UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

MENOMINEE INDIAN TRIBE OF WISCONSIN,

Plaintiff,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, SCOTT PRUITT, Administrator, U.S. Environmental Protection Agency, U.S. ARMY CORPS OF ENGINEERS, MARK T. ESPER, Secretary, U.S. Army,

Defendants.

Case No. 1:18-cv-108

Hon. William C. Griesbach

MEMORANDUM IN SUPPORT OF AQUILA RESOURCES INC.'S MOTION TO INTERVENE

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Aquila Resources Inc. ("Aquila"), by its undersigned counsel, submits this Memorandum in Support of its Motion to Intervene, and states as follows:

INTRODUCTION

Aquila has been planning the Back Forty mining project ("Back Forty Project") in Michigan's Upper Peninsula for over a decade. It applied for four state permits, including a mining permit, in November 2015 with the Michigan Department of Environmental Quality ("MDEQ"). Aquila has received all of the permits from MDEQ, with the exception of the delegated state wetlands permit, which is still in process. The Menominee Indian Tribe of Wisconsin ("Menominee Tribe" or the "Tribe") has filed an administrative contested case challenge to Aquila's mining permit, and has said that it will challenge the state wetlands permit as well.

This lawsuit is the Tribe's latest effort to stall the Back Forty Project. Even though the Tribe has been aware of Aquila's state wetlands permit application for some time and even though MDEQ's delegated wetlands permitting process is nearing its conclusion after almost 2½ years of federal and state review, the Tribe now wants to force the U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("Army Corps") to assert permitting authority over the project and thus force Aquila to start all over again. If the Tribe is granted the relief it seeks and EPA and the Corps are forced to undertake their own separate review process, it could easily delay the project for several more years and result in a tremendous waste of government resources, not to mention additional cost to Aquila. Of course, the Tribe's primary objective in filing this lawsuit is to delay the Project.

As the permit applicant and the owner of the Back Forty Project at issue in this litigation, Aquila moves to intervene as of right under Fed. R. Civ. P. 24(a)(2), or permissively under Fed.

R. Civ. P. 24(b)(1)(B), to protect its interests from being impaired. Intervention is essential in this matter because Aquila's interests are not adequately represented by any existing party. The interests of the Tribe are plainly adverse to those of Aquila since, by the Tribe's own admission, it is "opposed to the mine" and "committed to stopping the project."[1] Likewise, EPA and the Army Corps are duty-bound to advance and protect the interests of the federal government. Consequently, unless Aquila is allowed to intervene, the only party with a legally cognizable interest in the project that necessitates a wetlands permit will be forced to sit on the sidelines, without a voice, while the Court decides whether Aquila should be required to obtain a federal wetlands permit for its own project and undergo the additional delay and cost that entails. Allowing Aquila to intervene at this early stage of litigation will avoid such a miscarriage of justice and assist the Court in deciding whether EPA and the Army Corps are required to assume jurisdiction over the wetlands permitting process for the Back Forty Project. Indeed, as discussed below, the Tribe's Complaint is ripe for dismissal.

Rule 24(c) requires that a motion to intervene "be accompanied by a pleading that sets out the claim or defense for which intervention is sought." Fed. R. Civ. P. 24(c). Under Rule 7, a formal pleading must take the form of a complaint or an answer. As Aquila seeks to intervene as a defendant, a strict reading of Rule 24(c) would therefore require Aquila to file an answer. In the current posture of this action, however, as Defendants have done, Aquila is submitting a proposed Motion to Dismiss the Menominee Tribe's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) and a memorandum in support (**Exhibit 1)**. In anticipation that the Court might adopt a literal reading of the "pleading" requirement of Rule 24(c) and deny Aquila's

[1] *See* http://www.noback40.org/ (last visited March 4, 2018); *see also* Menominee Indian Tribe of Wisconsin Resolution No. 15-93: Opposition to Mining Activity That Threatens Menominee Cultural Resources at Tribes Place of Origin, *available at* http://www.noback40.org/Documents/MITW%20Resolution%2015-93.pdf.

motion to intervene unless it were accompanied by an answer rather than a motion to dismiss, Aquila is tendering a Conditional Answer and Affirmative Defenses (**Exhibit 2**) in the event that the Court grants the Motion to Intervene but denies the Motion to Dismiss. Should the Court grant the Motion to Intervene and accept Aquila's Motion to Dismiss as satisfying the Rule 24(c) pleading requirement, the Conditional Answer should not be filed.

