STATE OF MICHIGAN
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

In the matter of:	**Docket No.: 18-013058**
The Petitions of Tom Boerner, Menominee Indian Tribe of Wisconsin, and Coalition to SAVE the Menominee River on the permit issued to Aquila Resources Inc. (Consolidated Cases)	**Permit No.: WRP017785**
	Part(s): 31, Floodplain Regulatory Authority 301, Inland Lakes and Streams 303, Wetlands Protection
	Agency: Department of Environment, Great Lakes, and Energy
_____/	**Case Type: Water Resources Division**

Issued and entered
this 4th day of January 2021
by Daniel L. Pulter
Administrative Law Judge

FINAL DECISION AND ORDER

This contested case concerns an Application submitted by Aquila Resources Inc. (Aquila) for a permit under Part 31, Floodplain Regulatory Authority; Part 301, Inland Lakes and Streams; and Part 303, Wetlands Protection, of the Natural Resources and Environmental Protection Act (NREPA), 1994 PA 451, as amended. MCL 324.3104; MCL 324.30101, *et seq.*; MCL 324.30301, *et seq*. The Water Resources Division (WRD) of the Department of Environment, Great Lakes, and Energy (EGLE) issued a permit on June 4, 2018.[1] That agency action was challenged by Tom Boerner by filing a Petition for Contested Case Hearing on June 11, 2018. Similar Petitions for Contested Case Hearing were filed by the Coalition to SAVE the Menominee River, Inc. (Coalition) under Docket No. 18-016280 and by the Menominee Indian Tribe of Wisconsin (Menominee)

[1] The permit in this case was issued by the Department of Environmental Quality (DEQ). Pursuant to Executive Order 2019-06, effective April 22, 2019, the name of the agency was changed to the Department of Environment, Great Lakes, and Energy. All citations in the record to DEQ shall be treated as a reference to EGLE. In addition, Executive Order 2019-06 also abolished the Michigan Administrative Hearing System (MAHS) and created the Michigan Office of Administrative Hearings and Rules (MOAHR). In that Executive Order, the authorities, powers, duties, functions, and responsibilities of MAHS were transferred to MOAHR.

under Docket No. 18-016422. On September 27, 2018, a Stipulated Order was entered, consolidating the three contested cases and granting Aquila's intervention in the consolidated case.

On March 4, 2019, the WRD filed a Motion for Summary Disposition as to the Part 31 aspects of this contested case. Because none of the Parties raised challenges to its Part 31 decision-making, this Tribunal entered an Order granting the WRD's Motion. Therefore, this contested case will be limited to a determination of whether Aquila is entitled to a permit under Part 301 and Part 303 of the NREPA.

JURISDICTION

Parts 301 and 303 grant the right to a contested case hearing to a person "aggrieved by any action … of the department…." MCL 324.30110(2); MCL 324.30319(2). Mr. Boerner, the Coalition, and Menominee (collectively Petitioners) claimed they were aggrieved by the issuance of the permit on June 4, 2018.[2] Consistent with the foregoing authorities, a contested case hearing was conducted over twenty days on June 3-7, 2019; June 10-13, 2019; August 5-9, 2019; August 12-14, 2019; and October 23-25, 2019. The hearing was conducted under the applicable provisions of the Administrative Procedures Act (APA), 1969 PA 306, as amended. MCL 24.201, e*t seq.* The record was closed at the conclusion of the hearing. Closing briefs and response briefs were filed in accordance with the agreed schedule of the Parties.

PROPERTY RIGHTS PRESERVATION ACT

Pursuant to the Property Rights Preservation Act, 1996 PA 101, MCL 24.421, *et seq*., the undersigned, in formulating this Final Decision and Order, reviewed the Takings Assessment Guidelines and considered the issue of whether this governmental action equates to a constitutional taking of property. Const 1963, art 10 § 2.

[2] In a Motion for Summary Disposition, Aquila alleged that the Coalition was not "aggrieved." Aquila's Motion was denied in an Order entered on May 14, 2019.

PARTIES

I. Petitioners

A. Mr. Boerner appeared *in propria persona* and offered the testimony of the following witnesses.

1. Michael Boerner, the brother of the adjoining landowner to the proposed project (10 Tr 2059-2085).

2. Tom Boerner, the adjoining landowner to the proposed project (10 Tr 2086-2268).

Through these witnesses, Mr. Boerner entered Exhibits P-502, P-512 through P-522, P-524, P-560,[3] P-562, P-563, P-569, P-605, P-606, and P-648.[4]

B. The Coalition was represented by Ted A. Warpinski of the firm Davis & Kuelthau, s.c. The Coalition offered the testimony of the following witnesses:

1. Dave Chambers, Ph.D., the Founder and President of the Center for Science in Public Participation (4 Tr 820-892).

2. Sophia Sigstedt, a certified professional hydrogeologist for Lynker Technologies (6 Tr 1235-1327).[5]

3. Dale Burie, the President of the Coalition to SAVE the Menominee River (10 Tr 2221-2268).

Through these witnesses,[6] the Coalition entered Exhibits P-4, P-100, P-111, P-131, P-132 (second page only), P-135 (first page only), P-159, P-161, P-162, P-163, P-164, and P-165.

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[3] Exhibit P-560 was admitted for the limited purpose stated on the record. 10 Tr 2162-2168.

[4] The Exhibits in this contested case have been submitted electronically on compact disks (CD) in portable document format (PDF). All references to exhibit page numbers are to the PDF page number of the electronic Exhibit, not the page number at the bottom of the exhibit.

[5] Ms. Sigstedt was jointly called by both the Coalition and Menominee. 6 Tr 1234.

[6] The Coalition also entered the testimony of Tim Landwehr and Dr. David Hyndman from the Part 632 contested case, *Petition of Boerner*, 2019 WL 6717176 (Mich.Dept.Nat.Res.). Exhibit P-161; and Exhibits P-164 and P-165.

C. Menominee was represented by Janette K. Brimmer and Stephanie K. Tsosie of the firm Earthjustice. Menominee offered the testimony of the following witnesses:

1. Douglas Cox, the Chairman of the Menominee Indian Tribe of Wisconsin (4 Tr 893-906; 5 Tr 914-988).

2. Dave Grignon, the Tribal Historic Preservation Officer for the Menominee Indian Tribe of Wisconsin (5 Tr 991-1041).

3. David Overstreet, Ph.D., an adjunct professor of archeology at the College of Menominee Nation (5 Tr 1042-1116).

4. Alice Thompson, a professional wetland scientist for Thompson and Associates Wetland Services, LLC (6 Tr 1328-1575).

Through these witnesses,[7] Menominee entered Exhibits P-251, P-252, P-253, P-262, P-268,[8] P-269,[8] P-270,[8] P-271,[8] P-272,[8] P-273, P-274, P-275, P-276, P-283, P-286, P-287, P-288, P-288A, P-289, P-293,[9] P-298, and P-348.

II. Respondent

A. The WRD was represented by Andrew T. Prins and Charles A. Cavanagh, Assistant Attorneys General. The WRD offered the testimony of the following witnesses:

1. Kristina Wilson, an Environmental Quality Specialist for the WRD (1 Tr 66-242; 2 Tr 250-448; 3 Tr 455-650; 4 Tr 657-819).[10]

2. Kim Fish, formerly (but now retired) Assistant Division Chief for the WRD (6 Tr 1122-1206).

3. Teresa Seidel, the WRD Director (6 Tr 1207-1234).

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[7] Menominee also entered the testimony of Dave Grignon and Dr. David Overstreet from the Part 632 contested case, *Petition of Boerner*, 2019 WL 6717176 (Mich.Dept.Nat.Res.). Exhibit P-348. In addition, Menominee submitted an additional CD purporting to cover all the exhibits admitted into evidence in this case. However, such CD included the testimony of Dr. Marla Buckmaster from the Part 632 case. Because such testimony was never offered into evidence when the record was open in this case, such testimony is excluded herein.

[8] Exhibits P-268 through P-276 were admitted for the limited purpose stated on the record. 5 Tr 946-947.

[9] While pages 28-32 of Exhibit P-293 were conditionally admitted into evidence, these pages are no longer conditionally admitted because the proponent of the evidence, Ms. Thompson, testified and was available for cross-examination. 5 Tr 918-921; 7 Tr 1382.

[10] A portion of Ms. Wilson's testimony was taken during an *in camera* proceeding. 3 Tr 484-501. That portion of the transcript has been sealed by this Tribunal separate and apart from the remainder of the transcript.

4. Michael Pennington, the Wetland Mitigation and Banking Specialist for EGLE (7 Tr 1576-1590; 8 Tr 1596-1795).

5. Jill Van Dyke, a Geology Specialist for the Water Use Program for the WRD (8 Tr 1796-1829; 9 1837-1969; 19 Tr 4022-4066).

6. Eric Chatterson, a Geology Specialist within the Groundwater Permits Unit for the WRD (9 Tr 1970-2050).

7. Luis Saldivia, Field Operations Section Manager for Lakes Michigan and Superior at the WRD (19 Tr 4067-4141).

Through these witnesses, the WRD entered Exhibits R-1, R-2, R-4, R-5, R-8 through R-11, R-13 through R-15, R-17, R-20, R-25, R-26, R-32, R-39, R-41, R-42, R-49, R-51, R-54, R-56, R-57, R-59, R-61, R-62, R-63 (pages 1 through 7 only) , R-64,[11] R-65 through R-70, R-72, R-74 through R-77, R-80, R-81, R-84 through R-87, R-90, R-92 through R-96, R-99, R-100, R-102 through R-107, R-109 through R-111, R-114 through R-116, R-119, R-126, R-133, R-135, R-141, R-143, R-146, R-148, R-155, R-156, R-157,[12] R-157A, R-164, R-167, R-168, R-174, R-175, R-179 through R-182, R-184, R-189, R-190, R-194, R-195, R-197, R-209, R-210, R-214, R-216, R-217, R-221, R-229, and R-230 through R-234.

III. Intervenor

A. Aquila was represented by Daniel P. Ettinger, Christopher J. Predko, and Ashley G. Chrysler of the firm Warner, Norcross & Judd LLP. Aquila offered the testimony of the following witnesses:

1. Stephen V. Donohue, a licensed professional hydrologist who is employed as the Vice President of Mining by Foth Infrastructure & Environment, LLC (11 Tr 2302-2507; 12 Tr 2513-2699; 13 Tr 2722-2940; 14 Tr 2946-3100).

2. Kenneth A. Bocking, Senior Geotechnical Engineer for Golder Associates Ltd. (14 Tr 3102-3161).

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[11] Exhibit R-64 was conditionally admitted into evidence for the limited purposes stated on the record. 2 Tr 390-395.

[12] While Exhibit R-157 was conditionally admitted into evidence, this Exhibit is no longer conditionally admitted because the proponent of the evidence, Ms. Van Dyke, testified and was available for cross-examination. 6 Tr 1278-1286; 9 Tr 1865.

3. Steven Koster, an environmental consultant for Environmental Resources Management (15 Tr 3173-3182).

4. Jacquie Payette, an archaeologist for Environmental Resources Management (15 Tr 3183-3239).

5. Jeffrey King, a wetlands consultant for King & MacGregor Environmental (15 Tr 3240-3394; 16 Tr 3401-3588).

6. Donald L. Tilton, Ph.D., a wetlands consultant for Tilton Enterprises, LLC. (17 Tr 3596-3817).

7. Peter F. Andersen, a groundwater hydrology and civil engineering professional for Tetra Tech (18 Tr 3823-3983; 20 Tr 4147-4216).

8. Tony Retaskie, the Executive Director of the Upper Peninsula Construction Council (18 Tr 3984-4012).

Through these witnesses,[13] Aquila entered Exhibits I-1 through I-9, I-17, I-21, I-24 through I-26, I-40, I-54, I-59, and I-61 through I-74.

STIPULATIONS ON THE RECORD

During the Pre-Hearing Conference held on December 18, 2017, the Parties stipulated that:

1. Aquila is the proper applicant; and

2. The proposed activity is regulated, and a permit is required.

Scheduling Order entered on November 26, 2018.[14] Stipulations by the Parties are evidence and are binding on the Parties. MCL 24.278. Since these stipulations are factual, I adopt them as Findings of Fact.

[13] Aquila also entered the testimony of Jacquie Payette, Steven Koster, Peter Anderson, Mark Ciardelli, Greg Council, and Steven Donohue from the Part 632 contested case, *Petition of Boerner*, 2019 WL 6717176 (Mich.Dept.Nat. Res.). Exhibit I-65; Exhibit I-66; Exhibit I-67; Exhibit I-68; Exhibit I-69; and Exhibit I-70.

[14] One of the "standard" stipulations in contested cases is that the Department has jurisdiction. In this case, both the Coalition and Menominee were unwilling to make such a stipulation, because they believe that jurisdiction is appropriate in federal court under § 404 of the Clean Water Act. 33 USC § 1344(g). On December 21, 2018, the Coalition filed a Motion to Stay and to Hold Proceeding in Abeyance. That Motion was denied by an Order entered on January 29, 2019. Similarly, Menominee filed a Motion for Summary Disposition under § 404 of the (continued…)

FINDINGS OF FACT

I. The Application Process

Aquila filed two applications for a Part 301 and Part 303 permit. The first application was filed in 2015 (2015 Application), and after two revisions was withdrawn in 2016. The second was filed in 2017 (2017 Application) and, after it was also revised on two occasions, was approved in a permit issued on June 4, 2018. The specifics of each application, along with the site plans submitted with each, are addressed as follows:

A. 2015 Application

An Application for a permit under Part 301 and Part 303 was filed by Aquila on November 16, 2015. Exhibit R-4. This Application sought a permit authorizing direct impacts to **2.1 acres** of regulated wetlands. Exhibit R-4 at p 7. Specifically, the Application contemplated dredging 12,261 cubic yards of material from 1.9 acres of wetland and placing 1,291 cubic yards of fill within 0.2 acres of wetland. *Id.* The proposed project also contemplated the placement of a discharge pipe below the Ordinary High-Water Mark (OHWM) of the Menominee River at a location to be determined. *Id* at p 5. The actions taken on this Application include the following:

- The WRD determined that the Application was not administratively complete and sent a Correction Request letter dated December 2, 2015. Exhibit R-5. This letter noted that "[a]ll impacts to wetlands, including indirect or secondary impacts, must be included on the application."[15] *Id* at p 2. Aquila's response to the Correction Request letter is dated January 15, 2016. Exhibit I-5. Aquila's second response to the Correction Request letter is dated March 29, 2016. Exhibit I-6.

(…continued) Clean Water Act. That Motion was denied by an Order entered on May 14, 2019. Both the Coalition and Menominee have preserved this issue for review.

Another of the "standard" stipulations is that the application was processed correctly. The Coalition was also unwilling to make this stipulation because it contends that the application was not administratively complete. This contention is addressed *infra*.

[15] "Indirect impacts are impacts to wetland quality, value, and function that could be realized through other direct impacts." 1 Tr 89.

- The Application was amended in a filing dated April 18, 2016.[16] Exhibit I-8. In this amendment, the amount of fill to be placed within wetlands was increased to 4,747 cubic yards. *Id* at p 13. Also, the amendment included a request to place 11 cubic yards of riprap below the OHWM of the Menominee River. *Id* at p 14.
- The Application was amended a second time by a filing dated August 5, 2016.[17] Exhibit I-9. This filing included a request for a permit to cover direct impacts to wetlands of **9.13 acres**[18] and indirect impacts to wetlands of **5.5 acres**. Exhibit I-9 at p 59.
- The Application was deemed administratively complete, and a public notice dated May 17, 2016, was sent by the WRD. Exhibit R-10; 1 Tr 83.
- On May 18, 2016, representatives of the WRD and the United States Environmental Protection Agency (EPA) conducted a site visit of the project area. Exhibit R-11; 1 Tr 83. At the site visit, additional regulated resources were identified that were not included in the Application. *Id*.
- By letter dated August 15, 2016, the EPA advised the WRD of its objections to the issuance of a permit covering the proposed project. Exhibit R-10. The EPA noted that the proposed project will involve "dewatering of 12.53 acres of wetlands." *Id* at p 1.
- Due to concerns raised by the EPA, the WRD sent Aquila a letter for Clarification and Amplification dated August 26, 2016. Exhibit R-11; 1 Tr 81-82. This letter requested Aquila to "[p]rovide analysis on the direct and indirect impacts to wetlands within the affected watersheds as a result of pit dewatering." Exhibit R-11 at p 2.

[16] This filing was signed on "18/4/16." Exhibit I-8 at p 12. In this notation, the day appears before the month.

[17] This filing was signed on "5/8/16." Exhibit I-8 at p 12. In this notation, the day appears before the month.

[18] The form of the amended application only noted direct impacts to 1.9 acres by dredging and 0.2 acres by the placement of 4,747 cubic yards of fill. Exhibit I-9 at p 13. However, this information conflicted with information explained on pages 17 and 18 of the filing. *Id* at pp 17-18.

- Representatives of EGLE, the EPA, and Aquila met on September 13, 2016, to discuss the comments in the letter for Clarification and Amplification. Exhibit I-10.
- The 2015 Application, as amended, was withdrawn by Aquila by a letter dated September 22, 2016. Exhibit I-10; 1 Tr 84.

B. 2017 Application

Aquila filed a second Application for a permit dated January 13, 2017, under Part 31, Part 301, and Part 303. Exhibits R-14(1), R-14(2), R-14(3), R-14(4), R-14(5), and R-14(6).[19] This Application sought a permit authorizing direct impacts to **5.8 acres** of regulated wetlands. Exhibit R-14(1) at p 13. Specifically, the Application contemplated dredging 824,600 cubic yards of material from 1.9 acres of wetlands and placing 159,290 cubic yards of fill in 3.90 acres of wetland and within 332 linear feet of an intermittent stream channel. *Id*. The Application also contemplated indirect impacts to **10.36 acres** of regulated wetlands, as well as 422 linear feet of an intermittent stream channel. *Id* at p 14. This Application conceded that the drawdown of water within the pit could cause indirect wetland impacts. Exhibit R-14(3) at p 9. The proposed project also contemplated the placement of 28 cubic yards of riprap below the OHWM of the Menominee River, as well as the installation of a discharge pipe below the OHWM. *Id* at pp 17, 18. Further, this Application contained a second proposed site plan for the project. See the Site Plan section *infra*. The actions taken on this Application include the following:

- The WRD determined that the Application was not administratively complete and sent a Correction Request letter dated January 26, 2017. Exhibit R-17. This letter requested Aquila to "address and evaluate the proposed pit dewatering operation … and the wetland impacts that will result from this activity." *Id* at p 3. On April 3, 2017, the WRD sent to Aquila an addendum to this Correction Request letter concerning the Part 31 floodplains aspects of the project. Exhibit R-20.

[19] Exhibit R-14 is such a voluminous document that it was saved in six parts, denoted as Exhibits R-14(1), R-14(2), R-14(3), R-14(4), R-14(5), and R-14(6).

