Warner Norcross&Judd LLP
ATTORNEYS AT LAW

DANIEL P. ETTINGER

616.752.2168
FAX 616.222.2168

dettinger@wnj.com

September 29, 2017

*Via Email and First Class Mail*

Robert A. Kaplan
Acting Regional Administrator
U.S. EPA Region 5
77 W. Jackson Blvd.
Chicago, Illinois 60604

Lt. Col. Dennis P. Sugrue
U.S. Army Corps of Engineers
Detroit District
477 Michigan Ave.
Detroit, Michigan 48226

Re: **Aquila Resources, Inc.'s Response to the Menominee Tribe's August 21, 2017 Letter Requesting Consultation Regarding Permitting of the Back Forty Mine Project under the Clean Water Act**

Dear Mr. Kaplan and Lt. Col. Sugrue:

Our firm represents Aquila Resources, Inc. ("Aquila"). Aquila proposes to develop the Back Forty Project ("Project"), which is an open pit mining operation in Menominee County, Michigan involving the extraction and processing of a polymetallic zinc, copper, and gold ore deposit. We are writing in response to a letter dated August 21, 2017 to the U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("Corps") from Gary Besaw, Chairman of the Menominee Indian Tribe of Wisconsin. In particular, we want to respond to the Menominee Tribe's assertion that the Clean Water Act ("CWA") does not allow for Michigan to assume jurisdiction of the wetlands near the Menominee River in the Project area. This assertion should be rejected because it incorrectly assumes: 1) that the Menominee River in the project area is "navigable"; and 2) that the wetlands in the project area are "adjacent" to a navigable waterbody. Beyond that, the Tribe's position would severely and improperly undermine Michigan's delegated wetlands program. Michigan has been processing Aquila's wetlands permit under the state's delegated authority and should continue to be allowed to do so.

By way of background, Michigan is one of two states that has been delegated jurisdiction over the federal 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 ("MDNR"); 2011 Memorandum of Agreement between Region 5 EPA and the Michigan Department of Environmental Quality ("MDEQ"). Thus, wetlands permits in Michigan are issued by MDEQ under Part 303 of Michigan's Natural Resources and Environmental Protection Act ("NREPA"). Aquila first submitted its Part 303 wetlands permit application to MDEQ in November 2015. The application process has been ongoing for approximately two years. This is the first time that the Tribe has raised this alleged jurisdictional issue. Nevertheless, we would like to address the Tribe's belated argument and

---

explain why the law and the facts do not support the Tribe's claim that MDEQ does not have delegated authority over the minimal wetland impacts being permitted as part of the Back Forty Project.

First, on the issue of the navigability of the Menominee River, the Corps has already determined that only the section of the Menominee River many miles south of the Project area near the City of Menominee is navigable in Michigan. The Corps determined in 1981 that the Menominee River was only navigable in Michigan and Wisconsin from the mouth upstream 1.86 miles to the Interstate Highway Bridge. According to a declaration from John Konik, Chief of the Regulatory Office for the Corps' Detroit District, in a lawsuit involving another mine in the Upper Peninsula (the Eagle Mine), *Huron Mountain Club v. U.S. Army Corps of Engineers*, Case No. 2:12-cv-00197 (W.D. Mich.), "the Corps conducted studies of each and every river and stream in the State of Michigan to determine its navigability. These studies looked at each water's historical, present and potential use for interstate or foreign commerce."

The Corps developed a list of navigable waters in Michigan as a result of those studies, and that list, including the determination regarding the navigability of the Menominee River, was attached to a 1984 Memorandum of Agreement between the Corps and the State of Michigan regarding the enforcement responsibilities of the respective parties. The Corps updated its list in 2012, noting that "with respect to an upper limit to navigability, a river will, at some point along its length, change from navigable to non-navigable." *See also* 33 C.F.R. § 329(11)(b). In that document, the Corps indicated that the Menominee River is navigable up to a dam 2.5 miles above the mouth, still many miles south of the Project area.

CWA Section 404(g)(1) shows that Congress' concern in terms of federal delegation of Section 404 responsibility to a state was Rivers and Harbors Act ("RHA") Section 10 navigability, referring to waters used as a means to transport interstate or foreign commerce. The Corps' 1981 and 2012 navigability lists reflect this priority in allocating CWA jurisdiction between the State of Michigan and the Corps. There is no reason for the Corps to revisit its recent conclusion about the upper limit of navigability for the Menominee River as reflected in its 2012 list. The report of the Assumable Waters Subcommittee cited by the Tribe (which, of course, is not a rule, guidance or law, and is in no way binding on EPA or the Corps) actually supports the Corps' previous conclusion. The majority recommendation of the Subcommittee relies primarily on the Corps' RHA Section 10 navigable waters list to differentiate between assumable waters and those that must be retained by the Corps.

Second, the wetlands in the Project area are not subject to the federal government's jurisdiction under Section 404(g)(1), as they are not part of a navigable waterbody. To begin, the wetlands in the Project area cannot be adjacent to a navigable waterbody because the Corps has already determined that the section of the Menominee River in the Project area is not navigable. Further, even if the Menominee River was somehow deemed navigable in the Project area, the

wetlands would not be "adjacent" wetlands implicated by Section 404(g)(1). There is no evidence that the wetlands in the Project area abut the Menominee River or that the minimal impacts on wetlands from the Project implicate navigability concerns or otherwise affect interstate commerce. Again, the Assumable Waters Subcommittee report cited by the Tribe does not support the Tribe's argument, as the report notes that the concern under CWA Section 404 is with activities taking place in wetlands "that are likely to generate sediment and debris that reach channels and harbors and affect the navigable capacity of waters used to transport interstate or foreign commerce."

