

**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,

Case No. \_\_\_\_\_-AA

Petitioners,

Hon. Donald E. Shelton

vs.

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

Respondents.

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**PETITION FOR REVIEW OF FINAL DETERMINATION AND ORDER  
OF THE MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY  
CONCERNING GROUNDWATER DISCHARGE PERMIT NO. GW1810162**

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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, and in Washtenaw County Circuit Court, which was given docket number 10-264-AA and was assigned to Judge Donald E. Shelton. Docket No. 08-263-AA is pending before the Michigan Court of Appeals, and Docket No. 10-264-AA is pending in Washtenaw County Circuit Court. The other actions are no longer pending.*

The National Wildlife Federation (“NWF”), the Keweenaw Bay Indian Community (“Community”), Yellow Dog Watershed Preserve, Inc. (“YDWP”), and the Huron Mountain Club (“HMC”) (collectively, “Petitioners”) hereby petition this Court for review of the Final Determination and Order (“FDO”) entered January 14, 2010 by the Michigan Department of Environmental Quality (“MDEQ”) approving the issuance of a groundwater discharge permit under Part 31<sup>1</sup> (“Part 31 Permit”) to Kennecott Eagle Minerals Company (“KEMC”) for discharges of wastewater from KEMC’s proposed mining operation in Michigamme Township, Marquette County, Michigan. A copy of the FDO is attached hereto as **Exhibit A**.<sup>2</sup>

The FDO is the culmination of the contested case proceedings in *In The Matter Of The Petitions Of The Keweenaw Bay Indian Community, Huron Mountain Club, National Wildlife Federation, and Yellow Dog Watershed Preserve, Inc. On Permits Issued To Kennecott Eagle Minerals Company* (File Nos. GW1810162 and MP 01 2007) (“Contested Case”). The underlying Proposal for Decision in the Contested Case (“PFD”) was issued by Administrative Law Judge Richard A. Patterson (hereinafter the “ALJ”) on August 18, 2009 and is attached

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<sup>1</sup> Part 31 of the Michigan Natural Resources and Environmental Protection Act (“NREPA”), MCL 324.3101 *et seq.*

<sup>2</sup> The FDO also affirmed the issuance of a mining permit under Part 632 of NREPA, MCL 324.63201 *et seq.* (“Part 632”). Petitioners have filed with this Court a separate Petition for Review of the FDO as it pertains to the Part 632 permit.

hereto as **Exhibit B**, because many of the findings and conclusions in the PFD are incorporated into the FDO by reference.

## **I. INTRODUCTION**

At issue in this case is a Part 31 groundwater discharge permit that was issued to KEMC for a proposed mining operation in Michigamme Township, Marquette County, Michigan. KEMC's proposed mining operation will generate huge amounts of acidic wastewater containing harmful amounts of metals and other pollutants. KEMC proposes to manage all of this polluted wastewater by pumping it into the ground through a "treated water infiltration system" ("TWIS"), after which the discharge will travel through the groundwater and ultimately vent into streams and creeks in the area, including the pristine Salmon Trout River. Part 31 requires that KEMC obtain a permit that authorizes and limits that discharge. As further specified in the Part 31 groundwater discharge administrative rules,<sup>3</sup> to obtain such a permit, KEMC must, among other things:

- Accurately estimate the volume of the mine wastewater to be treated and the levels of pollutants that the wastewater will contain.
- Design a wastewater treatment system that will be able to adequately treat that wastewater.
- Accurately quantify the levels of pollutants in the treated wastewater that will be discharged.
- Investigate subsurface conditions and provide sufficient data to determine where the discharge will go and how it will affect the environment.
- Design a monitoring system that will adequately monitor the environmental impacts of the discharge.

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<sup>3</sup> R 323.2201 *et seq.*

Additionally, any such permit must contain certain mandatory discharge limits that are specified in the rules, and must impose such other conditions as may be necessary to ensure that the waters of the State are protected.

The water resource protections under Part 31 are especially crucial at the type of mine KEMC proposes to construct, which, because it involves rocks high in sulfide mineralization, is commonly known as a “sulfide mine.” Sulfide mines are unusually dangerous to the environment because, when sulfide rock is exposed and interacts with water and oxygen, an irreversible chemical process begins that produces sulfuric acid, which, in turn, leaches high levels of metals and other pollutants from the rock. This acidic and pollutant-laden leachate, which is known as “acid mine drainage,”<sup>4</sup> then flows into surrounding groundwater, wetlands, and streams. Once it begins, that reaction is not only irreversible, it is essentially unstoppable; there is no “off switch” as there would be with typical industrial discharges. In fact, witnesses at the Contested Case hearing confirmed that some mines from Roman times still generate acid mine drainage today. The environmental impacts of acid mine drainage at sulfide mines elsewhere in the United States and the world have been devastating, rendering groundwater unusable and destroying streams, associated habitat, and all manner of flora and fauna that depend on those resources.<sup>5</sup>

The three basic ingredients for environmental disaster at a sulfide mine (sulfide rock + water + oxygen) are present in abundance at KEMC’s proposed mine, perhaps even more so than

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<sup>4</sup> Acid mine drainage is also referred to as “acid rock drainage.” *See, e.g.*, MCL 324.63202(c).

<sup>5</sup> Indeed, MCL 324.63202(c) specifically recognizes that:

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.

at any other sulfide mine in the world. Witnesses for all parties in the Contested Case agreed that the rock at KEMC's proposed mine has some of the highest sulfide levels, and hence, the highest potential to create acid and leach pollutants, that they had ever seen. KEMC's mine, which will extend as deep as 950 feet below ground, will be well below the water table, is located in a water-rich environment with heavy precipitation, and, indeed, is located *directly beneath the Salmon Trout River*. Moreover, the mine is located in a pristine wilderness that will be irreparably degraded by any environmental contamination. Therefore, it is absolutely essential to ensure that KEMC's wastewater characterization and treatment predictions are correct, that KEMC's related system designs and plans are complete, and that KEMC's proposed treatment, discharge, and monitoring systems will, without question, adequately protect the environment, *before* a Part 31 permit is issued to KEMC.

In recognition of the risk of acid mine drainage and other potential environmental risks associated with KEMC's proposed mine, in a letter dated February 23, 2006, Governor Jennifer Granholm instructed the MDEQ Director to:

. . . give rigorous and thorough review to Kennecott's permit applications and ensure that they meet each and every aspect of the new regulations and that any authorized activities not harm or impair our public trust resources. While this project has the potential to provide significant economic benefit to the local community, the irreplaceable natural resources of our Upper Peninsula constitute an extraordinary endowment that we hold in trust for the benefit of our citizens. This sacred trust must be protected.

As the Contested Case record demonstrates, however, MDEQ's review of KEMC's application for the Part 31 Permit was anything but "rigorous and thorough." Instead, MDEQ staff accepted KEMC's unsupported assertions, did not require inclusion of crucial data, and lacked the experience to recognize critical errors and omissions underlying the conclusions and predictions set forth in KEMC's permit application materials. Based on the testimony of

KEMC's and MDEQ's own witnesses at the Contested Case hearing, the Part 31 Permit was admittedly issued despite the following:

- The MDEQ staff person who reviewed KEMC's wastewater volume predictions admitted that he was inexperienced with the numerical models that generated those predictions<sup>6</sup> and, thus, had no ability to recognize the significant errors in KEMC's predictions.
- KEMC's own expert admitted that his predictions of the pollutant levels in the wastewater – which directly formed the basis for KEMC's predicted wastewater concentrations – are underestimated and incorrect, and, in fact, his predictions were only intended to generally determine whether treatment would be necessary, not to quantify the pollutant levels that will be present.<sup>7</sup> No MDEQ staff involved in issuing the Part 31 Permit recognized this or inquired into the basis for KEMC's predictions.<sup>8</sup>
- KEMC's modeling of the expected wastewater volume and the impacts of its discharge, which MDEQ readily accepted and relied upon in issuing the Part 31 Permit, was so defective that KEMC prepared new models for purposes of the Contested Case hearing.<sup>9</sup>
- KEMC's novel and untested wastewater treatment system design is *not yet even finalized* and crucial information necessary to evaluate the effectiveness of treatment was not provided to MDEQ, which accepted KEMC's predictions of treatment effectiveness at face value.<sup>10</sup> Further, just last month KEMC asked the Michigan Department of Natural Resources and Environment ("MDNRE")<sup>11</sup> to modify the Part 31 Permit to change its TWIS (discharge system) design from a subsurface

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<sup>6</sup> See Tr. 33:6754, 6818, 6823-6824. References to the transcripts of the Contested Case proceedings are in the format "Tr. [volume]:[page]."

<sup>7</sup> See, e.g., Tr. 20:4138, 4188-4190, 4193-4196, 4210-4213, 4219-4222, 4225-4227, 4232, 4267.

<sup>8</sup> See, e.g., Tr. 32:6626-6627, 35:7253.

<sup>9</sup> Int Ex 399 and Int Ex 591. "Int Ex" stands for "Intervenor Exhibit," or, KEMC's exhibits in the Contested Case.

<sup>10</sup> See, e.g., Tr. 10:1974-1976; Tr. 11:2158, 2169-2170, 2209, 2212, 2215-2217; Tr. 21:4450-4451, 4479, 4519-4520, 4529-4530; Tr. 32:6688-6690, 6715.

<sup>11</sup> MDEQ ceased to exist and was essentially merged with the former Michigan Department of Natural Resources ("MDNR") into the new Michigan Department of Natural Resources and Environment ("MDNRE") effective January 17, 2010. The party of record in this case is MDNRE. However, because the agency was called MDEQ when the Permit was issued, throughout the Contested Case, and when it issued the FDO, MDNRE is referred to herein as MDEQ.

infiltration system to what KEMC characterized as an above-ground “rapid infiltration system.”<sup>12</sup>

- MDEQ acknowledged that KEMC has not established with any reasonable degree of certainty where the wastewater will go after it is discharged. MDEQ’s witness believed that it “wouldn’t matter” where the discharge would go.<sup>13</sup>

These are only the *admitted* mistakes. As Petitioners established through expert testimony on the record, there are numerous other fatal errors and omissions in KEMC’s application materials and, indeed, even in the Part 31 Permit itself that require denial of the Part 31 Permit. In sum, Petitioners established that the issuance of the Part 31 Permit must be reversed by this Court because: KEMC’s predictions of wastewater volume and quality are wrong; KEMC has not supplied enough information to determine what its wastewater treatment system will even look like, much less whether those processes will be effective; KEMC’s investigation of subsurface conditions is so inadequate that it is impossible to predict the environmental impact of the discharge; KEMC’s own predictions of that impact are invalid and incorrect; and the Part 31 Permit does not comply with requirements of MDEQ’s own rules, including mandatory permit limits and monitoring requirements. All of this not only fails to protect the “irreplaceable natural resources” of the Upper Peninsula, most importantly, it also palpably violates the law.

Beyond the TWIS discharge authorized in the Part 31 Permit, KEMC also plans to make other discharges into its mine (of contaminated “utility water” and backfill during mining, and water to flood the mine after mining). These are regulated “discharges” that require a groundwater discharge permit under Part 31. When Petitioners raised this issue during the

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<sup>12</sup> Details of this modification request are available on the MDNRE website, at [http://www.michigan.gov/deq/0,1607,7-135-3311\\_4111\\_18442-130551--,00.html](http://www.michigan.gov/deq/0,1607,7-135-3311_4111_18442-130551--,00.html).