- On September 1, 2017, the WRD met with Aquila's representatives to discuss the information sought in the Correction Request letters, specifically the indirect impacts analysis. Exhibit R-39.
- In response to the Correction Request letters, Aquila filed a revised Application dated October 2, 2017 (the first revision to the Application). Exhibit R-42. The first revision to the Application sought a permit authorizing direct impacts to **11.21 acres** of regulated wetlands. Exhibit R-42 at pp 10, 13, 29. Specifically, Aquila sought to dredge 980,820 cubic yards of material from 5.3 acres of wetlands, and to place 803,453 cubic yards of fill within 5.91 acres of wetland and 253 linear feet of intermittent streams. *Id*. The first revision to the Application also sought a permit authorizing indirect impacts to **17.0 acres** of regulated wetlands. *Id*. Further, the first revision to the Application contained a third proposed site plan for the project. See the Site Plan section *infra*.
- After completing its review, the WRD determined that the first revision to the Application was not administratively complete and sent Aquila a Request for Clarification letter dated October 20, 2017. Exhibit R-51. This letter was sent to Aquila because there were items previously addressed with the applicant that were still not adequately defined within the revised Application. 1 Tr 138. Among the information sought in the Request for Clarification was information regarding Aquila's groundwater computer model. Exhibit R-51; 1 Tr 138-139.
- Aquila sent a document to the WRD in November of 2017 that addressed indirect wetland impacts of the project. Exhibit R-56.
- Aquila filed a second revised Application dated December 7, 2017 (the second revision to the Application). Exhibit R-59. The second revision to the Application sought a permit authorizing direct impacts to **11.22 acres** of regulated wetlands. Exhibit R-59 at p 10. Specifically, Aquila sought to dredge 980,820 cubic yards of material from 5.31 acres of wetlands and to place 803,453 cubic yards of fill within 5.91 acres of wetland and 253 linear

feet of intermittent streams. *Id*. The second revision to the Application also sought a permit authorizing **17.17 acres** of indirect wetland impacts. *Id*.

- While Ms. Wilson did not believe that the Application, as revised, was administratively complete,[20] that determination was made by Ms. Fish, the Assistant Division Chief. 2 Tr 356. The Application was placed on public notice on December 8, 2017. Exhibit R-61. Pursuant to the public notice, the public hearing was held on January 23, 2018. Exhibit R-61; 1 Tr 149. In addition to the public hearing, the WRD received written public comments on the Application until February 3, 2018. 1 Tr 150; Exhibit R-72. In total, the WRD received approximately 3,400 written comments. 1 Tr 150. The WRD used these comments, in part, for its determination of public interest for the project. 1 Tr 151. See MCL 324.30311(2).
- On January 19, 2018, the WRD sent a Request for Clarification and Amplification to Aquila. Exhibit R-62. This letter was sent because the WRD had not received a response to the Letter for Clarification sent on October 20, 2017. Exhibit R-51; 1 Tr 152-153. The first portion of the letter involved a request for information related to Aquila's groundwater computer model. Exhibit R-51; 1 Tr 153. The second portion of the letter related to questions regarding indirect impacts to wetlands. 1 Tr 156. Aquila's response to the January 19, 2018, Request for Clarification and Amplification was contained in Exhibit R-76, which was sent in March of 2018.
- On February 8, 2018, Ms. Wilson had an in-person meeting with Mr. King and via telephone with Dr. Tilton. Exhibit R-69. Both Dr. Tilton and Mr. King agreed that there was insufficient data supplied with the Application to determine whether the wetlands within the project area are perched,[21] but Aquila's third consultant, Foth Infrastructure & Environment, LLC, did not

[20] Ms. Wilson believed that the impacts of the project would be greater than those referenced in the Application. 2 Tr 357.

[21] A perched wetland is disconnected from groundwater influx through some form of restrictive feature such as a lens of restrictive soils or bedrock. 1 Tr 129-130.

agree with this assessment. *Id* at p 1. During this meeting, the parties also addressed Aquila's groundwater computer model. *Id*.

- On March 2, 2018, the WRD sent a letter to Aquila seeking its response to the public comments received by the agency. Exhibit R-72. Aquila's response sent in March of 2018 is contained in Exhibit R-80.
- In a letter dated March 8, 2018, the EPA notified the WRD that it objected to the issuance of a permit to Aquila. Exhibit R-74. Among its concerns, the EPA noted that Aquila has not provided information related to "all impacts of the project identified in the application" and that, without this information, "the reviewing agencies cannot adequately assess the extent of the proposed mine's impact on aquatic resources…." *Id* at p 1.
- By letter dated March 19, 2018, the WRD forwarded the EPA's objection letter. Exhibit R-77. In this letter, the WRD requested Aquila to "[p]rovide a clear distinction on what is determined to be an impact, both direct and indirect or secondary." *Id* at p 2. In addition, the WRD requested Aquila to provide "[a]dditional documentation … to establish that pit dewatering will not lower the water table within wetlands." *Id*. Aquila's response sent in April of 2018 was contained in Exhibit R-87.
- In an email dated April 27, 2018, Aquila sought to increase the amount of wetland impacts to "approximately **42 acres** of wetland, approximately **31 acres** of which would be indirect and temporary." Exhibit P-111 (emphasis supplied). The email further provided that, "[a]ssuming our above math is correct, the total requested permit impact would be 42.4 acres, 11.2 acres of which would be permanent, and 31.2 which would be temporary." *Id*.
- By letter dated April 5, 2018, Aquila responded to the EPA's March 8 objection letter. See Exhibit R-99. A copy of this letter was not provided to the WRD and was not made a part of the record in this case by Aquila.
- On April 16, 2018, Aquila met in Chicago with the following members of the EPA: Chris Korleski, Wendy Melgin, Melanie Burdick, and Peter Swenson. 12 Tr 2628. Subsequent to this meeting, Aquila provided additional documentation to the EPA on April 23, 2018. *Id*; Exhibit R-99. This documen-

tation was not provided to the WRD and was not made a part of the record in this case by Aquila.

- Upon the WRD's completion of its processing of the Application, Ms. Wilson prepared a document dated April 30, 2018, entitled Finding of Fact and Conclusion of Law. Exhibit R-92. In this document, it was concluded that a permit could be granted under Part 31, Floodplain Regulatory Authority, but that the Application should be denied under Parts 301 and 303. Exhibit R-92 at pp 5, 12, 27. With respect to Part 303, this document noted that the assessment of impacts to wetlands are underestimated and that the extent of such impacts cannot be determined by the information currently provided in the Application. Exhibit R-92 at p 14. Neither Ms. Fish, the Assistant Division Chief, nor Ms. Seidel, the Director of the WRD, disagreed with the Finding of Fact document prepared by Ms. Wilson. 6 Tr 1167; 6 Tr 1234.
- On May 4, 2018, the WRD received a letter from the EPA which stated that Aquila had provided information to the EPA related to its objections to the project such that "a number of objections identified in EPA's March 8 letter have been resolved." Exhibit R-99. The EPA further noted that "we believe that there is a ready pathway for the resolution of EPA's remaining objections through [EGLE's] inclusion of specific conditions in a final permit issued by June 6, 2018." *Id.* At the time of the WRD's receipt of this letter, Aquila had not met the statutory criteria of Parts 301 and 303 for a permit to be issued. 2 Tr 337.
- In response to the EPA's letter, Ms. Wilson received direction from WRD management to start drafting permit conditions to alleviate the objections to the Application. 1 Tr 177. To fulfill this charge, Ms. Wilson requested Ms. Van Dyke, Mr. Pennington, and Mr. Chatterson to draft permit conditions "that would identify all the information that we would need to determine the assessment of impacts under Part 303 and 301, and we would take that information, essentially reiterate the information that we had previously requested in the letters for clarification and amplification and turn that into requirements of a permit." 1 Tr 177. Ms. Wilson emphasized that "essen-

tially the information that we would require to determine impacts would need to be provided prior to the initiation of the project." *Id*.

- On May 25, 2018, the WRD forwarded to the EPA a draft permit containing extensive conditions for its review. Exhibit R-104. In a letter dated June 1, 2018, the EPA stated that "the conditions in the draft permit would satisfy EPA's objections, provided a final permit containing these conditions is timely issued by [EGLE] … by June 6, 2018…." Exhibit R-105.
- A permit was signed by the Director of EGLE on June 4, 2018. Exhibit R-107. The permit authorized direct impacts to **11.22 acres** of wetlands, and indirect impacts to "approximately" **17.17 acres** of wetlands. *Id*. It authorized the dredging of 980,820 cubic yards of material within 5.31 acres of wetland, the placement of 803,453 cubic yards of fill within 5.91 acres of wetland and within 253 linear feet of intermittent stream channel, and the placement of 15 cubic yards of riprap and a 15-inch diameter outfall pipe below the OHWM of the Menominee River. *Id*.
- In a letter dated October 24, 2018, Ms. Fish purported to "clarify the requirements and meaning of several sections of the permit." Exhibit R-217 at p 1. This letter recited that "[t]he revised model and subsequent monitoring will be used to validate groundwater model predictions" and to "verify the predicted and potential effects of the drawdown/dewatering of the wetlands and/or streams from the mining operations." *Id* at p 2.

II. The Site Plan

There have been three site plans proposed in the various iterations of the Application filed in this contested case. The site plan contained in the 2015 Application is identical to the site plan in the Part 632 Application. See *Petition of Boerner*, 2019 WL 6717176, at *7-9 (Mich.Dept.Nat.Res.); Exhibit R-4 at p 14. This plan consists of a pit located approximately 150 feet from the Menominee River. *Id*. The plan includes an Oxide Tailings and Waste Rock Management Facility (OTWRMF) located immediately adjacent to Mr. Boerner's property. *Id*. The plan also includes a Flotation Tailings and Waste Rock Management Facility (FTWRMF) located south of the OTWRMF. *Id*.

With respect to wetland impacts, this plan involves dredging 1.9 acres of wetland WL-15b due to the location of the pit and placing 1,291 cubic yards of fill within 0.2 acres of wetland WL-B1 for the construction of a road. Exhibit R-4 at pp 7, 12; 1 Tr 79. It was subsequently determined by delineation that the plan includes direct impacts to additional wetlands, such as wetlands WL-2c and WL-4A. Compare Exhibit R-4 at p 14 with Exhibit R-42 at p 31. This site plan avoids direct impacts to the wetland complex WL-B1 and WL-B2. Exhibit R-4 at p 14. The total footprint of the project in this site plan is 865 acres. Exhibit R-4 at p 54.

A second site plan was contained in the 2017 Application. Exhibit R-14(1) at p 37. It is unclear from the Application whether this site plan increased the overall acreage of the project's footprint. See Exhibit R-14. Of note, this site plan no longer contains separate oxide and flotation tailings facilities. See Exhibit R-14(1) at p 37. Also, the Waste Rock Management Facility (WRMF) is no longer proposed to be immediately adjacent to Mr. Boerner's property in the north but is now south an undisclosed distance from the southerly boundary of his property. *Id*. The location of the pit, the contact water basins, and the topsoil/overburden stockpiles are the same as the first site plan. *Id*. However, all other mine facilities (*i.e.*, the laydown area, general operations area, ore blending area, and beneficiation facilities) are proposed to be located between the pit/ contact water basins and the WRMF. *Id*.

With respect to wetland impacts, the 2017 Application sought a permit covering direct impacts to 5.8 acres of regulated wetlands, including dredging 824,600 cubic yards of material from wetland WL-14b and the placement of 159,290 cubic yards of fill in 3.90 acres of wetland WL-B2. Exhibit R-14(1) at pp 13, 37. It was subsequently determined by delineation that the plan includes direct impacts to additional wetlands, such as wetlands WL-2c and WL-4A. Compare Exhibit R-14(1) at p 37 with Exhibit R-42 at p 31.

A third site plan was contained in both the first and second revisions to the 2017 Application. Exhibit R-42; Exhibit R-59. See also Exhibit I-64 at p 8. According to the second revision to the Application, "[t]he Project boundary consists of a total of approximately 1,094.5 acres, approximately 92.5 acres of which consist of regulated wetlands." Exhibit R-59 at 374. In this site plan, a mine waste storage area is located immediately south of the pit. Exhibit R-59 at p 31. Immediately east of the mine waste storage area

are two contact water basins. *Id.* East of this proposed feature is an ore blending area, ore stockpiles, and a process plant. *Id*. Ore stockpiles are also located immediately east of the pit. *Id*. East of these stockpiles is a second mine waste storage area. *Id*.

This site plan, which was revealed after the WRD conducted its wetland delineation in 2017, contains direct impacts to 11.22 acres of regulated wetlands. Exhibit R-59 at p 10. Specifically, the third site plan calls for 980,820 cubic yards of material to be dredged from 5.31 acres of wetlands (wetland WL-15b) and to place 803,453 cubic yards of fill within 5.91 acres of wetland and 253 linear feet of intermittent streams (wetlands WL-B-1, WL-52, WL-B1c, WL-B2, WL-6, WL-4A, and WL-2c). Exhibit R-59 at pp 29, 31.

The third site plan contained in the first and second revisions to the 2017 Application is the project that was ultimately considered by the WRD and approved in the permit and is considered in this case. Cf Exhibit R-107 at p 37 with Exhibit R-42 at p 31 and Exhibit R-59 at p 31.

I. PRELIMINARY MATTERS

A. Standard of Review

In their Closing Briefs, each of the Parties suggest that the other party has not met its burden of proof. However, as the Parties agree, this contested case is "an extension of the initial application process for the purpose of arriving at a single final agency decision on the application…." *National Wildlife Fed'n v Department of Envtl Quality (No. 2)*, 306 Mich App 369, 379; 856 NW2d 394 (2014). As such, the Parties are obligated to put on proofs to support their respective positions. Therefore, a party may not simply argue that the other party failed to meet their burden. This Tribunal will review the proofs entered into evidence by all of the Parties to determine whether Aquila is entitled to a permit under the statutory criteria.

B. Part 303 Jurisdiction

Part 303 is implicated if a jurisdictional activity occurs in the proposed project. MCL 324.30304. The jurisdictional activities identified in Part 303 are (a) placing fill material in a wetland, (b) dredging or removing soil from a wetland, (c) constructing or operating a use in a wetland, and (d) draining surface water from a wetland. *Id*. In this case, the

second revision to the Application contemplated excavating 980,820 cubic yards of material from 5.31 acres of wetlands and placing 803,453 cubic yards of fill within 5.91 acres of wetland. Exhibit R-59 at p 10. Hence, the proposed project clearly implicates activities covered by § 30304 (a) & (b) which require a permit from the WRD for dredging or filling a wetland. MCL 324.30304 (a) & (b). Indeed, the permit issued by the WRD expressly covers these jurisdictional activities. Exhibit R-107.

However, a discrete question in this case is whether a third jurisdictional activity is implicated. Namely, whether the proposed project involves draining surface water from a wetland. MCL 324.30304(d). This question is relevant because the proposed project involves a 700-foot-deep open pit mine. To prevent the mine from filling with water during mining operations, Aquila intends to pump water from the pit. This dewatering of the pit will cause a cone of depression with a predicted drawdown of groundwater to a depth of approximately 23 feet near the pit and 1.6 feet one mile from the pit rim.[22] Exhibit I-5 at p 44. See also Figure 2 at p 52 of Exhibit I-5.

In its Closing Brief, Aquila contends that such activities do not implicate a jurisdictional activity because only "groundwater" is being drained from beneath the wetlands at the project site. In support of its position, Aquila cited *Michigan Citizens for Water Conservation v Nestlé Waters North America, Inc*, 269 Mich App 25; 709 NW2d 174 (2005), *rev'd on other grounds*, 479 Mich 280; 737 NW2d 447 (2007). Therein, the Court of Appeals held that Part 303 "specifically limits its own application to specific acts, none of which includes the removal of groundwater." 269 Mich App at 95. Aquila also relies upon the testimony of Dr. Tilton, a wetlands expert, who stated that, "EGLE does not interpret drainage of a surface water to include a drawdown, even if you put a pipe in the wetland." Aquila's Closing Brief at p 14; 17 Tr 3802.[23]

While this Tribunal requested the Parties to address this jurisdictional question in their Closing Briefs, the WRD's Briefs are silent on this issue. Nevertheless, certain testimony and exhibits admitted by the WRD at the hearing are relevant to understanding the

[22] Aquila's documentation in this case is in meters. This Tribunal converted the numbers to feet. Exhibit I-5 indicates that the cone of depression will extend 1,600 meters, which is 5,249 feet. Exhibit I-5 at p 44. A mile is 5,280 feet.

[23] Note that Dr. Tilton's testimony is not as to the correct application of Part 303, but as to his "belief" as to how EGLE interprets Part 303.

WRD's position. Initially, Exhibit R-230 is WRD Policy and Procedure No. WRD-023 effective April 18, 2006. That policy statement expressly provides that "[t]he surface and subsurface drainage of wetlands is regulated under Part 303, and this activity is prohibited without a permit from [EGLE]." Exhibit R-230 at p 2. During her testimony, Ms. Wilson similarly stated:

> And so one of the things that we've really been looking at with this application is that there will be pit dewatering associated with keeping the pit dry so that the minerals can be mined or excavated and that will create a cone of depression. There are wetlands on this site that the applicant had identified were reliant on groundwater. That cone of depression based upon the MODFLOW model that they had provided extended out into some regulated wetlands, but was not represented in the application as a potential impact. We wanted to know why. Draining surface waters from a wetland under Part [303] is a direct impact, but those impacts are not addressed in this application.

1 Tr 156.

Moreover, Exhibit R-62 is a Request for Clarification and Amplification dated January 19, 2018, sent by the WRD to Aquila. In this document, Ms. Wilson noted that "[d]raining surface waters from a wetland is a regulated activity. [EGLE] has expressed that drainage of groundwater that results in the reduction of wetland hydrology may constitute an impact." Exhibit R-62 at p 7. In addition, Mr. Pennington opined that a wetland will be impacted if there is a four-inch decrease in the hydrology of the wetland. 8 Tr 1640, 1685-1686. A four-inch drawdown in a wetland will cause a reduction in the wetland's size. 8 Tr 1786. Finally, Mr. Saldivia testified that groundwater drawdowns that lead to the drainage of wetlands will require a permit from EGLE. 19 Tr 4081. Based on this evidence, it appears that the WRD's position is that the subsurface drainage of surface water from a wetland that results in a four-inch reduction in hydrology of the wetland is an activity that requires a permit under Part 303.

In its Closing Brief, the Coalition cites to federal authorities for its proposition that draining a wetland is another way of saying "dewatering" and that dewatering a wetland is a regulated activity. Coalition's Closing Brief at p 25. It further argues that dewatering is another way of describing a reduction in wetland hydrology. It argues that the removal of water from a pipe in the surface of a wetland is the same as removing water from below.

In its Closing Brief, Menominee contends that if the activity drains surface water from a wetland, it requires a permit, especially for drawdown from mining operations. Menominee's Closing Brief at p 33. Essentially, it contends that the draining of surface waters is a regulated activity regardless of the method of draining. Menominee points to the legislative findings contained in Part 303 which state that "[a] loss of a wetland may deprive the people of the state of the … benefits to be derived from the … [p]rotection of subsurface water resources and provision of valuable watershed and recharging ground water supplies." MCL 324.30302(1)(b)(iii). Menominee argues that the proposed drawdown during mining operations will directly affect subsurface water resources as well as impact the ability of those resources to recharge groundwater supplies.

