STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

NATIONAL WILDLIFE FEDERATION,
KEWEENAW BAY INDIAN COMMUNITY,
YELLOW DOG WATERSHED PRESERVE, INC.
and HURON MOUNTAIN CLUB,

Petitioners/Appellants,

vs.

MICHIGAN DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT and KENNECOTT EAGLE MINERALS COMPANY,

Respondents/Appellees.

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Case No.10- 284 -AA
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**PETITION FOR REVIEW OF FINAL DECISION AND ORDER OF ADMINISTRATIVE AGENCY IN CONTESTED CASE (NONFERROUS METALLIC MINING PERMIT – PART 632)**

**BRIEFING AND ORAL ARGUMENT REQUESTED**

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*Civil actions between these parties or other parties arising out of the transactions or occurrences alleged in this Petition for Review have been previously filed in Ingham County Circuit Court, where they Were given docket numbers 06-664-AA, 07-1824-AA, 08-263-AA, and 08-546-AA, and were assigned to Judge Paula J.M. Manderfield. The actions are no longer pending, except for Docket No. 08-263-AA, which is pending before the Michigan Court of Appeals.*

## INTRODUCTION

The National Wildlife Federation ("NWF"), Keweenaw Bay Indian Community (the "Community"), The Yellow Dog Watershed Preserve ("YDWP"), and the Huron Mountain Club ("HMC") (collectively referred to as "Petitioners"), following a "contested case," hereby petition for review of the Final Decision and Order entered January 14, 2010 by the Michigan Department of Environmental Quality ("MDEQ"), including the Proposal for Decision ("PFD") issued by Administrative Law Judge Richard A. Patterson (hereinafter the "ALJ") of the State Office of Administrative Hearings and Rules on August 18, 2009. The Final Decision and Order and its incorporated sections of the Proposal For Decision are collectively referred to as the "FDO."[1]

The proceedings as to which review is sought are described beginning at page 10 below. They arise out of an application filed by Kennecott Eagle Minerals Company ("Kennecott") in February, 2006 for a Nonferrous Metallic Mining Permit, required by part 632 of the Natural Resources and Environmental Protection Act ("NREPA"), MCL 324.63201 *et seq,* for a proposed underground mining operation of a sulfide metallic ore body located beneath the Salmon Trout River in the Yellow Dog Plains in Marquette County, Michigan.

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[1] The FDO is numbered pages 1-22 and will be cited accordingly. The PFD which is "adopted as modified" in the FDO is numbered pages 1-177. It will be cited in this Petition as FDO (PFD) p __. The FDO and PFD are set forth in the accompanying Appendix, Exhibit 1, and incorporated by this reference.

This case is the first to arise under this new statute. The statute was enacted in recognition of the fact that sulfide mining is unlike all other conventional mining operations in that it poses extraordinary risk to the environment and has resulted in severe long-lasting environmental damage wherever it has been conducted throughout the world. The statute includes the following legislative finding:

> Nonferrous metallic sulfide deposits are different from the iron oxide ore deposits currently being mined in Michigan in that the sulfide minerals may react, when exposed to air and water, to form acid rock drainage. If the mineral products and waste materials associated with nonferrous metallic sulfide mining operations are not properly managed and controlled, they can cause significant damage to the environment, impact human health, and degrade the quality of life of the impacted community.

MCL 63202(C) (emphasis added).

The Order of the MDEQ issued on January 14, 2010 sustains MDEQ's issuance of Michigan's first sulfide mining permit to Kennecott. The permit approved Kennecott's plan to conduct a massive sulfide mining operation in the middle of the biologically rich Yellow Dog Plains, underneath and on the bank of the Salmon Trout River, a world-class trout stream, and sandwiched between the famed McCormick Wilderness Tract and the Huron Mountain Club, a 40-square mile tract of rivers, inland lakes and old growth forest. Attachment A to this Petition is a photograph of the surface of the area on the Salmon Trout River above the ore body.

In recognition of the extraordinary environmental risks of sulfide mining, the statute places the burden on the applicant for a permit to demonstrate that its operation will not "pollute, impair or destroy natural resources." In furtherance of this goal, the statute requires the applicant to disclose in detail its proposed methods, materials and techniques to be utilized within the mining area itself. In addition, recognizing the geographically widespread consequences of any large-scale mining operation, particularly sulfide mining which creates

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acid mine drainage, the statute also requires the applicant to include in its application an Environmental Impact Assessment ("EIA") inventorying and analyzing all of the flora, fauna, and natural resources "outside the mining area" which have the "potential" to be affected by the mining operation. To be specific, MCL §324.63201(b) defines the term "Affected Area" as follows:

> An area **outside of the mining area** where the land surface, surface water, ground water, or air resources are determined through an Environmental Impact Assessment to be **potentially affected** by mining operations within the proposed mining area. (Emphasis added)

The purpose of requiring the mining company to collect and provide, in advance, detailed natural resource information for the potentially affected area, is to enable the regulatory agency both to assess whether the proposed natural resource protections set forth in the application will be adequate, and also to catalogue benchmark data to monitor whether those resources are being degraded as the mining operation eventually proceeds. In short, the EIA, which, pursuant to the statute, must include a prescribed two-year study of flora and fauna across the entire potentially affected area, is the linchpin to assuring environmental protection against an ill-conceived mining plan or later irresponsibly conducted mining operations.

Despite submitting a several thousand page application to the MDEQ, Kennecott pointedly failed and refused to define the area outside the mining area which could potentially be damaged by heavy metal bearing sulfuric acid discharges in the mine's effluent or the deposit of toxic particulate matter from the mine's exhaust stack. It is uncontested that this particulate matter will spread over dozens of square miles beyond the mine and into Lake Superior. (Attachment B) Kennecott apparently recognized that if it complied with the EIA requirement that the entire potentially affected area be studied, it would need to inventory and provide potential protection for the eagles nesting on the Salmon Trout River, the wolf pack

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residing on the Huron Mountain Club property, the endangered Kirtland's warbler and fringed gentian living in the Yellow Dog Plains, the wild native trout in the Salmon Trout River, and up to 5000 other species of flora and fauna indigenous to the unspoiled surroundings of the proposed mine, including many additional rare and threatened species.

Kennecott's strategy has worked thus far. Kennecott ignored the potentially "affected area" requirement for the EIA, and the ALJ, despite thousands of pages of testimony and exhibits from Petitioners' expert scientists, exempted Kennecott from the "affected area" study requirement, effectively reading the word "potential" out of the statute, and declaring, against all logic and scientific data, that the mining operation would have "no impact" outside its own fence line.

The FDO improperly reversed the statute's burden of proof. Instead of requiring Kennecott to prove that the mine would not "pollute, impair, or destroy" the affected area, it imposed upon Petitioners the burden to prove "conclusively" that it would. This error irreparably prejudiced Petitioners' rights.

Another salient example suffices to demonstrate that the grounds for reversal in this case more than meet the requirements set forth in the Administrative Procedures Act, MCL 24.306. This example is the likely collapse of the mine itself. The nearly unrebutted record in the contested case proceedings shows that the regional geology in the location selected for this sulfide mining operation has led to sudden and final mine collapses at nearby locations and that the proposed design of this mine was highly likely to result in its collapse. The ore body proposed to be mined by Kennecott lies directly below the headwaters of the Salmon Trout River, in bedrock which is fractured and faulted. No witness in the contested case proceeding

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was aware of the existence of any sulfide ore body that has ever been successfully mined under a body of water. None had prior experience attempting to do so.

Not possessing expertise within the agency to evaluate the geotechnical aspects of the mine design, the MDEQ outsourced the assignment to an expert in this scientific specialty who criticized Kennecott's geotechnical analysis in unmistakable terms, in two detailed reports to the MDEQ (the "Sainsbury Reports") (Attachment C). Both of these reports mysteriously disappeared from the record before the public learned of their existence. Initially, with neither of the Sainsbury Reports in the record, the MDEQ approved the permit. Later, after the deep-sixing of the Sainsbury Reports was discovered and made public, the Director of the MDEQ was forced to reverse the approval of the permit and conduct an investigation into the apparent wrongdoing. When the Sainsbury Reports were eventually made part of the record, a second MDEQ expert who was hired to review Sainsbury's analysis was in complete agreement with Sainsbury's concerns. However, nearly all of those concerns went entirely unanswered by Kennecott or the MDEQ and approval of the permit was nonetheless reinstated.