<sup>13</sup> See, e.g., Tr. 36:7452-7453; Tr. 37:7583.



application review process, MDEQ simply decided – after the fact, and without any analysis of the environmental impact of those discharges – to claim that those discharges were exempt from groundwater discharge permit requirements because they were authorized in KEMC’s Part 632<sup>14</sup> mining permit. MDEQ’s Part 632 witnesses, however, confirmed at the hearing that they had not considered the environmental impact of those discharges. KEMC’s discharges into the mine also do not meet the minimum requirements to trigger the supposed exemptions. MDEQ simply tried to sweep this issue under the rug with its post hoc holding that the discharges are exempt from groundwater discharge permit requirements.

When Petitioners brought the Contested Case, despite the legal mandate for “a fair, efficient, and impartial determination of the issues presented in contested cases consistent with due process and safeguarding the rights of the parties,” R 324.2, the ALJ conducted the Contested Case proceedings by issuing procedural rulings that were unfair and prejudicial to Petitioners. These procedural rulings included the decision to consolidate Petitioners’ separate Part 31 and Part 632 contested cases, which created unnecessary complexity and confusion in the ensuing consolidated Contested Case proceedings; denial of Petitioners’ request for limited discovery; acceptance of late-filed exhibits and terse and insufficient descriptions of expected testimony from MDEQ and KEMC’s 37 highly technical expert witnesses; and the admission of new evidence and data that were not part of KEMC’s permit application, and subsequent reliance on that new evidence in ruling against Petitioners on numerous issues.

As a result of the denial of discovery and the lack of pre-hearing information provided by MDEQ and KEMC, Petitioners were forced to develop their case in chief based on KEMC’s permit application, the only information they had at that point, and had no notice of or ability to

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<sup>14</sup> Part 632 of NREPA, MCL 324.63201 *et seq.* (“Part 632”).

tailor their evidence to address the positions and issues advanced by their opponents. Those key issues were revealed only *at the hearing itself* through testimony with very short, if any, advance notice of the contents of that testimony. This was exacerbated by the ALJ's admission of new evidence and testimony, which was not included in KEMC's voluminous Part 31 permit application, and which Petitioners previously had little or no opportunity to review and no ability to discern the relevance thereof. The only opportunity Petitioners had to address those issues was on the fly through cross-examination and limited rebuttal testimony. All of this was fundamentally unfair to Petitioners.

The ALJ's admission of new evidence was not only unfair, it was also legally improper – KEMC cannot supplement its permit application through a contested case and avoid the (purportedly) thorough specialized MDEQ staff and public review that is required by law for any groundwater discharge permit application. The ALJ's approach served to substitute a single person, the ALJ, in place of the MDEQ staff and public review that the Legislature in Part 31, and MDEQ in the Part 31 groundwater discharge rules, determined to be necessary before a Part 31 permit can be issued.

Despite the improper and prejudicial determinations made at the hearing, Petitioners expected that a PFD would be issued with cogent analysis and precise findings on the contested issues consistent with the requirements of the Administrative Procedures Act<sup>15</sup> ("APA") and MDEQ's contested case rules.<sup>16</sup> The PFD, however, was confusing, conclusory, completely failed to address several significant issues that were raised by Petitioners, did not analyze Part 31 requirements, and perhaps most egregiously, did not make any conclusions of law on Part 31 groundwater discharge issues. The PFD's findings were also inconsistent with the evidentiary

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<sup>15</sup> MCL 24.201 *et seq.*

<sup>16</sup> R 324.1 *et seq.*

record, relied on KEMC's new evidence that should not have been admitted in the first place, and were based on erroneous interpretations of legal requirements. Ultimately, the PFD rejected every contention raised by Petitioners under Part 31 (except for those that the PFD completely failed to address) and found in favor of Petitioners on only a single issue under Part 632.

The parties filed Exceptions to the PFD on October 2, 2009. By executive order on October 8, 2009, Governor Granholm announced the creation of the MDNRE, to become effective January 17, 2010. A series of unusual procedures ensued, including a State employee's October 15, 2009 request to the parties for a Microsoft Word version of MDEQ's Exceptions; an unwarranted Order of Remand requiring further briefing and requiring a Supplemental PFD on the single issue Petitioners had prevailed upon under Part 632;<sup>17</sup> the subsequent resignation of former MDEQ Director and final decisionmaker Steven Chester effective January 4, 2010; the appointment of new Interim Director James Sygo effective January 5, 2010; and Mr. Sygo's January 5, 2010 Order of Delegation immediately naming "Senior Policy Advisor" Frank Ruswick as the new final decisionmaker in the Contested Case (**Exhibit C**).

Capping off this strange turn of events, on January 14, 2010, only nine days after being named final decisionmaker in the Contested Case, and only three days before new MDNRE Director (and new final decisionmaker) Rebecca Humphries was to take office, final decisionmaker Frank Ruswick inexplicably, abruptly, and without notice vacated the Order of Remand under Part 632 and issued the FDO, which reversed the PFD's holding for Petitioners on the Part 632 issue. MDEQ<sup>18</sup> also adopted in the FDO many of the PFD's findings concerning

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<sup>17</sup> The clear violations of due process inherent in that remand, as well as the numerous errors in the FDO's rulings on that Part 632 issue, are addressed in Petitioners' Part 632 Petition for Review.

<sup>18</sup> Although final decisionmaker Frank Ruswick issued the FDO, the FDO represents the final determination of MDEQ. Therefore, the findings and holdings in the FDO are referenced herein as having been made by MDEQ.

the Part 31 issues, and copied and pasted additional findings that MDEQ had proposed in its Exceptions in an attempt to fill the “holes” in the PFD, such as the PFD’s utter failure to address numerous claims and proposed findings raised by Petitioners. **Exhibit A** at 9-18. MDEQ ultimately rejected all of Petitioners’ claims and held that the Part 31 Permit was properly issued, the discharges will not be injurious, and the discharges will not violate the Michigan Environmental Protection Act (“MEPA”).<sup>19</sup> **Exhibit A** at 18.

This record demonstrates that the outcome of the Contested Case was preordained, and further, that the FDO was merely “rubber-stamped” by the final decisionmaker. Within the nine days between being appointed as the final decisionmaker and his issuance of the FDO, it was impossible for the final decisionmaker to review the hundreds of pages of argument and proposed findings of fact and conclusions of law submitted by the parties on both Part 31 and Part 632 issues; the parties’ voluminous Exceptions to the PFD; the briefs on remand concerning the Eagle Rock issue; and all of the legal authorities and the thousands of pages of record evidence referenced in those documents; and to further prepare a written FDO analyzing and arriving at reasoned conclusions in accordance with the record evidence and the law. Indeed, the procedural history demonstrates that MDEQ began preparing the FDO long before the final decisionmaker was even appointed. All of this violates the APA and the Due Process Clause of the Michigan Constitution,<sup>20</sup> which prohibit the kind of one-sided proceedings that occurred here, and require that a final decisionmaker actually review the record and consider the evidence before making findings of fact and conclusions of law. Therefore, the FDO should be reversed as a matter of law.

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<sup>19</sup> MCL 324.1701 *et seq.*

<sup>20</sup> Mich Const art I, §17.

Finally, the FDO is also subject to reversal based on the substance of MDEQ's holdings and findings on Part 31 issues, which are based on clearly incorrect legal conclusions, are arbitrary and capricious, and are not supported by the whole record. The legal and factual bases for those findings and holdings set forth in the FDO are often conclusory and lack sufficient detail to facilitate judicial review. In addition, MDEQ in the FDO fails to address or resolve several issues raised by Petitioners. Simply put, the record evidence and applicable law establish that the Part 31 Permit should not have been issued, and the MDEQ's findings and holdings to the contrary must be reversed.

## **II. JURISDICTION AND VENUE**

1. This Court has jurisdiction over the Petition for Review pursuant to MCL 24.301 through 24.303 and MCR 7.105. Venue is proper in this Court under MCL 24.303 and MCR 7.105(C)(1)(a) because Petitioner NWF's principal place of business in this State is located in Washtenaw County. NWF's headquarters are located at 213 West Liberty Street, City of Ann Arbor. Its 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.

## **III. THE PARTIES**

2. **NWF.** Petitioner NWF is a not-for-profit corporation organized and existing under the laws of the District of Columbia, and is a natural conservation education organization with approximately four million members, supporters, and contributors nationwide. NWF and

its members are devoted to the protection of wildlife, people, and wild places. From NWF's Great Lakes office in Ann Arbor, Michigan, the organization pursues its mission in and for the Great Lakes basin. This mission includes protection of water quality in the Great Lakes and its tributaries, the preservation of biodiversity and rare, threatened, and endangered species, and the protection of wildlife and native ecosystems.

3. NWF members frequently use the areas that will or potentially will be impacted by the mine discharges for a variety of purposes. Allowing the mine to proceed will impair those uses through degradation of the environment and destruction of wildlife and habitat. In addition, NWF member Rico Torreano owns a 40-acre parcel located about one mile north of, and downstream from, the proposed mining surface facility, and about 746 yards (less than one-half mile) and in a direct groundwater flow path from the mine's proposed groundwater discharge. The operation of the mine will pollute the surface water of his property with fugitive dust, pollute his groundwater, raise the water table, flood his privy pit, destabilize the soils, on his property, kill the trees on his property, and make his property unusable. Mr. Torreano's use of his camp and nearby public lands for vehicle riding, blueberry picking, and spending time in the woods will also be impaired by environmental impacts from the proposed mine.

4. **The Community.** Petitioner the Community is a federally recognized Indian tribe and is the successor in interest of the L'Anse and Ontonagon Bands of Chippewa Indians, having government-to-government relations with the United States of America and the State of Michigan. The Community has approximately 3,450 members. The Community and its members enjoy the express rights to hunt, fish, trap, and gather in, on and over the lands and waters ceded to the United States ("Ceded Territories") under the Treaty with the Chippewa at La Pointe, Oct. 4, 1842, 7 Stat. 591, which includes the lands upon which KEMC's proposed

mine is to be located, and the lands upon and waters into which discharges from mine operations would occur.

5. Community members routinely exercise those rights and make other traditional, cultural, and recreational uses of KEMC's proposed mining area and the larger surrounding "affected area."<sup>21</sup> The effects of the mining operation, including, but not limited to, contamination of lands and natural resources within the Ceded Territories from the mine operations and KEMC's groundwater discharge, will adversely impact Community members' uses of those areas, including, but not limited to, impairment of members' exercise of treaty rights, other traditional and recreational uses of the area, and uses of streams and groundwater for drinking water. In addition, Community members will be completely excluded from a portion of the Ceded Territories through construction of a fence surrounding KEMC's mining surface facilities.

6. Of particular significance to the Community is Eagle Rock, known as *Migi zii wa sin* by Community members, which is a sacred place of worship and gathering area for Community members and has served as the location of tribal ceremonies for hundreds of years. The proposed mine's portal and decline tunnel will be drilled and blasted with explosives directly into and through Eagle Rock. This will desecrate Eagle Rock and destroy its use and value as a sacred site. In addition, Community members will be entirely precluded from visiting Eagle Rock, for at least decades, if not longer, by the fence surrounding KEMC's mining facilities.

7. The Community also owns in fee simple title 40 acres of riparian land ("Riparian Property") located within the Ceded Territories, which is approximately one and one-half miles

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<sup>21</sup> See MCL 324.63201(b).

from the location of KEMC's proposed discharge and 1.8 miles from Eagle Rock. A tributary of the East Branch of the Salmon Trout River, which overlies the projected path of groundwater flow from the mine, runs through the Riparian Property. The Riparian Property has been used for residential, spiritual, hunting and gathering purposes by Community members. Adverse environmental impacts from mining operations and KEMC's groundwater discharge would negatively impact the Community's and its members' interests in the Riparian Property, including hunting, gathering, and fishing opportunities, the ability to supply drinking water to the Riparian Property, and economic interests such as the value of timber on the Riparian Property, the value of the exercise of riparian rights, the ability to lease the Riparian Property to others, and the value of the Riparian Property.