The question of whether the proposed drawdown will "drain surface water from a wetland" is both a question of law and a question of fact. Statutory construction is a question of law for this Tribunal. See *Paige v City of Sterling Heights*, 476 Mich 495, 504; 720 NW2d 219 (2006). The fundamental purpose of statutory construction is to assist in both discovering and giving effect to legislative intent. *Ansell v Department of Commerce*, 222 Mich App 347, 355; 564 NW2d 519 (1997). Legislative intent is to be reasonably inferred from the words expressed in the statute. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). In this case, the statutory language is clear and unambiguous: "a person shall not … [d]rain surface water from a wetland" without a permit. MCL 324.30304(d). This restriction is not limited spatially because the draining of surface water from below a wetland is just as prohibited as draining surface water from the surface of a wetland. Exhibit R-230 at p 2. When a wetland is connected to groundwater, the draining of groundwater can have the effect of draining surface water from a wetland.

Aquila's reliance upon *Michigan Citizens for Water Conservation* is misplaced. The Court of Appeals held that the draining of groundwater, in and of itself, is not a regulated activity under Part 303. *Michigan Citizens for Water Conservation*, 269 Mich App at 95. However, when the draining of groundwater connected to surface waters causes a concomitant draining of surface waters from the wetland, a permit must be obtained. MCL 324.30304(d). Aquila's argument – that a different result obtains when the legislative history of Part 303 is reviewed – is also without merit. Aquila's Closing

Brief at p 13. The Supreme Court has held that, "We do not resort to legislative history to cloud a statutory text that is clear." *Chmielewski v Xermac, Inc.*, 457 Mich 593, 608; 580 NW2d 817 (1998). As noted *supra*, the statutory language is clear and unambiguous, leading to only one result: the draining of surface water from a wetland – however that activity is accomplished – is a regulated activity.

Based on the foregoing, I conclude, as a Matter of Law, an activity that results in the draining of groundwater connected to surface waters which causes a concomitant draining of surface waters from a regulated wetland requires a permit under Part 303. MCL 324.30304(d).

The question of fact in this case is whether the dewatering of the pit is anticipated to cause a draining of surface waters from a wetland. To answer this question, a review of Aquila's testimony and exhibits is warranted. As noted *supra*, the dewatering of the 700-foot-deep pit will cause a regional cone of depression with a predicted drawdown of groundwater to a depth of approximately 23 feet near the pit and 1.6 feet one mile from the pit rim. Exhibit I-5 at p 44. See also Figure 2 at p 52 of Exhibit I-5. According to Figure 2, the cone of depression extends to wetlands located at the southeast corner of the project area, such that 1.6 feet of groundwater will be drawn down from such wetland by pit dewatering. Exhibit I-5 at p 52. However, there is no evidence in the record which indicates that there is a concomitant drawdown of surface water from this 1.6-foot groundwater drawdown. According to Exhibit I-2, the wetland located at the southeast corner of the project area is wetland WL-A1. Exhibit I-2 at p 91. The hydrograph on this exhibit indicates that water in this wetland is normally at the surface. *Id.* In the summer months during mining operations, Aquila anticipates that the surface water of wetland WL-A1 will be lowered by 24 inches. *Id*. Mr. Donohue testified that this reduction in surface water is due to lack of surface water runoff. 14 Tr 2999. He explained that the construction of surface facilities at the project site is anticipated to reduce the influx of water into the nearby wetlands, such as wetland WL-A1. 11 Tr 2408-2409. Mr. Donohue described this reduction of influx water as an indirect wetland impact from the project. *Id*. He opined that the reduction in surface water level of this wetland is not due to pit drawdown. 14 Tr 3000. There is no evidence or testimony in the record that the anticipated 24-inch reduc-

tion of surface water of wetland WL-A1 is proximately caused by groundwater drawdown from pit dewatering.

Based on the evidence in the record, I find, as a Matter of Fact, that a permit is not required under § 30304(d) because the dewatering aspect of the proposed project will not result in draining surface water from a regulated wetland. MCL 324.30304(d).

C. Administrative Completeness

The Coalition contends that the Application is not administratively complete by arguing that it failed to specify the amount of wetland impacts that are anticipated to be caused by the project. Coalition's Closing Brief at pp 37-40. See also Coalition's Response Brief at pp 3-5. In support of its position, the Coalition correctly argues that one of the four predicates for a contested case is the proper processing of the application by the WRD. Citing *Petition of CCMS Associates, Inc.*, 2000 WL 1597733, *7 (Mich.Dept. Nat.Res.). To address this preliminary issue, a review of the law regarding processing Part 303 applications is warranted.

Part 13 delineates a two-step procedure for the processing of a permit application. The first step is called the "application period," which is defined as "the period beginning when an application for a permit is received by the state and ending when the application is considered to be administratively complete" which occurs when "the department makes that determination or 30 days after the state receives the application, whichever is first." MCL 324.1301(a); MCL 324.1305(1). However, before the expiration of the thirty-day period, the WRD may notify the applicant that the application is not administratively complete, specifying the deficient information. MCL 324.1305(2). According to Ms. Wilson, these letters sent by the WRD are called "Correction Request" letters.[24] 1 Tr 80; 2 Tr 355. The 30-day period is tolled until the applicant submits the specified information. MCL 324.1305(2).

The second step in the processing of an application is the "processing period," which commences after the application is deemed administratively complete. MCL

[24] But see Exhibit R-51, which is entitled a Request for Clarification. Ms. Wilson testified that this letter is essentially the same as a "Correction Request" letter. 1 Tr 80; 2 Tr 355. Aquila requested that the title of this letter be changed to a Request for Clarification and that the WRD not send another Correction Request "under that language." 2 Tr 378.

324.1301(i). During this period, the WRD "may request the applicant to clarify, amplify, or correct the information required for the application." MCL 324.1305(4). According to Ms. Wilson, these letters are called "Requests for Clarification and Amplification." 2 Tr 355. The processing period for a permit under Part 303 is 150 days if a public hearing is held. MCL 324.1301(i). The "processing deadline" is "the last day of the processing period." MCL 324.1301(h). This deadline may be extended by a request of the applicant but may not be extended for more than 1 year after the application is deemed administratively complete. MCL 324.1307(2); MCL 324.1301(a).

The concept of administrative completeness was addressed by the Court of Appeals in *Harkins v Department of Natural Resources*, 206 Mich App 317; 520 NW2d 653 (1994). Therein, the Court stated:

> The DNR was not in a position to act on petitioner's original application because it did not contain sufficient information. Hence, the request for additional information was made. Given the DNR's obligation to effectuate the purposes of the [Wetlands Protection Act (WPA)],[25] we agree with the DNR that requests for additional and more specific information from applicants are not unreasonable. Therefore, if an application is such that it cannot be acted upon because of a lack of information, we cannot fairly characterize the application as "complete." Instead, an application is to be considered "complete" when it contains sufficient information to be acted upon.

206 Mich App at 322. However, in the determination of administrative completeness, the WRD may not require more information than what is reasonably necessary for it to make its decision on the application. *Petition of Crystal Lake & Watershed Ass'n*, 2008 WL 5102271, *9 (Mich.Dept.Nat.Res.).

It has been held that "the purpose of an application for a permit is to provide [the WRD] with the information necessary to review the project, and to provide the public with a form of notice of the project." *Petition of Sierra Club*, 2018 WL 2148695, at *30 (Mich. Dept.Nat.Res.). The application in this case sought a permit under Parts 301 and 303. Sections 30105(2) and 30307(1) govern public notification for projects proposed to impact inland streams and regulated wetlands. MCL 324.30105(2); MCL 324.30307(1). The

[25] The WPA was repealed in 1995, but its provisions were recodified in Part 303 of the NREPA. See *Huggett v Department of Natural Resources*, 464 Mich 711, 715 n 1; 629 NW2d 915 (2001).

necessity of an administratively complete application is due, in part, to the need for the application to provide the public with notice of the proposed project and for its effective participation in the permitting process. Based on the foregoing, this Tribunal must determine whether the application contains sufficient information to be acted upon by the WRD and whether it provides adequate notice of the project to the public. However, it is first necessary to determine what is required for an administratively complete application.

The Coalition contends that "a reliable identification of the impacts requested in a permit must be the cornerstone of a complete application." Coalition's Closing Brief at p 1. I agree. The contents of an application under Part 303 are set forth in § 30306, which includes the requirement of filing the application on "a form provided by the department." MCL 324.30306(1). These forms require the applicant to identify the anticipated impacts to wetlands from the proposed project. See, e.g., Exhibit R-4 at p 7.[26] Without a reliable identification of impacts to wetlands, the public notice is inadequate.

Based on the foregoing, I conclude, as a Matter of Law, for a Part 303 application to be administratively complete, it must contain a reliable identification of wetland impacts.[27]

With respect to the evidence in this case, Ms. Wilson testified that the amount of acreage of wetland impacts proposed by Aquila was a "moving target." 1 Tr 172, 200; 3 Tr 646. Indeed, from the various filings, Aquila's recitation of impacts was constantly changing with respect to the amount of impacts contemplated in the Application, as follows:

- **2.1 acres** of direct impacts (2015 Application), Exhibit R-4;
- **9.13 acres** of direct impacts and **5.5 acres** of indirect impacts (August 5, 2016, amendment to the 2015 Application), Exhibit I-9;
- **5.8 acres** of direct impact and **10.36 acres** of indirect impacts (2017 Application), Exhibit R-14;

[26] Ms. Wilson similarly testified that "[t]he application requires the applicant complete that information in a section of the application on how many acres of wetland they will be impacting, what those impacts are…." 4 Tr 804.

[27] The WRD attempted to create a distinction between an "administratively complete" application and a "technically complete" application. See, e.g., 6 Tr 1135 (direct testimony of Ms. Fish); 16 Tr 3511-3518 (cross-examination testimony of Mr. King). Ms. Fish defined a "technically complete" application as one that contains technically complete information for a final permitting decision. 6 Tr 1135. While no language regarding "technical completeness" is contained in the statutory scheme, Ms. Fish was apparently referring to the information needed to make a decision at the conclusion of the "processing period." MCL 324.1307(1).

- **11.21 acres** of direct impacts and **17.0 acres** of indirect impacts (October 2, 2017, revision to the 2017 Application), Exhibit R-42;

- **11.22 acres** of direct impacts and **17.17 acres** of indirect impacts (December 7, 2017, revision to the 2017 Application), Exhibit R-59; and

- **11 acres** of direct impacts and **31 acres** of indirect impacts (April 27, 2018, email from Aquila), Exhibit P-111.

While Aquila eventually landed on approximately 11 acres of direct wetland impacts from the project, the amount of indirect impacts was indeed a "moving target." The WRD's concern with indirect impacts was due, in part, to the effects of pit dewatering on the wetlands within the project area.

The WRD voiced its concern with impacts caused by pit dewatering in many letters sent to Aquila. On August 26, 2016, the WRD requested Aquila to "[p]rovide analysis on the direct and indirect impacts to wetlands within the affected watersheds as a result of pit dewatering." Exhibit R-11 at p 2. On January 26, 2017, the WRD requested Aquila to "address and evaluate the proposed pit dewatering operation … and the wetland impacts that will result from this activity." Exhibit R-17 at p 3. On October 20, 2017, the WRD requested, due to questions with conductivities used in the computer model, that Aquila provide an analysis to evaluate the "potential impact to the groundwater level and draw-down predictions." Exhibit R-51 at p 2. On January 19, 2018, the WRD requested Aquila to "provide a table that includes the MODFLOW range in drawdown (in feet) for all wetlands in the project area." Exhibit R-62 at p 3. On March 19, 2018, the WRD advised Aquila that "[a]dditional documentation is needed to establish that pit dewatering will not lower the water level within wetlands." Exhibit R-77 at p 2. From these letters alone, it appears that the Application was not administratively complete as of March 19, 2018, due to Aquila's failure to provide information requested by the agency regarding pit dewatering and its effects on the wetlands within the project area. See MCL 324.1305(2) (providing that the application period "is tolled until the applicant submits to the department the specified information").

To that end, Aquila acknowledged very early in the application process in a document dated January 15, 2016, that the project is anticipated to cause indirect impacts

due, in part, to "[r]eduction in groundwater contributions because of drawdown from mine pit dewatering." *Id* at p 38. This response also noted that "[t]he extent of drawdown from pit pumping was modeled using a groundwater flow model." Exhibit I-5 at p 44. From this point forward, Aquila used its computer model as a basis to substantiate the amount of anticipated wetland impacts, particularly those impacts from pit dewatering. Exhibit R-14(3) at p 13 ("The groundwater model was developed for the purpose of estimating groundwater inflow rates to the pit during operations … and overall impacts to surrounding water resources"). Indeed, in the Request for Clarification dated October 20, 2017, the WRD confirmed that this computer model was provided by Aquila "for use in the evaluation of potential wetlands impacts in support of a Wetlands Permit for the Aquila Back Forty Mine Project." Exhibit R-51 at p 1.

The October 20, 2017, Request for Clarification also indicated the WRD had problems with the groundwater model. Exhibit R-51. These concerns were raised before the Application was deemed administratively complete.[28] 2 Tr 356; Exhibit R-61. The letter first noted there were concerns with the boundary conditions of the model. *Id* at p 2. Second, doubts were raised regarding the conductivities used in the model which significantly exceed the calibrated conductivities within the project area. *Id*. Third, there were questions regarding the model's assessment of indirect impacts. *Id*. at 4.

Of note, Ms. Van Dyke testified Aquila's model "didn't represent what was going on, on the site" and that "it's not reflecting how the wetlands are functioning." 8 Tr 1821; 9 Tr 1848. Ultimately, she opined that, "because of the way it was constructed, we didn't have the information that we needed to evaluate the wetlands." 9 Tr 1838. In fact, Ms. Van Dyke further testified that, "we don't consider that to be a valid model for the goals of what we need to see." 19 Tr 4025-4026. Finally, in response to questioning from this Tribunal, Ms. Van Dyke testified that the computer model put forth by Aquila did not provide sufficient information to recommend the issuance of the permit. 19 Tr 4065.

Ms. Van Dyke's testimony is consistent with the testimony of Dr. Hyndman from the Part 632 case, which testimony was incorporated into this case. *Petition of Boerner*,

[28] Recall that the Application, as revised, was treated as administratively complete and was placed on public notice on December 8, 2017. Exhibit R-61.

2019 WL 6717176 (Mich.Dept.Nat.Res.); Exhibits P-164 and P-165. Specifically, Dr. Hyndman opined that he had concerns with the adequacy of the computer model. Exhibit P-164 at Tr p 526. Similar to Ms. Van Dyke, he had problems with the boundary conditions of the model which he testified provided it with "an infinite source of water."[29] Exhibit P-164 at Tr p 528. Dr. Hyndman opined that if Aquila had used proper boundary conditions, the cone of depression generated from the computer model would extend farther into the surrounding wetlands. *Id* at Tr p 531-532. As a result of these boundary conditions, the model was prevented from predicting any wetland impacts from pit dewatering. *Id* at Tr p 530.

Mr. Chatterson similarly opined as to the adequacy of the computer model. He stated that the model "wasn't really built to answer as far as I could tell any questions about the wetland." 9 Tr 1991. He opined that Aquila "predetermined what was going to happen and it just manipulated the mathematics to make that happen." 9 Tr 1991. See also 9 Tr 1994, 1995. Mr. Chatterson agreed that the use of the river cell for the boundary conditions was not appropriate. 9 Tr 1993. He also opined that "[t]he hydraulic conductivity was higher than it should have been" and was "higher than the surrounding materials which isn't realistic." 9 Tr 1994, 1996.

The Coalition and Menominee called Ms. Sigstedt to testify regarding Aquila's computer model. Her testimony also raised concerns like those addressed by Ms. Van Dyke, Dr. Hyndman, and Mr. Chatterson. With respect to the boundary conditions of the model, she noted that it would be appropriate to create a model which supplies as much water as possible through the boundary conditions when determining the maximum inflow of water into the pit. 6 Tr 1251. However, when evaluating wetland impacts, such a model does not reflect reality. 6 Tr 1251-1252. Second, Ms. Sigstedt similarly noted that the conductivities in the model are set up to provide a maximum regional recharge rate. 6 Tr 1259. Third, she stated that Aquila excluded perched wetlands from the model, which creates a mass balance error. 6 Tr 1260. Instead, she opined that the perched

[29] This testimony is also consistent with Mr. Pennington's related to Aquila's water balance models. He stated that Aquila "modeled it as basically a big, unending bathtub that could take as much water as you can possibly put into the … system." 8 Tr 1623.

wetlands should have been included in the model to use the regional water level to confirm that these wetlands are not connected to the water table. *Id*.

In response to such testimony, Aquila certified Mr. Donohue as an expert in groundwater modeling. 11 Tr 2367. During his testimony, Mr. Donohue conceded that the WRD required an identification of the number of acres of impacted wetlands from the project, instead of a range of impacts as proposed by Aquila.[30] 11 Tr 2429. He also conceded that the Army Corps of Engineers had concern with respect to the "the potential for wetlands to be affected by groundwater drawdown…." 11 Tr 2420. Mr. Donohue disagreed with Ms. Van Dyke's criticism of Aquila's use of the river cell boundary condition. 12 Tr 2663. However, he conceded that the wetlands that Aquila determined were surface water wetlands were not included in the river package of the groundwater model.[31] 12 Tr 2766-2767. He noted that Aquila "chose a conductance value that approximated what the average recharge is that we see across the region and that's six inches, and that's what the K value in the conductance term represents." 12 Tr 2667. He suggested that the conductance values can be confirmed through sensitivity analysis. 12 Tr 2668-2671. Finally, Mr. Donohue agreed that the groundwater model was used to determine drawdown effects on wetlands due to pit dewatering. 12 Tr 2805-2806.

Aquila also called Mr. Andersen to testify regarding its model. He opined that the use of the river package boundary condition is representative of the onsite conditions at the project site. 18 Tr 3828-3829. He also stated that the assertion the wetlands in the model produce an infinite source of water is false because the maximum that can come out of a wetland is six inches. 18 Tr 3829. He testified that the model was well-calibrated with no spatial bias. 18 Tr 3830-3838. Finally, his sensitivity analysis of the model indicated that "a two order magnitude uncertainty … does not really change the result significantly regardless of what your baseline value is." 19 Tr 3883.

Ms. Van Dyke was re-called by the Petitioners to testify regarding Mr. Andersen's sensitivity analysis. She opined that, in performing a sensitivity analysis, you must have

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[30] Mr. Donohue testified that it was his belief that a "range of impacts" derived from the groundwater model was a more appropriate determination. 11 Tr 2490.

[31] He stated that three wetlands were excluded from the model: the B complex, wetlands 14/15, and wetlands 40/41. 12 Tr 2768-2769.

"a good model to start with…." 19 Tr 4025. She stated that a sensitivity analysis of Aquila's groundwater model is immaterial because "we don't consider that to be a valid model for the goals of what we need to see." 19 Tr 4025-4026. She further stated that "there's issues with the construction of the model and how the wetlands are defined so that needs to be corrected first." 19 Tr 4026.

From the foregoing, there appears to be a conflict of expert opinion regarding the validity of Aquila's groundwater model. It is axiomatic that the weight given to testimony is not dependent upon the number of witnesses. *Dewey v Perkins*, 295 Mich 611, 616; 295 NW 333 (1940). In cases tried without a jury, the trier of fact may give such weight to which the testimony, in his opinion, is entitled. *Lather v Michigan Public Service Co*, 332 Mich 683, 690; 52 NW2d 551 (1952). Moreover, the resolution of conflicting expert testimony falls within the province of the trier of fact. See *Goodman v Stafford*, 20 Mich App 631, 637; 174 NW2d 593 (1969).