At the contested case hearing, Petitioners' nationally recognized experts agreed with the MDEQ's outside experts' criticisms, and predicted that the mine as designed would collapse, sucking the Salmon Trout River into the void beneath. Like most of Sainsbury's criticisms, the testimony of Petitioners' experts on the issue of mine stability remains for the most part unrebutted.

Petitioners seek an order reversing the approval of the mining permit. For that reason, the following references to additional procedural irregularities and errors in the contested case are not cited for the purpose of seeking remand, which in light of the omissions in the original mining application would be futile, but rather to demonstrate that the ALJ arrived at a puzzling

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and unsupported Proposal for Decision, incorporated in the FDO, at the end of the contested case hearing. One central reason is that, although the contested case consisted of nearly 60 witnesses, almost all of them experts in highly technical fields, no discovery whatsoever was permitted despite Petitioners' requests prior to and during the hearing.

The ALJ ruled that full disclosure of expected testimony, together with exchange of expert reports, would substitute for the normal discovery one would expect in a highly technical case. Petitioners provided witness descriptions and expert reports before trial and offered expert testimony that was generally clear and compelling. But then, the ALJ did not require Kennecott to comply with these requirements and Kennecott ignored them. A typical trial day would begin with Kennecott handing dozens, if not hundreds of pages of previously undisclosed text and exhibits to Petitioners' counsel and the ALJ and immediately launching an incomprehensible direct examination of a technical expert regarding these exhibits. At one point, the ALJ went so far as to request that Kennecott "dumb down" its presentation so that he could understand it, but the pattern continued to the end of trial. As a consequence, the FDO ultimately consisted of dozens of pages of Findings of Fact supporting Petitioners' contentions, each with citations to the transcript and exhibits, followed in each instance by a limited number of pages supposedly summarizing Kennecott's response with no citations to the record.

The one matter that the ALJ seemed clearly to understand was that the proposed mining operation would begin with heavy explosives at the base of a centuries-old place of worship of the tribal petitioner (Eagle Rock) and end with this religious site being fenced off from the tribe and the public for decades, if not permanently. The scheduled blasting will desecrate Eagle Rock and permanently ruin its use as a sacred site. Kennecott and MDEQ deliberately ignored the planned fate of Eagle Rock despite having full knowledge, during the application process,

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of its importance to the tribal petitioner. These simple facts, unrebutted in the record, led the ALJ to require Kennecott to change its mine plan in order to protect Eagle Rock. Kennecott thereupon vehemently opposed the only part of the ALJ's ruling in Petitioners' favor and the MDEQ gave in, by engaging in a series of procedural maneuvers that resulted in a subordinate MDEQ official signing the FDO, which overturned the ALJ's findings and conclusions regarding protection of Eagle Rock.

Petitioners recognize that their criticisms in this Petition of the proceedings in the contested case hearing are extensive. However, they provide context for the necessity and urgency to invalidate the mining permit. This Court will be able to do so on the following narrow bases, among others, simply because the permit application did not meet the requirements of Part 632 as required by MCL 325.63205 and the PFD is legally unsustainable for the following reasons:

1. Kennecott failed to submit an EIA for the affected area that meets the requirements of MCL 324.63205(2)(b);

2. The FDO constitutes plain legal error by imposing the burden of proof regarding adverse environmental impacts on Petitioners, when Part 632 plainly places that burden on the applicant, MCL 324.63205(3);

3. Kennecott failed to submit a reclamation and environmental protection plan for the affected area as defined in the Act, as required by MCL 324.63205(2)(c);

4. The application did not include information that demonstrates that all methods, materials and techniques proposed to be utilized are capable of accomplishing their stated objectives in protecting the environment, as required by MCL 324.63205(c)(ii);

5. The application did not contain a contingency plan meeting the requirements of MCL 324.63205(2)(d); and

6. Kennecott failed to assess the potential impacts of mining operations on Eagle Rock as a place of worship as required by MCL 324.63205(2)(b) and R 425.202(2)(p), and also failed to assess impacts on Community members'

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land uses at Eagle Rock and the surrounding area as required by MCL 324.63205(2)(b) and R 425.202(2)(x).

## JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this Petition pursuant to MCL 24.301, 24.303 and MCR 7.105. MCL 24.301 provides that an aggrieved party which has exhausted all administrative remedies is entitled to "direct review by the courts as provided by law." All Petitioners are aggrieved by the FDO, and the FDO is the "final" step in the contested case proceedings. MCL 24.303 states that "a petition for review shall be filed in the circuit court where petitioner resides or has his or her principal place of business in this state, or in the circuit court for Ingham County." (Emphasis added)

2. Pursuant to MCL 24.303, venue is proper in this Circuit for the reason that the National Wildlife Federation has its principal place of business in the State of Michigan in the County of Washtenaw, at its headquarters located at 213 West Liberty Street, City of Ann Arbor. NWF's Ann Arbor headquarters were established in 1982 as the Great Lakes Natural Resources Center, a regional leader in protecting the Great Lakes for wildlife and humans that depend upon the invaluable natural resources of the Great Lakes basin. NWF directs the Environmental Law Clinic at the University of Michigan Law School and is affiliated with Ann Arbor's Leslie Science and Nature Center. NWF's resident office in Ann Arbor has provided staff expertise, financial support and litigation support to promote environmental protection for more than 25 years.

3. Keweenaw Bay Indian Community is a federally recognized Indian tribe whose members reside in Baraga County and elsewhere. Its members have the right to hunt, fish, trap and gather, in, on and over lands which include lands where the mine is to be located. The

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Community owns riparian property along the Salmon Trout River downstream from the mine site.

4. The Yellow Dog Watershed Preserve consists of members from Marquette County and elsewhere. The group's mission is to protect the Yellow Dog River, Salmon Trout River and the Yellow Dog Plains which houses the headwaters of both rivers. It owns land within 1.3 miles of the proposed mine.

5. The Huron Mountain Club is a Michigan not-for-profit corporation established as a family retreat and wildlife preserve in 1889. Property owned by the Huron Mountain Club is within 4 miles of the proposed land site and includes 11 miles of the Salmon Trout River downstream from the proposed mine site. The Club's membership includes residents of Washtenaw County.

6. Kennecott is owned by Rio Tinto which is one of the largest mining companies in the world and is headquartered in London. Kennecott's United States operations are based in Salt Lake City, Utah where the company operates the nearby Bingham Copper Mine. Kennecott has maintained an office in the Marquette County region for approximately five years.

7. The Michigan Department of Environmental Quality ("MDEQ"), a Michigan agency, was recently merged with the Michigan Department of Natural Resources to form the new Michigan Department of Natural Resources and Environment ("MDNRE"). Since the record indicates the decision-making agency as the MDEQ, that is the nomenclature used in this petition. MDEQ/MDNRE is charged with issuing environmentally-related permits under state law, including all but one federal permit now required of the proposed mining project.

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## NATURE OF PROCEEDINGS AS TO WHICH REVIEW IS SOUGHT

8. In January, 2007 MDEQ announced that it proposed to approve Kennecott's Part 632 permit and ordered it consolidated with other permits and with a lease of State-owned land for the proposed mine's surface facilities, for public meetings to be held in March of 2007. However, in February, 2007, Petitioners informed MDEQ Director Chester that they had reason to believe that a report prepared by Dr. David Sainsbury, an expert consultant retained by MDEQ to review information provided by Kennecott relating to crown pillar stability and subsidence, which was highly critical of the geotechnical information provided in the application, had not been disclosed to the public. In fact, Director Chester eventually admitted there were two such reports from Dr. Sainsbury, both of which had been received by MDEQ and were not disclosed to the public. They were also not provided to Petitioners pursuant to FOIA requests which specifically sought them, and no record of either of them could be found anywhere in MDEQ's files. These reports are exhibits to the Sainsbury deposition and are part of the record in this case. (Attachment C)

9. Because the Sainsbury reports had not been disclosed, Director Chester cancelled the public meetings scheduled for March, 2007, rescinded the tentative approval of the Part 632 permit, and announced that he would seek an "independent investigation" into the missing reports. That investigation, by a former colleague of the MDEQ staff selected by Director Chester, found no wrongdoing by anyone. Director Chester re-scheduled the permits for public meetings in September 2007. On December 15, 2007, MDEQ issued the requested permits to Kennecott, signed by MDEQ Deputy Director Sygo.

10. Petitioners filed for contested case hearings on the Part 632 permit and on the Part 31 (Groundwater Discharge) permit on December 21, 2007. Both of the contested case

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hearings were assigned to Administrative Law Judge Richard Patterson. Kennecott moved to consolidate the two cases. Petitioners opposed consolidation because different rules governed the two cases. The ALJ granted Kennecott's motion to consolidate. Petitioners then moved for authorization to conduct discovery. Kennecott opposed the motion. The ALJ denied Petitioners' request for discovery.