8. **HMC.** Petitioner HMC is a recreational club organized around hunting, fishing, biking, birding, swimming, and various other outdoor activities. The HMC includes 19,400 acres of land and ten inland lakes that have an area in the aggregate of about 2,477 acres, plus approximately 11 miles of Lake Superior shoreline. The HMC property contains just under 10,000 acres reserved as a preserved area. This area has never been subject to logging. The HMC also contains a virgin hemlock forest that has never been logged that is not included in the HMC preserved area. The HMC is 3.38 miles from the proposed mine site.

9. HMC's property hosts a variety of wildlife and is a significant avian habitat. The HMC property is also home to numerous rare or unusual species, including rare and unusual fungi, mollusks, fish populations, dragonfly species and birds. In addition, a unique species of lake trout, the Rush Lake Trout, resides in Rush Lake on the HMC property and is found nowhere else in the world. There are also at least two genetically unique Cisco populations, which are listed in Michigan's list of rare, unusual and endangered species list, in the HMC.



Eleven miles of the Salmon Trout River flow through HMC property. The Salmon Trout River is particularly ecologically important because a large portion of it is protected within the HMC and the surrounding uplands are still largely undisturbed. It serves as the only breeding ground for the Coaster Brook Trout, listed as a species of concern by the U.S. Fish and Wildlife Service, on the south shore of Lake Superior.

10. The HMC is also used for significant scientific study and research and has great value as a “reference ecosystem,” as a virgin ecosystem that is barely, or not at all, utilized by mankind that can be used to compare a region with a natural area. The diversity of the landscape in the HMC, the history of environmental research and the lack of human activity make it a uniquely attractive reference system. The quality of the water on the HMC is so pristine that in many cases the levels of contaminants are below the levels of detection for standard equipment. The HMC ranks “A,” the highest ranking, in terms of quality at the Salmon Trout Bay Area by the Michigan Natural Features Inventory.

11. KEMC’s proposed mine will spread copper and nickel bearing sulfide particulate over the entire areas of the Yellow Dog Plains and the HMC. It will also pollute surrounding land, groundwater, and surface water through its permitted groundwater discharge and “acid mine drainage” from the mine itself. In addition, the mine is likely to collapse as presently designed, with catastrophic environmental consequences.

12. Those impacts will unacceptably damage the Salmon Trout River, a largely pristine watercourse providing spawning habitat to an exceedingly rare fish population; the Yellow Dog Plains, a wild and isolated amalgam of diverse habitats and biological richness which attracts, among unusual birds and mammals, one of the rarest bird species in the world;

and the lands, waters, and flora and fauna of the HMC, a rare and uniquely preserved reference ecosystem prized by scientists for the untouched wilderness areas it contains.

13. **YDWP.** Petitioner YDWP is a 501(c)(3) non-profit organization focused on the protection of the Yellow Dog River, its watershed, and the surrounding region. The organization is based in Big Bay, Michigan and is a public advocacy group and land trust. Members of YDWP frequently utilize the areas that will or potentially will be impacted by the mine for scientific research, as well as for hiking, birding, wildlife viewing, hunting, fishing, and other recreational purposes, all of which uses would be impaired by effects of the construction and operation of the mine, including, but not limited to, impairment from environmental contamination. In addition, YDWP members own and operate local business enterprises, such as a motel and a real estate business, that will be negatively impacted by the mine's degradation of the natural environment.

14. YDWP also owns a 160-acre parcel, acquired in 2003, along the Yellow Dog River that is located within 1.3 miles of the proposed mine site, and owns other parcels in the Yellow Dog River watershed. YDWP conducts water chemistry monitoring in the Yellow Dog Plains. YDWP also conducts tours and public education activities on these parcels, including on the 160-acre parcel south of the proposed mine site. Those activities and YDWP's property rights will be impaired by the construction and operation of the mine, including, but not limited to, the effects of environmental contamination.

15. **MDEQ / MDNRE.** Respondent MDEQ is the State agency that issued the Part 31 Permit and issued the FDO. In addition to the Part 31 Permit, MDEQ issued two other environmental permits for KEMC's proposed mining operation: (1) a permit to install under

Part 55,<sup>22</sup> which authorizes the installation and operation of certain equipment that generates air emissions; and (2) a nonferrous metallic mineral mining permit under Part 632, which is applicable to most other activities associated with the proposed mining operation.

16. **KEMC.** Respondent KEMC is the mining company to whom those permits were issued.

#### **IV. NATURE OF PROCEEDINGS AS TO WHICH REVIEW IS SOUGHT**

17. On or about February 22, 2006, KEMC filed its applications for the Part 31 Permit and the Part 632 permit.

18. On December 14, 2007, MDEQ issued those permits to KEMC.

19. On December 21, 2007, Petitioners filed separate Petitions for Contested Cases challenging the issuance of the Part 31 Permit and the Part 632 permit under MCL 324.3113(3) and MCL 324.63219, respectively. Petitioners filed an Amended “Sworn” Petition regarding the Part 31 Permit on February 6, 2008.

20. By Order dated February 5, 2008, the ALJ consolidated Petitioners’ Part 31 and Part 632 contested cases for purposes of hearing.

21. By Order dated February 15, 2008, the ALJ set various deadlines for, *inter alia*, pre-hearing motion practice, the filing of witness lists, and the exchange of exhibits.

22. Petitioners requested leave to conduct discovery in the Contested Case in motions filed February 21, 2008. The parties filed various responses, replies, and additional briefs on those motions through March 13, 2008. The ALJ denied Petitioners’ motions to conduct discovery in an Order dated April 1, 2008.

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<sup>22</sup> Part 55 of NREPA, MCL 324.5501 *et seq.* (“Part 55”).

23. The parties exchanged witness lists, curricula vitae, and recitations of expected witness testimony on March 7, 2008.

24. The parties filed various dispositive motions through March 14, 2008, and filed responses and replies on those motions through April 1, 2008. Those motions were resolved by Orders dated April 1, 2008 and April 9, 2008.

25. The parties identified and exchanged proposed exhibits on April 1, 2008. KEMC filed a revised exhibit list on April 14, 2008. As stipulated in advance by the parties, Petitioners filed an amended exhibit list related to the Part 31 contested case on April 23, 2008.

26. Petitioners filed a motion in limine on April 25, 2008 seeking to prohibit KEMC from introducing evidence that was not considered by MDEQ in issuing the Part 31 and Part 632 permits. At the contested case hearing on April 29, 2008, the ALJ denied that motion.

27. The parties filed various other motions in limine and responses to those motions during the time period between April 21, 2008 and April 28, 2008. The ALJ resolved those motions at the contested case hearing on April 29, 2008.

28. The contested case hearing covering both the Part 31 and Part 632 matters was held under the applicable provisions of the APA, MCL 24.201 *et seq.*, and the MDEQ administrative rules promulgated under its authority, R 324.1 *et seq.*, over a period of time commencing April 28, 2008 and concluding August 6, 2008.

29. During the hearing, Petitioners presented the testimony of 26 witnesses; KEMC presented the testimony of 26 witnesses; and MDEQ presented the testimony of 11 witnesses.

30. During the course of the hearing, approximately 516 exhibits were entered, 148 by Petitioners, 255 by Intervenor KEMC, and 113 by Respondent MDEQ.

31. Consistent with a schedule agreed upon by the parties, post-hearing briefs and proposed Findings of Fact and Conclusions of Law were filed with the ALJ on October 15, 2008.

32. On August 18, 2009, the PFD was issued (**Exhibit B**).

33. On October 2, 2009, the parties filed Exceptions to the PFD.

34. On October 8, 2009, Governor Granholm issued Executive Order No. 2009-45, which abolished MDEQ and effectively merged it into the new MDNRE, effective January 17, 2010. *See* MCL 324.99919.

35. On October 15, 2009, State Office of Administrative Hearings and Rules employee Dennis Mack issued an email to the parties asking for a Microsoft Word version of MDEQ's Exceptions.

36. The parties filed briefs on November 23, 2009 and reply briefs on December 7, 2009 pursuant to a November 5, 2009 Order of Remand concerning a legal issue under Part 632.

37. On December 22, 2009, Steven Chester announced his resignation as MDEQ Director effective January 4, 2010, and Governor Granholm named Deputy Director James Sygo as Interim Director, effective January 5, 2010.

38. On January 5, 2010, Mr. Sygo issued an Order of Delegation naming MDEQ "Senior Policy Advisor" Frank Ruswick as the final decisionmaker in the Contested Case (**Exhibit C**).

39. On January 13, 2010, Governor Granholm named Rebecca Humphries as the new director of the newly created MDNRE, effective January 17, 2010, the same day MDNRE was to come into existence.

40. On January 14, 2010, final decisionmaker Frank Ruswick issued the FDO under the purported authority of MCL 324.99903(7), R 324.1(3), and R 324.74. **Exhibit A** at 2.

41. The FDO held that MDEQ is not required to address all of Petitioners' proposed findings of fact and conclusions of law, and that Petitioners have the burden of proof in the Contested Case. **Exhibit A** at 2-3.

42. The FDO also adopted and incorporated the findings on pages 1-52 of the PFD. **Exhibit A** at 9.

43. The FDO also adopted findings from the PFD concerning Part 31 issues and made several additional findings concerning the Part 31 Permit. **Exhibit A** at 9-18. The FDO held that the Part 31 Permit was properly issued, the discharges will not be injurious, and the discharges will not violate MEPA. *Id.* at 18.

44. This Court's statutory authority to review these proceedings arises through MCL 24.301 *et seq.*

## **V. GROUNDS ON WHICH RELIEF IS SOUGHT**

45. Without limiting or waiving Petitioners' rights to raise other claims, arguments, and defenses, Petitioners' substantive and procedural rights have been prejudiced by MDEQ's holdings and findings under Part 31 in the FDO, and those holdings and findings are subject to reversal under Mich Const art VI, §28 and MCL 24.306 because they are in violation of the constitution or statute; are in excess of the statutory authority or jurisdiction of the agency; 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 error of law, for at least the following reasons:

**A. Procedural Irregularities.**

46. MDEQ's holdings and findings in the FDO were in excess of the statutory authority or jurisdiction of the agency; were made upon unlawful procedure resulting in material prejudice to Petitioners; are arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion; were the result of substantial and material error of law; and were made in violation of the constitution or statute, including, but not limited to, R 324.2 and the Due Process Clause of the Michigan Constitution, Mich Const art I, §17; for reasons including, but not limited to:

a. The FDO was based upon a Contested Case that was irreparably flawed and prejudicial for reasons including, but not limited to:

i. The ALJ improperly consolidated the Part 31 and Part 632 contested cases.

ii. The ALJ abused his discretion by rejecting Petitioners' request for limited discovery on the basis of a contested case time limit that applies only to Part 632, and not to Part 31, contested cases.

iii. The ALJ's other grounds for rejecting discovery were rendered invalid by his arbitrary and capricious decisions to allow terse and uninformative recitations of witness testimony, late-filed exhibits, "demonstrative" witness reports, and evidence that was not part of KEMC's application.

iv. The ALJ's admission and reliance, and MDEQ's reliance in the FDO, upon KEMC's post-application evidence was prejudicial and legally improper.

v. MDEQ improperly relied in the FDO upon evidence that was not part of the record, including, but not limited to, a purported wastewater "treatability study" that was not admitted as an exhibit.

b. 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) took office.

c. Significant portions of the FDO, including, but not limited to, those portions adopting verbatim Part 31 findings of fact that were proposed by MDEQ, were prepared before the Order of Delegation was issued and, therefore, could not reflect any analysis by the final decisionmaker as required by law.

d. 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’ claims and/or the record evidence in the Contested Case. For the same reasons, 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* R 324.74(1) and (4); Mich Const art I, §17.

e. The FDO was issued upon highly irregular and prejudicial procedures that failed to satisfy the basic standards of procedural due process under Mich Const art I, §17.



