

Wisconsin's 'Standing Rock': the proposed Back Forty mine

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Abstract: An environmental and indigenous rights campaigner describes the fight, led by the Menominee Indian Tribe of Wisconsin and backed by numerous environmental groups, against the proposed Back Forty mine project which would not only destroy Native Nations' sacred lands but also lead to widespread water contamination. The campaign recalls that of Standing Rock.

Keywords: Aquila Resources, Back Forty mine, Clean Water Act, Menominee Indians, mining, Native Nations, sacred sites, water protector alliance

Multinational mining corporations have met fierce resistance to ecologically destructive mining projects in the Lake Superior Region from Native nation and environmental alliances in Wisconsin. Exxon, Rio Algom, BHP Billiton, Noranda Minerals and Gogebic Taconite are some of the mining corporations that have failed to develop mining projects that would have threatened clean water for both Indian and rural communities in Wisconsin.¹ The most recent threat to

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clean water and sacred sites comes from a Canadian exploration company that has no experience with mining.

Aquila Resources has proposed an open pit metallic (gold, zinc, copper and silver) sulphide mine a mere 150 feet from the Menominee River, which forms the Wisconsin-Michigan border. The name 'Back Forty mine' is highly misleading; rather than the forty acres suggested by the name, the footprint of the mine encompasses over 800 acres. The pit would be 2,000 feet wide, 2,500 feet long and 750 feet deep.

The proposed mine would produce 70 million tons of acid-producing waste rock and milled tailings. When sulphide minerals in mines and mining wastes are exposed to air and water, the chemical reaction produces sulphuric acid and metal pollution known as acid mine drainage (AMD). AMD is toxic to fish and wildlife due to dissolved metals and contaminants such as mercury, lead, arsenic, cadmium, zinc, copper and many others. These contaminants would threaten the Menominee River and eventually Lake Michigan, which provides drinking water to millions in the upper Midwest.

Mining on sacred lands?

The location of the proposed Back Forty mine project has special significance for the Menominee Indian Tribe of Wisconsin because it is their original homeland. The Menominee River is named for the Menominee Indians, who trace their origin back thousands of years to when the Ancestral Bear emerged from the mouth of the Menominee River and was transformed into human form as the first Menominee. They occupied the Menominee River area for millennia, until an 1836 Treaty with the US pressured them to cede their original territory in Michigan. However, the Menominee Nation never gave up its right to protect its traditional cultural resources that are essential to their identity. The present-day Menominee reservation is sixty miles southwest of the proposed mine.

The site is located on the traditional lands of the Menominee Nation that include prehistoric burial mounds, village sites, raised agricultural beds and dance circles. According to former Menominee Tribal Chairman Gary Besaw:

the Michigan Department of Environmental Quality (DEQ) and Aquila Resources are well aware of the Menominee Indian Tribe's close cultural connection to this area and our serious concern in regards to our cultural resources and mounds, including our ancestral burial sites located within the impact area of the proposed mine. Despite these valid and well-documented concerns, a full evaluation of the cultural resources and mounds threatened by this project never occurred.²

Similar concerns about harm to water supplies, the destruction of sacred sites and the failure to consult indigenous peoples have resulted in massive tribal and environmental protest against the Dakota Access Pipeline next to the Standing Rock Sioux reservation in North Dakota.

Treaty rights and federal trust responsibility

Because Michigan is one of only two states that has been delegated authority to issue wetlands permits under the federal Clean Water Act, the mine application process is subject only to state permits. The US Environmental Protection Agency (EPA) retains the authority to review and object to state-issued permits if they do not meet the requirements of the Clean Water Act. However, Michigan DEQ is not required under state law to consult with the tribe or comply with the provisions of the National Historic Preservation Act of 1996 that requires federal agencies to take into account the effects of their undertakings on historic properties.

The Menominee Nation has criticised the lack of federal involvement in the Back Forty approval process as a violation of the federal government's trust responsibility to the tribe. When Native Nations signed treaties with the US government they usually gave up land in exchange for promises that the government would honour the treaties and its 'duty of protection' toward the tribes. This obligation is known as its 'trust responsibility'.³ Gary Besaw told the National Congress of American Indians (NCAI) that 'this delegation of authority, without federal treaty and trust responsibility concept, is dangerous'.⁴ The NCAI passed a resolution supporting the Menominee Nation, calling upon the President and Congress 'to ensure that all agencies permitting projects or authorizations allowing states to assume permitting authority which affect tribal lands, waters or sacred places, demonstrate compliance with federal trust obligations, treaties, consultation requirements, the UN Declaration on the Rights of Indigenous Peoples and all other statutory responsibilities of federal agencies in these matters'.⁵