Aquila respectfully requests that the Court grant its Motion to Intervene and consider its Motion to Dismiss.

BACKGROUND

The Back Forty Project.

Aquila proposes to construct an open pit mining operation and adjacent mineral beneficiation facility in Lake Township, Menominee County, Michigan, to extract and process a polymetallic zinc, copper, and gold ore-deposit (the "Back Forty Project" or the "Project"). The Project is located in a remote, sparsely populated area of Menominee County on the western side of Lake Township, just east of the Menominee River. The 865-acre area associated with the Project includes both private and state mineral lands. Once construction is substantially completed, the mining operations will continue for seven years, including the processing of ore through a mill. Progressive reclamation will occur throughout the construction and operational phases in those areas no longer needed to support ongoing mining operations.

The Project will have a substantial positive impact on the region in terms of employment and the direct and indirect impacts flowing from employment. Peak employment is anticipated to occur during the 3rd and 4th years of operation, with 250 workers at the Project site, declining to 208 workers in the final year. Aquila estimates that 500 workers will be needed to construct the Project.

Aquila reaches out to the Menominee Tribe in an effort to address its concerns.

For almost 10 years, Aquila has engaged with the Menominee Tribe (and other tribes in the project vicinity) to keep the Tribe informed of the project and to discuss potential environmental and cultural resource concerns.[2] Aquila has presented to the Tribal Legislature and has hosted project site visits with Tribal officials. Aquila has also conducted extensive cultural resource surveys of the project area. Aquila's mine will not disturb any cultural resources identified in the project area, and Aquila has developed an unanticipated discovery plan to address any unanticipated cultural resources that are encountered during ground disturbing activities. In fact, Aquila's state mining permit includes a special permit condition addressing unanticipated discoveries.

Aquila began applying for its state permits in November 2015, including a mining permit, an air permit, a water discharge permit, and a wetlands permit. The Menominee Tribe has been aware of these applications, including the delegated state wetlands permit application, since at least October 2015. On October 15, 2015, MDEQ held a scoping meeting with the Menominee Tribe, as well as five other tribes or tribal organizations, and EPA to discuss Aquila's upcoming applications on the process moving forward. MDEQ's delegated permitting authority over the wetlands permit was specifically discussed at the meeting.

Aquila applies for and obtains a state mining permit.

In November 2015, Aquila submitted its application for a mining permit for the Back Forty Project to MDEQ under Part 632 of Michigan's Natural Resources and Environmental Protection Act ("NREPA"), which governs non-ferrous metallic mining.[3] As required under Part 632 and the applicable regulations, the 40,000 page application included a mining, reclamation,

[2] Aquila provided MDEQ with a Tribal Engagement Summary memorializing its efforts.
[3] *See* https://gis.lic.wisc.edu/wwwlicgf/glifwc/Back-40/MPA/.

and environmental protection plan; a contingency plan; a plan for financial assurances; and an environmental impact assessment ("EIA") that (a) described the natural and human-made features and baseline conditions in the affected area, and (b) analyzed the impacts of the proposed mining operation on those features. The EIA alone includes over 15,000 pages of reports, studies, and data gathered and analyzed over the course of seven years, including the cultural resource surveys and studies described above.

MDEQ exhaustively reviewed each and every one of these reports and studies, requiring Aquila to provide supplemental information to 197 discrete follow up questions. MDEQ held public hearings, received extensive public comments and responded to all of them before issuing the permit after a comprehensive and detailed review of the comments. On December 28, 2016, MDEQ issued Aquila a mining permit (MP-01-2016).[4] On February 24, 2017, the Tribe brought a contested case petition challenging the Part 632 mining permit.