**B. Failure To Comply With APA And MDEQ Contested Case Rules.**

47. The FDO does not comply with the applicable requirements of the APA and MDEQ contested case rules, including, but not limited to, MCL 24.279, MCL 24.281, MCL 24.285, and R 324.74, and, therefore, is in violation of the constitution or statute; is in excess of the statutory authority of the agency; was made upon unlawful procedure resulting in material prejudice to Petitioners; is arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion; and/or is the result of other substantial and material error of law for reasons including, but not limited to:

a. MDEQ's holdings and underlying findings in the FDO are conclusory and MDEQ did not articulate a sufficient factual or legal basis for its holdings and findings to facilitate judicial review.

b. MDEQ's holdings and underlying findings in the FDO impermissibly fail to set forth a precise statement of what evidence on the record supports those holdings and findings.

c. MDEQ's holdings and underlying findings in the FDO impermissibly fail to address the conflicting evidence presented by Petitioners on numerous issues.

d. MDEQ impermissibly fails in the FDO to address or rule upon numerous claims, evidence, and proposed findings of fact and conclusions of law raised and offered by Petitioners.

e. MDEQ's holding that if a proposed finding "is not addressed, or a contrary finding is made" in the FDO, that proposed finding does not "control the decision" and need not be addressed under MCL 24.285, is based on an error of law.

**Exhibit A** at 2-3.

f. MDEQ adopts in the FDO the erroneous findings set forth on pages 1-52 of the PFD. **Exhibit A** at 9. However, MDEQ did not specify which of the other findings and holdings concerning Part 31 issues in the PFD have been specifically adopted, modified, or rejected in the FDO. *Id.*

g. 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 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* R 324.74(1) and (4); Mich Const art I, §17.

h. MDEQ impermissibly relies in the FDO on evidence that was not part of the record, including, but not limited to, a purported wastewater "treatability study" that was not admitted as an exhibit. *Id.*

### **C. Clear Legal Errors.**

48. MDEQ adopts in the FDO the PFD's erroneous holding that KEMC's evidence in the Contested Case "is not limited to the materials and filings made up to the time of the issuance of the respective permits." **Exhibit A** at 9 (adopting PFD pages 1-52); **Exhibit B** at 4. MDEQ further relies on KEMC's post-application evidence in erroneously holding that the Part 31 Permit should be issued. *See, e.g.,* **Exhibit A** at 10, para. 3; and at 12, para. 21. MDEQ's holding and its reliance on KEMC's post-application evidence in the FDO are in violation of the constitution or statute; are in excess of the statutory authority of the agency; 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 error of law for reasons including, but not limited to:

a. MDEQ's holding is erroneously premised on the theory that the standard of review in a contested case is *de novo*, and that this somehow supports KEMC's introduction of new evidence that was not included in its permit application. **Exhibit A** at 9 (adopting PFD pages 1-52); **Exhibit B** at 4.

b. MDEQ's holding is also erroneously premised on the theory that a contested case is intended to render a "final decision" on a permit, and that this somehow supports KEMC's introduction of new evidence that was not included in its permit application. *Id.*

c. MDEQ's holding is further based on its erroneous finding that limiting KEMC's evidence to its application would "alter the focus" of a contested case to whether MDEQ "erred in [granting] the application." *Id.*

d. MDEQ's holding would allow KEMC to entirely circumvent the statutory and regulatory procedures for agency review and public comment on KEMC's permit application.

e. MDEQ's holding also directly conflicts with R 323.2133, which provides that a contested case is an "appeal" of MDEQ's "final determination" on a Part 31 groundwater discharge permit, and not a *de novo* determination.

f. MDEQ's holding prejudiced Petitioners' substantial rights because MDEQ relied on the newly introduced evidence in finding that the Part 31 Permit should be issued.

49. MDEQ erroneously held in the FDO that the Part 31 Permit's limits for ammonia, nitrate, and nitrite meet the requirements of R 323.2222(2)(a). **Exhibit A** at 13-15, para. 24-32, 39-41. MDEQ further erroneously held that the Part 31 Permit's limits generally are consistent with Part 31 and its rules and will not be injurious or violate MEPA. **Exhibit A** at 18, para. 59. These holdings are in violation of the constitution or statute; are in excess of the statutory authority of the agency; 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 error of law for reasons including, but not limited to:

a. MDEQ did not address whether or not R 323.2222(2)(a) applies to KEMC's discharge. If MDEQ held in the FDO that R 323.2222(2)(a) does not apply to KEMC's discharge, that finding is based on an error of law, is arbitrary and capricious, and is not supported by the whole record.

b. The Part 31 Permit's limits for ammonia, nitrate, and nitrite violate the mandatory limits for those substances under R 323.2222(2)(a).

c. MDEQ found that those substances are limited by the Part 31 Permit to their corresponding Part 201<sup>23</sup> standards. **Exhibit A** at 13, para. 29, 30, 32. However, the Part 201 standards for those substances exceed the mandatory limits required by R 323.2222(2)(a).

d. The FDO erroneously held that because the Part 31 Permit's limits for those substances will not be "injurious," they meet the requirements of Part 31 and its rules. **Exhibit A** at 15, para. 41.

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<sup>23</sup> Part 201 of NREPA, MCL 324.20101 *et seq.*

50. MDEQ erroneously held in the FDO that the Part 31 Permit's limits for beryllium, boron, and lead meet the requirements of R 323.2222(5)(a). **Exhibit A** at 14-15, para. 33-41. MDEQ further erroneously held that the Part 31 Permit's limits generally are consistent with Part 31 and its rules and will not be injurious or violate MEPA. **Exhibit A** at 18, para. 59. MDEQ's holdings are in violation of the constitution or statute; are in excess of the statutory authority of the agency; 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 error of law for reasons including, but not limited to:

a. MDEQ did not address whether or not R 323.2222(5)(a) applies to KEMC's discharge. If MDEQ found in the FDO that R 323.2222(5)(a) does not apply to KEMC's discharge, that finding is based on an error of law, is arbitrary and capricious, and is not supported by the whole record.

b. The Part 31 Permit's limits for beryllium, boron, and lead violate the mandatory limits for those substances under R 323.2222(5)(a).

c. MDEQ found that the Part 31 Permit's limits for those substances were "rounded" upward to whole numbers. **Exhibit A** at 14, para. 38. MDEQ's "rounding" is not authorized by R 323.2222(5)(a).

d. MDEQ erroneously held that because the Part 31 Permit's limits for those substances will not be "injurious," they meet the requirements of Part 31 and its rules. **Exhibit A** at 15, para. 41.

e. MDEQ did not address Petitioners' proposed finding that KEMC's failure to sufficiently determine groundwater flow direction makes it impossible to determine

which wells are “upgradient” for purposes of determining compliance with R 323.2222(5)(a).

51. The ALJ erroneously held in the PFD that KEMC’s discharge of “utility water” into its proposed mine does not require a Part 31 groundwater discharge permit. **Exhibit B** at 168. MDEQ did not explicitly adopt or reject that holding in the FDO. If MDEQ did not incorporate that holding in the FDO, MDEQ has failed to address or resolve a significant contested issue in violation of the Michigan Constitution, APA, and MDEQ contested case rules, including, but not limited to, Mich Const art VI, §28, MCL 24.285, and R 324.74.

52. In the alternative, if MDEQ did incorporate the PFD’s erroneous holding concerning “utility water” in the FDO, MDEQ’s holding is in violation of the constitution or statute; is in excess of the statutory authority of the agency; is not supported by competent, material, and substantial evidence on the whole record; is arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion; and/or is the result of other substantial and material error of law for reasons including, but not limited to:

a. Part 31 and its rules require KEMC to submit necessary information in its permit application to evaluate regulated groundwater discharges, and require MDEQ to require submission of such information and appropriately control those discharges in a Part 31 permit. KEMC did not submit that information, and MDEQ did not require that information or take steps to control those discharges in a Part 31 permit.

b. KEMC’s discharge of “utility water” into the mine is a regulated “discharge” requiring a Part 31 groundwater discharge permit.

c. MDEQ's finding in the FDO that KEMC's discharge of "utility water" is not a regulated "discharge" because it is "continuously recycled and reused, with no loss to the ground or groundwater," **Exhibit B** at 169, is an error of law.

d. The finding that there will be no "loss to the ground or groundwater" is also arbitrary and capricious and is not supported by the whole record.

e. KEMC's discharge of "utility water" is not exempt from Part 31 groundwater discharge permit requirements.

53. The ALJ erroneously held in the PFD that KEMC's discharges of backfill and mine reflooding water into its proposed mine are exempt from Part 31 groundwater discharge permit requirements. **Exhibit B** at 169-170. MDEQ did not explicitly adopt or reject those holdings in the FDO. If MDEQ did not incorporate those holdings in the FDO, MDEQ has failed to address or resolve a significant contested issue in violation of the Michigan Constitution, APA, and MDEQ contested case rules, including, but not limited to, Mich Const art VI, §28, MCL 24.285, and R 324.74.

54. In the alternative, if MDEQ did incorporate the PFD's erroneous holdings concerning KEMC's backfill and mine reflooding discharges in the FDO, MDEQ's holdings are in violation of the constitution or statute; are in excess of the statutory authority of the agency; 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 error of law for reasons including, but not limited to:

a. Part 31 and its rules require KEMC to submit necessary information in its permit application to evaluate regulated groundwater discharges, and require MDEQ to require submission of such information and appropriately control those discharges in a

Part 31 permit. KEMC did not submit that information, and MDEQ did not require that information or take steps to control those discharges in a Part 31 permit.

b. KEMC's discharges of backfill and mine reflooding water into the mine are regulated "discharges" requiring a Part 31 groundwater discharge permit.

c. MDEQ erroneously held in the FDO that Petitioners have the burden of proof on all issues in the Contested Case. **Exhibit A** at 3. That conclusion is based on an error of law because, as the proponent of permit exemptions, KEMC had the burden of proof to establish its entitlement to those exemptions. KEMC did not carry that burden of proof.

d. MDEQ erroneously held in the FDO that KEMC's discharges are exempt from Part 31 groundwater discharge permit requirements because they qualify for "at least three" exemptions under R 323.2210. **Exhibit B** at 169-170. MDEQ's holdings are conclusory and lack any analysis of the applicable requirements for those exemptions or the factual basis for those holdings, and, therefore, violate the Michigan Constitution, APA, and MDEQ contested case rules, including, but not limited to, Mich Const art VI, §28, MCL 24.285, and R 324.74.

e. MDEQ's holdings are also erroneous because, to be exempt under R 323.2210, a discharge must comply with R 323.2204. The record demonstrates that KEMC's discharges do not meet the requirements of R 323.2204, including, but not limited to, R 323.2204(2)(a), (2)(f), (2)(e), and (3). Therefore, they are not exempt under R 323.2210.

f. The only R 323.2204 requirement addressed in the FDO is the requirement of R 323.2204(2)(f) that a discharge shall not create a "facility" under Part 201. **Exhibit**



**B** at 167-168. MDEQ's holding that KEMC's discharges cannot "create" a facility because "natural background levels of metals in the bedrock already exceed Part 201 residential criteria" is based on an error of law, is arbitrary and capricious, and is not supported by the whole record.

g. MDEQ did not expressly address in the FDO the requirements of R 323.2204(2)(a), (2)(e), and (3). In the alternative, if MDEQ held in the FDO that those requirements are met with respect to KEMC's discharges into the mine, those holdings are erroneous, are arbitrary and capricious, and are not supported by the whole record.

h. MDEQ's holdings in the FDO that KEMC's discharges qualify for the following R 323.2210 exemptions are based on errors of law, are arbitrary and capricious, and are not supported by the whole record:

i. The R 323.2210(w) exemption for discharges "specifically authorized" in another MDEQ permit.

ii. The R 323.2210(x) exemption for solid waste designated as "inert" under Part 115.<sup>24</sup>

iii. The R 323.2210(y) exemption for discharges "determined" by MDEQ to have "insignificant potential to be injurious based on volume and constituents" after specified public notice and comment procedures.

i. MDEQ found in the FDO that the mitigation and monitoring measures required in the Part 632 permit are "appropriate for protecting water quality in the groundwater system during and after mining," and that the re-flooding of the mine "is a recognized mitigation technique," **Exhibit A** at 21, para. 17 and 19; at 20, para. 11. If

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<sup>24</sup> Part 115 of NREPA, MCL 324.11501 *et seq.*

those constitute a finding that those mitigation and monitoring measures will effectively prevent the release of elevated levels of contaminants in the mine and/or into surrounding groundwater, or that those measures somehow satisfy the requirements of Part 31 with respect to KEMC's discharges into the mine, that finding is arbitrary and capricious and is not supported by the whole record.