11. The consolidated contested case hearing began on April 28, 2008. There were 40 days of testimony, concluding on July 16, 2008, followed by a site visit. During the hearing 59 persons testified, many of them expert witnesses. In addition, the *de bene esse* deposition of Dr. Sainsbury was admitted. There were numerous exhibits, many of them detailed technical reports. All parties' closing arguments and proposed findings of fact were filed with the ALJ by October 15, 2008.

12. Ten months later, the ALJ issued his Proposal For Decision ("PFD") on August 18, 2009. It found against Petitioners on every issue except one – the ALJ found that Eagle Rock, located on adjacent State-owned land, and into which Kennecott proposed to blast its portal for the proposed mine, was a sacred "place of worship," requiring specific assessment in Kennecott's EIA. His PFD recommended that the Part 632 permit be issued "with the exception that provision be made to avoid direct impacts to Eagle Rock that may interfere with the religious practices thereon."

13. The PFD gave the parties 30 days (later extended by 14 days) to file exceptions. On October 1, 2009, Petitioners filed extensive exceptions to the PFD. (Appendix, Exhibit 2) Respondents also filed exceptions to the ALJ's ruling on Eagle Rock.

14. On October 8, 2009, Governor Granholm issued Executive Order 2009–45, consolidating MDEQ and the Michigan Department of Natural Resources ("MDNR") into a

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new department named the Michigan Department of Natural Resources and Environment ("MDNRE"), to become effective January 17, 2010, and transferred responsibilities of the former MDEQ to MDNRE effective on that date.

15. On November 5, 2009, MDEQ Director Chester remanded the PFD to the ALJ, on the legal issue of whether Eagle Rock is a "place of worship" within the meaning of Part 632. (Appendix, Exhibit 3) The Order of Remand was based on Director Chester's finding that the parties "had not briefed that issue before issuance of the Proposal for Decision," despite the fact that all parties had thoroughly briefed that issue in their written post-hearing closing arguments filed with the ALJ. In fact, not only had the place of worship issue been briefed prior to the issuance of the PFD, the PFD specifically rejected the arguments of Kennecott and MDEQ that only "buildings used for human occupancy" could constitute places of worship. The Order of Remand directed the ALJ to issue a supplemental PFD on the legal issue of "place of worship." Pursuant to the order of remand, the parties again briefed the issue. All of those briefs were filed by December 7, 2009.

16. At some point between December 7, 2009 and January 14, 2010, the ALJ prepared a Supplemental PFD as directed by the Order of Remand, which held in favor of Petitioners. (Appendix, Exhibit 4).[2]

17. On December 22, 2009, Director Chester announced his decision to retire effective January 4, 2010, and Governor Granholm named Deputy Director Sygo Interim Director, effective January 5, 2010.

18. On January 5, 2010, Interim Director Sygo delegated responsibility for the final decision on Kennecott's permits because he was the MDEQ official who had signed the

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[2] This document was obtained from SOAHR through its February 22, 2010 response to a request filed by Petitioners' counsel under the Freedom of Information Act, MCL 15.231, *et seq*. The redactions were made by SOAHR before the document was provided to Petitioners.

permits. The statute on which Mr. Sygo relied in making this delegation provided that the delegation could be made to another individual within the agency or outside it. (MCL 324.99903) He delegated this matter to another MDEQ employee, "Senior Policy Advisor" Frank Ruswick Jr. (Appendix, Exhibit 5)

19. On January 13, 2010, Governor Granholm named the former Director of MDNR, Rebecca Humphries, to be Director of the new combined agency.

20. The following day, January 14, Mr. Ruswick issued a Final Decision and Order ("FDO"), vacating former Director Chester's order of remand to the ALJ for a supplemental Proposal for Decision. Mr. Ruswick then reversed the ALJ's findings on the place of worship issue and ordered that the Part 632 permit be issued.

21. Petitioners seek review of the FDO pursuant to the Michigan Administrative Procedures Act ("MAPA"), MCL 24.301 – 24.306, and MCR 7.105(B)(1), which govern judicial review of final decisions or orders of administrative agencies in contested cases. Petitioners also rely on Mich. Const. 1963, Art. 6, Sec. 28, which provides, in pertinent part, as follows:

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, at a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record.

**STANDING**

22. The Petitioners' standing respecting the claims addressed herein was not contested in the proceedings below. The bases of Petitioners' standing are summarized in Appendix, Exhibit 6.

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## GROUNDS ON WHICH RELIEF IS SOUGHT

23. MDEQ's holding in the FDO that Kennecott's application complies with MCL 324.63201, *et seq.* and R 425.201, *et seq.* and MDEQ's findings underlying that holding in the FDO are subject to reversal under Mich Const art VI, §28 and MCL 24.306 because they are in violation of the constitution or a statute (including numerous sections of Michigan's Natural Resources and Environmental Protection Act), are in excess of the statutory authority or jurisdiction of the agency, violated Petitioners' substantive rights, were made upon unlawful procedure resulting in material prejudice to Petitioners, are not supported by competent, material, and substantial evidence on the whole record, are arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion, and/or are the result of other substantial and material errors of law, for the following reasons:

**The Permit Application Failed to Include an Environmental Impact Assessment of the Affected Area, as Defined in MCL 324.63201(b) and Failed to Meet the Requirements of MCL 324.63205(2)(b), Requiring Denial of the Permit under MCL 324.63205(12).**

24. Kennecott defined the "affected area" as the approximately 92 acres included within the fenced-in mining area. This fenced area will contain many buildings, a 420,000 ton pile of sulfide waste rock, holding ponds and waste water treatment facilities, a cement plant, a towering exhaust stack, a fleet of 40 ton ore trucks, and associated mining facilities. It is undisputed that there was no environmental impact assessment of any area outside of that fence line. The FDO does not mention the statute's definition of "affected area," the "area ***outside of the mining area*** where the land surface, surface water, ground water, or air resources are determined to be ***potentially*** affected by mining operations...." MCL 324.63201(b) (emphasis added). Instead, the FDO adopted Kennecott's definition limited to the area inside the mining area. This conclusion is in error. In light of the plain meaning of the statute, the "affected area"

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studies in Kennecott's application simply cannot meet Part 632's requirement. Since the statute defines the affected area as an area "outside of the mining area," an area contained entirely within the mining area is not consistent with the statutory definition.

25. The FDO explained the reasoning for this Conclusion of Law by stating: "the record shows that there will be no adverse environmental effects outside the mine's fence line from air deposition, water drawdown, habitat fragmentation, or noise. Kennecott's air emissions will meet air quality standards both on and off site." (FDO (PFD), p 176) This statement is erroneous, including its own circular logic: the FDO allowed Kennecott to evade its statutory obligation to provide an EIA of the affected area by simply stating that there will be no adverse environmental effects outside its fence line, the very area as to which no EIA was performed.

26. The FDO's conclusion not only ignores abundant testimony, it also misstates the applicable legal standard. First, the legal standard is not to determine whether there will or will not be adverse environmental effects outside the mine's fence line. Rather, according to Part 632, the mining application must include:

> (b) An environmental impact assessment for the proposed mining operation that describes the natural and human-made features, including, but not limited to, flora, fauna, hydrology, geology, and geochemistry, and baseline conditions in the proposed mining area ***and the affected area that may be impacted by the mining, and the potential impacts on those features from the proposed mining operation.*** The environmental impact assessment shall define the affected area and shall address feasible and prudent alternatives.

MCL 324.63205(2)(b)(emphasis added).

27. The intent of this section, particularly considered together with MCL 324.63201(b), quoted above, both of which the FDO ignored, is not only to require examination of the impacts the applicant predicts will happen, but also to meaningfully consider the potential impacts. In light of this record, and the industry's track record, it is untenable to claim

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that there will be no ***potential*** impacts beyond the fence line of this operation. And, if the statute leaves any doubt as to the required reach of the EIA, the Rules further clarify that potential impacts in the affected area must be included:

> (1) The environmental impact assessment required under R 425.201(l)(c) shall include, but is not limited to, the following:
>
> (a) For each of the conditions and features listed in subrule (2) of this rule:
>
> (i) An identification and description of the condition or feature as it currently exists *within the mining area* ***and*** *the affected area.*
>
> (ii) An identification of the proposed mining activities that ***may*** impact the condition or feature, and the process or mechanism through which the impact ***may*** occur.
>
> (ii) An analysis of the ***potential*** impacts of proposed ***mining activities***[3] on the condition or feature and, where applicable, the effects of the condition or feature on the proposed ***mining activities***.