In addition, the opinions of the WRD's experts are entitled to deference. Specifically, deference is appropriate with respect to conflicts in evidence and the credibility of witnesses. *Huron Behavioral Health v Department of Community Health*, 293 Mich App 491, 497; 813 NW2d 763 (2011). Moreover, "great deference should be given to an agency's administrative expertise." *Id*. Similarly, when there are conflicting expert opinions, "great deference should be given to an agency's choice between two reasonably differing views as influenced by administrative expertise." *Vanzandt v State Employees Retirement System*, 266 Mich App 579, 592-593; 701 NW2d 214 (2005).

In this case, two of the WRD's experts (Ms. Van Dyke and Mr. Chatterson) challenged the validity of Aquila's groundwater model. Their opinions are entitled to deference from this Tribunal, particularly since the WRD is the reviewing agency and because Aquila could have provided additional evidence to alleviate their concerns. Indeed, an applicant may grant the agency an extension of the processing deadline for up to 1 year after the application is deemed administratively complete. MCL 324.1307(2); MCL 324.1301(a). Within such a one-year extension, Aquila could have constructed a new

computer model that would have satisfied the concerns of the agency.[32] Notwithstanding the deference to which the WRD's experts are entitled, the testimony of both Ms. Van Dyke and Mr. Chatterson was corroborated over a year before they testified by Dr. Hyndman in the Part 632 case. *Petition of Boerner*, 2019 WL 6717176 (Mich.Dept.Nat. Res.); Exhibits P-164 and P-165.

Based on the evidence in this case, I find, as a Matter of Fact, that Aquila's computer groundwater model does not provide a reliable identification of wetland impacts, particularly those related to groundwater drawdown due to pit dewatering.

In arguing that the Application is administratively complete, the WRD contends that "EGLE knows the full extent of the Project's impacts because the permit expressly limits the impacts that may be realized." WRD's Response Brief at p 3. This assertion is belied by the statements contained within the April 30th Finding of Fact document. Therein, the WRD determined that the amount of indirect impacts from pit dewatering was "under-estimated" and that "the total probable effects are unknown." Exhibit R-92 at p 20. Neither Ms. Fish, the Assistant Division Chief, nor Ms. Seidel, the Director of the WRD, disagreed with the Finding of Fact document. 6 Tr 1167; 6 Tr 1234. While the WRD determined that the total probable wetland effects of the project are "unknown," a permit was issued by the WRD on June 4, 2018, a mere 35 days later. Exhibit R-107. The record does not contain any exhibits or evidence that was submitted by Aquila to the WRD between April 30th and June 4th. Nevertheless, the permit was issued for the amount of wetland impacts sought in the revised Application. Cf Exhibit R-59 with Exhibit R-107. Therefore, based on the evidence in the record, the WRD's assertion that it knew the amount of wetland impacts must be rejected.

In its Closing Brief and during its testimony at the hearing, Aquila argued that its indirect impacts analysis was adequate because the permit conditions are contemplated to "confirm" its computer groundwater model. See Aquila's Closing Brief at p 26; 12 Tr 2644. This position appears to be supported by Ms. Fish's letter dated October 24, 2018, wherein she stated that the revised model required by the permit "will be used to validate

[32] Rather than extending the processing deadline and requiring Aquila to construct a new model during the extended processing period, the WRD issued a permit containing conditions that required Aquila to construct a new groundwater model prior to the commencement of operations under the permit. Exhibit R-107 at p 6. See Section 4, Satisfying Permitting Criteria with Permit Conditions, *infra*.

groundwater model predictions" and to "verify the predicted and potential effects of the drawdown/dewatering of the wetlands and/or streams from the mining operations." Exhibit R-217 at p 2. However, Ms. Fish's statements in the October 24 letter appear to be inconsistent with her sworn testimony in the record and the findings of the WRD's experts.

As noted *supra*, the Finding of Fact document recites that the amount of indirect impacts from pit dewatering was "underestimated" and that "the total probable effects are unknown." Exhibit R-92 at p 20. At the hearing, Ms. Fish testified that she had no disagreement with the Finding of Fact document. 6 Tr 1167. Indeed, she testified that at the time the permit was issued, the WRD "did not have the information that we had requested…." 6 Tr 1163. Hence, if the amount of wetland impacts from pit dewatering is "unknown," it is difficult to understand how the revised model required by the permit conditions was merely meant to "verify" or "validate" Aquila's original model. Further, Ms. Van Dyke made it clear that the conditions in the permit were not included to simply confirm what is known from the existing model because "it really can't be used to assess the wetlands in its current form…." 19 Tr 4027-4028. I find that the testimony of Ms. Van Dyke is entitled to great weight. Because the October 24th letter is inconsistent with the record and her own sworn statements at the hearing, I find that Ms. Fish's statements contained in Exhibit R-217 are entitled to little or no weight.

In its Response Brief, Aquila also argues that the criticisms of its groundwater model are immaterial because "Aquila's indirect impact determination … was based on a wetland water budget model, not the groundwater model."[33] Aquila's Response Brief at p 11. Aquila's argument misses the mark. The groundwater model in this case is material, not because Aquila used it to analyze indirect wetland effects, but because the model was used to determine the effects of pit dewatering on wetlands in the project area. 12 Tr 2805-2806 (testimony of Mr. Donohue). More importantly, Mr. Donohue testified that the water balance model was used to "assess impacts to either individual wetlands, small areas of wetlands near the project site in the facility, and it's to look at the impact

[33] According to Ms. Wilson, "a water balance, or sometimes referred to as a water budget, it's the inputs and outputs of your aquatic system." 1 Tr 96. For a wetland, the inputs to the water budget include groundwater, precipitation through rain and snow melt, and runoff into the wetland. 1 Tr 97. The outputs include evapotranspiration and runoff out of the wetland. *Id*.

that may occur due to changes in runoff…." 11 Tr 2459. By Mr. Donohue's own testimony, the water budget model was not contemplated to address wetland impacts from pit dewatering. Absent its computer model, Aquila simply failed to provide any evidence of the effects of pit dewatering on wetlands.

In addition, Aquila argued during the contested case hearing that the concept of "adaptive management," including the use of wetland augmentation, should be employed instead of identifying indirect wetland impacts. Mr. Donohue testified that, "if an impact starts to develop, then through the adaptive management plan and augmentation plan, then we add water to those wetlands so that the impact doesn't occur." 14 Tr 2984. He further testified that "it comes down to the monitoring, the adaptive management, and the augmentation to ensure that there is no take there." 14 Tr 3002. However, monitoring and adaptive management does not negate an applicant's obligation to identify in an application foreseeable wetland impacts, including indirect impacts. Rather, monitoring is used to prevent unforeseen impacts that were not contemplated in the application, such as drought conditions or other unforeseen circumstances that exacerbate the impacts contemplated in an application. It is for this reason that the WRD frequently requires monitoring of wetlands as a condition of permit issuance. The concept of "adaptive management" does not excuse an applicant from making the required showing of wetland impacts that are necessary for a determination of administrative completeness.

Finally, Aquila may argue that it produced thousands of pages of documentation in this contested case, so it is inconceivable that the application is not administratively complete. Indeed, the 2017 Application, in and of itself, is over 1,500 pages in length. Exhibit R-14(1), R-14(2), R-14(3), R-14(4), R-14(5), and R-14(6); 11 Tr 2445. However, the size of an application is irrelevant. Rather, it is the content of the application. Otherwise, an applicant may attempt to flood the agency with a voluminous application merely hoping to take advantage of the short statutory time frames for processing a Part 303 application. As noted *supra*, the WRD made numerous requests for information regarding wetland effects from pit dewatering. See, e.g., Exhibit R-11 at p 2; Exhibit R-17 at p 3; Exhibit R-51 at p 2; Exhibit R-62 at p 3; Exhibit R-77 at p 2. See also Exhibit R-74 at p 1 (wherein the EPA stated that "the reviewing agencies cannot adequately assess the extent of the proposed mine's impact on aquatic resources"); 11 Tr 2420 (wherein Mr.

Donohue testified that the Army Corps of Engineers had similar concerns about "the potential for wetlands to be affected by groundwater drawdown as well"). Despite the size of the Application, this information was deficient.

Nor may Aquila argue that the WRD required it to produce a computer model to substantiate wetland impacts from pit dewatering. The computer model was Aquila's choice in providing the requested data. See, e.g., Exhibit R-51 at p 1 ("The Foth Groundwater Modeling Report dated October 2015 was provided to [the WRD] on May 17, 2017, along with subsequent submittal of the Groundwater Vistas software model files for use in the evaluation of potential wetlands impacts in support of a Wetlands Permit for the Aquila Back Forty Mine Project"). Aquila's choice of evidence in this case was simply inadequate to substantiate the amount of impacts from pit dewatering.

Therefore, based on the evidence in this case, I find, as a Matter of Fact, that the revised application for a permit filed by Aquila in this contested case is not administratively complete.[34] This Tribunal has repeatedly held that, in order for a party to be entitled to a contested case hearing, four predicates must be met: (1) the filing of an application by a proper applicant, (2) the proper processing of the application by WRD, (3) an action or inaction by WRD on the application, and (4) the timely filing of a petition. See *Petition of CCMS Associates, Inc.*, 2000 WL 1597733, *7 (Mich.Dept.Nat.Res.). Because it was not administratively complete, the Application must be denied, and this contested case must be dismissed. See also R 281.922(4) (providing that, if the applicant fails to provide the information requested by the agency, the application may be treated as withdrawn by the applicant).[35]

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[34]In addition to the administrative completeness review under Part 303, Part 301 provides that a permit is required when the proposed project diminishes the size of an inland lake or stream. MCL 324.30102(1)(d). The concern in this case is that pit dewatering will diminish either the Menominee River or regulated streams within the project area. While Ms. Wilson found that the pit dewatering will have no effect on the Menominee River, 1 Tr 212, she testified that the WRD was unable to determine from Aquila's groundwater model whether pit dewatering will diminish any streams within the project area. 1 Tr 169. Therefore, in a similar manner, the Application was not administratively complete under Part 301. See Exhibit R-92 at pp 6-10.

[35] See also the discussion of administrative completeness discussed in the Part 301 section *infra*, regarding § 30102(1)(d), and in the Part 303 section *infra*, regarding feasible and prudent alternatives. MCL 324.30102(1)(d); MCL 324.30311(2)(b).

D. Satisfying Permitting Criteria with Permit Conditions

On April 30, 2018, the WRD issued the Finding of Fact document which determined that the Application should be denied. Exhibit R-92. The WRD's Closing Brief accurately recites the following opinions of its experts[36] in arriving at such a decision:

- "Ms. Van Dyke concluded that inappropriate groundwater target levels were used for calibrating the steady-state groundwater model which ignored the growing season for wetlands and did not represent the consistent seasonal changes that had been documented on site." WRD's Closing Brief at p 16.
- "Ms. Van Dyke also concluded that the groundwater model conceptual design for the wetlands ignored actual site conditions, particularly due to the generic information used in the boundary conditions that simulated the wetlands." *Id*.
- "Because of these deficiencies, Ms. Van Dyke questioned the accuracy of the model." *Id*.
- "Mr. Chatterson opined that the parameters used in the model did not accurately represent wetlands at the site." *Id*.
- "Mr. Chatterson noted that the hydraulic conductivities used for the wetlands were higher than surrounding material and the thin veneer of water used in the wetland cells was not realistic." *Id*.
- "Mr. Chatterson further opined that the Project had the potential to mobilize constituents and contaminate and that a Part 22 permit was required for the Project." *Id*.
- "Mr. Pennington opined that the water budgets presented by Aquila were not appropriate based on site conditions." *Id*.
- "Mr. Pennington disagreed with some of the assumptions used in the model and believed that an accurate, well calibrated groundwater model was necessary." WRD's Closing Brief at pp 16-17.

[36] During the hearing, the WRD proffered the testimony of Ms. Van Dyke, Mr. Chatterson, Mr. Pennington and Ms. Wilson as expert witnesses. See 1 Tr 73, 75 (Ms. Wilson); 7 Tr 1588, 1590 (Mr. Pennington); 8 Tr 1810, 1811 (Ms. Van Dyke); and 9 Tr 1982, 1987-1988 (Mr. Chatterson).

- "Ms. Wilson opined that Aquila had failed to demonstrate that there were no feasible or prudent alternatives to the Project." WRD's Closing Brief at p 17.
- "Ms. Wilson based this opinion on her belief that viable off-site alternative locations existed that Aquila could utilize for mining processing activities." *Id*.

Neither Ms. Fish, the Assistant Division Chief, nor Ms. Seidel, the Director of the WRD, disagreed with the Finding of Fact document dated April 30, 2018. 6 Tr 1167; 6 Tr 1234. Despite the opinions of the WRD's experts and supervisors, a permit was signed by the Director of EGLE on June 4, 2018. Exhibit R-107. No additional evidence or information was provided to the WRD between April 30 and June 4, 2018. At the time the permit was issued, none of the WRD's experts had received evidence demonstrating that all criteria for the issuance of a permit under Parts 301 and 303 had been met.

Rather, it appears that the decision to issue a permit in this case was based on the EPA's suggestion of issuing a permit with "conditions" to address the evidentiary shortcomings.[37] Exhibit R-99. In a letter dated May 3, 2018, the EPA stated, *inter alia*, that it "had raised concerns that Aquila had not adequately identified secondary impacts to wetlands due to changes in hydrology." Exhibit R-99 at p 2. However, the EPA noted that the WRD "could include conditions in the final permit that would require Aquila to complete and obtain [the WRD's] approval on its secondary impacts assessment and adaptive management and monitoring plans, and that would prohibit any discharges from occurring prior to this approval." Exhibit R-99 at pp 2-3. In other words, the EPA recommended the issuance of a permit with conditions to meet its objections to permitting.

After receipt of the May 3 letter from the EPA, Ms. Wilson was directed by Ms. Fish to draft a permit containing conditions to alleviate the EPA's and the WRD's objections. 1 Tr 177; 1 Tr 207. To fulfill this charge, Ms. Wilson requested Ms. Van Dyke, Mr. Pennington, and Mr. Chatterson to supply draft permit conditions "that would identify all the information that we would need to determine the assessment of impacts under Part

[37] Section 30311b provides that the WRD may issue a permit with conditions that are designed to (a) "[r]emove or reduce an impairment to wetland benefits, as set forth in section 30302, that would otherwise result from the project"; (b) "[i]mprove the water quality that would otherwise result from the project"; and (c) "[r]emove or reduce the effect of a discharge of fill material." MCL 324.30311b(3).

303 and 301, and we would take that information, essentially reiterate the information that we had previously requested in the letters for clarification and amplification and turn that into requirements of a permit." 1 Tr 177. Ms. Wilson emphasized that "essentially the information that we would require to determine impacts would need to be provided prior to the initiation of the project." *Id*.

On May 25, 2018, the WRD forwarded to the EPA a draft permit containing such conditions for its review. Exhibit R-104. By letter dated June 1, 2018, the EPA notified the WRD that "the conditions in the draft permit would satisfy EPA's objections, provided a final permit containing these conditions is timely issued by [EGLE] … by June 6, 2018…." Exhibit R-105. A permit containing such conditions was signed by the Director of EGLE on June 4, 2018. Exhibit R-107.

To demonstrate the shortcomings of the permit conditions, it is helpful to review the testimony of Ms. Van Dyke. She testified that "because of the way it [Aquila's computer model] was constructed, we didn't have the information that we needed to evaluate the wetlands." 9 Tr 1838. Instead of requiring Aquila to provide this information during either the application period or the processing period, the permit contains a condition that allows Aquila to "provide a revised groundwater model that accurately depicts existing site conditions." Exhibit R-107 at p 6. Ms. Van Dyke also concluded as of May 24, 2018, that the groundwater model's boundary cells were defined with generic values not representative of on-site wetlands. Exhibit R-103 at p 2. Instead of requiring Aquila to provide this information during either the application period or the processing period, the permit contains a condition that allows Aquila to provide "[a] revised MODFLOW groundwater model using appropriate methods for defining wetland cells … that will incorporate site-specific groundwater hydrogeology and geology information…." Exhibit R-107 at p 7. This revised model is to be supplied to the WRD "prior to [Aquila conducting] any site activities related to mining and infrastructure…." *Id*. Indeed, Ms. Fish conceded that the intent of the permit conditions was to supply information that was missing throughout the application process. 6 Tr 1168.

Because the impetus for the issuance of the permit in this case is the removal of the EPA's objections under § 404 of the Clean Water Act (CWA), 33 USC § 1344(g), it is necessary to review the WRD's authority under Part 303 *vis-à-vis* § 404. Prior to the

commencement of the contested case hearing, the Coalition filed a Motion to Stay suggesting that the EPA possessed primary jurisdiction due to its delegation of authority under § 404 of the CWA. In ruling on the Motion, this Tribunal held:

> In its Motion, the Coalition confuses the dual regulatory schemes of § 404 of the CWA and Part 303 of the NREPA. The Court of Appeals has explained:
>
> > At the federal level, the Clean Water Act (CWA) provides for the regulation and protection of wetlands, while Michigan's wetland protection act (WPA) serves the same purpose for this state. Our Legislature made clear that it enacted the WPA to benefit all the people of this state. The act provides that "[t]he legislature finds that … [w]etland conservation is a matter of state concern since a wetland of 1 county may be affected by acts on a river, lake, stream, or wetland of other counties. M.C.L. §324.30302(1)(a).
>
> *K & K Const, Inc. v Department of Envtl Quality*, 267 Mich App 523, 529-530; 705 NW2d 356 (2005). The Coalition incorrectly argues that because an applicant files a "joint application," the WRD issues a "joint state and federal wetlands permit…." Coalition's Reply at 4. The WRD issues a permit under Part 303 of the NREPA, formerly known as the Wetlands Protection Act (WPA). See Exhibit A attached to the Coalition's Petition. The WRD does not issue a § 404 permit under the CWA. Moreover, this Tribunal issues a Final Decision and Order under Part 303 of the NREPA, not federal wetlands law. MCL 324.1317(1). In fact, the Michigan Supreme Court has recognized that when addressing Part 303, there is no need to reach a decision based on federal law. *Huggett v Department of Natural Resources*, 464 Mich 711, 722; 629 NW2d 915 (2001). The Court held that, "[b]ecause we can discern the Legislature's intent on this question from the wetland provisions themselves, we need not concern ourselves with federal law in this case." *Id.* The *Huggett* decision was followed by the Court of Appeals in *Department of Envtl Quality v Gomez*, 318 Mich App 1, 43; 896 NW2d 39 (2016). See also *Garg v Macomb County Community Mental Health Serv*, 472 Mich 263, 284; 696 NW2d 646 (2005), amended 473 Mich 1205 (2005) ("While federal precedent may often be useful as guidance in this Court's interpretation of laws with federal analogues, such precedent cannot be allowed to rewrite Michigan law."). Based on such decision, this Tribunal may proceed in this case under Part 303, unimpeded by the pending federal lawsuit. For such reason, the Coalition's Motion that this contested case be stayed pending resolution of its federal lawsuit is without merit.