55. MDEQ erroneously held in the FDO that Petitioners have the burden of proof on all issues in the Contested Case. **Exhibit A** at 3. That holding is in violation of the constitution or statute; is in excess of the statutory authority of the agency; is arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion; and/or is the result of other substantial and material error of law for reasons including, but not limited to:

a. As the proponent of permit exemptions, KEMC had the burden of proof to establish its entitlement to those exemptions.

b. If MDEQ correctly held in the FDO that a contested case is, as a matter of law, a *de novo* proceeding that is essentially a continuation of the application process, then KEMC, just as all other applicants would, has the burden of proof to establish that it is entitled to the Part 31 Permit.

**D. Geochemistry/Wastewater Quality.**

56. MDEQ erroneously held in the FDO that KEMC's wastewater characterization is sufficient under R 323.2218(2)(b) and 323.2220(6). **Exhibit A** at 10, para. 6-7. In support of this holding, MDEQ adopted the erroneous finding on page 82 of the PFD "that there is no reasonable basis to upwardly adjust Kennecott's predictions of water quality." **Exhibit A** at 10, para. 11.

57. The erroneous finding on page 82 of the PFD adopted in the FDO is related to only one of numerous issues concerning KEMC's geochemical testing and related wastewater

characterization that were raised by Petitioners. **Exhibit B** at 82. MDEQ has, therefore, failed to resolve numerous proposed findings and contested issues, in violation of the Michigan Constitution, APA, and MDEQ contested case rules, including, but not limited to, Mich Const art VI, §28, MCL 24.285, and R 324.74. The finding on page 82 of the PFD is also not supported by competent, material, and substantial evidence on the whole record, and is arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion.

58. MDEQ erroneously held in the FDO that the PFD's analysis of geochemistry-related issues is "deficient" under Part 632, and the FDO adopts MDEQ's proposed findings on those issues. **Exhibit A** at 19-21, para. 8-19. MDEQ did not state in the FDO whether those findings supplement, or supplant, the PFD's findings on those issues. This fails to meet the requirements of the Michigan Constitution, APA, and MDEQ contested case rules, including, but not limited to, Mich Const art VI, §28, MCL 24.285, and R 324.74.

59. MDEQ also impermissibly failed to specify whether the findings on geochemistry issues in the FDO, which are only set forth as findings under Part 632, also apply to Petitioners' claims on geochemistry issues under Part 31. The FDO, therefore, does not meet the requirements of the Michigan Constitution, APA, and MDEQ contested case rules, including, but not limited to, Mich Const art VI, §28, MCL 24.285, and R 324.74.

60. If MDEQ's adoption in the FDO of the erroneous finding on page 82 of the PFD was not intended to adopt all of the PFD's findings and holdings on wastewater characterization / geochemistry issues as set forth on pages 52-85 of the PFD, and/or if the additional findings on geochemistry issues set forth on pages 20-21 of the FDO are not also intended to apply for Part 31 purposes, then MDEQ has failed to resolve numerous contested issues or to adequately describe the legal and factual basis for the holding in the FDO that the Part 31 Permit may be

issued, in violation of the Michigan Constitution, APA, and MDEQ contested case rules, including, but not limited to, Mich Const art VI, §28, MCL 24.285, and R 324.74.

61. In the alternative, if MDEQ's adoption in the FDO of the finding on page 82 of the PFD was intended to adopt all of the PFD's findings and holdings on wastewater characterization / geochemistry issues as set forth on pages 52-85 of the PFD, and/or if the additional findings on geochemistry issues set forth on pages 20-21 of the FDO are intended to apply for Part 31 purposes, then MDEQ's holdings and findings are in violation of the constitution or statute; are in excess of the statutory authority of the agency; 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 error of law for reasons including, but not limited to:

a. MDEQ's findings describing Petitioners' evidence and testimony are arbitrary and capricious and are not supported by the whole record. **Exhibit B** at 52-79.

b. Concerning Petitioners' claims that KEMC's geochemical testing was inadequate, MDEQ finds that MDEQ's witness Dr. Eary "concluded" that KEMC's geochemical studies followed "industry practice" and provided a "thorough characterization." **Exhibit A** at 20, para. 10. That finding is merely an observation that a witness proffered certain testimony and does not address any of Petitioners' evidence to the contrary or otherwise resolve the issue. Therefore, that finding does not meet the requirements of the Michigan Constitution, APA, and MDEQ contested case rules, including, but not limited to, Mich Const art VI, §28, MCL 24.285, and R 324.74. In the alternative, if MDEQ's finding can somehow be construed as a finding that KEMC's geochemical testing and modeling was scientifically valid and/or meets the requirements

of Part 31 and its rules, that finding is based on an error of law, is arbitrary and capricious, and is not supported by the whole record.

c. MDEQ's findings that KEMC's selection of rock types for geochemical testing was "a reasonable and representative collection of [rock] types likely to be stored in the TDRSA,"<sup>25</sup> and that assessing ARD potential of more than the one ore sample utilized in the testing was not justified in light of the fact ore will be quickly removed from the mine site and no long-term storage of ore at the surface would occur," and that MDEQ's and KEMC's witnesses testified that KEMC's rock sample selection was "appropriate and representative," **Exhibit B** at 80, are based on errors of law, are arbitrary and capricious, and are not supported by the whole record.

d. The foregoing findings on geochemical testing fail to address or resolve Petitioners' claims that KEMC's geochemical testing was invalid and inadequate because KEMC failed to adequately test rock types that will be present in and around the mine; inappropriately used filtered samples; focused on samples at the lower end of leaching potential; did not test materials in the mine's "crown pillar"; and utilized far fewer samples than are called for by generally accepted standards. Therefore, those findings do not meet the requirements of the Michigan Constitution, APA, and MDEQ contested case rules, including, but not limited to, Mich Const art VI, §28, MCL 24.285, and R 324.74. In the alternative, if MDEQ's findings can somehow be construed as a rejection of those claims, that finding is based on an error of law, is arbitrary and capricious, and is not supported by the whole record.

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<sup>25</sup> KEMC's proposed "temporary development rock storage area," i.e., waste rock pile.

e. MDEQ's findings that "Dr. Eary concluded" that Petitioners' alternative predictions of mine wastewater quality were "incomplete and invalid," and that KEMC's characterizations were "adequate" and consistent with "industry practice," **Exhibit A** at 21, para. 14-15, are, again, merely observations that he testified to that effect. Those findings do not address any of Petitioners' evidence to the contrary or otherwise resolve the issues, and, therefore, do not meet the requirements of the Michigan Constitution, APA, and MDEQ contested case rules, including, but not limited to, Mich Const art VI, §28, MCL 24.285, and R 324.74. In the alternative, if MDEQ's findings can somehow be construed as an adoption of Dr. Eary's opinions and/or findings that KEMC's wastewater quality predictions meet the requirements of Part 31 and its rules, those findings are based on errors of law, are arbitrary and capricious, and are not supported by the whole record.

f. The following MDEQ findings in the FDO are based on errors of law, are arbitrary and capricious, and are not supported by the whole record:

i. MDEQ's erroneous findings that Petitioners' expert Dr. Maest's wastewater quality predictions are "worst-case," **Exhibit B** at 80-81.

ii. MDEQ's erroneous findings concerning the existence of "disseminated ore" and Dr. Maest's assumptions in that regard, **Exhibit B** at 81.

iii. MDEQ's erroneous findings concerning Dr. Maest's and KEMC's expert's use of certain leach testing inputs, **Exhibit B** at 82.

iv. MDEQ's erroneous finding concerning the impossibility of leaching through the mine's crown pillar, **Exhibit B** at 82-83.

v. MDEQ's erroneous finding that KEMC's modeling already encompassed the possibility of leaching through the crown pillar, **Exhibit B** at 83.

vi. MDEQ's erroneous findings concerning Petitioners' and KEMC's experts' assumptions about rock particle sizes, Id.

vii. MDEQ's erroneous finding that Dr. Maest's wastewater predictions are invalid because she did not use "solubility controls," **Exhibit B** at 84.

viii. MDEQ's erroneous findings that Petitioners' experts' alternative wastewater quality predictions are invalid because they do not account for several so-called "mitigation measures," that such measures are "widely used and effective," and that Dr. Maest's testimony concerning failed mitigation is of "limited relevance," **Exhibit B** at 84.

g. The foregoing findings listed in subparagraph (f) are also conclusory and do not specifically identify the supporting evidence for those findings or address Petitioners' evidence to the contrary, and, therefore, those findings do not meet the requirements for findings of fact and conclusions of law under the Michigan Constitution, APA, and MDEQ contested case rules, including, but not limited to, Mich Const art VI, §28, MCL 24.285, and R 324.74.

h. MDEQ's findings concerning KEMC's admitted use in its wastewater modeling of incorrect assumptions about the amounts of rock that will be present in the mine and on the surface, **Exhibit B** at 83-84, impermissibly fail to address whether those mistakes violate Part 31 or to otherwise resolve the issue. Therefore, those findings do not meet the requirements of the Michigan Constitution, APA, and MDEQ contested case rules, including, but not limited to, Mich Const art VI, §28, MCL 24.285, and R 324.74.

i. In the alternative, if MDEQ's findings can somehow be construed as finding that KEMC's wastewater predictions were correct or that KEMC has met the requirements of Part 31 and its rules despite KEMC's admittedly mistaken assumptions concerning those amounts of rock, those findings are based on an error of law, are arbitrary and capricious, and are not supported by the whole record.

j. MDEQ's findings concerning KEMC's admitted use in its wastewater modeling of incorrect assumptions about the volume of mine groundwater inflow, **Exhibit B** at 84, impermissibly fail to address whether those mistakes violate Part 31 or to otherwise resolve the issue. Therefore, those findings do not meet the requirements of the Michigan Constitution, APA, and MDEQ contested case rules, including, but not limited to, Mich Const art VI, §28, MCL 24.285, and R 324.74.

k. In the alternative, if MDEQ's findings can somehow be construed as finding that KEMC's wastewater predictions were correct or that KEMC has met the requirements of Part 31 and its rules despite KEMC's admittedly mistaken mine groundwater inflow volume assumptions, those findings are based on an error of law, are arbitrary and capricious, and are not supported by the whole record.