Aquila applies for and obtains state water discharge and air permits.

Also in November 2015, Aquila submitted its application for a National Pollutant Discharge Elimination Permit under Part 31 of NREPA ("Part 31 permit"). The Part 31 permit authorizes the mine to discharge treated filtered water into the Menominee River and regulates the effluent limitations and monitoring requirements of this discharged water. The review process and permit decisions were completed in compliance with the provisions of the Federal Water Pollution Control Act, Part 31, Water Resources Protection, of NREPA, Part 41, Sewerage Systems. Following a comprehensive public comment period that ended on November 3, 2016, and review by EPA, which was completed on February 24, 2017, MDEQ issued the Part 31

[4] *See* http://www.michigan.gov/documents/deq/deq-oogm-mining-AquilaBackFortyPermit 12282016_546947_7.pdf.

permit on April 5, 2017.[5] Despite the alleged concern for the Menominee River articulated in its Complaint, the Tribe never challenged Aquila's Part 31 permit, which authorizes the mining operation to discharge directly into the Menominee River.

Aquila also submitted its application for an Air Permit to Install in November 2015.[6] This permit is required under Rule 336.1201 of the Michigan Administrative Rules for Air Pollution Control prior to the installation, construction, reconstruction, relocation, or modification of equipment that emits air contaminants. MDEQ issued Aquila a Permit to Install on December 28, 2016.[7] The Menominee Tribe has not challenged that permit either.

Aquila applies for a wetlands permit under Part 303 of Michigan's Natural Resources and Environmental Protection Act.

The wetlands permit is the fourth and final permit Aquila needs to obtain before it can begin construction of the Project. Michigan is one of two states that has been delegated authority over the federal Clean Water Act ("CWA") Section 404 wetland dredge and fill program. See 33 U.S.C. § 1344(g); 40 C.F.R. § 233.70; 1983 Memorandum of Agreement between Region 5 EPA and the Michigan Department of Natural Resources; 2011 Memorandum of Agreement between Region 5 EPA and the Michigan Department of Environmental Quality. This means that MDEQ has primary responsibility for administering the provisions of the State 404 program. Michigan manages its State 404 program under Part 303 of NREPA.

"State-run permitting programs such as Michigan's are subject to rigorous EPA oversight." *Marquette Cnty. Rd. Comm'n v. U.S. Envt'l Prot. Agency*, No. 17-1154, 2018 WL 1388541, at *1 (6th Cir., Mar. 20, 2018) (attached as **Exhibit 3**). A state administered 404 program must be consistent with the requirements of the CWA and associated regulations set

[5] The NPDES permit materials and the wetlands permit materials can be accessed at https://miwaters.deq.state.mi.us/miwaters/#/external/home.
[6] *See* http://www.deq.state.mi.us/aps/downloads/permits/Aquila/205-15.htm.
[7] *See* http://www.deq.state.mi.us/aps/downloads/permits/finpticon/2015/205-15.pdf.

forth in the Section 404(b)(1) guidelines. While in most other states, an applicant must apply to the Army Corps and a state agency for federal and state wetland permits respectively, applicants in Michigan generally submit only one wetland permit application to MDEQ.

Once MDEQ deems an application complete, it puts the application on public notice, which starts the substantive review process. If the proposed fill is for one acre or more of regulated wetlands, EPA is provided a copy of the application. 2011 MOA at 3. EPA must notify MDEQ if it intends to submit any comments on the application and/or object to issuance of the permit within 30 days of receiving the application, and submit such comments or objections within 90 days of receiving the application. 33 U.S.C. § 1344(j). If EPA lodges an objection, then MDEQ has 90 days from the date of the objection to submit a permit to EPA that resolves EPA's objections. If the federal objections cannot be resolved within that time frame, then MDEQ is prohibited from issuing a wetlands permit under its delegated authority. *Id.* The Army Corps then takes over the process, and the applicant must begin the process anew by applying to the Army Corps for the wetlands permit.