Order entered on January 29, 2018 (footnotes omitted). Similarly, the fact that the EPA withdrew its objections to a permit under § 404 of the CWA does not somehow render the WRD's objections to the issuance of a permit under Part 303 superfluous.[38] Therefore, regardless of an applicant's fulfillment of the permitting criteria under § 404 of the CWA, the WRD is still obligated to confirm that an applicant has satisfied the statutory criteria under Part 303.

In this case, Aquila did not satisfy the permitting criteria as of April 30, 2018.[39] Exhibit R-92; WRD's Closing Brief at pp 16-17. Hence, a preliminary question needs to be settled: Whether Michigan law authorizes the deficiencies in the permitting process to be alleviated with conditions in a permit that require the applicant to supply after-the-fact evidence which satisfies the statutory criteria. There are at least five legal bases that demonstrate that such a conditional permit is improper.

First, such a conditional permit is not authorized under the language of the controlling statutes. Specifically, "[i]f the language of a statute is clear and unambiguous, the plain meaning of the statute reflects the legislative intent and judicial construction is not permitted." *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 135; 545 NW2d 642 (1996). As demonstrated *infra*, both Parts 301 and 303 are unambiguous in requiring the statutory criteria to be met prior to the issuance of a permit.

Part 301 provides that "[t]he department shall issue a permit if it finds that the structure or project will not adversely affect the public trust or riparian rights." MCL 324.30106. This clause is unambiguous. A Part 301 permit cannot be issued unless the WRD affirmatively "finds" that the project will not adversely affect the public trust or riparian rights. Section 30106 also provides that, "[i]n passing upon an application, the department shall consider the possible effects of the proposed action upon the inland lake or stream and upon waters from which its waters flow and the uses of all such waters,

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[38] In fact, Ms. Wilson explained that, even when the WRD issues a permit with § 404 authority, it issues the permit under Part 303. 4 Tr 782-783.

[39] Because this Tribunal conducts a de novo review of the application for the purpose of arriving at a final agency decision, *National Wildlife Fed'n v Department of Envtl Quality (No. 2)*, 306 Mich App 369, 379; 856 NW2d 394 (2014), the applicant is not limited to the evidence it submitted with its application but may submit new and different evidence during the contested case hearing. Therefore, this Tribunal will review the evidence submitted at the contested case hearing to determine if the deficiencies noted by the WRD's experts were resolved. See analysis under Part 301 and Part 303, *infra*.

including uses for recreation, fish and wildlife, aesthetics, local government, agriculture, commerce, and industry." *Id*. This language requires the agency to "consider" possible effects of the proposed activity in "passing upon" the application, *i.e.*, before the permit is issued. Finally, § 30106 provides that "[t]he department shall not grant a permit if the proposed project or structure will unlawfully impair or destroy any of the waters or other natural resources of the state." *Id*. This clause unambiguously provides that "the department shall not grant" a permit until the requisite determinations have been made. Therefore, from the language of the statute alone, an applicant must meet the Part 301 permitting criteria before a permit can be issued.

Similarly, with respect to Part 303, a permit "shall not be approved unless the department determines that the issuance of a permit is in the public interest, that the permit is necessary to realize the benefits derived from the activity, and that the activity is otherwise lawful." MCL 324.30311(1) (emphasis supplied). This statutory language unambiguously provides that a permit "shall not be approved" unless these three determinations are made. Therefore, from the language of the statute alone, an applicant must meet the Part 303 permitting criteria before a permit can be issued. Hence, the language of neither Part 301 nor Part 303 sanction the conditional permit issued in this case.

Second, in contested cases under Parts 301 and 303, this Tribunal prepares the Final Decision and Order on behalf of the agency. MCL 324.1301(f); MCL 324.1317(1). This Tribunal is required to render a decision based upon the preponderance of the evidence. *Aquilina v General Motors Corp*, 403 Mich 206, 210-211; 267 NW2d 923 (1978). The evidence must be in the record – not the promise of evidence to be provided in the future. Therefore, in formulating a decision, this Tribunal cannot render a Final Decision and Order based on an applicant's promise to provide this information to the agency in the future through permit conditions.

Third, the use of a conditional permit impermissibly avoids public participation in the permitting process. Initially, the documents submitted by Aquila during the permitting process are available to the public in the administrative record as part of the application. As a result, the public may offer comment during the public comment period or may provide comment at the public hearing. Ms. Wilson testified that it is her belief that the information provided by Aquila in fulfillment of the permit conditions will not be made

available to the public because a permitting decision has already been made by the agency. 2 Tr 418-419. By issuing such a conditional permit, the WRD is effectively avoiding public participation by excluding evidence related to indirect project impacts.

Also, the Public Notice in this case identified a project with the following impacts:

> The project proposes to excavate approximately 980,820 cubic yards of material from 5.3 acres of wetland and place approximately 803,453 cubic yards of fill in 5.9 acres of wetland and 253 linear feet of stream channel. The project also proposes reductions in surface water inputs that would impact 17.2 acres of wetland and 297 linear feet of stream channel.

Exhibit R-61. Under normal circumstances, when wetland impacts significantly increase in a project, a second Public Notice and public hearing is required. In this case, it is possible Aquila's new computer groundwater model could indicate that wetland impacts will be significantly increased from the amount referenced in the Public Notice *supra*. Since a permit has been issued, there are no provisions within Part 303 providing for a new public notice of an already permitted project. Under such conditions, Aquila would have effectively avoided public review of its project.

Fourth, the permit was issued for 17.17 acres of indirect wetland impacts. What happens if Aquila's revised model determines that the indirect impacts will be doubled from this estimate? *See, e.g.*, Exhibit P-111 (wherein Aquila identified 31 acres of indirect impacts). According to Ms. Wilson, Aquila would be required to apply for a second wetland permit covering the additional acreage of wetland impacts. 1 Tr 202. However, the issuance of two permits for one project runs afoul of § 30306(2), which provides that "a proposed use or development of a wetland shall be covered by a single permit application under this part if the scope, extent, and purpose of a use or development are made known at the time of the application for a permit." MCL 324.30306(2). This provision was intended to prevent piecemeal permitting of a project area. Therefore, a second permit would be impermissible in this case.

Fifth, under normal circumstances, an applicant is entitled to a contested case to challenge the WRD's decision-making. See, e.g., MCL 324.30319(2). What happens if the after-the-fact information provided by Aquila is inadequate for the issuance of a permit? Is the permit revoked by the WRD? Moreover, if the agency asserts that the

after-the-fact evidence failed to meet statutory criteria, there are no statutory provisions for Aquila to challenge the agency's after-the-fact determination.

For each of the foregoing reasons, I conclude, as a Matter of Law, that a conditional permit that requires an applicant to provide evidence – after-the-fact – to satisfy permitting criteria is not permissible under Parts 301 and 303. Therefore, I also conclude, as a Matter of Law, that the permit issued in this case is invalid, as currently written. To obtain a permit, Aquila must have submitted competent evidence satisfying the statutory criteria. Because this case is a de novo review of the Application, such evidence could be submitted for the first time during the contested case proceeding. *National Wildlife Fed'n, supra*. Therefore, this Tribunal will review the evidence contained within the record to determine if Aquila is entitled to such a permit. See analysis under Part 301 and Part 303, *infra*.

II. SUBSTANTIVE REVIEW OF THE PROJECT

In the Administrative Completeness section *supra*, this Tribunal determined that the Application is not administratively complete, that the Application should be denied, and that the contested case should be dismissed. However, to provide a complete record in this case, a substantive review of the project under Parts 301 and 303 will be conducted.

A. PART 301, INLAND LAKES AND STREAMS

1. Jurisdiction

Under Part 301, the definition of "inland lake or stream" is construed to mean "a river, stream, or creek … or any other body of water that has definite banks, a bed, and visible evidence of continued flow…." MCL 324.30101(ii). Section 30102 provides that a permit is required when a party places fill or a structure on bottomland. MCL 324.30102(1)(a) & (b). Bottomland is defined as "the land area of an inland lake or stream that lies below the [OHWM]…." MCL 324.30101(a). The revised application contemplates the placement of 11 cubic yards of riprap below the OHWM of the Menominee

River, as well as the installation of an outlet pipe below the OHWM of the River.[40] Exhibit R-59 at pp 13, 14. Because the riprap and the outlet pipe are to be placed below the OHWM, this activity is regulated under Part 301. MCL 324.30102(1)(b). Accordingly, the proposed activity will be reviewed under the Part 301 permitting standards. For purposes of review under Part 301, the "jurisdictional activity" is the activity conducted below the OHWM, which is the placement of riprap and an outlet pipe in the Menominee River.

2. Section 30106

The issuance of a permit under Part 301 is governed by the strictures of § 30106. MCL 324.30106. Section 30106 first provides that the WRD shall issue a permit if it finds that the project will not adversely affect the public trust or riparian rights. *Id.* In making this determination, the WRD is also obligated to consider the possible effects of the proposed activity upon the resource, including uses of the resource for recreation, fish and wildlife, aesthetics, local government, agriculture, commerce, and industry. *Id.* Finally, the WRD is to consider the environmental impacts of the proposed project. *Id*; R 281.811(1)(f). Each of these factors will be addressed *infra*.

a. Public Trust

Under the common law, the public trust ensures the public's right to navigate, fish, and fowl on the waters of the State. *Collins v Gerhardt*, 237 Mich 38; 211 NW 115 (1926). The "public-trust doctrine applies only to *navigable* waters and not to all waters of the State." *Bott v Natural Resources Comm'n*, 415 Mich 45, 71; 327 NW2d 838 (1982) (emphasis in original). Ms. Wilson testified that the Menominee River is a navigable river, while the streams within the project area are not. 1 Tr 189. Similarly, in the companion Part 632 case, this Tribunal held that the Menominee River is a navigable river. *Petition of Boerner*, 2019 WL 6717176, at *66 (Mich.Dept.Nat.Res.). Accordingly, I find, as a Matter of Fact, that the Menominee River is impressed with the public trust.

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[40] In addition, the application contemplates the placement of an undisclosed amount of fill within 253 linear feet of intermittent streams. Exhibit R-59 at p 10. Because these intermittent streams are located entirely within a wetland, the resource impacts related to the placement of fill within these stream segments will be evaluated within the strictures of Part 303, *infra*.

The Petitioners contend that the overall mining project will affect the public trust in the Menominee River. See, e.g., Mr. Boerner's Closing Argument at p 7. The Petitioners apparently rely upon the testimony of Mr. Chatterson regarding the infiltration of pollutants into the Menominee River after closing the pit upon the completion of mining. See 9 Tr 2009, 2011-2012. Indeed, the Findings of Fact document recites that "[t]he constituents anticipated to be mobilized will impact water chemistry and have a high likelihood to result in degradation to the aquatic communities within the unnamed streams that discharge to the Menominee, direct discharges of groundwater from the project site to the Menominee River…." Exhibit R-92 at p 12. The Coalition also presented testimony regarding the impact such pollutants would have on the business of a fishing guide operating on the Menominee River. Testimony of Tim Landwehr, Exhibit P-161. However, the constituents discharged by Aquila into the Menominee River is subject to a National Pollutant Discharge Elimination System (NPDES) permit. See Exhibit I-233 from *Petition of Boerner*, 2019 WL 6717176 (Mich.Dept.Nat.Res.). To the extent that the discharges comply with Aquila's NPDES permit, there should be no release of pollutants.

Rather, relevant to this case is the impact upon the public trust of the jurisdictional activity – the placement of riprap and an outfall pipe below the OHWM of the Menominee River. There was no testimony provided in this case that such an activity will affect the public trust. Therefore, I find, as a Matter of Fact, that the proposed jurisdictional activity of placing riprap and an outfall pipe below the OHWM of the Menominee River will not affect the public trust.

i. R 281.811(1)(f)

The Administrative Rules promulgated under Part 301 define "public trust" as follows:

(i) The paramount right of the public to navigate and fish in all lakes and streams that are navigable.

(ii) The perpetual duty of a state to preserve and protect the public's right to navigate and fish in all inland lakes and streams that are navigable.

(iii) The paramount concern of the public and the protection of the air, water, and other natural resources of this state against pollution, impairment, and destruction.

(iv) The duty of the state to protect the air, water and other natural resources of this state against pollution, impairment, or destruction.

R 281.811(1)(f). Items (i) and (ii) of this Administrative Rule track the public trust standards under common law, as discussed *supra*, while the last two items implicate environmental considerations, which are addressed under the applicable criterion of § 30106 and R 281.814, addressed *infra*.

b. Riparian Rights

The second criterion to be considered under § 30106 is a determination that the project will not adversely affect riparian rights. MCL 324.30106. The phrase "riparian rights" is defined in Part 301 as "those rights which are associated with the ownership of the bank or shore of an inland lake or stream." MCL 324.30101(s). Under common law, riparian rights include the right to use the water for bathing and domestic use, the right to wharf out to navigability, and the right of access to navigable waters. *Hilt v Weber*, 252 Mich 198, 225; 233 NW 159 (1930). A number of other uses fall under riparian rights. See *Stupak-Thrall v United States*, 89 F3d 1269, 1297 (6th Cir 1996). However, the rights of a riparian owner are limited by the public trust. *Collins v Gerhardt*, *supra*. See also R 281.811(2).

In this contested case, Mr. Burie testified that the proposed mining operation would decrease tourism and lower property values on the Menominee River. 10 Tr 2264-2265. Yet, from a review of the plans attached to the application, it appears that the riprap and outfall pipe will be installed entirely within Aquila's riparian interest area. Exhibit R-59 at pp 44-45. The Finding of Fact document recites that "[t]he WRD is unable to determine if the project will impact riparian rights." Exhibit R-92 at p 12. However, there was no evidence in the record to indicate that the riprap or outfall pipe would affect the riparian rights of adjacent riparian interest owners. Accordingly, the evidence suggests that no party's riparian rights will be adversely affected by the placement of the riprap and outfall pipe. Therefore, I find, as a Matter of Fact, that the proposed jurisdictional activity of

placing riprap and an outfall pipe below the OHWM of the Menominee River will not adversely affect riparian rights.

c. Recreation

The Coalition also presented testimony regarding the impact pollutants from the mine would have on the business of a fishing guide operating on the Menominee River. Testimony of Tim Landwehr, Exhibit P-161. However, there was no evidence offered that the riprap or outfall pipe will adversely affect recreation within the Menominee River. Therefore, I find, as a Matter of Fact, that it will not adversely affect uses of the resource for recreation.

d. Fish and Wildlife

The 2017 Application contained a "Proposed Mussel Monitoring and Relocation Plan." Exhibit R-14(5) at p 266. This plan noted that EGLE, as well as the EPA and the United States Army Corps of Engineers, were concerned with mussels within the vicinity of the outfall pipe proposed in the Part 301 application. *Id* at p 267. The study noted that 800 mussels representing 12 species were observed within the project area. *Id*. The study recommended the relocation of mussels present in the vicinity of the outfall pipe. *Id*.

The 2017 Application also contained a report regarding the anticipated chemical constituency of the "mixing zone" surrounding the outfall pipe, which is a pipe from the mine's wastewater treatment plant. Exhibit R-14(5) at p 278. This report addressed the potential harmful effect on mussels within the "mixing zone." *Id* at p 279. This report also provided additional support for the proposed relocation of mussels within the "mixing zone." *Id* at pp 276-282. In her Request for Clarification, Ms. Wilson sought information regarding mussel relocation. Exhibit R-17 at p 8-10. When Ms. Wilson listed her concerns with respect to the Part 301 application, she did not identify any concerns regarding mussel relocation. 4 Tr 785-790. No other evidence of impacts to fish or wildlife were raised in this case.

Therefore, from a review of the evidence in this case, I find, as a Matter of Fact, that the proposed jurisdictional activity of placing riprap and an outfall pipe below the OHWM of the Menominee River will not adversely affect fish and wildlife.

e. Aesthetics

As a general principal under Part 301, "[a]esthetics is inherently a subjective criterion." *Petition of Clifford T. Riordan, Jr.*, 2011 WL 983190, at *7 (Mich.Dept.Nat. Res.). None of the Parties have contended that the riprap and outfall pipe will be aesthetically displeasing. Accordingly, I find, as a Matter of Fact, that the jurisdictional activity of placing riprap and an outfall pipe below the OHWM of the Menominee River is not aesthetically displeasing.

f. Local Government, Agriculture, Industry and Commerce

There is no contention that the installation of riprap and an outfall pipe will cause any impact, adverse or otherwise, on local government, agriculture, industry and commerce. Therefore, I find, as a Matter of Fact, that the proposed jurisdictional activity of placing riprap and an outfall pipe below the OHWM of the Menominee River will not cause any impact on uses of the resource for local government, agriculture, industry and commerce.

g. Environmental Impacts

Part 301 requires the issuance of a permit with respect to (a) dredging or filling bottomland, (b) placing a structure on bottomland, (c) constructing a marina, (d) enlarging or diminishing an inland lake or stream, (e) interfering with the natural flow of an inland lake or stream, (f) constructing an artificial canal or water body, and (g) connecting a canal or waterway with an existing lake or stream. MCL 324.30102(1) (a) – (g). Under the Part 301 statutory scheme, a project may not be permitted if it impairs or destroys the waters or other natural resources of the state. MCL 324.30106. Due to potential environmental effects of the proposed mine, a question arises regarding the scope of review for Part 301 purposes.

In this case, the proposed project is the development of a polymetallic zinc, copper, and gold mine. Exhibit R-59 at p 11. In general, the development of a nonferrous mine is not a project that is subject to Part 301. Rather, the environmental impacts of closure of a nonferrous mine are properly the subject of a Part 632 proceeding. See, e.g., *Petition of Boerner*, 2019 WL 6717176 (Mich.Dept.Nat.Res.). In addition, a groundwater discharge that is anticipated to occur after mine closure may require a Part 31 permit. See, e.g., *Petition of Keweenaw Bay Indian Community*, 2010 WL 276664 (Mich.Dept.Nat. Res.). While there may be some overlap between the different Parts of the NREPA, each Part has a specific focus. One of the main focuses of Part 301 is the regulation of activities that occur on bottomlands of navigable inland lakes and streams. See MCL 324.30102(1) (a) – (c).

As noted *supra*, the activity requiring a Part 301 permit in this case is the placement of riprap and an outfall pipe below the OHWM of the Menominee River.[41] If the effluent of the outfall pipe releases pollutants into the Menominee River, such an activity is not the subject of a Part 301 permit. Rather, it is the subject of Michigan's NPDES program. See Exhibit I-233 from *Petition of Boerner*, 2019 WL 6717176 (Mich.Dept.Nat.Res.). Hence, the environmental impacts that are important for Part 301 review are those impacts caused by those activities occurring below the OHWM of a navigable river.

The Finding of Fact document recites that "[t]he constituents anticipated to be mobilized [from the mine] will impact water chemistry and have a high likelihood to result in degradation to the aquatic communities within the unnamed streams that discharge to the Menominee, direct discharges of groundwater from the project site to the Menominee River…." Exhibit R-92 at p 12. This analysis of environmental impacts is too broad for the Part 301 review. No analysis was made with respect to environmental impacts caused by the placement of riprap and an outfall pipe below the OHWM of the Menominee River. While this is an activity that is commonly permittable under Part 301, the Finding of Fact document recommended the denial of a Part 301 permit for these expressed reasons.

