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

JAN 2 3 2017

REPLY TO THE ATTENTION OF:
WN-16J

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Dear (b)(6):

I am writing in response to your letter of December 15, 2016 to Administrator Gina McCarthy. That letter enclosed your request that U.S. Environmental Protection Agency enter into a programmatic agreement with the State of Michigan and the Menominee Nation, pursuant to Section 106 of the National Historic Preservation Act (NHPA), regarding consultation and coordination to consider impacts to cultural and natural resources from the proposed Aquila Resources Back Forty Project. EPA does not have the authority to enter into such an agreement.

Section 106 of the NHPA requires federal agencies to take into account the effects of their undertakings on historic properties, and afford the Advisory Council on Historic Preservation a reasonable opportunity to comment. As currently proposed, the Back Forty Project requires no federal undertaking because all of the permit decisions for the project required by federal law are the responsibility of the State of Michigan under federally approved state authorities covering the National Pollutant Discharge Elimination System (NPDES) permit program (Section 402 of the Clean Water Act (CWA), 33 U.S.C. 1342), the wetlands/dredge and fill permit program (Section 404 of the CWA, 33 U.S.C. 1344), and Title 1 of the Clean Air Act (42 U.S.C. 7475). While EPA retains federal oversight responsibilities for these approved state programs, including reviewing draft permits, the final permit decisions made under these authorities are state decisions and thus they are not subject to NHPA review.

In addition to the State of Michigan's authority to issue permits under federally approved state authorities, Michigan also maintains state authority to issue mining permits under Part 632 of its Natural Resources and Environmental Protection Act. Such permits are not subject to federal oversight.

While there is no basis for EPA to enter into an agreement with the State and Tribe pursuant to Section 106 of the NHPA, we note that the Michigan Department of Environmental Quality (MDEQ) has acknowledged the importance of the project area to tribal members. MDEQ and the State Archeologist met with the Menominee Tribe to discuss the Tribe's concerns, and agreed to include reasonable permit conditions that would protect identified cultural resources.[1] The State subsequently required Aquila Resources to undertake a cultural resources impact study

[1] MDEQ's response to comments received on the Part 632 permit.

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of the proposed mine site. Aquila Resources submitted reports entitled "Archaeological Investigations of the Aquila Resources Inc., Back Forty Project Area, Menominee County, Michigan" and "Phase I Archaeological Resources Survey for the Back Forty Project – Private Land North, Menominee County, Michigan" (Environmental Impact Assessment Volume II-H, Appendix F, in the Part 632 Permit Application). As a result of these studies, mine features have been located so as to avoid cultural resources identified, and permit conditions were added to the proposed Part 632 permit to further minimize impacts to cultural resources. These conditions are enclosed. The complete permit may be viewed at:

http://www.michigan.gov/documents/deq/deq-oogm-mining-AquilaBackFortyPermit12282016_546947_7.pdf.

Additional information regarding MDEQ's approach to consulting with tribal governments and specific tribal coordination regarding the Back Forty Project is discussed in a January 19, 2017 letter from C. Heidi Grether, Director, MDEQ, to Joan Delabreau, Chairwoman, Menominee Indian Tribe of Wisconsin. A copy of the letter is enclosed.

We appreciate the concerns you raised in your letter and have forwarded these to the State of Michigan for further consideration and coordination. Please do not hesitate to contact me or Peter Swenson of my staff if you have further questions.

Sincerely,

for Christopher Korleski
Director, Water Division

Enclosures

Enclosure

Conditions Related to Cultural and Archaeological resources
Aquila Resources Back Forty Mine
Part 632 Mining Permit, Special Permit Conditions: A. General, Parts 2 and 3

2. The permittee shall immediately suspend relevant mining activities, and shall promptly notify the OOGM Upper Peninsula District Geologist, in the event that any materials of possible archaeological, historic, or cultural value are unearthed by m1nmg activities, and the permittee shall implement the Unanticipated Discovery Plan. If a qualified archaeologist determines that materials discovered are in fact cultural, the permittee shall notify the State Archeologist. In the event that pre-contact cultural materials are discovered, the permittee or the State Archaeologist w1ll notify appropriate tribal groups

3. If work must proceed near the area of an unanticipated discovery of cultural resources or human remains before the disposition of the discovery is final, care must be taken to avoid disturbing the area in which the discovery was made. Further, the activity shall be monitored by a qualified archaeologist until the disposition of the discovery is resolved.