Aquila initially submitted its application for a wetlands permit to MDEQ on November 12, 2015.[8] As is typical, MDEQ issued correction requests to Aquila in December 2015 and then again in February 2016, seeking additional information about the Project. Aquila responded to both requests and submitted an updated wetlands permit application containing additional information included in its responses on April 18, 2016. At that point, MDEQ believed the application to be administratively complete, put the application out for public notice, and transmitted a copy of the application to EPA.

[8] The Tribe's Complaint mistakenly alleges that the application was filed in November 2016.

In August 2016, Aquila invited the Tribe to meet and discuss the environmental studies and groundwater modeling, which was performed in part to analyze drawdown effects on wetlands and was peer reviewed by a nationally recognized expert with over 35 years of experience. The Tribe requested that the United States Geological Survey ("USGS") also attend. The Tribe did not ultimately attend the meeting, but USGS did. At that meeting, Aquila's consultant presented a detailed presentation on the hydrogeologic data collection, conceptual model, model discretization, boundary conditions, calibration, sensitivity analysis, predictions and uncertainty analysis. At the end of the meeting, USGS was complimentary of the effort and had no major comments.

On August 15, 2016, MDEQ issued yet another correction request, and EPA issued a letter notifying MDEQ of its objections to issuance of a permit. After a September 2016 meeting between Aquila, MDEQ, EPA, and the Army Corps, the parties agreed that the best course of action was to withdraw the application and resubmit to MDEQ at a later date in order to work through remaining issues.

Aquila resubmitted its Part 303 application on January 16, 2017.[9] In response to another correction request by MDEQ, Aquila continued to tweak the application. In addition, because MDEQ wetlands staff decided that it no longer agreed with its informal August 2015 wetland delineation for the mine site, Aquila decided to request a formal Level 3 determination letter from MDEQ to support the new application, which MDEQ issued on July 12, 2017. Aquila then filed an updated application at the beginning of September 2017.[10] In December 2017, MDEQ deemed Aquila's permit application administratively complete and issued a public notice along

[9] *See* http://www.michigan.gov/deq/0,4561,7-135-3313_71520_24403-405734--,00.html.
[10] The Back Forty Project's potential impacts to wetlands is relatively small—approximately 10 acres of direct impacts and 18 acres of indirect impacts.

with a public hearing announcement. A public hearing was held on January 23, 2018, and the public comment period closed on February 2, 2018.

On March 8, 2018, EPA sent a letter to MDEQ, citing its objections to the application. EPA indicated that if its objections were not resolved within 90 days, authority to process the permit would transfer to the Army Corps. On April 5, 2018, Aquila submitted a written response to EPA's March 8 letter. Aquila is currently in the process of working with MDEQ and EPA to resolve EPA's objections so it can obtain the final permit for its project. The Tribe has indicated numerous times that it will file a state contested case administrative challenge to the state wetlands permit.

The Menominee Tribe sues EPA and the Army Corps.

In August 2017, nearly two years after Aquila initially submitted its application for a wetlands permit to MDEQ, the Tribe sent a letter to EPA and the Army Corps asserting that the wetlands adjacent to the Back Forty mine site are non-delegable waters, and therefore Michigan is not the proper permitting authority. EPA and the Army Corps responded separately to this letter. The Army Corps explained that it did not have authority to assume the lead over permitting because EPA had authorized Michigan to administer the Clean Water Act permitting program, but it offered to consult with the Tribe.

On November 6, 2017, the Tribe issued its 60-day notice of intent to file a citizen suit against EPA pursuant to Section 505 of the Clean Water Act, 33 U.S.C. § 1365(a)(2).[11] Specifically, the Tribe asserted that EPA and the Army Corps "are in violation of their mandatory duties under the Clean Water Act Section 404 (33 U.S.C. § 1344), due to their failure to exercise jurisdiction and regulatory authority over navigable waters of the United States—the

[11] *See* https://earthjustice.org/sites/default/files/files/60%20Day%20Notice%20Letter%20back%20Forty%20Mine%20Project.pdf.