R 425.202(1) (emphasis added)

28. The record does not support a finding that there is no potential for adverse environmental effects outside the fence line. It does, however, demonstrate that there are many huge uncertainties in Kennecott's plan and that the potential for the unexpected is immense.

29. Thus, the permit must be denied because the permit application fails to provide an environmental impact assessment of the potentially affected area outside of the mining area and the PFD must be rejected because it applies incorrect legal standards.[4]

> **The Proposed Mine, as Described in the Mine Design Set Forth in the Mine Application, is Likely to Subside and Collapse Beneath the Salmon Trout River and "Pollute, Impair or Destroy" Natural Resources from the Yellow Dog Plains to Lake Superior. The Mine Application Lacked a Plan for Preventing Damage to the Environment or Public Health or Safety from Subsidence or Possible Collapse, and Failed to Meet the Requirements of MCL 324.63205(2)(c) and Rule 203, Requiring Denial of the Permit Under MCL 324.63205(12).**

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[3] The definition of "mining activity" includes, among other things, "transportation of overburden, waste rock, ore, and tailings" and "construction of haul roads" R 425.103(a)(vi) and (x) – activities that clearly extend beyond the fence line.

[4] Appendix, Exhibit 7 is an Opinion and Order in the case of *Anglers of the Au Sable v US Forest Service* providing an analogous example under federal law of the purposes and parameters for statutorily required Environmental Assessments.

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30. Kennecott's mining plan, as set forth in the application, is to remove most of the existing sulfide ore deposit which is located immediately beneath the headwaters of the Salmon Trout River. Early in the process, this will create a void beneath the river sufficiently vast to allow a phalanx of ore trucks to drive underground from Eagle Rock to the cavity under the river from which ore will be hauled away. No witness disputed the obvious fact that if the mine substantially subsides or collapses beneath this river it will result in enormous and irremediable damage for the length of the watercourse. The only structure that will stand between the Salmon Trout River and the mine cavity is the crown pillar.

31. The crown pillar is not really a pillar; there will be no pillars supporting this mine. The "crown pillar" is actually just the roof of the mine over the mined-out cavity and each day and month of mining, from the bottom up, this roof will become thinner and weaker. Crown pillar stability is an issue with no room for error. A crown pillar collapse will likely be sudden, devastating and irreversible. The consequences would be so vast that Kennecott proposes no contingency plan to deal with this relatively commonplace form of mine disaster, and the MDEQ has granted the permit with no contingency plan whatsoever, leaving Petitioners and the natural resources of the Yellow Dog Plains and the Huron Mountain Club at great and irremediable risk of calamity if Petitioners' witnesses, with strong industry backgrounds, are even partially correct in their analyses, or if Kennecott's mining experts are the least bit wrong in theirs.

32. At a threshold level, it is clear that if there exists a "potential" for such an environmentally devastating consequence as a mine collapse beneath the Salmon Trout River, then the area "potentially" affected by such a collapse was required to be the subject of Kennecott's EIA. So the only way to exonerate Kennecott for failing to conduct an EIA that

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encompassed at least the waters and surrounding lands of the Salmon Trout River basin downstream from the ore body was for the FDO to conclude that there was no potential for such a collapse to occur and, as a result, no potential to affect the area surrounding the Salmon Trout River between the mine and Lake Superior. The FDO never quite articulates a direct factual finding that there is no potential whatsoever for a collapse of the mine and thus no potential for the Salmon Trout River and its shoreline to be adversely affected, but that is the only possible inference to be drawn from the FDO's ultimate findings and conclusions.

33. Petitioners' experts testified that collapse of the mine as currently designed is not merely "potential," but virtually certain and the FDO accepted and quoted their testimony (FDO (PFD), pp 31-44). At the contested case hearing it was unrebutted that Petitioners' leading expert, Jack Parker, has studied and personally visited some 500 mines around the world and has devoted his entire career to supporting the mining industry. He was described as an "icon" by the MDEQ's own mining expert, Dr. Blake. (FDO (PFD), p 32)

34. Parker testified that "the backfill will settle and leave the crown pillar unsupported." He was certain and unshakeable that the mine would be "unstable." He stated that, as planned, this mine would endanger public health, safety and welfare. Parker pointed out that despite the likelihood of crown pillar collapse (like the nearby Athens Mine) there are "absolutely no contingency plans" presented in the mine application or in Kennecott's evidence at trial.

35. The most credentialed witness put on the stand to respond to Mr. Parker was the MDEQ's expert geologist, Wilson Blake. The MDEQ's own expert testimony more than reinforced the power of Jack Parker's concerns. Dr. Blake testified that:

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a. Jack Parker's documented understanding of horizontal stresses stands as "the seminal work" on the subject, not only in the Upper Peninsula, but anywhere.

b. Jack Parker is an "icon."

c. Petitioners' geology expert Dr. Bjornerud's analysis of the core samples was "very thorough" and both she and Dr. Vitton had raised legitimate concerns.

d. No calculations have been provided which support the claim that an 87.5 meter (the eventual proposed and permitted design measurement) crown pillar will be stable.

e. Many of the complaints about Golder's [Kennecott's consultant] rock mechanics work expressed by the MDEQ expert, Dr. Sainsbury, have gone unanswered.

f. When Dr. Sainsbury, on the very same day (November 9, 2006), finally seemed to endorse the crown pillar thickness Kennecott wanted, he also was highly critical of the work leading to that conclusion, so much so that he was described by MDEQ's witness Blake as "speaking, with two tongues."

36. Petitioners emphasized the likelihood of crown pillar failure because crown pillar collapse is utterly dispositive and the most alarming end game for an "affected area."

37. If the Salmon Trout River is sucked into the cavity created by Kennecott's poorly designed mine, that failure will cause consequences from which the River, the Huron Mountain Club, and surrounding natural resources will never recover. At the contested case hearing no Kennecott witness could defend sulfide mining under a river, no MDEQ witness could point to a successful precedent for doing so, and every witness from Petitioners' range of experts, from rock mechanics to hydrogeologists to geochemists to mine designers, forcefully condemned it.

38. The MDEQ's mining team leader expressly admitted that the MDEQ and his mining review team lacked sufficient expertise to review this mining application. In

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particular, the Department lacks expertise in rock mechanics, geochemistry, and even the financial capacity to conduct an adequate mine application review.

39. The record gives no hint that the design of this mine will be reviewed by some other layer of experts at some other regulatory body before mining actually begins. After an admittedly inexpert and troublingly irregular review process, the MDNRE will now be tasked with the enormous responsibility of what finally to say and do to further protect, or not, the Salmon Trout River and its surroundings in light of the testimony of Jack Parker and Petitioners' other experts. The record provides no answer to this ultimate deficiency in the mine application. MDEQ's grant of the mining permit under the circumstances constitutes reversible error.

**The Permit Should be Denied Because the Applicant has not Met the Burden of Proof Imposed by Part 632 and the MDEQ Admitted that it did not Apply the Statutory Burden of Proof. Kennecott was Required to Demonstrate that the Mining Operation will not "Pollute, Impair, or Destroy" Natural Resources. Petitioners Affirmatively Established that Kennecott Failed to Meet that Burden.**

40. Part 632 places the burden of showing that all regulatory requirements have been met squarely on the permit applicant. MCL 324.63205(3). Thus, the applicant must affirmatively show that the mine will meet every statutory requirement under Part 632, including the requirement that the mine will not pollute, impair or destroy natural resources. MCL 324.663205911)(b). The FDO, however, squarely places the burden of proof on Petitioners, completely ignoring the statutory language of Part 632, nowhere acknowledging the Part 632 requirement that the ***applicant*** demonstrate that the mine will not pollute, impair or destroy natural resources. According to Part 632:

> *The applicant has the burden* of establishing that the terms and conditions set forth in the permit application; mining, reclamation, and environmental protection plan; and environmental impact assessment will result in a mining operation that reasonably

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> minimizes actual or potential adverse impacts on air, water, and other natural resources *and meets the requirements of this act.*

MCL 324.63205(3)(emphasis supplied). When applied to the pivotal requirement of Part 632, that "the proposed mining operation will not pollute, impair, or destroy the air, water, or other natural resources or the public trust in those resources, in accordance with part 17 of this act...," MCL 324.65205(11)(b), the applicant failed to meet the burden of proof, and MDEQ and the ALJ improperly applied it.