l. If MDEQ's erroneous finding that the mitigation and monitoring measures required in the Part 632 permit are "appropriate for protecting water quality in the groundwater system during and after mining," **Exhibit A** at 21, para. 17, can somehow be construed as finding that those mitigation and monitoring measures will prevent the generation of wastewater concentrations above those predicted by KEMC, that such measures can excuse KEMC's failure to accurately predict wastewater concentrations under Part 31, or that such measures will prevent impacts to water quality in the



groundwater system from KEMC's proposed mining operations, that finding is based on an error of law, is arbitrary and capricious, and is not supported by the whole record.

m. MDEQ's finding that "uncontradicted evidence" establishes that KEMC's wastewater treatment system can effectively treat Dr. Maest's predicted metals concentrations, **Exhibit B** at 84, is arbitrary and capricious and is not supported by the whole record, and, because that finding is also conclusory and does not identify the evidence upon which it is based or address Petitioners' evidence to the contrary, it does not meet the requirements of the Michigan Constitution, APA, and MDEQ contested case rules, including, but not limited to, Mich Const art VI, §28, MCL 24.285, and R 324.74.

n. MDEQ's finding that the treatment system can treat KEMC's wastewater even if concentrations are "considerably greater" than predicted, **Exhibit A** at 11, para. 16, is arbitrary and capricious and is not supported by the whole record, and, because that finding is also conclusory and does not identify the evidence upon which it is based or address Petitioners' evidence to the contrary, it does not meet the requirements of the Michigan Constitution, APA, and MDEQ contested case rules, including, but not limited to, Mich Const art VI, §28, MCL 24.285, and R 324.74.

o. MDEQ did not address Petitioners' proposed findings concerning the inadequacy of KEMC's composite wastewater estimate and, therefore, the FDO fails to meet the requirements of the Michigan Constitution, APA, and MDEQ contested case rules, including, but not limited to, Mich Const art VI, §28, MCL 24.285, and R 324.74. In the alternative, if MDEQ held in the FDO that KEMC's composite estimate satisfies the requirements of under Part 31 and its rules, that finding is based on an error of law, is arbitrary and capricious, and is not supported by the whole record.

p. MDEQ did not address whether KEMC's numerous admitted mistakes in estimating mine wastewater quality and the admitted inaccuracy of KEMC's estimates satisfy the requirements of Part 31 and its rules, and, therefore, the FDO fails to meet the requirements of the Michigan Constitution, APA, and MDEQ contested case rules, including, but not limited to, Mich Const art VI, §28, MCL 24.285, and R 324.74. In the alternative, if MDEQ found in the FDO that KEMC's admitted mistakes and inaccurate estimates satisfy the requirements of Part 31 and its rules, that finding is based on an error of law and is arbitrary and capricious.

q. MDEQ's findings that KEMC's expert testified that correction of his admitted mistakes would not affect his "conclusions" or "recommendations" that "mitigation" would be needed, **Exhibit B** at 82 and 84, are merely an observation that a witness proffered certain testimony and do not address or resolve whether KEMC's admitted mistakes and inaccurate wastewater quality estimates satisfy the requirements of Part 31 and its rules. In the alternative, if those findings can somehow be construed as finding that KEMC's admittedly inaccurate wastewater predictions satisfy the requirements of Part 31 and its rules, that finding is based on an error of law and is arbitrary and capricious, and, because the FDO does not contain any explanation of the legal basis for that finding, it does not meet the requirements of the Michigan Constitution, APA, and MDEQ contested case rules, including, but not limited to, Mich Const art VI, §28, MCL 24.285, and R 324.74.

r. MDEQ's finding that Dr. Eary "explained that the purpose of the geotechnical modeling efforts is not to precisely and absolutely quantify the expected chemistries of [mine wastewater], but to guide management decisions about the need for

mitigation and monitoring measures,” **Exhibit A** at 21, para. 16, is merely an observation that a witness proffered certain testimony and does not address or resolve whether KEMC’s admitted mistakes and inaccurate wastewater quality estimates satisfy the requirements of Part 31 and its rules. In the alternative, if that finding can somehow be construed as finding that KEMC’s admittedly inaccurate wastewater predictions satisfy the requirements of Part 31 and its rules, that finding is based on an error of law and is arbitrary and capricious, and, because the FDO does not contain any explanation of the legal basis for that finding, it does not meet the requirements of the Michigan Constitution, APA, and MDEQ contested case rules, including, but not limited to, Mich Const art VI, §28, MCL 24.285, and R 324.74.

62. The record demonstrates that KEMC’s wastewater quality predictions are unreliable, inaccurate, and dramatically underestimated.

63. The record demonstrates that neither KEMC’s wastewater quality predictions, nor MDEQ’s issuance of the Part 31 Permit based on those predictions, meet the requirements of Part 31 and its rules.

**E. Wastewater Volume.**

64. MDEQ erroneously held in the FDO that KEMC’s wastewater volume estimate is sufficient under R 323.2218(2)(a) and that KEMC’s wastewater treatment system is designed with sufficient hydraulic capacity and detention time to treat the anticipated wastewater. **Exhibit A** at 9, para. 1. In support of this holding, MDEQ adopts the erroneous findings on page 115 of the PFD “that the Petitioners’ alternative hypothesis of higher inflows to the mine is not supported by the record.” **Exhibit A** at 10, para. 3. MDEQ’s holding and findings are in violation of the constitution or statute; are in excess of the statutory authority of the agency; 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 error of law for reasons including, but not limited to:

a. MDEQ's findings describing Petitioners' evidence and testimony are arbitrary and capricious and are not supported by the whole record. **Exhibit B** at 115.

b. MDEQ's erroneous findings that Petitioners' assumptions are not supported by "data in the field" or "data from the field," **Exhibit B** at 115, do not address or resolve Petitioners' claims that such "data" are scientifically invalid and insufficient or whether KEMC's reliance on that invalid data meets the requirements of Part 31 and its rules. Therefore, those findings do not meet the requirements of the Michigan Constitution, APA, and MDEQ contested case rules, including, but not limited to, Mich Const art VI, §28, MCL 24.285, and R 324.74. In the alternative, if MDEQ's findings can somehow be construed as finding that KEMC's data are scientifically valid and sufficient or satisfy the requirements of Part 31 and its rules, that finding is based on an error of law, is arbitrary and capricious, and is not supported by the whole record.

c. The following MDEQ findings are based on errors of law, are arbitrary and capricious, and are not supported by the whole record:

i. MDEQ's erroneous finding that "there is no evidence" of a large fault "running through the area of the mine" based on "several boreholes" drilled by KEMC and KEMC's "own more recent geophysical surveys," **Exhibit B** at 115.

ii. MDEQ's erroneous finding that KEMC's hydraulic testing establishes that there are no water-conductive faults or geological features in the area or that they are interconnected to one another, **Exhibit B** at 115.

iii. MDEQ's erroneous finding that "there is no evidence" of any vertical orientation of water-conductive features between the lower bedrock, upper bedrock, and glacial aquifer based on a KEMC pump test, **Exhibit B** at 115-116.

d. The foregoing findings listed in subparagraph (c) also do not meet the requirements of the Michigan Constitution, APA, and MDEQ contested case rules, including, but not limited to, Mich Const art VI, §28, MCL 24.285, and R 324.74, because MDEQ did not specifically identify the record evidence upon which it relied, Petitioners' evidence to the contrary, or why MDEQ held that KEMC's evidence outweighs that presented by Petitioners.

e. MDEQ's findings impermissibly rely on evidence that was not part of KEMC's application, including, but not limited to, the aforementioned "boreholes" and "more recent geophysical surveys."

f. MDEQ did not address or resolve Petitioners' claims that KEMC failed to sufficiently investigate dikes intersecting the mine, and, therefore, MDEQ's holding in the FDO does not meet the requirements of the Michigan Constitution, APA, and MDEQ contested case rules, including, but not limited to, Mich Const art VI, §28, MCL 24.285 and, R 324.74. In the alternative, if MDEQ found that KEMC's investigation of those dikes was sufficient, that finding is based on an error of law, is arbitrary and capricious, and is not supported by the whole record.

g. MDEQ did not address or resolve Petitioners' claims that KEMC improperly investigated and characterized the so-called "upper" and "lower" bedrock "zones," and, therefore, MDEQ's holding in the FDO does not meet the requirements of the Michigan Constitution, APA, and MDEQ contested case rules, including, but not limited to, Mich Const art VI, §28, MCL 24.285, and R 324.74. In the alternative, if MDEQ found that KEMC's investigation and characterization of those zones was valid, that finding is based on an error of law, is arbitrary and capricious, and is not supported by the whole record.

h. MDEQ did not address or resolve Petitioners' claims that KEMC improperly investigated and characterized the unconsolidated/glacial aquifer and surface water systems and, therefore, MDEQ's holding in the FDO does not meet the requirements of the Michigan Constitution, APA, and MDEQ contested case rules, including, but not limited to, Mich Const art VI, §28, MCL 24.285, and R 324.74. In the alternative, if MDEQ found that KEMC's investigation and characterization of those systems was valid, that finding is based on an error of law, is arbitrary and capricious, and is not supported by the whole record.

65. MDEQ impermissibly failed to specify whether the FDO incorporates the background findings concerning KEMC's bedrock hydrogeologic investigation and modeling set forth on pages 55-56 of the PFD. If MDEQ did incorporate those findings, they are arbitrary and capricious and are not supported by the whole record.

66. MDEQ impermissibly failed to specify whether the FDO incorporates the erroneous holdings and findings on page 116 of the PFD concerning KEMC's groundwater inflow modeling. If MDEQ did not incorporate those holdings and findings, MDEQ has failed to

address or resolve numerous contested issues or to adequately describe the legal and factual basis for its holding that the Part 31 Permit may be issued and, therefore, the FDO does not meet the requirements of the Michigan Constitution, APA, and MDEQ contested case rules, including, but not limited to, Mich Const art VI, §28, MCL 24.285, and R 324.74.

67. In the alternative, if MDEQ did incorporate those erroneous holdings and findings, MDEQ's holdings that Petitioners' expert testimony concerning KEMC's inflow modeling was "dubious," and that KEMC's modeling and related inflow volume estimate is adequate, **Exhibit B** at 116, and the findings underlying those holdings, are in violation of the constitution or statute; are in excess of the statutory authority of the agency; 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 error of law for reasons including, but not limited to:

a. MDEQ's findings describing Petitioners' evidence and testimony are arbitrary and capricious and are not supported by the whole record. **Exhibit B** at 116.

b. MDEQ's findings impermissibly rely on evidence that was not part of KEMC's permit application, including, but not limited to, new groundwater inflow modeling and related estimates.

c. The following MDEQ findings are based on errors of law, are arbitrary and capricious, and are not supported by the whole record:

i. MDEQ's erroneous finding that KEMC's hydrogeologic investigation conformed with ASTM standards, **Exhibit B** at 116.

ii. MDEQ's erroneous finding that KEMC's modeling was "properly calibrated to field data." Id.

iii. MDEQ's erroneous finding that KEMC's modeling included valid and "extensive" sensitivity analyses. Id.

iv. MDEQ's erroneous finding that KEMC's sensitivity analyses evidence a "well-constructed, properly calibrated model." Id.

d. The foregoing findings set forth in subparagraph (c) also do not meet the requirements of the Michigan Constitution, APA, and MDEQ contested case rules, including, but not limited to, Mich Const art VI, §28, MCL 24.285, and R 324.74, because MDEQ did not specifically identify the record evidence upon which it relies, Petitioners' evidence to the contrary, or why it believes that KEMC's evidence outweighs that presented by Petitioners.

e. MDEQ did not address or resolve Petitioners' claims that KEMC's groundwater inflow modeling is invalid for numerous other reasons including, but not limited to, KEMC's improper modeling design and use of an improper modeling code, unrealistic assumptions, improper modeling adjustments, and the lack of an "uncertainty analysis." Therefore, the FDO does not meet the requirements of the Michigan Constitution, APA, and MDEQ contested case rules, including, but not limited to, Mich Const art VI, §28, MCL 24.285, and R 324.74. In the alternative, if MDEQ found that Petitioners' claims are not valid, those findings are based on errors of law, are arbitrary and capricious, and are not supported by the whole record.