Menominee River and adjacent wetlands—that are not delegable to the State of Michigan under 33 U.S.C. § 1344(g)." EPA and the Army Corps did not respond to the Tribe's notice of intent.

The Tribe filed the instant lawsuit on January 22, 2018. (Compl., Dkt. 1.) EPA and the Army Corps were served with the Complaint on January 29, 2018. On March 30, 2018, EPA and the Army Corps filed a Motion to Dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). (Defs.' Memorandum in Support of Mot. to Dismiss, Dkt. 7.)

ARGUMENT

Though this lawsuit is framed as a suit against EPA and the Army Corps, at its core, this is another challenge to Aquila's project, and a belated one at that. The Tribe has known about Aquila's application for a state wetland permit under Part 303 at least since it was first filed in November of 2015.

I. Aquila should be allowed to intervene as of right under Federal Rule of Civil Procedure 24(a)(2).

A party may intervene by right if it "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may, as a practical matter impair or impede the movant's ability to protect its interest, unless the existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). For a party to intervene as of right, it must satisfy four elements: (1) its motion to intervene must be timely; (2) it must possess an interest related to the subject matter of the action; (3) disposition of the action must threaten to impair that interest; and (4) the parties must fail to adequately represent the interest. *United States v. BDO Seidman,* 337 F.3d 802, 808 (7th Cir. 2003). Rule 24 is to be liberally construed with all doubts resolved in favor of intervention. *Clark v. Sandusky,* 205 F.2d 915, 919 (7th Cir. 1953).

A. Aquila's motion to intervene is timely and non-prejudicial.

A prospective intervenor must move promptly to intervene as soon as it knows or has reason to know that its interests might be adversely affected by the outcome of the litigation. *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 949 (7th Cir. 2000). In determining whether a motion to intervene is timely, courts consider four factors: "(1) the length of time the intervenor knew or should have known of his interest in the case; (2) the prejudice caused to the original parties by the delay; (3) the prejudice to the intervenor if the motion is denied; [and] (4) any other unusual circumstances." *Id.*

Aquila readily satisfies these factors. Aquila has moved for intervention at the earliest possible stage of litigation. The complaint was filed less than three months ago, on January 22, 2018, and Aquila filed this motion as soon as practicable after obtaining a copy of the complaint and reviewing the allegations. Because there was no delay between the time when Aquila knew of its interest in the case and the filing of this motion, there will be no prejudice caused to the parties. Indeed, EPA and the Army Corps just recently filed a Motion to Dismiss and the Menominee Tribe has yet to file a response to the motion. A scheduling order has not yet been issued. Aquila will merely be representing its own interests, which will not lead to any delay or prejudice to the parties in this case. Accordingly, the timing of the filing of this motion will not even affect, much less prejudice, the rights of any party.

B. Aquila has a direct and substantial interest in the outcome of this matter.

Though the "interest" required by Rule 24(a)(2) has never been defined with particular precision, a proposed intervenor must show that the "interest" asserted is a "direct, significant, legally protectable" one. *Sec. Ins. Co. of Hartford v. Schipporeit*, 69 F.3d 1377, 1380 (7th Cir. 1995) (citation omitted). Whether a proposed intervenor has an interest sufficient to warrant intervention as a matter of right is a highly fact-specific determination. *Id.* at 1381. While it is

something more than a mere "betting" interest, *Reich v. ABC/York Estes Corp.*, 64 F.3d 316 (7th Cir. 1995), it is less than a property right, *United States v. City of Chicago*, 870 F.2d 1256, 1260 (7th Cir. 1989).