41. Throughout the contested case proceedings and prior to permit issuance, Petitioners raised and emphasized the pivotal questions of whether Kennecott met – and whether the MDEQ ever applied – this key criterion for permit approval: proof that the mining activities will not pollute, impair or destroy natural resources.

42. MDEQ's FDO asserts that Petitioners conflated the requirement in the statute regarding information that must be provided in an application with the burden of proof in a contested case. That assertion reflects a basic misunderstanding of Part 632. But, even if the FDO's faulty analysis that the burden applies to the applicant only at the application stage, MDEQ still fails the test. Under oath, the MDEQ Mining Team Coordinator admitted that he and the Mining Team had not applied the statute's central "pollute, impair or destroy" standard. In fact, in over 40 days of testimony, MDEQ never presented a single shred of testimony or evidence that this standard was ever applied during any part of the agency's consideration of the application. To the extent it is argued that Petitioners bore the burden of establishing Kennecott's failure to meet the statutory standard, Petitioners fully met that burden. The fact that MDEQ issued the mining permit without requiring Kennecott to demonstrate that the proposed mining would not pollute impair or destroy natural resources is reason enough alone to deny the permit.

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## The Application did not Contain Statutorily Required Information

### A. The Application did not Include Information that Demonstrates that All Methods, Materials, and Techniques Proposed to be Utilized are Capable of Accomplishing Their Stated Objectives in Protecting the Environment, as Required by Section 63205(2)(c)(ii).

43. Section 63205(2)(c)(ii) requires that the application include "information which demonstrates that all methods, materials, and techniques proposed to be utilized are capable of accomplishing their stated objectives in protecting the environment..." MCL 324.63205(c)(ii). Kennecott's application did not make the required demonstration and in many instances, did not even provide elementary information about methods, materials and techniques.

44. It is undisputed that no information of any kind was included in Kennecott's permit application concerning the method, materials and techniques to be employed in controlling emissions of toxic particulate matter from the Mine Ventilation Air Raise ("MVAR") stack. The record demonstrates only that Kennecott advised MDEQ on the last day of the public comment period that it would not be averse to adding a fabric filter system, which it claimed would reduce emissions of such matter by 85%. At no time, not even during the contested case hearing, was any evidence produced to back up Kennecott's reduction claim and there is no record that manufacturer's specifications have ever been seen by the MDEQ, the ALJ or anyone else. Kennecott admitted that such a system has never been tried before and must yet be custom-designed. Similarly, the MDEQ and Kennecott admitted that a plant like Kennecott's planned Waste Water Treatment Plant has never been tried at another mine anywhere in the world.

45. Contrary to statutory requirements, Kennecott intends to experiment with Michigan's air and water. Because the efficacy of Kennecott's proposed methods, materials and techniques is unproven and in many instances, globally untested, the permit violates Part 632

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and must be denied. In the most extreme examples, Kennecott has not even revealed, much less proven effective, the methods, materials and techniques it plans to rely upon to achieve protection of Michigan's natural resources.

**B. The Application did not Contain a Contingency Plan that Meets the Requirements of Section 63205.**

46. Section 63205(2)(d) requires that the application provide "a contingency plan that includes an assessment of the risk to the environment or public health and safety associated with potential significant incidents or failures and describes the operator's notification and response plans...." MCL 324.63205(2)(d). In almost every instance, even where evidence of likely failure has been presented in the strongest terms, the applicant has failed to assess environmental risk or to provide response plans.

47. The FDO erroneously states that Kennecott's mine plan includes a host of contingencies, including for unplanned crown pillar subsidence. However, this conclusion directly contradicts the MDEQ Mining Team Coordinator's and Kennecott's own testimony, and completely ignores much inconsistent evidence on the record, including the sworn testimony of a mining engineer who has worked in over 500 mines that "there are no contingency plans for things like a crown pillar collapse in the mine application or in Kennecott's testimony." This evidence, and much more like it, was arbitrarily disregarded by the ALJ and unaddressed by the FDO.

48. The MDEQ Mining Team Coordinator testified that the permit section addressing contingencies and contingency measures does not contain any: discussion of subsidence or crown pillar failure; discussion of catastrophic events or wastewater treatment plant closure for a substantial period of time; contingency for significantly increased inflow to the mine; contingency should the MVAR air filtering system not work; or contingency

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addressing contaminated water leaking into aquifers from the underground mine. Finally, he admitted that essentially, the "contingency plan" for water quality protection really just requires additional monitoring and that in fact "[he] wouldn't call monitoring a contingency plan."

49. Despite MDEQ's own admissions about the inadequacy of Kennecott's contingency plans, the FDO upheld the permit and made inconsistent factual and legal findings with no explanation. To be clear: the permit includes no contingency plans for the most predicted and potentially fatal failures, omitting perhaps the most important mechanism for protecting humans and the environment. For these reasons, Petitioners request that the permit be denied.

### C. The Application did not Include a Reclamation and Environmental Protection Plan for the Affected Area as Defined in the Act, as Required by Section 63205(2)(c).

50. Section 63205 requires that the application include:

> A mining, reclamation, and environmental protection plan for the proposed mining operation, including beneficiation operations, that will reasonably minimize the actual and potential adverse impacts on natural resources, the environment, and public health and safety within the mining area ***and the affected area***.

MCL 324.63205(2)(c) (emphasis added)

51. Section 63209(8) provides:

> Both the mining area ***and the affected area*** shall be reclaimed and remediated to achieve a self-sustaining ecosystem appropriate for the region that does not require perpetual care following closure and with the goal that the affected area shall be returned to the ecological conditions that approximate premining conditions subject to changes caused by nonmining activities or other natural events.

MCL 324.63209 (emphasis added)

52. Despite these statutory requirements, Kennecott's permit application did not include any plan for reclamation or environmental protection for any area outside of its fenced

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area, *i.e.,* the mining area. The FDO held that Kennecott's application satisfies the statutory requirement, and, in so doing, misstated the statutory requirement as applying only to the "mine site."

53. The record in this case does not support a finding that there will be no potential for adverse environmental effects outside of the fence line. In fact, Petitioners presented uncontested evidence demonstrating that potential adverse impacts extend miles beyond the mine site. Air pollution will spread over the landscape, and a proposed new haul road will traverse over 20 miles of pristine rugged countryside, leaving acid-creating dust in its path. Yet, none of these impacts, or others raised by Petitioners, was assessed by the required reclamation and environmental protection plan. Since Kennecott's permit application did not include a reclamation and environmental protection plan which conformed to the statute's requirements, the permit should be denied.

**Cumulative Impacts were not Assessed as Required by Part 632 and its Implementing Rules Requiring Denial of the Permit**

54. Because the permit application failed to include analyses of the potential cumulative impacts "within the mining area and the affected area from all proposed mining activities and through all processes or mechanisms" required to be included in the Environmental Impact Assessment, the Applicant failed to meet the requirements of Rule 425.202(1)(b) and MCL 324.63205(2)(b), requiring denial of the permit under MCL 324.63205(12). It is undisputed that toxic materials will be spread for miles beyond the mine site, build up in snow and then melt into streams and rivers creating spikes of contamination, yet potential impacts to animals, plants, wetlands and water quality itself, were not assessed in the application and were ignored by the FDO. In fact the FDO essentially eliminated the statutory cumulative impacts analysis requirement by excusing Kennecott from performing it

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because purportedly there is "no generally accepted scientific protocol for evaluating cumulative impacts." This excuse is unsupportable given that scientists as well as federal laws and guidance provide specific processes for assessing cumulative impacts. In fact, Kennecott's own witnesses concluded that there would be impacts all the way to the mouth of the Salmon Trout River and that they should have been assessed.

55. The statutory definition of "cumulative impact" is the environmental impact that results from the proposed mining activities when added to other past, present, and reasonably foreseeable future activities. Rule 425.202(h). The permit application does not address past, present or reasonably foreseeable activities at all, therefore failing to meet this requirement. It is currently impossible for the cumulative impacts analysis to meet the statutory requirements because the "affected area" required to be included in the cumulative impacts analysis encompasses, by statutory definition, "an area outside of the mining area where the land surface, surface water, groundwater, or air resources are determined through an environmental impact assessment to be potentially affected by mining operations within the proposed mining area." MCL 324.63201(b). As discussed *infra/supra*, the permit application does not include an analysis of the affected area, much less did it assess the potential cumulative impacts that the mining activities would have on it.