While Aquila says it conducted its own archaeological survey and that it will not encroach on these cultural sites, the Menominee say Aquila did not consult with them and is in violation of the United Nations Declaration on the Rights of Indigenous Peoples that requires all extractive resource projects to obtain the free, prior and informed consent of indigenous peoples. Furthermore, the International Union for the Conservation of Nature has recently affirmed that the sacred natural sites of indigenous peoples should be 'no-go-areas' for destructive industrial activities like mining and for corporations to permanently withdraw from such areas.⁶

A water protector alliance against the Back Forty project

The Menominee Nation's opposition to the project has brought together the Menominee with local citizens in the Front 40 Environmental Fight group based in Lake Township, Michigan and Indian tribes and environmental organisations in both Michigan and Wisconsin. Menominee community organiser Guy Anahkwet Reiter (www.noback40.org) and Front 40 Environmental Fight leader Ron Henriksen (www.menomineeriver.com) organised a 'Save the Menominee River Speaking Tour' to inform downstream communities in Wisconsin about the pollution threat to the Menominee River and Lake Michigan.

In September 2016, the Marinette County Board in Wisconsin, located directly downstream from the proposed mine, voted 28–0 to oppose the project, citing concerns over long-term leaching of acid-producing wastes into the groundwater and the river where the City of Marinette gets its drinking water. Widespread concern about downstream mining pollution spurred resolutions against the project in six additional counties, four towns, three cities, dozens of tribal governments, along with environmental, sport-fishing and faith-based organisations. In April 2017, American Rivers, a national conservation organisation, designated the Menominee River as one of the ten most endangered rivers in the US because of the pollution threat from the Back Forty project.

No ‘social licence to operate’

Joe Maki, the head of the DEQ’s mining division has dismissed the widespread opposition to the project. According to him, as long as Aquila meets the conditions of the permit requirements, it will be granted permission to mine.⁷ However, this assumption is at odds with the growing realisation within the international mining industry that community support for a mining project, or a social licence to operate, is as important, if not more so, than a regulatory licence.⁸ A social licence to operate is intangible and unwritten and cannot be granted by the DEQ or any other state agency or legal authority. A social licence is essentially a set of demands and expectations, held by local stakeholders – like citizens, environmental groups and Native Nations – for how a business should operate.

The term ‘social licence to operate’ emerged in response to a perceived threat to the mining industry’s legitimacy as a result of environmental disasters in the late 1990s. The Fraser Institute, a mining industry thinktank in Vancouver, British Columbia says the social licence to operate ‘is based on the idea that mining companies need not only government permission [or permits] but also “social permission” to conduct their business’.⁹ According to mining risk analysts like Ernst & Young, the fourth greatest risk to mining investors comes from ‘ignoring community voices and their environmental and public health concerns. Mining projects that generate protests and civil unrest are bad for business.’¹⁰

The Menominee Nation, along with several local groups in Michigan, the Sierra Club of Wisconsin, the River Alliance of Wisconsin, the Wisconsin Resources Protection Council, GreenAmerica.org and NDNAction.org has created a divestment campaign urging supporters to tell Aquila’s institutional investors to withdraw from the Back Forty project because the project faces growing public opposition and does not have a social licence to operate. Institutional investors, who own 53 per cent of the project and are the primary funders, include the Orion Mine Finance Group in New York, Osisko Gold Royalties in Montreal, Hudbay Minerals in Toronto, and Ruffer in London. Not surprisingly, despite receiving several thousand letters and emails, none of the investors has responded to the

call for divestment. To acknowledge an organised divestment campaign risks investor confidence in controversial projects.

Mobilising political and legal opposition

The largest demonstration of public opposition to the Back Forty project occurred at the 23 January 2018 DEQ public hearing in Stephenson, Michigan on Aquila's wetland permit, the last of four permits needed for the project. Nearly 500 members of the public attended the hearing. Over one hundred people provided testimony. All but four speakers spoke in opposition to the project. Over half the speakers represented Native American Nations, including the Menominee, Ho Chunk, Oneida, Stockbridge-Munsee and Mole Lake Sokaogon Ojibwe.