Because Aquila is the permit applicant and the only entity with a property interest in the Project, Aquila has a direct, significant, and legally protectable interest. (*See* Compl. ¶¶ 38-39, 43, Dkt. 1.)[12] A permit applicant such as Aquila has legal standing and a property interest that it is entitled to protect. Notably, at least one court has held that a permittee may intervene as of right under Rule 24(a)(2). *See Sierra Club v. U.S. E.P.A.*, 995 F.2d 1478, 1482 (9th Cir. 1993), *abrogated on other grounds by Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011). In that case, like this one, the Sierra Club sued the EPA under the citizens' suit provision of the CWA, seeking declaratory and injunctive relief. *Id.* at 1480. The Sierra Club's complaint alleged that two wastewater treatment plants operated by the City of Phoenix discharged toxic pollutants into rivers impaired by pollution and, therefore, EPA had a duty to list the wastewater treatment plants as a source and formulate control strategies by imposing new permit requirements on the City's wastewater treatment facilities. *Id.* As the Court recognized, "[i]n practical terms, the Sierra Club wanted the court to order the EPA to change the City's [CWA] permits, in order to reduce the amount of pollutants from those wastewater treatment plants," even though the lawsuit was ostensibly over the scope of EPA's compliance with procedural aspects of the CWA. *Id.* at 1481.

The City of Phoenix moved to intervene, both as a matter of right and permissively, but the district court denied the motion, finding that the City did not have a protectable "interest"

[12] *See also* http://www.michigan.gov/documents/deq/deq-oogm-mining-AquilaBackFortyPermit 12282016_546947_7.pdf (mining permit); http://www.deq.state.mi.us/aps/downloads/permits/ finpticon/2015/205-15.pdf (air permit); http://www.michigan.gov/deq/0,4561,7-135-3313_71520_24403-405734--,00.html (wetlands permit application).

within the meaning of Rule 24. *Id.* at 1480-81. The Ninth Circuit reversed, holding that the City held protectable interests supporting intervention by virtue of its ownership of the wastewater treatment plants and its permits to discharge waste from them. *Id.* at 1485. Because the City's permits could be modified by control strategies that could be required by EPA as a result of its litigation with the Sierra Club, "the City's protectable interest relates to the litigation," thereby entitling the City to intervene in the lawsuit. *Id.* at 1486; *see also Sierra Club, Inc. v. E.P.A.*, 358 F.3d 516, 518 (7th Cir. 2004) (allowing the permittee of a coal-fired power plant to intervene because "[p]ersons whose legal interests are at stake are appropriate intervenors").

Similarly, Aquila's wetlands permit is at issue in the instant litigation, and Aquila is the owner of the mine for which the permit is required. As in *Sierra Club*, Aquila's interest in its wetlands permit and its ownership of the proposed mine requiring the permit are protectable "interests" within the meaning of Rule 24(a). Further, like the plaintiffs in *Sierra Club*, in practical terms, the Tribe here wants the court to order EPA to exercise jurisdiction over Aquila's wetlands permit in order to postpone and ultimately block the Project, even though the lawsuit is ostensibly over the scope of EPA's compliance with procedural aspects of the CWA. *See Sierra Club*, 995 F.2d at 1481. The resolution of the lawsuit between the Tribe and EPA and the Army Corps would therefore undoubtedly directly affect Aquila by requiring Aquila to engage in the federal Section 404 permitting process despite the extensive process that Aquila has already undertaken to obtain a state wetlands permit under the authority delegated to the State of Michigan pursuant to CWA Section 404. Not only could this delay the project for several more years, but it would also require Aquila to incur significant costs (in addition to those that have already been incurred throughout the state permitting process). Thus, by virtue of its ownership

of the proposed mine and its status as the wetlands permit applicant, Aquila's protectable interest plainly "relates to the litigation" between the Tribe and EPA and the Army Corps.