68. MDEQ impermissibly failed to specify whether the FDO incorporates the erroneous holding and findings on page 116 of the PFD concerning Petitioners' alternative



inflow volume modeling estimate. If MDEQ did not incorporate that holding and those findings, MDEQ has failed to address or resolve numerous contested issues or to adequately describe the legal and factual basis for its holding that the Part 31 Permit may be issued and, therefore, the FDO does not meet the requirements of the Michigan Constitution, APA, and MDEQ contested case rules, including, but not limited to, Mich Const art VI, §28, MCL 24.285, and R 324.74.

69. In the alternative, if MDEQ did incorporate that holding and those findings, MDEQ's holding that Petitioners' alternative modeling "assumptions are not reasonable and do not give rise to a reasonable range of modeling results," **Exhibit B** at 116, and the findings underlying that holding, are in violation of the constitution or statute; are in excess of the statutory authority of the agency; 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 error of law for reasons including, but not limited to:

a. MDEQ's findings describing Petitioners' evidence and testimony are arbitrary and capricious and are not supported by the whole record. **Exhibit B** at 116.

b. MDEQ's finding that Petitioners' modeling assumptions are invalid because they are "not supported by actual data collected from the field," **Exhibit B** at 116, is based on an error of law, is arbitrary and capricious, and is not supported by the whole record.

c. MDEQ's findings that other Upper Peninsula mines are "of a completely different nature" than KEMC's proposed mine, and that the literature on those mines actually supports KEMC's estimate, are arbitrary and capricious and are not supported by

the whole record, and, because MDEQ did not specifically identify the record evidence upon which it relied, Petitioners' evidence to the contrary, or why MDEQ found that KEMC's evidence outweighs that presented by Petitioners, those findings also do not meet the requirements of the Michigan Constitution, APA, and MDEQ contested case rules, including, but not limited to, Mich Const art VI, §28, MCL 24.285, and R 324.74.

d. MDEQ's finding that "unrebutted evidence" demonstrates that the mine can be grouted to stop inflows in the volume predicted by Petitioners, **Exhibit B** at 116, is arbitrary and capricious and are not supported by the whole record, and, because MDEQ did not specifically identify the record evidence upon which it relied, Petitioners' evidence to the contrary, or why MDEQ found that KEMC's evidence outweighs that presented by Petitioners, that finding also does not meet the requirements of the Michigan Constitution, APA, and MDEQ contested case rules, including, but not limited to, Mich Const art VI, §28, MCL 24.285, and R 324.74.

e. MDEQ did not address or resolve Petitioners' claims that MDEQ staff's review of KEMC's modeling estimates was insufficient and, therefore, MDEQ's holding in the FDO fails to meet the requirements of the Michigan Constitution, APA, and MDEQ contested case rules, including, but not limited to, Mich Const art VI, §28, MCL 24.285, and R 324.74. In the alternative, if MDEQ found in the FDO that MDEQ staff's review was sufficient, that finding is based on an error of law, is arbitrary and capricious, and is not supported by the whole record.

70. MDEQ's findings that KEMC's treatment system is designed to handle a maximum volume of 350 gpm, and that the Part 31 Permit does not authorize a discharge of greater than 350 gpm, **Exhibit A** at 10, para. 4-5, do not resolve Petitioners' claim that KEMC's

wastewater volume estimate fails to meet the requirements of Part 31 and its rules. In the alternative, if those findings can somehow be construed as finding that KEMC's estimate is valid and meets the requirements of Part 31 and its rules, that finding is in violation of the constitution or statute; is in excess of the statutory authority of the agency; is not supported by competent, material, and substantial evidence on the whole record; is arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion; and/or is the result of other substantial and material error of law.

71. The record demonstrates that KEMC's wastewater volume prediction is unreliable, inaccurate, and dramatically underestimated.

72. The record demonstrates that neither KEMC's wastewater volume prediction, nor MDEQ's issuance of the Part 31 Permit based on that prediction, meet the requirements of Part 31 and its rules.

**F. Wastewater Treatment System.**

73. MDEQ erroneously held in the FDO that KEMC's wastewater treatment system "basis of design" is sufficient under R 323.2218(2) and that the wastewater treatment system can effectively treat the wastewater from KEMC's proposed mining operation. **Exhibit A** at 11, para. 12-16. MDEQ set forth several findings in support of this holding. **Exhibit A** at 11-12, para. 12-23. MDEQ's holding and findings are in violation of the constitution or statute; are in excess of the statutory authority of the agency; 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 error of law for reasons including, but not limited to:

a. MDEQ's findings describing Petitioners' evidence and testimony are arbitrary and capricious and are not supported by the whole record.

b. The following findings do not meet the requirements of the Michigan Constitution, APA, and MDEQ contested case rules, including, but not limited to, Mich Const art VI, §28, MCL 24.285, and R 324.74, because those findings merely observe that a witness(es) proffered certain testimony and do not address whether that testimony is valid or how that testimony relates to whether KEMC's "basis of design" satisfies the requirements of Part 31 and its rules:

i. MDEQ's finding that KEMC's witness John Fassbender testified that he "concluded that the effluent from the treatment system will meet the permit limits" and that "the effluent will meet all permit limits based on his calculations." **Exhibit A** at 11, para. 12, 18.

ii. MDEQ's finding concerning KEMC's omission of several critical influent characteristics and Mr. Fassbender's testimony about that issue. **Exhibit A** at 11, para. 17.

iii. MDEQ's findings regarding Mr. Fassbender's testimony and evidence about his calculations of effluent quality, and MDEQ's witness Kristen Mariuzza's testimony that she concluded that KEMC's basis of design met the requirements of R 323.2218. **Exhibit A** at 11-12, para. 18.

iv. MDEQ's findings regarding Mr. Fassbender's testimony about a purported "treatability study" and his conclusions from that study. **Exhibit A** at 12, para. 21.

v. MDEQ's findings regarding Mr. Fassbender's and Ms. Mariuzza's testimony about finalization of the wastewater treatment system design. **Exhibit A** at 12, para. 22.

vi. MDEQ's findings regarding Mr. Fassbender's and Ms. Mariuzza's testimony in response to Petitioners' claims that the treatment system design is overly complex, untested, and unconventional. **Exhibit A** at 12, para. 23.

c. In the alternative, if those findings constitute an adoption of the witness/witnesses' testimony, and/or are findings that such testimony establishes that KEMC's wastewater treatment system design and related effluent quality estimates meet the requirements of Part 31 and its rules, those findings are based on errors of law, are arbitrary and capricious, and are not supported by the whole record.

d. The following findings are also arbitrary and capricious and are not supported by the whole record:

i. MDEQ's erroneous finding that Petitioners "erroneously claim[ed] that Kennecott failed to properly characterize the wastewater and that the treatment system will not adequately treat the influent wastewater." **Exhibit A** at 11, para. 15.

ii. MDEQ's erroneous finding that KEMC's treatment system will effectively treat the wastewater "even if the concentrations . . . are considerably greater than predicted." **Exhibit A** at 11, para. 16.

iii. MDEQ's erroneous finding that Petitioners "did not offer any solid testimony or proof that boron would not be adequately treated," and MDEQ's characterization of Petitioners' testimony on that issue. **Exhibit A** at 12, para. 20.

iv. MDEQ's erroneous finding that "Petitioners offer no factual basis" for the assertion that the treatment system design is overly complex, untested, and unconventional. **Exhibit A** at 12, para. 23.

e. MDEQ's erroneous finding that KEMC's treatment system will effectively treat the wastewater "even if the concentrations . . . are considerably greater than predicted." **Exhibit A** at 11, para. 17, is conclusory and does not identify the evidence upon which it is based or address Petitioners' evidence to the contrary, and, therefore it does not meet the requirements of the Michigan Constitution, APA, and MDEQ contested case rules, including, but not limited to, Mich Const art VI, §28, MCL 24.285, and R 324.74.

f. MDEQ's erroneous holding that KEMC's wastewater treatment system basis of design is sufficient under R 323.2218(2) and that the wastewater treatment system can effectively treat the wastewater from KEMC's proposed mining operation is also invalid because it is based on evidence that is not part of the record, including, but not limited to, a purported wastewater "treatability study" that was not admitted as an exhibit in the Contested Case. **Exhibit A** at 12, para. 21.

g. MDEQ did not address Petitioners' proposed findings concerning the inadequacy of the purported "contingency measures" for failure of the wastewater treatment system and, therefore, the FDO fails to meet the requirements of the Michigan Constitution, APA, and MDEQ contested case rules, including, but not limited to, Mich Const art VI, §28, MCL 24.285, and R 324.74. In the alternative, if MDEQ held in the FDO that such contingency measures are adequate and/or render KEMC's treatment

system design valid under Part 31 and its rules, that holding is based on an error of law, is arbitrary and capricious, and is not supported by the whole record.

h. MDEQ did not address Petitioners' proposed findings concerning the inadequacy of MDEQ staff's review of KEMC's treatment system design and influent/effluent calculations and, therefore, the FDO fails to meet the requirements of the Michigan Constitution, APA, and MDEQ contested case rules, including, but not limited to, Mich Const art VI, §28, MCL 24.285, and R 324.74. In the alternative, if MDEQ held in the FDO that MDEQ staff's review was adequate, that holding is based on an error of law, is arbitrary and capricious, and is not supported by the whole record.

i. The record demonstrates that KEMC's wastewater treatment system design was not finalized when the Part 31 Permit was issued and even now is not yet finalized, and, therefore, cannot possibly meet the requirements of Part 31 and its rules. KEMC is also now attempting to modify other components that had previously been "finalized," as it has recently requested a modification of the Part 31 Permit to change its TWIS design from a subsurface infiltration system to what KEMC characterized as an above-ground "rapid infiltration system."<sup>26</sup>

j. The record demonstrates that KEMC's wastewater treatment system will not effectively treat the volume or constituents in KEMC's wastewater and that KEMC's wastewater effluent characterization is invalid and inaccurate.

k. The record demonstrates that neither KEMC's wastewater treatment system design, nor MDEQ's issuance of the Part 31 Permit based on that design, meet the requirements of Part 31 and its rules.

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<sup>26</sup> See MDNRE's website at [http://www.michigan.gov/deq/0,1607,7-135-3311\\_4111\\_18442-130551--,00.html](http://www.michigan.gov/deq/0,1607,7-135-3311_4111_18442-130551--,00.html).

**G. Hydrogeologic Report.**

74. MDEQ impermissibly failed to specify whether the FDO incorporates the erroneous findings on page 163 of the PFD that KEMC's hydrogeologic report meets the requirements of R 323.2221(1). If MDEQ did not incorporate those findings in the FDO, MDEQ has failed to address or resolve numerous contested issues or to adequately describe the legal and factual basis for its holding that the Part 31 Permit may be issued, and, therefore, the FDO does not meet the requirements of the Michigan Constitution, APA, and MDEQ contested case rules, including, but not limited to, Mich Const art VI, §28, MCL 24.285, and R 324.74.