STATE OF MICHIGAN
DEPARTMENT OF ENVIRONMENTAL QUALITY
LANSING

RICK SNYDER
GOVERNOR

C. HEIDI GRETHER
DIRECTOR

January 19, 2017

VIA E-MAIL

Chairwoman Joan Delabreau
Menominee Indian Tribe of Wisconsin
P.O. Box 910
Keshena, Wisconsin 54135-0910

Dear Madam Chairwoman Delabreau:

Thank you for your December 13, 2016, letter regarding Aquila Resources Inc.'s Back Forty Mine Project. Your letter expressed concern regarding the Michigan Department of Environmental Quality's (MDEQ) consultation with your tribe on the project, specifically with regard to the level and manner of consultation.

The "meaningful tribal consultation" standard that you reference in your letter was set by the federal government to govern tribal consultation by federal agencies with respect to federal agency decision-making. For example, when the United States Environmental Protection Agency (U.S. EPA) considers a wetlands permit under Section 404 of the Clean Water Act, it is bound by the federal consultation policy. But the MDEQ is not required to meet this federal standard of tribal consultation with respect to the Back Forty project. The MDEQ is an agency of the State of Michigan, not the United States. As you note in your letter, the MDEQ operates under "delegated" authority in making decisions about wetlands permits. But when the MDEQ considers a wetlands permit, it does so as a state agency administering state law, specifically Part 303, Wetlands Protection, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (Act 451) [See, e.g., 33 U.S.C. § 1344(g)(1)]. The MDEQ does not act as a federal agency and does not make a federal agency decision. Therefore, it is not obligated to follow the federal tribal consultation policy. Region 5 U.S. EPA staff have confirmed that the MDEQ's understanding on this issue is correct, and they specifically have informed the MDEQ that the U.S. EPA would never have delegated this authority to the State. This tribal consultation responsibility is retained by the U.S. EPA.

The MDEQ's tribal consultation obligations stem from the 2002 Government-to-Government Accord signed by then Governor John Engler and the twelve federally-recognized Michigan tribal governments. Enclosed is a copy of the Accord for your convenience. This Accord has been reaffirmed by Governor Rick Synder as the means by which state agencies shall engage the Michigan Tribes. It includes reference specifically to tribal consultation (see Section V), and this is the process the state agencies are directed to follow. Additionally, in 2012 the MDEQ enacted a new Mining Policy outlining a process we have elected to follow in sharing information on mining permit applications with interested Michigan-based tribes and the U.S. EPA early in the permit review process.

While the MDEQ does not have an obligation under either the Government-to-Government Accord or the 2012 Mining Policy to engage Wisconsin's tribal governments in consultation, we have engaged in consultation with the Menominee Indian Tribe of Wisconsin on

numerous occasions over the course of our review of the Back Forty application. These meetings have included you as the Tribal Leader, along with several of your key staff. Our staff has even traveled to Wisconsin to meet with you. In addition, your tribe has provided written comments and feedback on the Back Forty application multiple times. Because we understand how important this issue is to you and your tribe, we elected to reach out and engage in government-to-government consultation, not because we were required to do so, but rather out of respect and courtesy to the Menominee Indian Tribe.

Given that the consultation responsibility for a Wisconsin-based tribal government rests with the U.S. EPA, we encourage your continued outreach and engagement with them on this issue.

Thank you for your correspondence on this important matter. If we can continue to provide clarity on Michigan's regulatory mining authority under Part 632, Nonferrous Metallic Mineral Mining, of Act 451, please do not hesitate to contact us. Mr. Joe Maki, who you already have met with from our Upper Peninsula District Office, is our Mining Coordinator, and can be reached at 906-250-4015; makij13@michigan.gov; or MDEQ, Oil, Gas, and Minerals Division, 1504 West Washington Street, Marquette, Michigan 49855. You may also contact Mr. James Goodheart, our Tribal Liaison, at 517-284-6706 or goodheartj@michigan.gov; or you may contact me.

Sincerely,

C. Heidi Grether

C. Heidi Grether
Director
517-284-6700

Enclosure
cc/enc: United States Senator Tammy Baldwin
United States Senator Ron Johnson
United States Representative Reid Ribble
Governor Rick Snyder
Mr. Larry Roberts, Assistant Secretary of Indian Affairs, U.S. Department of the Interior
Mr. Robert Kaplan, Acting Regional Administrator, U.S. EPA, Region 5
Mr. Kestutis Ambutas, Tribal Affairs Director, U.S. EPA, Region 5
Ms. Barbara Wester, Associate Regional Counsel, U.S. EPA, Region 5
Mr. Tom Melius, Regional Director, U.S. Fish and Wildlife Service
Ms. Katie Steiger-Meister, U.S. Fish and Wildlife Service-GLRI
Mr. Curtis Sedlacek, U.S. Army Corps of Engineers, Detroit District
Mr. David Nyberg, Director, Governor's Northern Michigan Office
Mr. Robert Reichel, Michigan Department of Attorney General
Ms. Kelly Drake, Michigan Department of Attorney General
Dr. Dean Anderson, Michigan State Historic Preservation Office
Mr. Robert Wagner, Environment Deputy Director, MDEQ
Ms. Sarah M. Howes, Legislative Liaison, MDEQ
Mr. Harold R. Fitch, MDEQ
Mr. James Goodheart, Tribal Liaison, MDEQ
Mr. Joe Maki, MDEQ