C. Aquila's ability to protect its interest will be impaired in the absence of intervention.

The existence of "impairment" depends on whether the decision of a legal question involved in the action would as a practical matter foreclose rights of the proposed intervenor in a subsequent proceeding. *Meridian Homes Corp. v. Nicholas W. Prassas & Co.*, 683 F.2d 201, 204 (7th Cir. 1982). The outcome of this litigation could significantly affect the timeline for Aquila to obtain a wetlands permit, and ultimately, to construct the Project. As noted above, Aquila has entered the third year of a protracted state permitting process that began in 2015. Its current application for a state Part 303 permit is still being processed by the State of Michigan, and could potentially be issued as soon as April 2018. This is the fourth and final permit Aquila needs to obtain before it can begin construction of the Project. If this Court determines that EPA and the Army Corps should exercise federal jurisdiction over the Section 404 permitting process, however, the Project will be significantly delayed. Indeed, if this Court rules in the Tribe's favor, Aquila must begin the process anew by applying to the Army Corps for a federal wetlands permit. There are no processing deadlines or timing requirements for the Army Corps to ultimately act on the application and a federal permitting process would require the Army Corps' compliance with the National Environmental Policy Act and Section 106 of the National Historic Preservation Act, which likely means several years of additional review and lengthy permitting delays would occur.

Further, if Aquila is not allowed to intervene and defend its own interests in the permitting process, it would be wholly deprived from later challenging the Court's decision in a subsequent proceeding. Any injunctive or declaratory relief granted by the Court may diminish

the utility of Aquila's available administrative safeguards because EPA and the Army Corps will be bound by any order issued in the present litigation. In other words, once this Court renders its decision on the Tribe's claims, Aquila will be effectively precluded from arguing that EPA and the Army Corps are not required to exercise federal jurisdiction over the Section 404 permitting for the Back Forty Project and must instead passively comply with the result.

The Ninth Circuit's decision in *Sierra Club* is again instructive. There, the Sierra Club had argued that because the City "could protect its interest in subsequent administrative or judicial proceedings, [its] interests would not be impaired by this litigation." 995 F.2d at 1486. The court rejected this argument because "the relief sought by the Sierra Club would constrain the EPA, which would not then be free to violate the terms of the declaratory and injunctive relief in later administrative proceedings." *Id.* As the Court explained:

> The City could not use its appeal of its NPDES permits to put at issue the extent of the EPA's regulatory duties. The case at bar would have controlling force on those issues. Although the City might challenge various determinations in separate proceedings, those proceedings would be constrained by the *stare decisis* effect of the lawsuit from which it had been excluded. . . .The relief sought in Sierra Club's lawsuit would necessarily result in practical impairment of the City's interests. [*Id.* (citations and quotation marks omitted).]

Likewise, the disposition of the instant litigation will undoubtedly influence EPA and the Army Corps' review of Aquila's permit. If Aquila is not made a party, it may be left with no legal means to challenge, if necessary, any remedy the Court provides. Therefore, the disposition of this action will, as a practical matter, impair or impede Aquila's ability to protect its interests.

D. The existing parties do not adequately represent Aquila's interests.

A party seeking intervention as of right must only make a showing that the representation "'may be' inadequate and 'the burden of making that showing should be treated as minimal.'" *Ligas ex rel. Foster v. Maram*, 478 F.3d 771, 774 (7th Cir. 2007) (quoting *Trbovich*

v. United Mine Workers of Am., 404 U.S. 528, 538 n.10 (1972)). Here, both the Tribe and the federal agencies are understandably advancing their own interests with respect to Aquila's permit and EPA and the Army Corps' jurisdiction over the Section 404 permitting process. However, because their interests do not coincide with those of Aquila, neither the Tribe nor EPA and the Army Corps can adequately represent Aquila's interest in this litigation.

