STATE OF MICHIGAN
DEPARTMENT OF ENVIRONMENTAL QUALITY
LANSING

RICK SNYDER
GOVERNOR

C. HEIDI GRETHER
DIRECTOR

January 19, 2018

VIA E-MAIL
Chairman Gary Besaw
Menominee Indian Tribe of Wisconsin
P.O. Box 910
Keshena, Wisconsin 54135-0910

Dear Chairman Besaw:

A little over one year ago, the Menominee Indian Tribe of Wisconsin contacted the Michigan Department of Environmental Quality (MDEQ) requesting meaningful tribal consultation regarding the pending wetland permit application for Aquila Resources Inc.'s proposed Back Forty mine. As you are aware, the wetland application was put on hold last year while Aquila Resources Inc. worked to provide the MDEQ with the additional information necessary for a complete wetland application.

The wetland application has been determined administratively complete and the MDEQ is conducting an environmental and technical review of the application. The MDEQ issued a public notice on the application on December 8, 2017. The MDEQ is also holding a public hearing to receive comments about the wetland application on January 23, 2018, at 6:00 p.m. CST at Stephenson High School, W526 Division Street, Stephenson, Michigan. I understand that you plan to make comments at the public hearing, and we look forward to hearing from you during that meeting.

As Director C. Heidi Grether, MDEQ, stated in her January 19, 2017, letter to Chairwoman Joan Delabreau (enclosed), Michigan's framework for consultation with federally-recognized tribal governments is derived from a 2002 Government-to-Government Accord that was entered into between Michigan Governor John Engler and the twelve federally-recognized tribal governments located within Michigan. Governor Rick Snyder issued an Executive Directive in 2012 that directs state executive branch departments, including MDEQ, to adhere to the 2002 Accord (Executive Directive 2012-2) and, upon written request, consult with federally-recognized Indian tribes regarding the matter in question. While the Menominee Tribe is not a party to the 2002 Accord, the MDEQ recognizes your tribe's significant interest in the proposed Back Forty mine project as well as its ancestral history in Michigan's western Upper Peninsula. As a matter of good faith and respect, we invite the Menominee Tribe to participate in a private government-to-government meeting with leaders from the MDEQ. This meeting is being offered to give you and your leadership team an opportunity to provide input directly to the leadership team within the MDEQ who are working on this application.

If you are interested in having such a meeting, we would also like to invite Mr. David Nyberg, Governor's Northern Michigan Office, and representation from Michigan's State Historic Preservation Office (SHPO). In addition, I know your tribe has contacted the United States Environmental Protection Agency's (USEPA), Region 5, office requesting a meeting. The USEPA's Watershed and Wetlands Branch staff, who oversee Michigan's wetland Section 404 Program, have also offered to attend this meeting if you would like them to attend. However, if

you prefer to meet with the USEPA separately, we encourage you to contact the USEPA directly.

If you would like to schedule this Government-to-Government leaders meeting please contact me at 517-284-5470, seidelt@michigan.gov, or MDEQ, P.O. Box 30458, Lansing, Michigan 48909-7958, so we can choose an appropriate date and location for the meeting.

Sincerely,

for Teresa Seidel, Director
Water Resources Division

Enclosure
cc: Ms. Melissa Cook, Intergovernmental Affairs Coordinator, Menominee Indian Tribe of Wisconsin
Mr. Peter Swenson, USEPA, Region 5
Mr. David Nyberg, Governor's Northern Michigan Office
Mr. Dean Anderson, SHPO
Mr. Michael McClellan, Environment Deputy Director, MDEQ
Ms. Katherine Kruse, Tribal Liaison, MDEQ

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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