Importantly, the wetland impacts associated with the Project are relatively small (the mine pit and processing operations only require about ten acres of wetland fill/removal). As noted above, none of the impacted wetlands are riverine wetlands adjacent to the Menominee River. This fact, coupled with statements in the Tribe's August 21, 2017 letter, indicate that the Tribe is not really concerned about whether any permitted dredge or filling activity associated with the Project in these wetlands will affect the navigable capacity of the Menominee River, but rather about whether the Project will contaminate the Menominee River with pollutants. However, MDEQ already issued a very stringent National Pollutant Discharge Elimination System ("NPDES") permit for discharges from the Project to the Menominee River that both EPA and the State of Wisconsin have reviewed and determined will meet all water quality standards applicable to the river. The Tribe did not challenge the NPDES permit.

From a policy standpoint, the Tribe's position on navigability and the definition of "adjacent" under Section 404(g)(1) would gut Michigan's delegated authority as reflected in the 1983 and 2011 MOAs between EPA and Michigan, in particular in the Upper Peninsula. There is no basis for such a fundamental alteration of Michigan's program. The Subcommittee report cited by the Tribe specifically recommends leaving the Michigan and New Jersey programs alone, recognizing "that these two long-standing programs were created through specific state-district negotiations and have established functional track records."

It is important to note that neither EPA nor the Corps is required to revisit its recent determination regarding the navigability of the Menominee River and make a formal jurisdictional determination here simply because the Menominee Tribe has requested one. The Tribe's claim that the agencies somehow have a non-discretionary duty to conduct an Approved Jurisdictional Determination ("JD") is simply incorrect.

Under the Corps' CWA rules and guidance, the Tribe is not entitled to request an Approved JD. Recent Corps guidance makes it clear that the CWA and RHA regulations do not create a right to a JD, and that only an affected party, such as the permit applicant (Aquila) or someone who otherwise has a substantial legal interest in the property where the proposed activity will take place, may request an Approved JD. *See* Corps Regulatory Guidance Letter No. 16-01 (October 2016); 33 C.F.R. §331.2 (defining "affected party"); U.S. Army Corps of Engineers, Jurisdictional Determination Form Instructional Guidebook 47 (2007). Given the

Tribe's distance from the regulated wetlands at issue it is not at all clear that the Tribe would even have standing to challenge a wetlands permit decision, let alone demand an Approved JD.[1]

Moreover, in the *Huron Mountain Club* litigation referenced by the Tribe, the Sixth Circuit clearly held that "Section 404 of the CWA . . . lacks language compelling the Corps to administer the CWA permitting program, and in fact includes language that explicitly leaves the process of issuing permits to the Corps' discretion." *Huron Mountain Club v. U.S. Army Corps of Engineers*, 545 Fed. Appx. 390, 394 (6th Cir. 2013). The Sixth Circuit further noted that "HMC has not shown that the RHA and CWA dictate any 'discrete action' the Corps is 'required' to take with regard to parties who have not submitted RHA and CWA permit applications and in the absence of a request for a jurisdictional determination." *Id.* at 393. As the Sixth Circuit concluded: "It is clear from the text of the CWA that Congress did not contemplate placing the burden on the agency to initiate the permit process, but rather to process permit applications once filed." *Id.* at 394.

Finally, it is important to note that, in order to support the Project and MDEQ's permitting processes, and to attempt to address Tribal concerns in a responsible and culturally sensitive manner, Aquila has engaged in substantial outreach efforts to the Menominee Tribe and other Tribes in the vicinity of the Project over the past decade.[2] Aquila's efforts have included several meetings with the Menominee Tribe, including a meeting on the reservation, two site visits to examine cultural resources of interest, and a presentation by Aquila's consultant to provide a detailed explanation of Aquila's groundwater modeling for the Project. Aquila has also conducted thorough cultural and archeological resource surveys in the Project area. These surveys were reviewed by Michigan's State Archaeologist and were also provided to the Menominee Tribe. Aquila submitted a summary with supporting materials documenting these engagement efforts to MDEQ. A copy of the engagement summary without the supporting materials is attached for your reference. A copy of the summary with the voluminous supporting materials can be downloaded using the following link: https://files.wnj.com/Tribal%20Engagement%20Summary%20with%20Attachments.

While the Project has been in the works for quite some time, the Menominee Tribe's opposition is much more recent. Aquila is disappointed that the Tribe has now passed a

[1] The Menominee Tribe's reservation is located in Wisconsin approximately 70 miles from the Project. And although Aquila understands that certain opponents of the Project recently donated property along the Menominee River to the Tribe for the express purpose of helping the Tribe attempt to establish standing to challenge the Project, this property is still some 20 miles downstream of the Project.

[2] This effort included outreach to numerous federally recognized tribes in the region regardless of whether they have any reserved treaty rights in the Project area. The Menominee Tribe does not have treaty rights in the Project area.

resolution opposing the Project, and has made numerous public comments about how stopping the Project is its ultimate goal, working with other Project opponents to undermine the Project however possible. These efforts include a state contested case challenge to Aquila's state mining permit. The Menominee Tribe's recent letter is just the latest tactic employed to achieve the Tribe's goal of stopping the Project by compelling lengthy federal duplication of cultural and environmental studies already completed in support of the state mining permit.

In sum, federal jurisdiction over Aquila's wetlands permit is not justified here and the Tribe's request should be rejected. That being said, Aquila continues to stand ready to meet with the Menominee Tribe and discuss its concerns, including any concerns it has about the wetlands permit.

Thank you for your consideration.

Very truly yours,

Daniel P. Ettinger

Enclosure

16289400