DEPT. OF THE
ATTORNEY GENERAL

DEC 17 2002

Assigned to

STATE OF MICHIGAN

OFFICE OF THE GOVERNOR

LANSING

JOHN ENGLER
GOVERNOR

December 9, 2002

To the Members of the Michigan House of Representatives
To the Members of the Michigan Senate

Executive Message of Governor John Engler Regarding the
2002 Government-to-Government Accord between the State of Michigan
and the Federally Recognized Indian Tribes in the State of Michigan

Dear Members of the Michigan Legislature:

Pursuant to Article V, Section 17, of the Michigan Constitution, I write to formally transmit to the Legislature the 2002 Government-to-Government Accord between the State of Michigan and the Federally Recognized Indian Tribes in the State of Michigan ("State-Tribal Accord"). I also transmit a copy of Executive Directive 2001-2, which is incorporated within the State-Tribal Accord. It is my hope that these documents will be published in the official journals of the Michigan House of Representatives and the Michigan Senate.

As these documents demonstrate, the relationship between the State of Michigan and the twelve federally recognized sovereign Indian tribes within our state continues to evolve and mature. I am proud of the many steps we have taken in recent years to improve this relationship. It is my hope that the principles articulated in the negotiated State-Tribal Accord will guide leaders of the state into the future. In that vein, I urge the leadership of the Michigan Legislature to create standing committees on State-Tribal Affairs, to provide a forum for legislative interaction and policymaking on the varied issues that confront the state and the tribes.

In addition to transmitting a copy of the State-Tribal Accord to the Legislature, I am also sending the original document to the Michigan Secretary of State for filing with the Office of the Great Seal of the State of Michigan. As each tribe ratifies the State-Tribal Accord, those ratified documents will also be transmitted to the Secretary of State.

Sincerely,

John Engler
Governor

DEPT OF ATTORNEY GENERAL
RECEIVED

DEC 19 2002

NATIVE AMERICAN AFFAIRS DIVISION

JE/jlf

Enclosures

cc w/enc: The Honorable Maura Corrigan, Chief Justice of the Michigan Supreme Court
The Honorable Candice Miller, Secretary of State of the State of Michigan
The Honorable Jennifer Granholm, Attorney General of the State of Michigan
Michigan Tribal Chairs

means for governments to resolve differences is through a process of discussion and negotiation, resorting to litigation only when this course is unavoidable.

In accordance with these operative facts, I hereby direct the following:

1. The Governor's Deputy Legal Counsel, or such other individual as the Governor may designate, shall serve as the Governor's Advisor on State-Tribal Affairs and be responsible for the implementation of this directive.

2. The Governor's Advisor on State-Tribal Affairs shall work with tribal representatives and representatives of the Executive Branch of the state of Michigan as may be appropriate to develop a State-Tribal Accord defining the relationship between the state of Michigan and the federally recognized tribes within her borders.

3. Each executive department having substantial interaction with tribal governments shall designate an individual serving in the executive office of that department to be responsible for department-wide coordination of the department's interactions with tribal governments. This coordinator shall regularly report departmental interaction to the Governor's Advisor on State-Tribal Affairs. This provision is not intended to supplant effective existing relationships with tribal governments. Likewise, it is not the intent of this directive to displace ongoing cooperative efforts and lines of communication between the state and tribes.

4. Each executive department engaged in a dispute with a tribal government and contemplating litigation shall first consult with the Governor's Advisor on State-Tribal Affairs and thereafter with that tribal government to negotiate a resolution prior to resorting to the court system.

5. The state of Michigan shall participate in an annual meeting at which appropriate representatives of the state and the tribes may work together to achieve mutual goals.

6. As Governor, I will support legislation to authorize intergovernmental agreements between tribal governments, state government and instrumentalities of the state.

Through cooperation, state and tribal governments can achieve more for all of our citizens, and when possible, avoid costly and disruptive disputes. It is my hope that these principles will guide the state of Michigan for many years to come.

(4) The development of strong, reliable government-to-government relationships between the state of Michigan and the tribes will be beneficial to all of the citizens of Michigan.

The tribes acknowledge that:

(1) The state of Michigan operates under authority granted by the United States Constitution and by the people of Michigan through the Michigan Constitution of 1963, and state laws and regulations;

(2) The state of Michigan is divided into three independent branches of government: executive, judicial, and legislative. Under the Michigan Constitution of 1963, the executive power is vested in the governor;

(3) The state of Michigan has a responsibility to provide for and protect the health, safety and welfare of all of the citizens of Michigan;

(4) Actions undertaken by the tribes that affect or may affect Michigan citizens who are not tribal members must be implemented in an informed and sensitive manner, respectful of individual rights; and

(5) The development of strong, reliable government-to-government relationships between the tribes and the state of Michigan will be beneficial to all of the citizens of Michigan.

IV. PURPOSES AND OBJECTIVES

This accord illustrates the commitment by the parties to implementation of the government-to-government relationship, a relationship reaffirmed as state policy on May 22, 2001, by Governor John Engler's Executive Directive 2001-2, "Policy Statement on State-Tribal Affairs." This relationship respects the sovereign status of the parties, enhances and improves communications between them, and facilitates the resolution of issues.

This accord commits the parties to the initial tasks that will translate the government-to-government relationship into more efficient, improved and beneficial services to Indian and non-Indian people. This accord encourages and provides the foundation and framework for specific agreements among the parties outlining specific tasks to address or resolve specific issues.

The parties recognize that implementation of this accord will require a comprehensive educational effort to promote understanding of the government-to-government relationship within their own governmental organizations and with the public.

Each tribe will develop and engage in an effective process for consultation with the state concerning tribal action significantly affecting state interests.

State-Tribal Forum and Task Forces

The state and the tribes shall establish a State-Tribal Forum consisting of tribal government political leaders and their designees and the Governor's Policy Advisor on State-Tribal Affairs and appropriate officials from other executive departments of state government. The members of the forum will be charged with monitoring the implementation of this accord and organizing the annual meeting described below.

The parties can also form Tribal Leaders Task Forces on matters that impact tribes across the state on issue-specific matters such as education, natural resources or health care or any other issues of common concern. In each instance, the desirability of a Task Force and the composition of the Task Force shall be determined jointly by the state and the tribes. Each Task Force may develop its own reporting schedule and protocols and procedures.

Annual Meeting

While this accord addresses the relationship between the parties, its ultimate purpose is to improve the services delivered to people by the parties. The parties shall meet on at least an annual basis to establish goals for improved services and identify the obstacles to the achievement of those goals. At the annual meeting, the parties will develop joint strategies and specific agreements to outline tasks, overcome obstacles and achieve specific goals.

As a component of the system of accountability within the state and tribal government, the parties will also review and evaluate at the annual meeting the implementation of the government-to-government relationship. A management report summarizing this evaluation will be drafted by authors selected by both the tribes and the state. The report will include mutually acceptable strategies and agreements to outline tasks, overcome obstacles, and achieve specific goals.

Accountability and Identification of Key Contacts

The parties recognize that a key principle of their relationship is a requirement that individuals working to resolve issues of mutual concern are accountable to act in a manner consistent with this accord.

The Governor's Advisor on State-Tribal Affairs is accountable to the governor for implementation of the accord. Tribal coordinators within the executive departments are accountable to the governor through the director of their

under state or federal law. Through this accord, the parties strengthen their collective ability to successfully resolve issues of mutual concern.

While the relationship described by this accord provides increased ability to solve problems, it likely will not result in a resolution of all issues. Therefore, inherent in their relationship is the right of each of the parties to elevate an issue of importance to any decision-making authority of another party, including, where appropriate, that party's executive office.

Representatives of the signatory parties have executed this accord on the date of October 28, 2002, and upon its taking effect agree to be duly bound by its commitments. This accord is effective as between the state of Michigan and each individual signatory tribe at such time as the accord is approved pursuant to the applicable ratification process of that tribe. Upon tribal approval, each tribe shall send notice of approval to the Office of the Governor for filing with the Office of the Secretary of State of Michigan. This accord continues in effect unless modified by mutual agreement or terminated by any party. In the event that one or more tribal signatories, but less than all tribal signatories, terminates their participation in the accord, the accord shall continue in effect between the state and remaining tribal signatories.

Given under my hand and the Great Seal of the state of Michigan this 13 day of December, in the Year of Our Lord, Two Thousand Two.

GOVERNOR

BY THE GOVERNOR:

SECRETARY OF STATE

MENOMINEE INDIAN TRIBE OF WISCONSIN
CHAIRMAN'S OFFICE
P.O. Box 910
Keshena, WI 54135-0910

December 13, 2016 ***Via Electronic Mail & USPS***

Michigan Department of Environmental Quality
Attn: C. Heidi Grether, DEQ Director
P.O. Box 30473
Lansing, MI 48909-7973

RE: Meaningful Tribal Consultation

Dear Ms. Grether,

My name is Joan Delabreau and I serve as the Tribal Chairwoman of the Menominee Tribal Legislature. I am writing to express my concern regarding the interpretation by staff of the Michigan Department of Environmental Quality of what constitutes "meaningful tribal consultation." It is the position of the Tribe that the Michigan Department of Environmental Quality, and by extension the State of Michigan, has not honored its own pledge to engage affected Tribes in decisions that adversely affect our cultural resources. Specifically;

1. The Michigan Department of Environmental Quality acting under authority delegated to them pursuant to the *Memorandum of Agreement between the Michigan Department of Environmental Quality and the United States Environmental Protection Agency, Region 5, Administration of Section 404 of the Clean Water Act by the State of Michigan*, has not adequately engaged with the Tribe in meaningful tribal consultation. "Meaningful consultation means tribal consultation **in advance** with the decision maker or with intermediaries with clear authority to present tribal views" to the agency decision maker. *Lower Brule Sioux Tribe v. Deer*, 911 F. Supp. 395, 401 (D.S.D) 1995) (citing *Hoopa Valley Tribe v. Christie*, 812 F. 2d 1097 (9th Cir. 1987) (emphasis added.) Meaningful consultation thus usually comprises of a meeting or series of meetings, during which the federal agency or its delegated authority notifies the tribe of the proposed action and justifies its reasoning. *Id.* The tribe may then issue a motion of support for the decision, or reject the decision, pursuant to tribal law or procedure. *Id.*

This concern comes on the heels of the pending decision to approve various permits required for Aquila Resources, Inc.'s request to mine the Back Forty, located in Menominee, Michigan. This area is of great significance to the Menominee Indian Tribe due to our historical and modern day connection to this territory. Additionally, this territory is the home to sturgeon, wild rice, burial sites and cultural items of significance to the Menominee people. To be clear, the current status of engagement with the Tribe has failed to appropriately and adequately address the Menominee Tribe's Leadership, who is by mandate of the Tribe's Constitution, to be the only spokesperson for the Menominee Indian Tribe. Rather than engage the Tribe's Leadership, it appears that the Michigan Department of Environmental Quality has considered indiscriminate contacts with individual members of the Menominee Tribe and staff who are employed by the Tribe, as meeting the threshold of the original intent of "meaningful tribal consultation."

To be clear, my expectation is that any informal communication with tribal members or staffers, or a single unofficial meeting with the tribe, is not meaningful consultation. Rather, the Menominee Indian Tribe of Wisconsin should be formally notified of any proposed action by the responsible agency and the responsible agency should formally justify its reasoning. The Tribe will then send an official response in writing.

Furthermore, with regard to the Menominee Tribe's concerns regarding our ancestral place of origin, the identification and repatriation of Menominee tribal cultural items, and the impact on the health of the environment and water, I ask for meaningful consultation with the appropriate decision-maker throughout the long process under the authority of the EPA's own regulations and policies in accordance with Executive Order 13175-*Consultation and Coordination with Indian Tribal Governments* and *EPA Policy on Consultation and Coordination with Indian Tribes* respectively.

I would like thank you for your immediate attention to this very important issue and request a written response. If you have any questions, please contact me at your earliest convenience.

Sincerely,

Joan Delabreau

Joan Delabreau
Menominee Tribal Chairwoman

Cc:
Joe Maki, Michigan DEQ, District Geologist
Dr. Dean Anderson, Michigan State Historic Preservation Office, State Archeologist
Rick Snyder, Michigan Governor
Robert Kaplan, EPA Region 5, Administrator
Barbara Wester, EPA Region 5, Associate Regional Counsel
Kestutis Ambutas, EPA Region 5, Tribal Affairs Director
Curtis Sedlacek, USACOE, Detroit District
Tom Melius, USFWS, Regional Director
Katie Steiger-Meister, USFWS-GLRI
Larry Roberts, Department of Interior, Assistant Secretary of Indian Affairs
Reid Ribble, House of Representatives – Wisconsin's 8th Congressional District
Tammy Baldwin, U.S. Senator, Wisconsin
Ron Johnson, U.S. Senator, Wisconsin
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