56. The "mining activities" from which impacts must be assessed in a cumulative impacts analysis include:

(i) Clearing of land,
(ii) Drilling and blasting,
(iii) Excavation of earth materials to access or remove ore,
(iv) Beneficiation,
(v) Reclamation,
(vi) Transportation of overburden, waste rock, ore, and tailings,
(vii) Storage, relocation, and disposal of overburden, waste rock, ore, and tailings within a mining area, including backfilling of mined areas,
(viii) Storage and transportation of chemical reagents,

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(ix) Construction of water impoundment and drainage features,
(x) Construction of haul roads,
(xi) Construction of utilities or extension of existing utilities, and
(xii) Withdrawal, transportation, and discharge of water.

Rule 425.103(3)(a).

57. Impacts from these past, present and reasonably foreseeable mining activities were not assessed in the original permit application, therefore the permit was issued in violation of Part 632 and its implementing rules and Petitioners request that it be denied. Complete categories of mining activities as defined above were not assessed in the application and are ignored in the FDO.

58. Further, subsequent to the permit issuance and the conclusion of the contested case, the applicant has undertaken or sought to undertake mining activities requiring amendments to the permit under MCL 324.63207(6). The applicant, however, has not sought, and the MDEQ has not required the necessary amendments, leaving the many potential cumulative impacts of those activities completely un-assessed and the permit, as issued, non-compliant with several portions of Part 632 including MCL 63207(6), Rule 425.206 and MCL 324.63209(1). For example, in 2009, Kennecott Eagle Minerals Company and other entities in the "Woodlands Road LLC" submitted permit applications to MDEQ to fill over 30 acres of wetlands in order to build a new 20 + mile road through rugged pristine terrain proposed for hauling ore from the Eagle Mine to the proposed Humboldt mill processing facility, among other things. Permit Application File No. 09-52-0086-P. No effort has been undertaken by Kennecott to comply with the mining statute's requirements regarding this "construction of haul road[s]" as required. Rule 425.103(3)(a)(x). Similarly, in December 2008, Kennecott Eagle Minerals Company submitted permit applications, including a separate application under Part 632 (which, like the Eagle permit, does not address transportation or the new haul road) to

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MDEQ to retro-fit and operate an ore processing facility known as the "Humboldt mill." The Humboldt mill is proposed for processing ore from the Eagle Mine and serving as a transfer station for the processed ore. Therefore, the applicant must provide a cumulative impacts analysis for "beneficiation" and "transportation of overburden, waste rock, ore, and tailings" as required by Rules 425.103(3)(a)(iv) and (vi). Finally, in the summer of 2008, the Alger-Delta Electric Cooperative, at the direction and expense of Kennecott, began upgrading and constructing new utility facilities intended to provide electrical service to the site of the Eagle Mine triggering the analysis requirement for "construction of utilities or extension of existing utilities." Rule 425.103(3)(a)(xi). Although within the purview of Part 632's affected area and cumulative impacts analysis requirements, Kennecott and MDEQ have completely ignored the governing statutory provisions. For all of these enumerated mining activities, road-building, beneficiation, transportation of ore and utility work, the far-reaching potential impacts remain completely un-assessed in violation of Part 632. For these reasons, the permit should be denied.

**The Permit Application Failed to Include an Environmental Impact Assessment Which Assessed the Potential Impacts on Eagle Rock as a Place of Worship and Impacts on the Tribal Community Members' Land Uses at Eagle Rock and the Surrounding Area and, Therefore, Failed to Meet the Requirements of MCL 324.63205(2)(b) and R 425.202, and Failed to "Reasonably Minimize" Impacts Under MCL 324.63205(2)(C), Requiring Denial of the Permit Under MCL 324.63205(12).**

59. Petitioners presented uncontested evidence that Eagle Rock is a place of worship for members of the Community and indigenous people from all over the Midwestern United States and Ontario. Kennecott and MDEQ intend to proceed with the current mining plan to literally blast a hole into and a tunnel through Eagle Rock and fence it off for at least 40 years, completely desecrating Eagle Rock and annihilating the tribal members' opportunities to utilize

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their place of worship. Beyond Eagle Rock, the planned mining operation will also prevent or impair tribal members' longstanding uses of the mining area and the surrounding affected area for a variety of other traditional and cultural activities, including, but not limited to, their exercise of treaty rights in those areas.

### A. MDEQ's Holding That Kennecott Assessed Impacts to Eagle Rock and Land Uses and Land Access as Required by Part 632's EIA Requirement is Based on Clear Legal Errors and is not Supported by the Record

60. MDEQ's holding that Kennecott's EIA complies with MCL 324.63205(2)(b) and R 425.202, despite Kennecott's failure to assess impacts to Eagle Rock in its EIA, and MDEQ's findings underlying that holding (FDO pp 4-8), are based on errors of law and are not supported by the whole record.

61. First, MDEQ's unfounded holding is based on its finding that Petitioners made a binding "stipulation" that "precludes any consideration of Eagle Rock as a place of worship or treaty rights." (FDO p 5) That finding is legally erroneous, contrary to an evidentiary ruling by the ALJ, and not supported by the whole record. MDEQ's finding that Petitioners' purported "stipulation" somehow led MDEQ and Kennecott to refrain from introducing evidence concerning Eagle Rock at the hearing (FDO p 7 n 6) is also not supported by the whole record. For example, the hearing spanned over 40 days and testimony as to the religious uses of Eagle Rock was presented during the first week of trial, leaving Kennecott and MDEQ plenty of time to augment their witness lists and testimony, which neither ever sought to do regarding this topic.

62. MDEQ's holding is also based on its flawed finding that Part 632 neither "regulates," nor requires reduction or mitigation of impacts to Eagle Rock. (FDO pp 6-7) That finding is erroneous for reasons including, but not limited to, MDEQ's failure to recognize that

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Kennecott's failure to assess Eagle Rock in its EIA patently requires denial of the permit whether or not Part 632 requires, and Petitioners assert that it does, reduction or mitigation of those impacts.

63. Furthermore, if by finding that Part 632 neither "regulates" nor requires reduction or mitigation of impacts to Eagle Rock (FDO pp 6-7), MDEQ purports to find or hold that MCL 324.63205(2)(c) does not require that Kennecott's mining, reclamation, and environmental protection plan reasonably minimize impacts to Eagle Rock or to the uses and significance thereof, Kennecott's failure to provide such a plan that reasonably minimizes those impacts does not require denial of the permit under MCL 324.63205(11)(a) and (12) and R 425.201(7)(a) and (8), MDEQ's finding or holding is legally erroneous and is not supported by the whole record. In the alternative, if the permit may be issued despite Kennecott's failure to reasonably minimize those impacts, such issuance is not authorized unless and until appropriate terms and conditions are imposed to reasonably minimize those impacts. *Id.*

64. The MDEQ's holding is also based on its erroneous conclusions of law that R 425.202(2)(p) "applies only to buildings used for human occupancy" and that "because Eagle Rock is not a building used for human occupancy, there is no basis to require the EIA [to] identify and describe the feature as a 'place of worship.'" (FDO p 8) Both of these conclusions are legally erroneous. Additionally, MDEQ's underlying finding that the PFD failed to address the phrase in R 425.202(2)(p) "or other buildings used for human occupancy all or part of the year" is simply wrong and is not supported by the whole record.

65. MDEQ continues its pattern of reaching for reasons to forgive Kennecott's deliberate ignorance of Eagle Rock, and appears to find in the FDO that R 425.202(2)(ee) is a limitation on which culturally significant features or conditions such as Eagle Rock must be

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assessed in an EIA and that Kennecott's rights under a lease with the former Michigan Department of Natural Resources ("MDNR"), which was issued under Part 5 of NREPA,[5] further establishes that Part 632 does not "regulate" impacts to Eagle Rock. (FDO p 7) Both of those findings are, again legally erroneous.

66. Part 632 also requires an applicant to identify and assess "land uses, land access, general size and shape of tracts of land, and current and historic land use trends." MCL 324.63205(2)(b) and Rule 425.202(x). Despite this statutory requirement, Kennecott did not identify, much less assess how mining activities would impact the Community's uses of and access to Eagle Rock and other land in the vicinity of the proposed mining area and affected area. MDEQ does not make any explicit finding or holding in the FDO regarding whether Kennecott's failure to do so violates MCL 324.63205(2)(b) and/or R 425.202(2)(x), and, if so, whether that requires denial of the permit under MCL 324.63205(11)(a) and (12) and R 425.201(7)(a) and (8). Kennecott did violate MCL 324.63205(2)(b) and R 425.202(2)(x), that violation does require denial of the permit, and if MDEQ purports to find or hold to the contrary in the FDO, that finding or holding is legally erroneous and is not supported by the whole record.

### B. MDEQ Violated the Administrative Procedures Act and MDEQ Contested Case Rules When it Held that Kennecott's EIA Complies with Part 632's EIA Requirements

67. MDEQ's holding that Kennecott's EIA "complies in all respects with" MCL 324.63205(2)(b) and R 425.202, and the findings underlying that holding (FDO pp 4-8), violate the Administrative Procedures Act[6] and MDEQ contested case rules,[7] including, but not limited to, MCL 24.285 and R 324.74(4). For example, the FDO does not address whether the failure

[5] MCL 324.501 et seq.
[6] MCL 24.201 et seq.
[7] R 324.1 et seq.

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of the EIA to assess impacts to the Community's "land uses and land access...and current and historic land trends" on Eagle Rock and in the vicinity of the proposed mining area and affected area violates MCL 324.63205(2)(b) and/or 425.202(2)(x), or, if so, whether that requires denial of the permit. The FDO also does not address Petitioners' proposed finding that R 425.202 does not limit the scope of "conditions and features" that must be assessed in an EIA, and that Eagle Rock and/or Community members' "land uses and land access" must, therefore, be assessed in the EIA even if they do not fall under R 425.202(2)(p) or (x). MDEQ simply failed to address those issues. In the alternative, if those issues were addressed and rejected in the FDO, MDEQ failed to articulate any factual or legal basis for doing so. Similarly, where MDEQ did proffer holdings and related findings, they are conclusory and lack sufficient explanation of their factual or legal basis.

### C. The FDO Was Made Under Highly Irregular and Prejudicial Circumstances in Violation of Applicable Law Including But Not Limited To the Michigan Administrative Procedures Act and the Due Process Clauses of the United States and Michigan Constitutions

68. The FDO was made under highly irregular and prejudicial circumstances and is in violation of applicable law, including, but not limited to, MCL 24.281 and 24.285, R. 324.2, and the Due Process Clauses of the United States and Michigan Constitutions.[8] The eleventh-hour Order of Delegation and issuance of the FDO by an MDEQ "senior policy advisor," only nine days after the Order of Delegation, were legally improper and clearly calculated to dispose of the contested case with a pre-ordained result before a new MDNRE Director (and, therefore, a new final decisionmaker) was named. MDEQ's vacation of the Order of Remand and issuance of a final decision on the Eagle Rock issue, without the issuance of the previously MDEQ Director-ordered Supplemental PFD and an opportunity to present exceptions to the

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[8] US Const Amend XIV, §1; Mich Const art I, §17.

Supplemental PFD, and after Petitioners had filed extensive briefs on the Eagle Rock issue at great expense, violated MCL 24.281 and R. 324.2; deprived Petitioners of substantial and material procedural rights; and, again, was clearly calculated to dispose of the contested case before the appointment of a new MDNRE Director.

**MDEQ's Final Decisionmaker Could not have Reviewed the Entire Record in the Brief Period of Time Between the Order of Delegation and the Issuance of the FDO, and Accordingly Issued the FDO in Violation of the Administrative Procedures Act and the Michigan Constitution.**

69. Another egregious violation of due process and applicable law is evident in the fact that MDEQ's final decisionmaker could not have reviewed the parties' Proposed Findings of Fact and Conclusions of Law and related briefs, Exceptions to the PFD, Briefs on Remand, and all of the record evidence relied upon and cited in those documents, during the nine days between the Order of Delegation and the issuance of the FDO. Therefore, the final decisionmaker was not qualified to pass upon the credibility or sufficiency of the parties' arguments and/or the record evidence, and, for the same reason, the FDO was not made "upon consideration of the record as a whole or a portion of the record as may be cited by any party to the proceeding and as supported by and in accordance with the competent, material, and substantial evidence" as required under MCL 24.285. See also Mich Const art VI, §28; R. 324.74. The FDO was issued upon highly irregular and prejudicial procedures that failed to satisfy the basic standards of procedural due process under US Const Amend XIV, §1 and Mich Const art I, §17. See also R 324.2. Therefore, the permit it authorizes must be denied.

**Impacts to the Salmon Trout River and Wetlands are Uncontested and Violate Part 632's Requirement that Mining Activities not Pollute, Impair or Destroy Natural Resources**

70. Uncontested evidence shows that holding ponds with water that is not monitored will overflow directly into the Salmon Trout River headwaters, that wetlands will be drained,

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and that the impacts of draining wetlands have not been assessed even though – and Kennecott's expert agrees – the entire length of the Salmon Trout River would be affected.

### A. The Permit Illegally Allows a Direct and Unmonitored Discharge Into the Salmon Trout River

71. Given the Part 632 requirement that a facility must obtain a permit for discharges directly into surface waters, MCL 632205(14), the discharge of water from the proposed mine's water holding basins into the Salmon Trout River requires a National Pollutant Discharge Elimination System ("NPDES") permit under the federal Clean Water Act ("CWA"). Clean Water Act (CWA), Section 402; 33 USCA 1342. The MDEQ excused Kennecott from this requirement. The risk of acid mine drainage from sulfide mining renders compliance with these permitting statutes critical. Case law establishes that where mine water runs into streams, as it will at the proposed mine site, a NPDES permit is required. Courts have found mining operations subject to regulation as point sources, even when the means of conveying of pollutants are strictly natural phenomena, such as rainfall or gravity. For example, in *Sierra Club v Abston Constr Co*, the Fifth Circuit Court of Appeals found that coal seams exposed by mining operations could be a point source of pollution when rainfall carried pollutants to navigable waters:

> Nothing in the Act relieves miners from liability simply because the operators did not actually construct those conveyances, so long as they are reasonably likely to be the means by which pollutants are ultimately deposited into a navigable body of water. Conveyances of pollution formed either as a result of natural erosion or by material means, and which constitute a component of a mine drainage system, may fit the statutory definition and thereby subject the operators to liability under the Act.

*Sierra Club v Abston Constr Co*, 620 F2d 41, 45 (5th Cir 1980). This is analogous to the situation at Eagle, where water holding basins (where no monitoring of water quality is required until there is a release, after the fact) are anticipated, as included in the Part 632

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permit, to overflow, and that the overflow water will follow its natural path to the Salmon Trout River. This is a discharge that requires a NPDES permit and allowing this discharge without requiring that Kennecott seek a permit violates both the CWA and Part 632 requiring on both counts that the permit be denied.

**B. All Witnesses Agree that Groundwater Drawdown Will Drain Wetlands**

72. The MDEQ violated Part 632 when it issued the permit while disregarding *uncontested* evidence that the mine will damage wetlands in the area with likely adverse consequences for the entire Salmon Trout River watershed. ***Every witness agreed that there will be groundwater drawdown.***

73. The parties presented evidence on the likely impact of the mining on wetlands resulting from inevitable groundwater drawdown. As the FDO states, a

> fundamental issue in this case is the sensitivity and importance of the Salmon Trout River and adjacent wetlands above and downstream from the mine site. ***All parties agree that some amount of drawdown of the water table above and around the mine will occur. And all parties agree that there is at least a potential that the drawdown will lower water levels in the reach of the river above the mine and in groundwater-supported wetlands.*** The only question is whether the drawdown will be great enough to impair these resources.

(FDO (PFD), p 94) Incredibly, the FDO contains no factual findings or legal conclusions on the issue of downstream wetlands. Uncontroverted evidence demonstrated that there *will* be damage to area wetlands, and that damage, involving as it will the headwaters of the Salmon Trout River, will likely adversely impact the entire river.

74. Several efforts were made to predict the groundwater drawdown that the mine would likely cause. In connection with its EIA, Kennecott presented modeling which projected drawdown "over a concentric area exceeding one mile in diameter." A newer model prepared for Kennecott by Geotrans, and disclosed during the course of the contested case hearing "concluded that drawdown of the glacial aquifer over the ore body would … rang[e] from 'very

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near zero *up to a few feet.*' In fact, the Geotrans model, as elsewhere noted by the ALJ "showed a drawdown of *eight feet* in the water levels above the ore body, based on a simulation of 60 gpm." At the hearing, "Kennecott predict[ed] there could be a six inch drop in the water table due to mining operations. Kennecott's own projections, as varying and uncertain as they are, implicate damaging outcomes for the Salmon Trout River.

75. The evidence demonstrated that even these Kennecott drawdown projections are unsupportable and substantially understated. More important for present purposes, however, is the fact that uncontradicted evidence established that under any of these projections extensive damage to area wetlands and vernal pools will result. Therefore the permit should be denied.