In *Sierra Club*, the City of Phoenix as would-be intervenor argued "that neither Sierra Club, which seeks to alter its permits, nor EPA, which enforces the permits against the City, can be expected to represent the City's interests in the lawsuit." 995 F.2d at 1481. The Court held that this was a sufficient showing by the City on this element. *Id.*

Aquila has made the same showing here and, accordingly, satisfied this element. As explained above, Aquila is the only entity with a legally recognized property interest with respect to the permit. Consequently, Aquila's interests are unique, as Aquila is ultimately responsible for obtaining a federal wetlands permit in the event that the Tribe is successful in this lawsuit. Indeed, the Tribe's interests are directly adverse to Aquila's, as demonstrated by the fact that the Tribe has admitted that it is "opposed to the mine, committed to stopping the project and . . . organized in efforts to bring about public awareness about the harmful impacts the mining operation would have if approved,"[13] and that the Tribe has already filed an administrative contested case petition challenging the State of Michigan's issuance of a mining permit for the Back Forty Project. Indeed, the Tribe has also indicated that it will file a contested case challenge of the issuance of a state wetlands permit.

Similarly, EPA and the Army Corps are required to advance and protect the interests of the government, not the interests of Aquila as the permit applicant. As noted in the contingent

[13] *See* http://www.noback40.org/.

Answer and Affirmative Defenses attached to this Motion, Aquila asserts that the Tribe's claims are barred by laches because the Tribe unreasonably delayed in bringing its claims.[14] This defense is unique to Aquila as the entity that has incurred the costs of processing the permit because, although the Tribe has known about this claim since the wetlands application was initially submitted more than two years ago, if not earlier, it waited to assert this claim until Aquila had expended significant sums of money in obtaining all of the other necessary permits for the project. As the permittee, Aquila is also the party that would suffer the substantial delay that would result from having to redo the entire wetlands permitting process. This defense cannot adequately be presented by EPA or the Army Corps. Because the parties' interests are sufficiently disparate from those of Aquila, Aquila should have the opportunity to protect and advance its own interests before this Court.

II. In the alternative, Aquila should be allowed to intervene permissively under Federal Rule of Civil Procedure 24(b).

Under Federal Rule of Civil Procedure 24(b), the court may permit anyone to intervene who "has a claim or defense that shares with the main action a common question of law or fact. . . . In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b). The Seventh Circuit has indicated that "permissive intervention is wholly discretionary with the district court." *Keith v. Daley*, 764 F.2d 1265, 1272 (7th Cir. 1985).

[14] Under the Seventh Circuit's two pronged test, "the plaintiff must first explain its delay in brining suit." *Union Carbide Corp. v. State Bd. of Tax Comm'rs of State of Ind.*, 992 F.2d 119, 123–24 (7th Cir. 1993). If no adequate excuse is offered, and the defendant shows the delay caused prejudice, then action is barred. *Id*. The Tribe has watched for several years as Aquila has expended significant time and resources preparing an application and pursuing a wetlands permit from MDEQ, in addition to the many other permits required for the mine. There is no good excuse for the Tribe's delay, and restarting the permitting process at this point would seriously prejudice Aquila by further delaying its mining project and requiring it to duplicate its prior efforts and expenditures in obtaining a federal wetlands permit.

Here, Aquila has a defense that shares with the main action common questions of law and fact regarding the critical legal question—namely, whether EPA and the Army Corps must exercise federal jurisdiction over the Section 404 permitting for the Back Forty Project. Indeed, as explained in the Contingent Answer and Affirmative Defenses, in addition to claiming that the Tribe has failed to state a claim on which relief can be granted, Aquila also asserts that the Tribe's claims are barred by laches because the Tribe unreasonably delayed in bringing its claims, resulting in significant prejudice to Aquila. The factual issues related to this defense are the same factual issues involved in the pending lawsuit between the Tribe and EPA and the Army Corps. Moreover, it is difficult to imagine how allowing Aquila to join the case this early could do anything to prejudice or delay adjudication of the issues. Accordingly, at the very least, Aquila should be permitted to intervene on a permissive basis.

CONCLUSION

For the foregoing reasons, Aquila respectfully requests that the Court grant its motion to intervene.

Respectfully Submitted,

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By: */s/ Ashley G. Chrysler*

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