual place of abode with *(name)*

\_\_\_\_\_, a person of suitable age and discretion who resides there,

on *(date)* \_\_\_\_\_, and mailed a copy to the individual's last known address; or

I served the summons and the attached complaint on *(name of individual)* \_\_\_\_\_

who is designated by law to accept service of process on behalf of *(name of organization)* \_\_\_\_\_

\_\_\_\_\_ on *(date)* \_\_\_\_\_ ; or

I returned the summons unexecuted because \_\_\_\_\_ ; or

Other *(specify)*: \_\_\_\_\_

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ \_\_\_\_\_

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_

\_\_\_\_\_  
*Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc.:

UNITED STATES DISTRICT COURT
for the
Eastern District of Wisconsin

RIVER, INC.,

Plaintiff(s)

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,

et. al.,

Defendant(s)

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address) DR. MARK T. ESPER
Secretary, U.S. Army
101 Army Pentagon
Washington, D.C. 20310-0101

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you receive it) – or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12(a)(2) or (3) – you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or the plaintiff's attorney, whose name and address are:

Ted A. Warpinski, Esq.
Christopher M. Meuler, Esq.
Davis & Kuelthau, s.c.
318 South Washington Street, Suite 300
Green Bay, WI 54301

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

STEPHEN C. DRIES, CLERK OF COURT

Date:

Signature of Clerk or Deputy Clerk

Civil Action No. \_\_\_\_\_

**PROOF OF SERVICE**

*(This section should not be filed with the court unless required by Fed. R. Civ. P. 4(l))*

This summons and the attached complaint for *(name of individual and title, if any)*:  
\_\_\_\_\_

were received by me on *(date)* \_\_\_\_\_.

I personally served the summons and the attached complaint on the individual at *(place)*:  
\_\_\_\_\_

\_\_\_\_\_ on *(date)* \_\_\_\_\_ ; or

I left the summons and the attached complaint at the individual's residence or usual place of abode with *(name)*

\_\_\_\_\_, a person of suitable age and discretion who resides there,

on *(date)* \_\_\_\_\_, and mailed a copy to the individual's last known address; or

I served the summons and the attached complaint on *(name of individual)* \_\_\_\_\_

who is designated by law to accept service of process on behalf of *(name of organization)* \_\_\_\_\_

\_\_\_\_\_ on *(date)* \_\_\_\_\_ ; or

I returned the summons unexecuted because \_\_\_\_\_ ; or

Other *(specify)*: \_\_\_\_\_

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ \_\_\_\_\_

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_

\_\_\_\_\_  
*Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc.: