the accurate determination of the waters that have been delegated is crucial to the EPA and USACE fulfilling the United States' trust responsibility to Menominee.

We believe that the wetlands adjacent to the Menominee River on the Back 40 mine site constitute non-delegable waters, and therefore the USACE and not Michigan is the proper permitting authority. We base this on the following:

Background on Back 40 CWA 404 Permitting

Aquila Resources, Inc. ("Aquila") is proposing to develop the Back Forty Project on the banks of the Menominee River in Sections 1, 11, and 12 of township 35 North, Range 29 West; Sections 4-9 of Township 35 North, Range 28 West; and Section 32 of Township 36 North, Range 28, Lake Township, Menominee County Michigan. As part of the Back 40 project, Aquila intends to fill, dredge, and dewater certain wetlands. Pursuant to Section 404 of the Clean Water Act (33 U.S.C. § 1344) Aquila is required to obtain a permit ("404 permit") prior to such filling, dredging, or dewatering.

The Clean Water Act generally requires that the 404 permit be issued by the United States Army Corps of Engineers. However, the State of Michigan has assumed 404 permitting in regard to certain waters in Michigan pursuant to 33 U.S.C. § 1344(g)(1). Aquila, believing that the wetlands in question are subject to the State of Michigan's permitting authority, previously made application for such a permit from the Michigan Department of Environmental Quality ("MDEQ"). The EPA and USACE, acting under the same belief regarding Michigan's permitting authority, provided comments on the application to the MDEQ pursuant to the provisions of the Memorandum of Agreement between Michigan and the EPA regarding administration of Section 404 of the Clean Water Act ("MOA"). Aquila subsequently withdrew their request for a 404 permit from MDEQ; however they have re-filed with MDEQ in January of 2017. MDEQ found Aquila's second attempt at a 404 application to be administratively incomplete. In response Aquila has requested, and has been granted, multiple extensions of time to complete their application. The current extension request runs until August 30, 2017.

Authority to Delegate CWA 404 Permitting to State

The Clean Water Act limits the types of waters that the United States may delegate jurisdiction over for 404 permitting purposes. The Act allows for delegation of such permitting to States only in regard to:

> ". . . navigable waters (other than those 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 all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto)." 33 U.S.C § 1344(g)(1).

The wetlands at issue in the Back 40 project are adjacent to the Menominee River. Therefore, if the Menominee River in the area of the wetlands at issue constitutes navigable waters that are currently used or susceptible to current use as a means to transport interstate commerce, then the