The day before the hearing, the Menominee Indian Tribe of Wisconsin and the environmental law firm Earthjustice, filed a lawsuit in a Wisconsin federal court alleging that the federal Environmental Protection Agency (EPA) and the US Army Corps of Engineers did not have authority to delegate the permitting process affecting an interstate and international watershed to the Michigan DEQ. If successful, the lawsuit will require the federal agencies to assume primary control over the wetland permitting process for the mine. Gary Besaw said federal oversight would subject the proposed mine to additional federal laws that would emphasise the importance of the waterway, wetlands and surrounding areas to the tribe. 'Federal oversight [of the mine] would also bring the National Historic Preservation Act into play which would provide further protections for our cultural and sacred sites', he said.¹¹

Mobilising scientific opposition

Much of the public testimony at the 23 January public hearing was informed by independent scientific reviews of Aquila's wetland permit that were commissioned by the Mining Action Group of the Upper Peninsula Environmental Coalition and the Front 40 Environmental Fight. The scientific and technical objections to the permit voiced by grassroots citizens and tribal members overlapped with criticisms of Aquila's wetland permit by the DEQ's own Water Resources Division that were made public just prior to the hearing. The DEQ informed Aquila that there were serious inconsistencies and inaccuracies in the permit application that required further information and explanation before the DEQ could decide on whether to grant the permit.¹²

Shortly afterwards, the EPA formally objected to Aquila's wetland permit, saying that the company had not demonstrated that public waters would be protected from pollution. The EPA gave Aquila and the DEQ ninety days to address its concerns. If Aquila failed to resolve the concerns, the US Army Corps of Engineers could assume responsibility for the wetland permit, taking it away from the state.¹³

In April 2018, Aquila met with the EPA to discuss the EPA's objections to the company's wetland permit. In May 2018, the EPA informed the DEQ that '[b]ased on the information Aquila provided, EPA concerns regarding the demonstration of avoidance and minimization of impacts within the [mine's] footprint are resolved'.¹⁴

Wetland permit approved over objections of regulators

On 4 June 2018 the Michigan DEQ issued Aquila's wetland permit with thirty pages of 'special conditions' because the project could not be permitted without additional supporting information. Moreover, the permit directly contradicted the recommendation of DEQ's own Water Resources Division. According to the agency's Findings of Fact:

After due consideration of the permit application, on-site investigation and review of other pertinent materials, the Water Resources Division finds that the project does not demonstrate that an unacceptable disruption to the aquatic resources of the State will not occur and that the activities associated with the project are not consistent with the permitting criteria for an acceptable impact to the resources regulated under Parts 301, Inland Lakes and Streams, and Part 303, Wetlands Protection.¹⁵

The DEQ's approval of the wetland permit not only ignored the agency's own scientists but issued Aquila's wetland permit 'conditionally' requiring submission and approval of key additional information and analysis. However, under the Clean Water Act, this information must be provided before a wetland destruction permit is granted, not after.

In a joint press statement, the Mining Action Group of the Upper Peninsula Environmental Coalition, the Front 40 Environmental Fight and numerous other local and regional environmental groups said they were outraged by the unwarranted approval of the wetland permit and are calling on DEQ director C. Heidi Grether to explain her decision. 'This smells rotten. Director Grether's approval of the Aquila Back Forty wetland permit was a political act, directly contradicting the recommendation of DEQ's own Water Resources Division. This permit is inconsistent with the Clean Water Act', said Kathleen Heideman of the Mining Action Group.¹⁶

The Front 40 Environmental Fight placed half-page ads in several local newspapers, providing website links to the DEQ decision and the Findings of Fact and Conclusions of Law, urging the public to contact Director Grether and demand answers as to why she approved the permit. For more than a month, the DEQ did not respond to hundreds of phone calls and emails from the public demanding answers about the permit decision. Finally, on 23 July 2018, DEQ Director Grether said, 'The key driver of the MDEQ's issuance of this

permit was the US EPA and Aquila Resources' resolution of objections previously raised by the US EPA'.¹⁷ However, this statement fails to address the critical question of why the DEQ ignored the legal and scientific objections of the Water Resources Division.

Permitting delays and uncertain financing

Aquila Resources may have the four permits it needs for the Back Forty project but they are a long way off from actual mine construction. Each of those permits contains multiple and complex conditions that must be met before construction can proceed. These permit conditions will force Aquila to fix the major shortcomings that should have been resolved before any permits were issued, including groundwater modelling, adequate baseline data and a plan for returning waste rock to the pit without impacts to surface and groundwater.