**C. <u>The Record Establishes that the Entire Salmon Trout River is at Risk</u>**

76. ***Every expert who testified on the subject, including Kennecott's wetlands expert, agreed that damage to area wetlands would implicate the health of the entire Salmon Trout River.*** Indeed, the FDO makes that fact plain:

- Dr. Adamus stressed that maintaining the ecological integrity of headwater wetland systems is necessary to protect the entire downstream watershed;
- Dr. Tilton [a *Kennecott* witness] agreed that headwater wetlands are especially important for several reasons, and that maintaining ecological integrity of headwater wetlands "is necessary to protect the quality of the entire downstream watershed."

In addition, Dr. Mac Strand, an aquatic ecologist, similarly testified that a substantial drawdown of groundwater in the upper Salmon Trout River would impair or destroy the River's entire ecosystem.

77. The complex of wetlands surrounding the mine site feed the headwaters of the Salmon Trout River. All relevant experts also agreed that the Salmon Trout, home to the last

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known breeding population of Coaster Brook Trout in the Upper Peninsula, is heavily fed by the groundwater that would be diminished to an unknown extent by the proposed mining.

78. All witnesses also agreed that damage to headwater wetlands will impact the entire river. Uncontradicted testimony thus established that likely damage to area wetlands will damage the entire Salmon Trout River. The evidence is uncontradicted because Kennecott, contrary to all record evidence, chose to ignore potential destruction of groundwater-fed wetlands and the resulting impacts to the Salmon Trout River. For these reasons, the permit should be denied.

**The FDO was the Product of Additional Incurable Errors Requiring Reversal of the MDEQ's Issuance of the Permit.**

79. The ALJ treated post-application correspondence, reports, and contested case evidence as constituting "amendments" to the application, these *de facto* "amendments" were never subjected to public comment or public hearings in contravention of MCL 324.63205(6), MCL 324.63205(7), MCL 324.63205(8), and the holding of *Sierra Club v DEQ*, 277 Mich App 531; 747 NW2d 321 (1977) and all applicable authorities.

80. The FDO accepted permit conditions as a substitute for explicit statutory requirements for the contents of the original mining application in contravention of MCL 324.63205.

81. The FDO incorporated factual and legal conclusions directly contradicted by the overwhelming preponderance of the FDO's own factual findings as prohibited by *Lopez v Mich Dept of Social Services*, 76 Mich App 505; 257 NW2d 143 (1977) and all applicable authorities.

82. The FDO's conclusion that Petitioners had failed to establish a *prima facie* case was in direct conflict with the FDO's Findings of Fact, supported in their entirety by the record,

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which established each and every element of the *prima facie* case presented by Petitioners, was in contravention of the holding of *Lopez v Mich Dept of Social Services*, 76 Mich App 505; 257 NW2d 142 (1977) and all applicable authorities.

83. The findings and rulings of the FDO repeatedly mischaracterize record evidence and ignore uncontradicted evidence to the contrary in the contested case hearing and thus are not supported by competent, material, and substantial evidence on the whole record, as required by MCL 24.306.

84. The FDO contains material and factual conclusions for which there is no factual support in the record and material factual conclusions which were directly contradicted by all of the witnesses testifying thereto, including Respondents' witnesses in direct contravention of MCR 24.285.

85. The Acting Director's eleventh-hour delegation of the ultimate responsibility to issue the FDO to subordinate staff personnel when a new director of the combined agency had already been identified, which delegation led to the subordinate official's "vacating" a lawful order of remand issued by the previous director, was accomplished without statutory authority and for the transparent purpose of evading a review process that prescribes that the director shall issue the Final Decision and Order unless his or her own prior involvement in the application process creates a conflict of interest in contravention of the purpose of MCL 324.99903.

86. Kennecott's permit application does not include any surface water monitoring at the Groundwater/Surface water Interface (GSI) for its discharges and fails to satisfy Rule 425.406(4) which requires that "surface water monitoring sites shall be designed and located to adequately assess the impact of a specific mining activity on surface water."

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87. Kennecott's permit application does not include any compliance monitoring wells for the bedrock aquifer in violation of Rule 425.406(5)(b) which requires that for groundwater monitoring sites, "compliance monitoring wells shall be located as close as physically practicable but not more than 150 feet from the mining activity being monitored...."

88. Kennecott's permit application does not contain a mining plan that includes "provisions for the *prevention*, control, and monitoring of acid-forming waste products and other waste products from the mining process so as to ***prevent leaching into groundwater or runoff into surface water.***" MCL 324.63205(c)(v)(emphasis added). Kennecott's permit application fails to satisfy the requirements of MCL 324.63205(2)(c)(v) because it does not contain a plan to prevent acid-forming waste products and other contaminants, including metal-rich waters, nor a plan to prevent them leaching into groundwater or runoff into surface water.

89. Kennecott's permit application does not include a mining plan with "a description of the geochemistry of the ore, waste rock, overburden, peripheral rock, and tailings, including characterization of leachability and reactivity." MCL 324.63205(c)(iv). Kennecott's permit application fails to satisfy the requirements of MCL 324.63205(2)(c)(iv) because it does not contain the required geochemical descriptions and characterizations.

90. Kennecott's permit application fails to satisfy the requirements of MCL 324.63209(8) because it does not demonstrate that it can achieve the required level of reclamation for the affected area (as Petitioners have shown it to be or by Kennecott's own description) nor that it will not rely upon perpetual care especially given the very poor quality of water in the re-flooded mine and Kennecott's stated plans to "pump and treat" ground water.

91. The activities permitted under Kennecott's permit fail to satisfy the requirements of MCL 324.63209(1) because those activities violate other parts of the act including

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Michigan's Water Legacy Act (MCL 324.32721); therefore MDEQ violated MCL 324.63209 when it issued the mining permit to Kennecott.

92. NREPA's Part 303, Wetlands Protection Act, prohibits conduct that drains surface water from a wetland without a permit from MDEQ, MCL 324.30304(d), and the proposed mine, if constructed, operated and maintained, will draw down the surface water of wetlands adjacent to or on the surface of the mine site in violation of Part 303 and MCL 324.63209(1).

93. Mich Admin Code R 323.1098 (the "anti-degradation rule") is a prohibition on new releases of certain constituents including some predicted to be released at this mine site. The proposed mine, if constructed, operated and maintained, will violate the anti-degradation rule; therefore MDEQ violated the anti-degradation rule and MCL 324.63209(1) by approving the mining permit and not requiring Kennecott to obtain or seek a NPDES permit. MDEQ wrongfully determined that Kennecott's discharges are exempt from the anti-degradation rule.

94. Part 31 of NREPA's Part 22, Water Resources, requires persons who discharge stormwater associated with industrial activity to apply for a stormwater discharge permit. MCL 324.3101, *et seq*. Construction, operation and maintenance of the proposed mine must manage stormwater overflow from non-contact water basins and therefore MDEQ violated Part 31 by not requiring Kennecott to apply for a storm water discharge permit for the proposed mine.

95. The FDO denies and omits the Exceptions filed by Petitioners set forth in Appendix of Exhibits, Exhibit 2 and incorporated by this reference.

96. The ALJ committed unlawful procedural error in excluding Exhibit 11 to the *de bene esse* deposition of David Sainsbury from the record in the contested case hearing and sustaining Respondents' objections to the exhibit based on lack of foundation, hearsay, and lack

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of opportunity to cross-examine, when the transcript of the deposition shows that there was no basis for either objection, resulting in material prejudice to Petitioners.

97. The ALJ abused his discretion in denying Petitioners any discovery and then allowing Kennecott to introduce exhibits and other evidence in the contested case hearing which had never been previously disclosed to Petitioners nor submitted to MDEQ for its review during the Permit application process nor provided to Petitioners as required by the ALJ's pretrial order.

**RELIEF SOUGHT**

98. Petitioners request that, upon receipt of the full contested case record from the MDEQ, this Honorable Court establish a schedule for briefing and oral argument. In light of the volume and complexity of the record below, Petitioners request an order permitting briefs to be filed in excess of existing page limitations to be determined by the Court.

99. Based upon the full record, Petitioners request that this Court hold unlawful and set aside the Final Decision and Order granting Kennecott a Nonferrous Metallic Mining Permit for the Proposed Mine, and order that the permit be denied in accordance with MCL 324.63205(11)(a) and (b) and (12) and R 425.2017(a) and (8), and for such other relief as the Court deems just under the circumstances.

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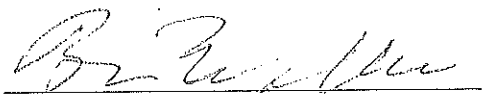
Dated: March 11, 2010

BY: 

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