[41] In note 40, *supra*, it was recognized that this case also involves interference with the natural flow of an inland lake or stream, *i.e.*, impacts to 253 linear feet of intermittent streams. MCL 324.30102(1)(e). Because such intermittent streams are located entirely within wetlands and because wetland impacts are being addressed under Part 303 herein, this Tribunal elected to limit the Part 301 analysis to those impacts occurring on bottomlands of a navigable river.

Due to a lack of evidence in the record, I find, as a Matter of Fact, that the placement of riprap and an outfall pipe below the OHWM of the Menominee River is an activity that will not impair, destroy or pollute the waters or natural resources of the State.

3. R 281.814

In addition to the statutory standards addressed *supra*, Rule 4 of the Administrative Rules also provides the following:

> In each application for a permit, all existing and potential adverse environmental effects shall be determined and the department shall not issue a permit unless the department determines both of the following:
>
> (a) That the adverse impacts to the public trust, riparian rights, and the environment will be minimal.
>
> (b) That a feasible and prudent alternative is not available.

R 281.814. The effects on the public trust, riparian rights and the environment have been discussed. R 281.814(a). In addition to their other challenges to the proposed project, the Petitioners contend that the Application should be denied due to the existence of feasible and prudent alternatives. However, the alternatives addressed by the Petitioners are to the wetland impacts of the project. See, e.g., Coalition's Closing Brief at pp 34-36. None of the parties contend that there is a feasible and prudent alternative to the placement of riprap and an outfall pipe below the OHWM of the Menominee River. As such, and based on the record in this case, I find, as a Matter of Fact, that there are no feasible and prudent alternatives to the placement of riprap and an outfall pipe below the OHWM of the Menominee River.

4. Summary

To review the findings of fact s*upra*, the placement of riprap and an outfall pipe below the OHWM of the Menominee River is an activity regulated under Part 301. This is an activity that will not affect the public trust. The Menominee River is a navigable river. The activity will occur entirely within Aquila's riparian interest area and will not adversely affect riparian rights. The activity will not adversely affect uses of the resource for recreation and will not adversely affect fish and wildlife. The activity is not aesthetically

displeasing and will not cause any impact on uses of the resource for local government, agriculture, industry and commerce. The activity will not impair, destroy or pollute the waters or natural resources of the state. Finally, there are no feasible and prudent alternatives to the placement of riprap and an outfall pipe below the OHWM of the Menominee River. Based on these findings alone, Aquila is entitled to a permit under Part 301, limited to this activity.

However, Aquila's failure to provide an administratively complete application has left evidentiary shortcomings throughout the administrative process. As noted *supra*, Part 301 provides that a permit is required when the proposed project diminishes the size of an inland lake or stream. MCL 324.30102(1)(d). The concern in this case is that pit dewatering will diminish either the Menominee River or regulated streams within the project area. While Ms. Wilson found that the pit dewatering will have no effect on the Menominee River,[42] 1 Tr 212, she testified that the WRD was unable to determine from Aquila's groundwater model whether pit dewatering will diminish any streams within the project area. 1 Tr 169. See the analysis of Aquila's computer model in the Administrative Completeness section, *supra*. Therefore, I find, as a Matter of Fact, that Aquila failed to provide necessary evidence to demonstrate that a permit is not required under § 30102(1)(d). MCL 324.30102(d). As a result, I find, as a Matter of Fact, that Aquila's application for a permit under Part 301 is not administratively complete and must be denied.

B. PART 303, WETLANDS PROTECTION

1. Jurisdiction

Part 303 is implicated if a jurisdictional activity occurs in the proposed project. MCL 324.30304. The jurisdictional activities identified in Part 303 are (a) placing fill material in a wetland; (b) dredging or removing soil from a wetland; (c) constructing or operating a use in a wetland; and (d) draining surface water from a wetland. *Id*. In this case, the second revision to the Application contemplated dredging 980,820 cubic yards of material from 5.31 acres of wetlands and placing 803,453 cubic yards of fill in 5.91 acres of

[42] But see the Testimony of Dr. Hyndman from the Part 632 case wherein he opined that water from the Menominee River will flow into the pit. Exhibit P-164 at Tr p 520.

wetland, with secondary impacts to approximately 17.17 acres of wetland as a result of surface water hydrology. Exhibit R-59. Therefore, I find, as a Matter of Fact, that the proposed project implicates activities covered by Part 303 which require a permit from EGLE. MCL 324.30304 (a) & (b).

2. Section 30311(1)

The first inquiry in determining what project, if any, can be permitted are the following requirements in § 30311(1):

> A permit for an activity listed in section 30304 shall not be approved unless the department determines that the issuance of a permit is in the public interest, that the permit is necessary to realize the benefits derived from the activity, and that the activity is otherwise lawful.

MCL 324.30311(1). Hence, under § 30311(1) analysis, there are three requirements necessary for approval of the permit: (a) "the issuance of a permit is in the public interest," (b) "the permit is necessary to realize the benefits derived from the activity," and (c) "the activity is otherwise lawful." MCL 324.30311(1). The first requirement necessitates a finding that "the issuance of a permit is in the public interest…." MCL 324.30311(1). Because the general criteria for determining whether the proposed activity is in the public interest are contained in § 30311(2), this requirement will be addressed *infra*.

The second requirement compels a finding that "the permit is necessary to realize the benefits derived from the activity…." MCL 324.30311(1). In this case, the proposed project is the development of a polymetallic zinc, copper, and gold mine. Exhibit R-59 at p 11. The proposed pit is to be located where the ore body is located. See Exhibit I-2 at p 56-57. To mine these elements, Aquila has proposed an open pit, the mining of which would cause the dredging of 906,300 cubic yards of material from 2.24 acres of wetland WL-15b. Exhibit R-59 at pp 29, 31. To avoid dredging this wetland, it is possible the minerals could be mined from an underground mine. However, Mr. Donohue testified that the proposed mine has "gossan" that is located at the surface. 11 Tr 2497. "Gossan" is a rock that is enriched in gold and silver quantities. 11 Tr 2337. Mr. Donohue testified that, "[i]f they were to mine this project underground, a significant amount of ore would be left in the ground to form … the crown pillar or the roof of the mine … and it would greatly reduce the amount of ore that they could extract from this project and it just would not be

economical." 11 Tr 2497-2498. Based on this testimony, I find, as a Matter of Fact, that a permit is necessary to realize the benefits derived from the activity.

The third requirement necessitates a finding that "the activity is otherwise lawful." MCL 324.30311(1). This standard asks whether the proposed activity is, assuming all requisite approval is obtained, lawful. Since no evidence was presented that the activity proposed in the wetland is unlawful, this criterion does not require the denial of the Application.

3. Section 30311(2)

Determining whether the proposed activity is in the public interest requires a balancing of the benefit against the foreseeable detriments, keeping in mind the national and state concern with protecting wetlands from impairment. MCL 324.30311(2). Section 30311(2) sets forth nine general criteria, each of which go to the benefit/detriment balancing test that must be considered. Before addressing each criterion, it is necessary to review the record regarding the proper analysis of the balancing test.

Ms. Wilson testified that the analysis is "somewhat subjective." 4 Tr 807. Rather than conducting a subjective analysis, the determination must be based upon a preponderance of the evidence. *Aquilina v General Motors Corp*, 403 Mich 206, 210-211; 267 NW2d 923 (1978). The agency must first determine whether the applicant has submitted evidence regarding each criterion. The agency then has the duty to weigh the evidence to determine whether the proposed activity is in the public interest. See, e.g., MRE 104(e); *Rasheed v Chrysler Corp*, 445 Mich 109, 121-122; 517 NW2d 109 (1994) ("Generally, it is the duty of the trier of fact to weigh the evidence").

The following is a recitation of the evidence submitted as it applies to each statutory criterion of the balancing test:

a. The relative extent of the public and private need for the proposed activity.

One of the contested issues in this case is whether there is a "public interest" for the project. See, e.g., Coalition's Closing Brief at pp 32-34. However, it is helpful to review the difference between "public interest" and "public need." Public interest is a

statutorily defined term. Part 303 provides that "public interest" is determined by "the benefit which reasonably may be expected to accrue from the proposal … balanced against the reasonably foreseeable detriments of the activity." MCL 324.30311(2). The statute requires the agency's decision to "reflect the national and state concern for the protection of natural resources from pollution, impairment, and destruction." *Id*. Finally, the statute provides nine criteria to assist in the determination of whether a project has "public interest." *Id*.

The first criterion is "[t]he relative extent of the public and private need for the proposed activity." MCL 324.30311(2)(a). Under this criterion, it is appropriate to address public comment received by the agency. Specifically, Ms. Wilson testified that she received approximately 3,400 comments during the public comment period. 2 Tr 383. Many of the comments the agency received were "form letters" sent by multiple parties. *Id*. In addition to individual comments, Ms. Wilson explained that the agency received a number of Resolutions from local townships, counties, boards, etc. 2 Tr 384. These Resolutions are addressed *infra*. Ms. Wilson testified that there were approximately 30 comments in favor of the project, with the remainder in opposition to it. 2 Tr 385. The public comments were contained in Exhibit R-72. Aquila's response to the public comments is contained in Exhibit R-80.

The following Resolutions were also contained in the record. First, Aquila submitted Senate Resolution No. 85, which was adopted by the Michigan Senate on September 14, 2017. Exhibit I-59. This Resolution notes that "[m]odern-day mining can boost our state and local economies while providing for a balanced use of natural resources." *Id* at p 1. The Resolution further notes that "Aquila Resources' Back Forty Project will enhance continued economic growth in the Upper Peninsula…." *Id*. It further notes:

> Local communities will benefit from tax revenue generated by the Back Forty mine. It has been estimated that approximately $20 million in severance taxes will be paid annually during operation to local communities (65 percent) and the state (35 percent). The state's portion will be directed to the Rural Development Fund. The fund issues grants for infrastructure and development projects related to the expansion or maintenance of agriculture, forestry, mining, oil and gas production, and tourism industries….

Id. Finally, the Resolution provides that the Senate "encourage[s] support by leaders at the local, regional, state and federal level for the Aquila Resources' Back Forty Project…." *Id*.

In response to Senate Resolution No. 85, the Petitioners submitted Exhibit P-163, which contains Resolution No. 2017-16 from the Menominee County Board of Commissioners of Menominee County, Michigan. Exhibit P-163 at pp 2-3. This Resolution recites that "[t]he Menominee County Board opposes any mine along the Menominee River" because, *inter alia*, "Menominee County's strong tourism industry relies on maintaining the integrity of our rivers and their tributaries, lakes, forests and wildlife, and parks from potential pollutions…." *Id*. The Resolution was sustained by a vote of 5-4 by the Board. Exhibit P-163 at p 3.

Exhibit P-163 also contains a Resolution by the Land Conservation Committee of the Brown County Board of Supervisors of Brown County, Wisconsin. *Id*. at pp 4-5. This Resolution, which opposes the mine, addresses potential impacts such as acid mine drainage, risks to human health and the environment, and economic loses. *Id*. The Resolution erroneously recites that "potential economic losses including reduction in property values and loss of tourism revenue are not factored into the permitting review process…." *Id* at p 4. The Resolution "strongly opposes the Aquila Resources, Inc. Back Forty Mine Project" and urges EGLE to deny a mining permit. *Id* at p 5.

Similar language to the Resolution of the Brown County Board of Supervisors was found in Resolution No. 2017-49 issued by the Door County Board of Supervisors of Door County, Wisconsin. Exhibit P-163 at p 6. Such language was also contained in Resolution No. 461-16 of the Marinette County Board of Supervisors of Marinette County, Wisconsin. Exhibit P-163 at p 7. The language was also included in Resolution No. 2017-03 of the Menominee County Board of Supervisors of Menominee County, Wisconsin. Exhibit P-163 at p 8. Such language was further included in Resolution R2017-08-04 of the Oconto County Board of Supervisors of Oconto County, Wisconsin. Exhibit P-163 at pp 9-10. Finally, similar language was contained in Resolution No. 48-17 of the Shawano County Board of Supervisors of Shawano County, Wisconsin. Exhibit P-163 at pp 13-14.

Exhibit P-163 also includes Resolution No. 77-2017-18 of the Outagamie County Board of Supervisors of Outagamie County, Wisconsin. Exhibit P-163 at p 11-12. While

this Resolution contains similar language from the Resolution of the Brown County Board of Supervisors, it concedes that "[t]he mining industry can potentially provide benefits to communities which it affects, including job creation, new tax revenue, and economic development." Exhibit P-163 at p 11. The Resolution concluded that "the Outagamie County Board of Supervisors opposes any mining project which does not implement sufficient safeguards to mitigate the potential negative impacts of the mining project on the natural resources, public health, cultural heritage, and economy of Wisconsin." Exhibit P-163 at p 11-12.

In addition to Senate Resolution No. 85, Aquila also proffered the testimony of Mr. Rataskie, who is the Executive Director of the Upper Peninsula Construction Council (UPCC). 18 Tr 3985, 3987. He testified that the UPCC's purpose is to promote jobs in the construction industry, particularly in the Upper Peninsula. 18 Tr 3987-3988. Mr. Rataskie testified that there will be approximately 350 construction jobs resulting from the proposed Back Forty Project. 18 Tr 3998. He stated that with such construction jobs, the Back Forty Project would be one of the largest employers "in town," although he didn't identify to which "town" he was referring. 18 Tr 4000. He also stated that Aquila has made a commitment to hiring "70 percent local," although he did not identify the locale for such hiring. *Id*. Other benefits to be provided by the mine project include free and reduced lunch (Title I) programs, the installation of a helipad on Aquila's facility, and a cell tower. 18 Tr 4000-4001. He further testified that the mine would provide an estimated $20 Million in tax revenues per year to the state. 18 Tr 4004.

With respect to the private need for the project, relevant testimony was proffered by Mr. Bocking. He testified that the project identified in the Application is projected to yield a post-tax net present value of $208 Million. 14 Tr 3142; Exhibit I-64 at p 6. By utilizing the project site contained in the Application, the Back Forty Project is anticipated to yield a post-tax internal rate of return of 28.2%. Exhibit I-64 at p 6; 14 Tr 3142.

In addition, the Finding of Fact document recites the following:

> The application states that the project has a public interest and will result in the creation of jobs and enhance economic development within the region. The application also states that the project will expand the U.S. mineral availability. The application does not provide further details on what benefits to the public the project will provide nor does the application demonstrate a public need that the benefits of the project will fulfill.

Exhibit R-92 at p 16.

In addition to all of the foregoing evidence, the Legislative Findings set forth in Part 632 are helpful. Therein, the Michigan Legislature stated that, "[i]t is the policy of this state to foster the development of the state's natural resources." MCL 324.63202(a). The Legislature further found that "[n]onferrous metallic mineral mining may be an important contributor to Michigan's economic vitality." MCL 324.63202(e).

Evidence of "public need" contained in the record includes the 350 jobs the mine will create; the $20 million in severance taxes to be paid annually during operation to local communities and the state; and the state's policy of fostering the development of natural resources. As a result of this evidence, I find, as a Matter of Fact, that there is a public need for the project. Because the project is anticipated to yield a post-tax net present value of $208 Million, I further find, as a Matter of Fact, that there is a private need for the project.

b. The availability of feasible and prudent alternative locations and methods to accomplish the expected benefits from the activity.

Initially, it should be noted that both the WRD and Aquila spent a great deal of time in this case discussing the Least Environmentally Damaging and Practicable Alternatives (LEDPA). See, e.g., Exhibit R-92 at p 40. However, Michigan's statutory scheme does not address LEDPA. Rather, Part 303 requires an analysis of feasible and prudent alternatives. See MCL 324.30311(2)(b); and MCL 324.30311(4)(b). See 3 Tr 622 (where Ms. Wilson acknowledged that "for the sake of Part 303, we do call it the feasible and prudent alternatives analysis"). The Court of Appeals has defined a "feasible" alternative as one that is "capable of being put into effect or accomplished…." *Friends of Crystal River v Kuras Properties*, 218 Mich App 457, 466; 554 NW2d 328 (1996). On the other hand, a "prudent" alternative is one that is "exercising sound judgment." *Id*. In undertaking the alternatives analysis, it must be noted that "an examination of alternatives that avoid or limit the impact to a resource is a hallmark of Michigan environmental law." *Petition of Dune Harbor Estates, LLC*, 2005 WL 3451406, at *5 n 8 (Mich.Dept.Nat.Res.). Indeed, under Part 303, the Administrative Rules provide, in part, that a feasible and prudent

alternative is one that has "less adverse impact on aquatic resources." R 281.922a(6). The Rules further provide that, "[u]nless an applicant clearly demonstrates otherwise, it is presumed that a feasible and prudent alternative involving a non-wetland location will have less adverse impact on aquatic resources than an alternative involving a wetland location." R 281.922a(8).

This criterion seeks an analysis of the availability of feasible and prudent "alternative locations and methods." MCL 324.30311(2)(b). In the Finding of Fact document, Ms. Wilson did not focus on methods but instead focused on 900 acres of upland to the east of the project site, which are under lease to Aquila. Exhibit R-92 at p 42. Ms. Wilson suggested that this acreage could be employed by moving portions of Aquila's facility eastward, thereby avoiding wetland impacts. *Id*. In response, Mr. Donohue testified that the Michigan Department of Natural Resources (DNR) "made it very clear to them that they wanted to keep that land intact as part of the Escanaba state forest and that they were not going to make that available to Aquila for the location of mine infrastructure." 11 Tr 2495. However, in the Finding of Fact document, Ms. Wilson stated:

> I contacted the Manager of DNR Real Estate Services and asked if Aquila has inquired after the availability to develop this property. DNR responded: "Aquila has never proposed that lands in these Sections be part of the exchange. The [sic] only have indicated that there will be likely future easement applications for utilities and roads, but to date, no applications have been submitted.

Exhibit R-92 at p 42. In response, Mr. Donohue testified that this alternative was not contained in the Application "because it's not an alternative. It's not an available alternative to the project." 11 Tr 2496. Instead, Aquila's Application addressed the following alternatives:

Alternative A: This alternative involves planning an underground mine instead of an open pit mine. See Exhibit R-59 at p 381. According to Table 4-1 of the Application, this alternative has zero wetland impacts. Exhibit R-59 at p 395. As noted *supra*, the proposed mine has "gossan" that is located at the surface. 11 Tr 2497. "Gossan" is a rock that is enriched in gold and silver quantities. 11 Tr 2337. Mr. Donohue testified that, "[i]f they were to mine this project underground, a significant amount of ore would be left in the ground to form … the crown pillar or the roof of the mine … and it would greatly

reduce the amount of ore that they could extract from this project and it just would not be economical." 11 Tr 2497-2498. Table 4-1 of the Application merely recites that this alternative "has a negative net present value and internal rate of return." Exhibit R-59 at p 395. While Mr. Bocking provided a cost analysis for various project alternatives, Exhibit I-64, he did not provide an analysis of the cost associated with mining the ore at the project site underground. Although Mr. Donohue testified that an underground mine would yield a lessor amount of revenues, he did not present a spreadsheet demonstrating the amount of revenues anticipated from the open pit mine verses an underground mine. Therefore, there is little to no evidence in the record to corroborate his testimony.

Alternative B: This alternative involves an alternative "method" to the proposed method of processing ore at the project site. In this alternative, Aquila proposed shipping the ore offsite for processing, either by truck or by rail. See Exhibit R-59 at p 382. Under this alternative, Table 4-1 of the Application indicates that there will be 8 acres of direct wetland impacts, and less than 10 acres of indirect wetland impacts. Exhibit R-59 at p 395. Two alternative processing sites were selected for this alternative. The first site is the Groveland Mine Site, located approximately 12.5 miles north of Iron Mountain, Michigan. Exhibit I-64 at 2. This site is located 85 miles by road and 72 miles by rail from the project area. 14 Tr 3126. The second site is the Humboldt Mill Site located 118 miles by road and 170 miles by rail from the project area. Exhibit I-64 at p 2; 14 Tr 3128. These alternative sites are for processing the ore and for storage of the tailings. 14 Tr 3008. Mr. Bocking testified that by utilizing this alternative, there is no need for a tailings management facility at the project site. 14 Tr 3122. The only facility at the site, other than the open pit, would be the waste management facility for storage of waste rock. *Id*. For a map of the project site under this alternative, see Exhibit I-64 at p 9.

Mr. Bocking provided an analysis of the economic returns that can be expected from each alternative. First, the project identified in the application is projected to yield a post-tax net present value (NPV) of $208 Million. 14 Tr 3142; Exhibit I-64 at p 6. By utilizing the proposed project site, the Back Forty Mine is anticipated to yield a post-tax internal rate of return (IRR) of 28.2%. Exhibit I-64 at p 6; 14 Tr 3142. By trucking the ore to Groveland, the NPV is projected to be $7 Million. Exhibit I-64 at p 6; 14 Tr 3142. The IRR for this alternative is 7.7%. By transporting the ore to Groveland by rail, the NPV is

projected to be $103.2 Million. Exhibit I-64 at p 6; 14 Tr 3142. The IRR for this alternative is 17.2%. Exhibit I-64 at p 6; 14 Tr 3142. By trucking the ore to Humboldt, the NPV is projected to be a negative $27 Million. Exhibit I-64 at p 6; 14 Tr 3142. The IRR for this alternative is 3.7%. Exhibit I-64 at p 6; 14 Tr 3142. Finally, the NPV for transporting the ore by rail to Humboldt is projected to be $65.8 Million. Exhibit I-64 at p 6; 14 Tr 3142. The IRR for this alternative is 14.4%. Exhibit I-64 at p 6; 14 Tr 3142.

Mr. Bocking testified that a potential investor to the project would primarily look at the initial capital cost and the IRR for the project. 14 Tr 3142-3143. Aquila intended to keep the initial capital cost for the project at less than $300 Million. 14 Tr 3143. The project proposed in the application meets this capital cost, as does the option of shipping the ore to Groveland. *Id*. Shipping the ore by truck or by rail to Humboldt exceeds this threshold. *Id.* Aquila contends that it requires an IRR greater than 25% to attract investors. 14 Tr 3145. Only the project as proposed in the Application exceeds this threshold. Exhibit I-64 at p 6; 14 Tr 3142.

Alternative C: In this alternative, the small pit concept is addressed. Exhibit R-59 at pp 383-384. Under this alternative, 7.7 acres of direct wetland impacts are contemplated, as well as 20.7 acres of indirect wetlands impact. Exhibit R-59 at p 395. The small pit concept reduces the size of the pit so that wetland WL-15b is not dredged. Exhibit R-59 at p 404. Mr. Donohue testified that this alternative was first considered by Aquila's predecessor-in-interest, Hudbay. 11 Tr 2500. He acknowledged that this alternative avoided direct impacts to wetlands complexes 14/15 and 6. 11 Tr 2500; Exhibit R-59 at p 404. In the Application, it asserts that "the small pit alternative suggests that insufficient tonnage of ore would be accessed in order to make the Project prudent or practicable in this regard." Exhibit R-59 at p 384. Table 4-1 merely provides that this alternative is "[n]ot economically viable" because it purportedly has a negative NPV and IRR. Exhibit R-59 at p 395. As with Alternative A, Aquila did not present a spreadsheet demonstrating the amount of revenues anticipated from the regular-sized pit verses the small-sized pit. Therefore, there is no evidence in the record to corroborate the statement in the Application.

Alternatives D and E: In the Application, Aquila listed its first and second site plans for the project as Alternatives D and E, respectively. Exhibit R-59 at p 384. A map

of Alternative D appears at Exhibit R-4 at p 14 and a map of Alternative E appears at Exhibit R-14(1) at p 37. Under Alternative D, Table 4-1 of the Application indicated that 6.4 acres of direct wetland impacts are contemplated with 19.9 acres of indirect wetland impacts. Exhibit R-59 at p 395. Aquila stated that its first site plan was based on "preliminary mineral characterization test work dating back to 2009…." Exhibit R-59 at p 384. The Application merely provides that Alternative D is "not prudent." *Id.* In his testimony, Mr. Donohue stated that this alternative would yield a mine waste storage facility that is much higher and an "operability issue." 11 Tr 2502. Aquila provided no other engineering information or economic analysis to provide how this alternative was "not prudent."

As to Alternative E, Table 4-1 of the Application indicated that 10.4 acres of direct wetland impacts are contemplated with 17.1 acres of indirect wetland impacts. Exhibit R-59 at p 395. The Application noted that "additional land was purchased by Aquila … that allowed for the avoidance of wetland WL-40 with the tailings and waste rock storage and for the expansion of the area without causing direct impacts to wetland complex WL-A1/A3." Exhibit R-59 at p 385. The Application provides that Alternative E is "not prudent" because "the economics, engineering, and environmental managements associated with the project have been optimized" in the third site plan. Exhibit R-59 at p 385. Aquila failed to provide any economics, engineering, and environmental managements associated with the third site plan to show how it was optimized over the second site plan.

It should be noted that the only site plan proposed by Aquila which avoids direct impacts to wetland WL-B1 is Alternative D, the site plan proposed with its initial Part 303 application. Cf Exhibit R-4 at p 14 with Exhibit R-14(1) at p 37 and Exhibit R-59 at p 31. Mr. Donohue testified that wetland WL-B1 is "largely surface water dominated" and was "getting its water from direct precip and runoff…." 11 Tr 2409. He acknowledged that the site plan in Alternative E resulted in flipping wetland WL-B1 from an indirect impact to a direct impact. 11 Tr 2449. In addition to filling this wetland, Aquila estimated that the revised site plan for Alternative E will fill 253 feet of stream located within that wetland and that "297 feet of that stream system there will be indirectly impacted because we're cutting off the water flow to … that stream segment." 11 Tr 2482-2483. Mr. Donohue testified that the second and third site plans for the project both show wetland WL-B1

being filled because the wetland is a surface feature that will be "choked off" by indirect impacts at the project site. 14 Tr 3023.

Alternatives F, G and H: In addition to the foregoing, Aquila addressed alternative concepts of tailings and waste rock storage to reduce wetland impacts. It proposed three alternatives. Alternative F provides for a slurry of tailings with a separate waste rock stockpile, Alternative G provides for a slurry of tailings with adjacent waste rock co-disposal, and Alternative H contemplates thickened tailings with adjacent waste rock co-disposal. Exhibit R-59 at p 386. Table 4-1 of the Application indicated the wetland impacts contemplated in each alternative as follows: Alternative F contemplated 25.5 acres of direct wetland impacts and 17.2 acres of indirect wetlands impact, Alternative G contemplated 11.4 acres of direct wetland impacts and 23.5 acres of indirect wetland impacts, and Alternative G contemplated 7.0 acres of direct wetland impacts and 30.2 acres of indirect wetland impacts. Exhibit R-59 at p 395. The Application recites that "[t]hese three alternatives were deemed to have the highest potential impact to aquatic resources of all the alternatives considered, deeming them not practical or prudent with respect to aquatic impacts." Exhibit R-59 at p 386.

This Tribunal has two concerns with respect to the foregoing evidence. First, there is a concern regarding the administrative completeness of the Application which affects the permitting decision under Part 303 as well. Specifically, Aquila did not provide revenues and cost figures for both Alternative A and Alternative C. To effectively evaluate these alternatives, Aquila must provide such information to corroborate its assertion that these alternatives are "not prudent." Rule 2a provides that "[a]n alternative may be considered feasible and prudent even if it entails higher costs or reduced profit" but "the department shall consider the reasonableness of the higher costs or reduced profit in making its determination." R 281.922a(11). By failing to provide evidence of revenues and costs associated with Alternatives A and C, this Tribunal is unable to determine the "reasonableness of the higher costs or reduced profit…."

In addition, Rule 2a provides that "[a]n area not presently owned by the permit applicant that could reasonably be obtained, utilized, or expanded, or managed in order to fulfill the basic purpose of the proposed activity is a feasible and prudent alternative location." R 281.922a(9). It is undisputed that Aquila possesses state of Michigan leases

covering lands located east of the project site. See, e.g., Exhibit R-59 at p 34. This Tribunal simply cannot determine from the record whether these lands are available for project facilities. The only evidence in the record is Mr. Donohue's testimony that the DNR "wanted to keep that land intact as part of the Escanaba state forest…." 11 Tr 2495. However, the Manager of DNR Real Estate Services advised the WRD that Aquila never proposed the lands to the east as part of an exchange. Exhibit R-92 at p 42. To corroborate its position, Aquila should have presented a copy of its request for a land exchange and a denial by the DNR. From the evidence in the record, this Tribunal simply cannot determine whether Aquila made any effort to utilize such lands. For each of these reasons, I find, as a Matter of Fact, that Aquila's alternatives analysis is not administratively complete.

The second concern with Aquila's alternatives analysis is the development of its project site plan. The Administrative Rules make it clear that an alternative is feasible and prudent if it has "less adverse impact on aquatic resources." R 281.922a(6). In many cases addressing feasible and prudent alternatives, the applicant's initial site plan has the most impact to the resource. During the processing of the application, it is common for the applicant to reduce the amount of wetland impacts sought in its original site plan. See, e.g., *Petition of Heverly*, 2019 WL 2052804, at *3 (Mich.Dept.Nat.Res.) (wetland impacts were reduced from 2,260 square feet of fill to 1,200 square feet); *Petition of Herweyer*, 2009 WL 5258564, at *4 (Mich.Dept.Nat.Res.) (wetland impacts were reduced from 1.28 acres to 0.54 acres); *Petition of Mees*, 2006 WL 2037825, at *2 (Mich.Dept.Nat. Res.) (wetland impacts were reduced from 3,000 square feet to 2,500 square feet); *Petition of Prodo, Inc.*, 1999 WL 124064, at *7 (Mich.Dept.Nat.Res.) (wetland impacts were reduced from 3.4 acres to "a lesser amount of fill and consequently a reduced wetland impact"); *Petition of Munzel*, 1996 WL 419816, at *4 (Mich.Dept.Nat.Res.) ("additional measures reduced the wetland impacts sufficient to merit permitting the project"); and *Petition of Kuras Properties, Inc*, 1990 WL 299409, at *9 (Mich.Dept.Nat.Res.) (there were 100 "revisions to the original proposal to minimize adverse environmental impact").

In this case, however, the amount of wetland impacts increased with each modification of Aquila's site plan. Table 4-1 reflects that the amount of wetland impacts in Alternative D (the initial plan) is **26.3 acres** (6.4 acres of direct impact; 19.9 acres of

indirect impact). Exhibit R-59 at p 31. That Table also indicates that the amount of wetland impacts in Alternative E (Aquila's second site plan) is **27.5 acres** (10.4 acres of direct impact; 17.1 acres of indirect impact). *Id*. Aquila's final site plan reflects wetlands impacts of **28.39 acres** (11.22 acres of direct impact; 17.17 acres of indirect impact). Exhibit R-59 at p 29.

Aquila did not proffer evidence of how it had re-designed its site plans with a view toward reducing wetland impacts.[43] Mr. Bocking testified that he had designed only five or six site plans in this case before arriving at the final site plan. 14 Tr 3114. Mr. Bocking did not testify regarding the re-design of the site plan with a view to reducing wetland impacts. Because it considered three site plans, each of which increased in wetland impacts, the record does not contain evidence of feasible and prudent alternative locations and methods. Therefore, I find, as a Matter of Fact, that Aquila failed to demonstrate that there are no feasible and prudent alternative locations or methods.

c. The extent and permanence of the beneficial or detrimental effects that the proposed activity may have on the public and private uses to which the area is suited, including the benefits the wetland provides.

The Application involves a mine that will be active for seven years. Exhibit R-92 at p 18. Under the current closure plan, the wastewater treatment plant will remain on site for 16 years. *Petition of Boerner*, 2019 WL 6717176, at *13 (Mich.Dept.Nat.Res.). Groundwater at the project site will be monitored for 30 years. *Id* at *12. During this 30-year period, it is unlikely any activity can take place on the property. However, the "extent" and "permanence" of detrimental effects may not be determined from such evidence.

The Finding of Fact document indicates that the application does not provide information regarding the "extent" and "permanence" of wetland effects. Exhibit R-92 at p 19. Due to the inadequacies of Aquila's computer model, the "extent" of wetland impacts in the project area was not adequately addressed at the hearing. As to permanence of impacts, the record contains an email from Aquila which recites that wetland impacts in

[43] While Exhibit R-59 indicates measures purportedly employed by Aquila to reduce wetland impacts, such as the use of a cut-off wall to minimize impacts of pit de-watering, Exhibit R-59 at p 388-391, such measures did not include a re-design of its site plans.

the project area include 42 acres of impact, including 31 acres of "indirect and temporary" impacts. Exhibit P-111. No other evidence was proffered by Aquila regarding the permanence of the wetland impacts in this case. Moreover, Aquila provided no evidence regarding the public and private uses to which the area is suited. The Finding of Fact document recites that "[t]he extent and permanence of this impact is not defined by the information available to the WRD and the extent of the detrimental effects cannot be determined." Exhibit R-92 at p 19. Based on this record, I find, as a Matter of Fact, that Aquila failed to provide evidence of the extent and permanence of the beneficial or detrimental effects that the proposed activity may have on the public and private uses to which the area is suited, including the benefits the wetland provides.

d. The probable effects of each proposal in relation to the cumulative effects created by other existing and anticipated activities in the watershed.

The Finding of Fact document recites that "[t]here is limited development or new land use in the watershed. There are no known or anticipated activities within the watershed that would contribute to the cumulative effects of this project." Exhibit R-92 at p 19. Based on this finding, I find, as a Matter of Fact, that the proposed project will cause minimal cumulative effects to the remaining wetland within the watershed.

e. The probable effects on recognized historic, cultural, scenic, ecological, or recreational values and on the public health or fish or wildlife.

Section 30311(2)(e) provides that the probable effects of the project on historical and cultural "values" are to be determined. MCL 324.30311(2)(e). Menominee first presented testimony of Mr. Cox, Chairman of the Menominee Indian Tribe of Wisconsin. He testified regarding the origin of the Menominee people at the mouth of the Menominee River. 4 Tr 905. He stated that, prior to European incursion into the upper Great Lakes area, the Menominee people were on the shore of Green Bay, and up and down the Menominee River. 4 Tr 906. The "Sixty Islands" area where the project site is located is an area where the Menominee people had a village site. 5 Tr 934. He stated that the archaeological evidence supports this position. *Id*. He noted that the 1854 treaty created

the current reservation for the Menominee people, and that the Menominee living along the River were moved to the reservation. 5 Tr 935-936. Members of the Tribe still visit the Sixty Islands area for cultural, spiritual and ceremonial reasons. 5 Tr 936. On cross-examination, Chairman Cox testified that the mouth of the Menominee River is located "[a]bout 23 miles as the crow flies" from the project site. 5 Tr 972.

Mr. Grignon is currently employed as the Tribal Historic Preservation Officer. 5 Tr 992. Mr. Grignon is also the Tribe's designated representative under the Native American Graves Protection and Repatriation Act (NAGPRA). 5 Tr 993. Since 1993, the Tribe has repatriated about 130 human remains or funerary objects under NAGPRA. *Id*. Mr. Grignon testified that the Menominee River is the birthplace of the Menominee people. 5 Tr 998. He also testified that the Menominee people lived from the mouth of the Menominee River to Sturgeon Falls, north of the project site. 5 Tr 1002. He testified that, in the immediate area around the project site, there are garden beds, burial mounds, and prehistoric storage pits. 5 Tr 1003. In his prior testimony, he explained that twenty Menominee ancestors and funerary objects were repatriated to the Menominee people from the University of Michigan. Exhibit P-348 at p 1093. These remains and funerary objects were originally recovered by the University from the Backlund mounds, which are very near the project site. 5 Tr 1093, 1101.

Mr. Grignon also testified that he worked with Dr. Overstreet to prepare an application for an Historic District registration under the National Register of Historic Places. 5 Tr 1013; Exhibit P-287. The registration relates to the Sixty Islands area, and is called Anaem Omot, The Dog's Belly. 5 Tr 1013-1014. The name relates to a Menominee legend associated with Sixty Islands, where otters that were at play in the Menominee River were mistaken for dogs. 5 Tr 1014. A map of the boundaries of the historic district is contained in the application and includes lands located in the project area. Exhibit P-287 at p 78. The map also shows a representation of all the archaeological sites located within the district. *Id*. With respect to those archaeological sites located in the state of Michigan, they are identified by a trinomial number: the first number 20 represents Michigan, the ME designation represents Menominee County, with the last number representing the number of the archaeological site in the County. See *Petition of Boerner*,

2019 WL 6717176, at *23 (Mich.Dept.Nat.Res.).[44] From this map, it is clear that numerous archaeological sites are located within the proposed Historic District. Exhibit P-287 at p 78. These sites are located in and around the project area. *Id*.

Dr. Overstreet testified that an Historic District is a means of recognizing important historic and archeological sites. 5 Tr 1053. He testified that the Sixty Islands area qualifies as an Historic District due to the integrity of the deposits, the limited amount of disturbance and destruction, and the fact that it is documented in literature. 5 Tr 1054. Dr. Overstreet stated that he compiled the published archaeological reports for the map referenced *supra*. 5 Tr 1057. He testified that if any of these sites are impacted, it would have an effect on the entire Historic District. 5 Tr 1059. He stated that "[o]nce these sites are gone, the – the information is lost." *Id*. Dr. Overstreet testified that a good portion of the mining project is located within the district boundaries. 5 Tr 1059-1060. He opined that the construction of the mine will have a negative impact on the proposed Historic District. 5 Tr 1063. He also testified that even if the proposed mine does not affect any of the archaeological sites, it would affect the ability to get a registration of the area as an Historic District because an 80-acre hole in the middle of the district will be looked upon with disfavor by the Keeper of the National Register. 5 Tr 1064-1065.

Finally, in response to questioning from the Tribunal, Dr. Overstreet stated that the application is currently under review by the Wisconsin Historical Preservation Office. 5 Tr 1110. After it is approved by the Wisconsin office, it must also be approved by Michigan's Historical Preservation Division. 5 Tr 1112. Thereafter, the Wisconsin office must nominate the Historic District with the National Park Service. 5 Tr 1113. After being submitted to the National Park Service, the next step is a determination of whether to list the District with the National Park Service. 5 Tr 1114. Dr. Overstreet was uncertain how long this process would take but that it was at least a year away from being approved by the Wisconsin and Michigan Historic Preservation Offices. 5 Tr 1114.

In response to this evidence, Aquila proffered the testimony of Ms. Payette. She testified that it could take years for any district nomination to get to the Keeper; and even then, there is no guarantee that the Keeper will list it. 15 Tr 3195-3196. She also testified

[44] On this map, the first part of the trinomial number – the 20 representing Michigan – has been omitted.

that the Historic District would not be determined eligible because of the inconsistency of the narrative and the lack of a clear boundary. 15 Tr 3190-3193. As a result of this testimony and as a result of the findings in the Part 632 case, Aquila argued that the proposed project will not affect recognized historic and cultural values. Aquila's Closing Brief at pp 35-37.

With respect to Aquila's argument that this issue was already determined in the Part 632 case, such a contention is erroneous. Two issues were addressed in the Part 632 case. First, whether "unlisted" historic or cultural archaeological sites are required to be described in an Environmental Impact Assessment (EIA). See *Petition of Boerner*, 2019 WL 6717176, at *24 (Mich.Dept.Nat.Res.). Second, whether the proposed mining project would impair or destroy the historical or cultural sites within the project area. *Id* at *25-26. In this case, Part 303 seeks a determination of the probable effects of the proposed project on historical or cultural "values," which is one of the factors used to determine the "public interest" of the project. MCL 324.30311(2)(e).

Even though these archaeological sites will not be destroyed, they will be affected by the proposed project. From the map contained within the application, dozens of recognized archaeological sites are located in and around the project area. Exhibit P-287 at p 78. These sites are important to the Tribe because this area is an ancestral home of the Menominee people. Whatever "values" are attributed to these archaeological sites, such values will be affected by the proximity of the mine. For example, a mining project in close proximity to the Colosseum in the City of Rome would affect its "values." Therefore, I find, as a Matter of Fact, that the proposed project will have a probable negative effect on historic and cultural values.

With respect to scenic values, the Finding of Fact document recites that "[t]he project is within the view shed of the Menominee River and will subjectively impact the scenic value of the reach of river within the proximity of the mine view shed." Exhibit R-92 at p 19. Mr. Landwehr similarly testified that the proximity of the mine to the Menominee River would cause scenic "pollution." Exhibit P-161 at Tr 806. No other evidence regarding scenic values were proffered by the parties. As a result, I find, as a Matter of Fact, that the proposed project will have a probable negative effect on scenic values.

With respect to ecological values, the Finding of Fact document recites that the proposed project will have "significant probable effect" on ecological values, including the direct loss of wetlands and streams within the project area, and loss of habitat function and value. Exhibit R-92 at p 19. Such a finding is corroborated by the 11.22 acres of direct impact and 17.17 acres of indirect impact contemplated by the Application. Exhibit R-59. The Finding of Fact document further suggested that "[a]dditional wetland impacts will be realized through pit dewatering activities that will increase infiltration values and drain surface water from wetlands." *Id* at p 20. While there is no evidence in this record that surface waters will be drained from wetlands, Aquila's groundwater model was inadequate to determine the amount of wetland impacts expected to be caused by pit dewatering. See Administrative Completeness section, *supra*. However, based solely upon the amount of impact contemplated in the Application, I find, as a Matter of Fact, that the proposed project will have a probable negative effect on ecological values.

Also, the record contained evidence regarding recreational values of the Menominee River. MCL 324.30311(2)(e). Mr. Landwehr conducts the business of a fishing guide operating on the Menominee River. Exhibit P-161. Ninety-eight percent of the guided fishing trips he makes on an annual basis occur on the Menominee River because it is one of the best small mouth bass fisheries in the world. Exhibit P-161 at Tr 757-758. He testified that he has four to nine boats on the River every day of the week, so he is capable of 400-600 guided fishing trips per year. Exhibit P-161 at Tr 762. Mr. Landwehr testified that the stretch of river from the mine to Green Bay is considered "trophy water." Exhibit P-161 at Tr 770. He also testified that "muskies," *i.e.*, muskellunge, are in the Sixty Islands area near the proposed mine site. Exhibit P-161 at Tr 776.

In his testimony, Mr. Landwehr described two possible effects of the project on recreational values. First, he testified that fish are affected by loud noise and swim from shallow to deep water to avoid the noise. Exhibit P-161 at Tr 810-811. However, it is possible for Mr. Landwehr to conduct his guided fishing trips upstream and downstream of the location of the mine. Second, he testified that the River's recreational values could possibly be affected if it becomes polluted by contaminants. Exhibit P-161 at Tr 805. While Mr. Chatterson testified regarding the need for a Part 22 groundwater permit in this

case, there was no testimony that the mine would pollute groundwater. See, e.g., 9 Tr 2009. Therefore, from the record in this case, I find, as a Matter of Fact, that the proposed project will have minimal negative effect on recreational values.

With respect to public health, the Finding of Fact document recited that there are numerous residential water supply wells in the project area. Exhibit R-92 at p 20. It further recited that "the proposed mine is located up gradient from these wells" and that "there is a risk of impact to the residential wells," but this risk is "difficult to determine." *Id*. No other evidence was proffered by any party. From the evidence in the record, I find, as a Matter of Fact, that the proposed project will not have an effect on public health.

The evidence related to the effect of the project on fish or wildlife was addressed in the Part 301 analysis, *supra*. Therein, it was noted that due to mussel relocation, the proposed project will not have an effect on fish or wildlife, which I so find.

f. The size of the wetland being considered.

In addressing this factor, three important points were raised in the Finding of Fact document. First, Aquila's model did not delineate the impact of the project on adjacent properties. Exhibit R-92 at p 20. Second, pit dewatering is anticipated to "increase infiltration values and drain surface waters from wetlands" thereby requiring a permit under § 30304(d). MCL 324.30304(d). See the Part 303 Jurisdiction section, *supra*. Third, the WRD determined that the 17.2 acres of indirect impact "is underestimated and the total probable effects are unknown." Exhibit R-92 at p 20. Hence, this case is not administratively complete with respect to evidence of impacts from pit dewatering, which could affect the size of the wetland being considered. Therefore, I find, as a Matter of Fact, that Aquila failed to provide material evidence regarding the size of the wetland being considered.

g. The amount of remaining wetland in the general area.

According to the Finding of Fact document, "an existing 217,101 acres of wetland" [are contained] within the 715,334 acre watershed. The watershed has an estimated loss of 8% since settlement." Exhibit R-92 at p 20. Because this evidence was not controverted at the hearing, I adopt this finding.

h. Proximity to any waterway.

The Finding of Fact document provides that the facility is proximately located near the following waterbodies:

(a) "The 84 acre open pit is proposed to be located approximately 150 feet from the Menominee River."

(b) "The project proposes to directly impact an unnamed stream with the placement of the Tailings and Waste Rock Management Facility (TWRMF) over the headwater of the stream and adjacent wetland (Wetland B1)."

(c) "[T]he TWRMF is adjacent to wetland C1 where there is a separate stream that lies approximately 300 feet from the facility."

(d) "The contact water basins are situated over Wetlands 4A and 2C, contagious with Wetland 2b, which supports a stream that flows southerly to the Shaky Lakes."

(e) "The Mine Waste Storage Area is proposed for placement over WL 6, which supports an observed ephemeral stream that dips underground near the sandstone pinch out."

Exhibit R-92 at p 21. Because this evidence was not controverted at the hearing, I adopt this finding.

i. Economic value, both public and private, of the proposed land change to the general area.

With respect to public economic value of the proposed land change, Senate Resolution No. 85 indicated that the project will yield $20 Million in severance taxes each year during the mine's operations. Exhibit I-59. Since the mine is anticipated to operate for seven years, this would amount to a total of $140 Million paid to the state and local communities. Senate Resolution No. 85 similarly provides that 65% of these funds, or $91 Million, will be paid to local communities. *Id*.

Mr. Rataskie also testified that there will be approximately 350 construction jobs resulting from the proposed Back Forty Project. 18 Tr 3998. However, in the Part 632 case, the Final Determination and Order notes that "[m]ine employment is anticipated to

reach as high as 500 individuals during construction"; that "full-time employment is anticipated to range from 208 employees during [Mine Year 7 (MY7)] to a maximum of 250 employees during MY3 and MY4"; and that "[i]n the mine closure period, employment will be limited to around to 30 employees." *Petition of Boerner*, 2019 WL 6717176, *10 (Mich.Dept.Nat.Res.). The economic value to the general area of such employment was not made clear in the record in this case.

With respect to private economic value of the proposed land change to the general area, Mr. Burie testified that the proposed mine operation would decrease tourism and lower property values on the Menominee River. 10 Tr 2264-2265. While Mr. Landwehr testified regarding the economic impact of fishing on the Menominee River, the record does not reflect how the presence of the mine would decrease such economic benefits. See generally Exhibit P-161. Nevertheless, the Finding of Fact document recites that "[t]he private economic value of the land change is assumed to include a net valuation of the mine to the owner…." Exhibit R-92 at p 21.

Therefore, from the record, I find, as a Matter of Fact, that the proposed mine will provide an economic value, both public and private, to the general area.

Weighing § 30311(2) Criteria

Part 303's "public interest" test requires a balancing of the proposed activity's benefits against its detriments. MCL 324.30311(2). Along with consideration of the general criteria addressed above, § 30311(2) mandates that "[t]he decision shall reflect the national and state concern for the protection of natural resources from pollution, impairment, and destruction." Factors weighing in favor of public interest include: (a) there is a public and private need for the project; (b) the proposed project will cause minimal cumulative effects to the remaining wetland within the watershed; (c) the proposed land change is anticipated to bring an economic value, both public and private, to the general area; (d) the proposed project will not have a probable effect on recreational values, public health, fish, or wildlife; and (e) there are 217,101 acres of wetland remaining within the watershed. Factors weighing against public interest include: (i) Aquila failed to prove that there are no feasible and prudent alternative locations or methods to accomplish the expected benefits from the activity; (ii) Aquila failed to provide evidence

of the extent and permanence of the beneficial or detrimental effects that the proposed activity may have on the public and private uses to which the area is suited, including the benefits the wetland provides; (iii) the proposed project will have a probable negative effect on historic, cultural, scenic, and ecological values; (iv) Aquila failed to provide material evidence regarding the size of the wetland being considered; and (v) the proposed project is proximately located near five waterbodies. Providing equal weight to each of these factors, the evidence appears balanced for and against a finding of public interest. However, because Aquila simply failed to provide evidence on several of these factors (including its alternatives analysis), I find, as a Matter of Fact, that the proposed project is not in the public interest. Because the proposed project is not in the public interest, I find, as a Matter of Fact, that Aquila is not entitled to a permit under § 30311(1). MCL 324.30311(1).

4. Section 30311(3)

Section 30311(3) requires that, "[i]n considering a permit application, the department shall give serious consideration to findings of necessity for the proposed activity which have been made by other state agencies." MCL 324.30311(3). There have been no such findings for the proposed activity.

5. Section 30311(4)

Section 30311(4) contains the final criteria, as follows:

> A permit shall not be issued unless it is shown that an unacceptable disruption will not result to the aquatic resources. In determining whether the disruption to the aquatic resources is unacceptable, the criteria set forth in section 30302 and subsection (2) shall be considered. A permit shall not be issued unless the applicant also shows either of the following:
>
> (a) The proposed activity is primarily dependent upon being located in the wetland.
>
> (b) A feasible and prudent alternative does not exist.

MCL 324.30311(4). Hence, the three main factors for analysis under this statutory provision include a determination of whether (a) there is an unacceptable disruption to

aquatic resources, (b) the proposed activity is wetland dependent, and (c) a feasible and prudent alternative does not exist.

a. Disruption to Aquatic Resources

Section 30311(4) first focuses on the disruption to aquatic resources caused by the proposed activity. To determine if the disruption is unacceptable, the provision requires a consideration of the Legislative findings set forth in §30302, which provides that "[a] loss of a wetland may deprive the people of the state of some or all of the following benefits to be derived from the wetland: … (ii) Wildlife habitat by providing breeding, nesting, and feeding grounds and cover for many forms of wildlife, waterfowl, including migratory waterfowl, and rare, threatened, or engendered wildlife species." MCL 324.30302(1)(b)(ii).

The proposed project contemplates 11.22 acres of direct impact and 17.17 acres of indirect impact, for a total of 28.39 acres of impact. Exhibit R-59. The Finding of Fact document recites that the proposed project will have "significant probable effect" on ecological values, including the direct loss of wetlands and streams within the project area, and loss of habitat function and value. Exhibit R-92 at p 19. However, the WRD also determined that the 17.2 acres of indirect impact "is underestimated and the total probable effects are unknown." Exhibit R-92 at p 20. Hence, this case is not administratively complete with respect to evidence of impacts from pit dewatering which could affect the level of disruption to aquatic resources. As a result, this Tribunal is unable to quantify the level of disruption to aquatic resources that will be caused by the proposed project. Therefore, from the evidence in the record, this Tribunal is unable to find that the disruption to aquatic resources caused by the proposed project is acceptable.

b. Wetland Dependent

Second, § 30311(4) prohibits the issuance of a permit unless the applicant shows the proposed activity is either wetland dependent or a feasible and prudent alternative does not exist. MCL 324.30311(4). With respect to the determination of whether the proposed activity is wetland dependent, the Administrative Rules provide guidance in this determination. Specifically, the Administrative Rules provide:

> The department shall consider a proposed activity as primarily dependent upon being located in the wetland only if the activity is the type that requires a location within the wetland and wetland conditions to fulfill its basic purpose; that is, it is wetland-dependent. Any activity that can be undertaken in a non-wetland location is not primarily dependent upon being located in the wetland.

R 281.922a(5). Since the construction of a mine is an activity which can be undertaken outside of a wetland, I find, as a Matter of Fact, that the proposed activity is not wetland dependent.

c. Feasible and Prudent Alternatives

As noted *supra*, this tribunal addressed feasible and prudent alternative "locations or methods." To reiterate, the Application is not administratively complete because Aquila did not provide evidence of the "reasonableness of the higher costs or reduced profit" of Alternatives A and C. Aquila also failed to demonstrate that there are no feasible and prudent alternative locations or methods because it did not proffer evidence of how it had re-designed its site plans with a view toward reducing wetland impacts.

In addition to a review of methods and locations, § 30311(4) expressly provides that "[a] permit shall not be issued unless the applicant also shows … [a] feasible and prudent alternative does not exist." MCL 324.30311(4). The analysis under this criterion is to feasible and prudent alternatives in general. However, by failing to demonstrate that its three site plans sought to decrease wetland impacts, Aquila has failed its analysis of feasible and prudent alternative under § 30311(4). Therefore, I find, as a Matter of Fact, that Aquila failed to demonstrate that there are no feasible and prudent alternatives in this case. As a result, I find, as a Matter of Fact, that Aquila is not entitled to a permit.

6. R 281.925

Aquila also suggested that it is entitled to a permit in this contested case due to the proposed mitigation it has offered. Specifically, Aquila proposed to preserve 507.75 acres, which includes 290 acres of wetland. Exhibit R-59 at p 417; 8 Tr 1603. However, Rule 5 provides that the WRD is to consider mitigation only if there are no feasible and prudent alternatives available to avoid wetland impacts. R 281.925(2). Because Aquila

failed in its alternatives analysis, I conclude, as a Matter of Law, that wetland mitigation is not permissible.

7. Summary

To summarize the findings under Part 303, the proposed project implicates activities covered by Part 303 which require a permit from EGLE. A permit is necessary to realize the benefits derived from the activity. The proposed activity is lawful. There is both a public and private need for the project. The Application is not administratively complete because Aquila did not provide evidence of the "reasonableness of the higher costs or reduced profit" of Alternatives A and C. Aquila failed to demonstrate that there are no feasible and prudent alternative locations and methods because it did not proffer evidence of how it had re-designed its site plans with a view toward reducing wetland impacts. Aquila failed to provide evidence of the extent and permanence of the beneficial or detrimental effects that the proposed activity may have on the public and private uses to which the area is suited, including the benefits the wetland provides. The proposed project will cause minimal cumulative effects to the remaining wetland within the watershed. The proposed project will have a probable negative effect on historic, cultural, scenic, and ecological values. The proposed project will not have a probable effect on recreational values, public health, fish or wildlife. Aquila failed to provide material evidence regarding the size of the wetland being considered. There are 217,101 acres of wetland remaining in the watershed. The proposed project is proximately located near five waterbodies. The proposed project is not in the public interest.

Aquila failed to demonstrative that the disruption to the aquatic resources caused by proposed activity will be acceptable. The proposed activity is not wetland dependent. Aquila failed to demonstrate that a feasible and prudent alternative does not exist. Therefore, Aquila is not entitled to a permit in this case.

CONCLUSIONS OF LAW

Based on the Findings of Fact, I conclude, as a Matter of Law:

1. An activity that results in the draining of groundwater connected to surface waters, which causes a concomitant draining of surface waters from a regulated wetland, requires a permit under Part 303. MCL 324.30304(d);

Michigan Citizens for Water Conservation v Nestlé Waters North America, Inc, 269 Mich App 25; 709 NW2d 174 (2005), *rev'd on other grounds*, 479 Mich 280; 737 NW2d 447 (2007).

2. For a Part 303 application to be administratively complete, it must contain a reliable identification of wetland impacts. MCL 324.30306(1); *Harkins v Department of Natural Resources*, 206 Mich App 317; 520 NW2d 653 (1994).

3. A conditional permit that requires an applicant to provide evidence – after-the-fact – to satisfy permitting criteria is not permissible under Parts 301 and 303. MCL 324.30106; MCL 324.30311(1); *National Wildlife Fed'n v Department of Envtl Quality (No. 2)*, 306 Mich App 369, 379; 856 NW2d 394 (2014).

4. The conditional permit issued in this case is invalid as currently written. MCL 324.30106; MCL 324.30311(1); *National Wildlife Fed'n v Department of Envtl Quality (No. 2)*, 306 Mich App 369, 379; 856 NW2d 394 (2014).

5. Because Aquila failed to demonstrate that there are no feasible and prudent alternatives, wetland mitigation is not permissible. R 281.925(2).

FINAL DECISION AND ORDER

The Application for a permit under Parts 301 and 303 (Exhibit R-59) is **DENIED**.

Daniel L. Pulter
Administrative Law Judge

PETITION FOR REVIEW

Consistent with § 1317 of the NREPA, this is a Final Decision and Order (FDO) for EGLE. MCL 324.1317(1). The Parties have the right to file a Petition for Review of this FDO with the EGLE Director within 21 days of receiving this FDO. Upon the timely and proper filing of a Petition for Review, the EGLE Director will convene a panel of the Environmental Permit Review Commission.

A Petition for Review must be filed with the EGLE Director in one of two manners, either by mail to Department of Environment, Great Lakes, and Energy at Executive Office, Attn: Director Clark, 525 West Allegan Street, P.O. Box 30473, Lansing, Michigan 48909-7973, or electronically at EGLE-PermitAppeal@michigan.gov. (See form at www.michigan.gov/egle website). A copy of the Petition for Review must also be sent to the Michigan Office of Administrative Hearings and Rules (MOAHR) either by mail to: 611 West Ottawa Street, P.O. Box 30723, Lansing, Michigan 48909-7973, or electronically at MOAHR-EGLE-PermitPanel@michigan.gov.

PROOF OF SERVICE

I certify that I served a copy of the foregoing document upon all parties and/or attorneys, by electronic delivery, unless indicated otherwise, this 4th day of January 2021.

Elaine Cussans

Michigan Office of Administrative Hearings and Rules

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