Aquila Resources is a cash-poor company. It has already spent \$85 million to get through the permitting process. Actual mine construction will require an additional \$260 million. These additional permit conditions will cause project delays and require additional project expenditures for a company that is dependent upon debt and/or equity financing. According to Aquila's most recent financial analysis:

Historically, the Company's main source of funding has been the issuance of equity securities for cash, primarily through private placement offerings to accredited investors and institutions. The Company's access to financing is always uncertain. There can be no assurance of continued access to significant equity financing, or that such access will be timely and, in the amounts, necessary to fund the Company's activities. There are many conditions beyond the Company's control which have a direct impact on the level of investor interest in the purchase of Company securities.¹⁸

Water protectors vow to continue fight

'This thing isn't over', said Guy Anahkwet Reiter. 'It's far from over. We have lived on that river for 10,000 plus years, and those cultural resources are ours. We're willing to camp out and stand in front of machines if necessary.'¹⁹ Dale Burie, president of the Coalition to Save the Menominee River, expressed solidarity: 'People who love our land and water, including our indigenous brothers and sisters, and those who have raised their children here and want to see their grandchildren grow up in this area, are the same people who will stand firm in total opposition to the proposed Aquila mine.'²⁰

The Menominee Nation has a long history of protecting its land and resources from destructive projects. In the 1980s they formed an Indian-environmental alliance to defeat a federal nuclear waste repository in the Wolf River watershed

encompassing the Menominee reservation. From 1976 to 2003 the Menominee Treaty Rights and Mining Impacts Office led the Indian-environmental alliance against Exxon's proposed Crandon metallic sulphide mine at the headwaters of the Wolf River.

The threats to water and sacred sites, which focused national attention and international solidarity for the Dakota Access Pipeline struggle at Standing Rock, also inspire resistance to the Back Forty project. They are one and the same.

References

- 1 Al Gedicks and Zoltan Grossman, 'Defending a common home: native/non-native alliances against mining corporations in Wisconsin', in Mario Blaser, Harvey Feit and Glenn McRae, eds, *In the Way of Development: indigenous peoples, life projects and globalization* (London: Zed Books, 2004), pp. 186-202; 'Defeating the Iron Mines in Wisconsin', *Z Magazine* 28, no. 6 (June 2015), pp. 33-38.
- 2 FOX 11 News, 'Menominee Indian Tribe challenges Back Forty Mine permit', 28 February 2017.
- 3 Stephen L. Pevar, *The Rights of Indians and Tribes: the basic ACLU guide to Indian and tribal rights* (Carbondale: Southern Illinois University Press, 1992), p. 26.
- 4 Chuck Quirnbach, 'Menominee nation leader asks tribes for help fighting Back Forty mine', *Wisconsin Public Radio*, 18 October 2017.
- 5 National Congress of American Indians Resolution, #MOH-17-015, 'Protection of the great lakes and support for the Menominee Indian Tribe of Wisconsin and allies in opposition to the proposed Back Forty mine project', 15 June 2017.
- 6 http://www.theecologist.org/News/news_analysis/2988121/world_conservation_congress_votes_to_protect_indigenous_sacred_lands.html.
- 7 Rachel Droze, 'Public voices concern over proposed gold, copper and zinc mine in Menominee County', uppermichigansource.com, 7 October 2016.
- 8 S. Joyce and I. Thomson, 'Earning a social licence to operate: social acceptability and resource development in Latin America', *The Canadian Mining and Metallurgical Bulletin* 93, no. 1037 (February 2000), pp. 49-53.
- 9 <http://www.miningfacts.org/What-is-the-social-licence-to-operate/>.
- 10 Ernst & Young, 'Top 10 business risks facing mining and metals, 2016-2017', <https://www.ey.com/Publication/vwLUAssets/EY-business-risks-in-mining-and-metals-2016-2017/%24FILE/EY-business-risks-in-mining-and-metals-2016-2017.pdf>, p. 4.
- 11 Jeff Bollier, 'Tribe sues feds over Back 40 Mine permits', *Green Bay Press Gazette*, Jan. 23 2018.
- 12 Kristi Wilson, Water Resources Division of DEQ to Barry Hildred, Aquila Resources, letter of 19 January 2018.
- 13 Steven Verburg, 'EPA objects to Aquila plan', *Wisconsin State Journal*, 21 March 2018.
- 14 Christopher Korleski, EPA Water Division to Teresa Seidel, MDEQ Water Resources Division, letter of 3 May 2018.
- 15 Michigan DEQ, Water Resources Division, Finding of fact and conclusion of law, 30 April 2018, https://drive.google.com/file/d/1INvqITC_LwIUyXs1bzA3aqV7Ms2lobRM/view, p. 1.
- 16 Mining Action Group and Front 40 Environmental Fight, joint press statement, 7 June 2018.
- 17 C. Heidi Grether, Michigan Department of Environmental Quality, email 23 July 2018.
- 18 Aquila Resources Inc., 'Management discussion and analysis for the quarter ended March 31, 2018', p. 21.
- 19 Paul Srubas, 'Aquila Resources gets fourth, final Back Forty mine permit, but with strings attached', *USA Today Network*, 4 June 2018.
- 20 'Group continues to be in opposition to mine', *Eagle Herald*, 7 June 2018.