75. In the alternative, if MDEQ did incorporate those findings concerning KEMC's hydrogeologic report in the FDO, those findings are in violation of the constitution or statute; are in excess of the statutory authority of the agency; 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 error of law for reasons including, but not limited to:

a. MDEQ's findings that MDEQ's and KEMC's witnesses "refuted" Petitioners' testimony that mounding would perch above low-permeability layers and break ground surface, and that "two soil borings" demonstrate that there is no perched water in the area of the TWIS, **Exhibit B** at 163, are arbitrary and capricious and are not supported by the whole record, and, because those findings are conclusory and do not adequately describe the factual basis for those findings, they also do not meet the requirements of the Michigan Constitution, APA, and MDEQ contested case rules, including, but not limited to, Mich Const art VI, §28, MCL 24.285, and R 324.74.

b. MDEQ's finding that R 323.2221(2)(c) does not require KEMC to submit a three-dimensional illustration of the flow path of KEMC's discharge, **Exhibit B** at 163,



is based on an error of law, is arbitrary and capricious, and is not supported by the whole record. In the alternative, if this finding can somehow be construed as finding that KEMC submitted sufficient information to “determine” the three-dimensional flow path, that finding is arbitrary and capricious and is not supported by the whole record.

c. MDEQ did not address or resolve Petitioners’ claims that KEMC’s hydrogeologic report is invalid under Part 31 and its rules for numerous other reasons including, but not limited to, a lack of data between the discharge point and the presumed venting location; omission of required information; failure to define the existence or thickness of aquifers; inaccurate characterization of aquifers and groundwater flow; improper reliance on an older conceptual study; failure to comply with applicable professional standards; and failure to provide sufficient information to determine compliance with R 323.2204(2)(f). Therefore, MDEQ’s holding in the FDO does not meet the requirements of the Michigan Constitution, APA, and MDEQ contested case rules, including, but not limited to, Mich Const art VI, §28, MCL 24.285, and R 324.74. In the alternative, if MDEQ found in the FDO that Petitioners’ claims are not valid, that finding is based on an error of law, is arbitrary and capricious, and not supported by the whole record.

76. MDEQ’s finding that groundwater flows “generally northeast” in the area around KEMC’s proposed mine and the TWIS, **Exhibit B** at 8, is arbitrary and capricious and is not supported by the whole record.

77. MDEQ impermissibly failed to specify whether the FDO incorporates the findings on pages 111 and 152 of the PFD concerning KEMC’s hydrogeologic report and groundwater

flow. If MDEQ did incorporate those findings, those findings are arbitrary and capricious and are not supported by the whole record.

78. MDEQ impermissibly failed to specify whether the FDO incorporates the findings on page 163 of the PFD concerning KEMC's TWIS mounding analyses. If MDEQ did not incorporate those findings in the FDO, MDEQ has failed to address or resolve numerous contested issues or to adequately describe the legal and factual basis for its holding that the Part 31 Permit may be issued, and, therefore, the FDO does not meet the requirements of the Michigan Constitution, APA, and MDEQ contested case rules, including, but not limited to, Mich Const art VI, §28, MCL 24.285, and R 324.74.

79. In the alternative, if MDEQ incorporated the findings on page 163 of the PFD concerning KEMC's TWIS mounding analyses into the FDO, those findings are in violation of the constitution or statute; are in excess of the statutory authority of the agency; 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 reasons including, but not limited to:

a. MDEQ's findings do not specifically identify which "two separate mounding analyses" its findings rely upon, and, therefore, those findings do not meet the requirements of the Michigan Constitution, APA, and MDEQ contested case rules, including, but not limited to, Mich Const art VI, §28, MCL 24.285, and R 324.74.

b. MDEQ's findings impermissibly rely on evidence that was not part of KEMC's permit application, including, but not limited to, new modeling of the TWIS discharge and mounding.

c. MDEQ's finding that KEMC's mounding analyses concluded that mounding would not break ground surface, would comply with Part 31 and its rules, and would not be injurious, does not address or resolve Petitioners' evidence to the contrary or Petitioners' claims that KEMC's analyses are unreliable and invalid. Therefore, that finding does not meet the requirements of the Michigan Constitution, APA, and MDEQ contested case rules, including, but not limited to, Mich Const art VI, §28, MCL 24.285 and, R 324.74. In the alternative, if MDEQ found in the FDO that Petitioners' claims are not valid, that finding is based on an error of law, is arbitrary and capricious, and not supported by the whole record.

d. MDEQ's finding that Petitioners "did not prepare a model" to contradict KEMC's analyses is not a valid basis on which to conclude that KEMC's analyses are sufficient.

e. MDEQ's finding that Petitioners did not "present any other evidence" contradicting KEMC's analyses is arbitrary and capricious and is not supported by the whole record.

f. MDEQ did not address or resolve Petitioners' claims that KEMC's mounding analyses are invalid under Part 31 and its rules for numerous other reasons including, but not limited to, KEMC's improper modeling design and use of the wrong modeling code; failure to calibrate or defective calibration; unrealistic assumptions and conditions; the invalidity of KEMC's so-called "analytical solution"; oversimplification of subsurface conditions; use of incorrect inflow volumes; and failure to follow professional modeling standards. Therefore, MDEQ's holding in the FDO does not meet the requirements of the Michigan Constitution, APA, and MDEQ contested case rules,

including, but not limited to, Mich Const art VI, §28, MCL 24.285, and R 324.74. In the alternative, if MDEQ found that Petitioners' claims are not valid, those findings are based on errors of law, are arbitrary and capricious, and are not supported by the whole record.

g. MDEQ's finding that MDEQ's and KEMC's witnesses "refuted" Petitioners' testimony that mounding would perch above low-permeability layers and break ground surface is arbitrary and capricious and is not supported by the whole record, and, because that finding is conclusory and does not adequately describe its factual basis, the FDO does not meet the requirements of the Michigan Constitution, APA, and MDEQ contested case rules, including, but not limited to, Mich Const art VI, §28, MCL 24.285, and R 324.74.

h. MDEQ's finding that "two soil borings" demonstrate that there is no perched water in the area of the TWIS is arbitrary and capricious and is not supported by the whole record.

80. The record demonstrates that neither KEMC's hydrogeologic report and related mounding analyses, nor MDEQ's issuance of the Part 31 Permit based on that report and those analyses, meet the requirements of Part 31 and its rules.

#### **H. Surface Water Quality.**

81. MDEQ erroneously held in the FDO that the Part 31 Permit limits are protective of surface water quality in accordance with Part 31 and its rules. **Exhibit A** at 18, para. 59. That holding is based on several findings in the FDO. **Exhibit A** at 15-18, para. 42-59. Those holdings and findings are in violation of the constitution or statute; are in excess of the statutory authority of the agency; 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 error of law for reasons including, but not limited to:

a. MDEQ did not identify the applicable legal standards under Part 31 and its rules or explain how its findings support its holding that those standards were met, and, therefore, the FDO does not meet the requirements of the Michigan Constitution, APA, and MDEQ contested case rules, including, but not limited to, Mich Const art VI, §28, MCL 24.285, and R 324.74.

b. MDEQ's findings that Petitioners' witness Dr. Maest is "unqualified to offer any expert opinion with respect to the establishment of surface water quality protection standards under Part 31," **Exhibit A** at 16, para. 49, and that her testimony and related exhibit about surface water quality standards are "flawed," Id. at 16-17, para. 50-53, are based on errors of law, are arbitrary and capricious, and are not supported by the whole record.

c. MDEQ did not address or resolve Petitioners' claims that the Part 31 Permit fails to protect surface water as required by Part 31 and its rules for numerous reasons including, but not limited to, the establishment of surface water quality-based permit limits based on KEMC's inaccurate influent and effluent quality predictions; insufficient daily effluent monitoring; a lack of appropriate and effective effluent limits for certain substances; MDEQ's admissions that the groundwater flow direction is uncertain, rendering invalid its determination that constituents will sufficiently attenuate before venting; and a lack of monitoring between the compliance points and the presumed venting location. Therefore, MDEQ's holding in the FDO does not meet the requirements of the Michigan Constitution, APA, and MDEQ contested case rules,

including, but not limited to, Mich Const art VI, §28, MCL 24.285, and R 324.74. In the alternative, if MDEQ found that Petitioners' claims are not valid, those findings are based on errors of law, are arbitrary and capricious, and are not supported by the whole record.

82. MDEQ impermissibly failed to specify whether its holding and findings on surface water quality issues in the FDO are intended to supplement, or supplant, the findings set forth on page 165-166 of the PFD concerning those issues. If MDEQ also incorporate the PFD's findings on those issues in the FDO, those findings are based on errors of law, are arbitrary and capricious, and are not supported by the whole record.

83. The record demonstrates that the Part 31 Permit does not protect surface water quality as required by Part 31 and its rules.

**I. Antidegradation.**

84. KEMC's TWIS discharge is subject to R 323.1098, Michigan's "antidegradation" rule, which requires, *inter alia*, that KEMC use "best technology in process and treatment" ("BTPT") to treat its wastewater.

85. MDEQ did not address in the FDO whether KEMC's wastewater treatment system constitutes BTPT in accordance with R 323.1098.

86. MDEQ impermissibly failed to specify whether the FDO incorporates the erroneous findings on pages 165-166 of the PFD that KEMC's wastewater treatment system constitutes BTPT in accordance with R 323.1098. If MDEQ did not incorporate those findings in the FDO, MDEQ has failed to address or resolve a contested issue or to adequately describe the legal and factual basis for its holding that the Part 31 Permit may be issued, and, therefore, the FDO does not meet the requirements of the Michigan Constitution, APA, and MDEQ contested case rules, including, but not limited to, Mich Const art VI, §28, MCL 24.285, and R 324.74.

87. In the alternative, if MDEQ did incorporate those findings in the FDO, those findings are based solely on the PFD's "previous analyses that there is no evidence the system will not work as proposed," **Exhibit B** at 166. There are no such "previous analyses" in the PFD. MDEQ's findings, therefore, lack any factual or legal basis.

88. In the alternative, if MDEQ's holding and related findings concerning KEMC's wastewater treatment system, **Exhibit A** at 9-12, para. 1-23, can somehow be construed as a holding and findings that KEMC's system is BTPT in accordance with R 323.1098, that holding and those findings are based on errors of law, are arbitrary and capricious, and are not supported by the whole record, and, because MDEQ did not apply those facts to the requirements of R 323.1098, that holding and those findings also do not meet the requirements of the Michigan Constitution, APA, and MDEQ contested case rules, including, but not limited to, Mich Const art VI, §28, MCL 24.285, and R 324.74.

89. The record demonstrates that KEMC's wastewater treatment system is not BTPT as required by R 323.1098, and, therefore, MDEQ's issuance of the Part 31 Permit violated the requirements of Part 31 and its rules.

#### **J. Monitoring System.**

90. The Part 31 groundwater discharge rules require, *inter alia*, that KEMC must provide sufficient information to enable MDEQ to determine, and that MDEQ must require through the Part 31 Permit, a monitoring system that will intercept and adequately assess the effect of the discharge. *See, e.g.,* R 323.2218(4)(c), 323.2223(1)-(2), 323.2224(1)(a), 323.2206(1), and 323.2221(2)(e).

91. MDEQ did not address in the FDO whether the Part 31 Permit's monitoring system meets the requirements of Part 31 and its rules.

92. MDEQ impermissibly failed to specify whether the FDO incorporates the erroneous findings on pages 166-167 of the PFD that the monitoring system required by the Part 31 Permit is sufficient. If MDEQ did not incorporate those findings in the FDO, MDEQ has failed to address or resolve a contested issue or to adequately describe the legal and factual basis for its holding that the Part 31 Permit may be issued, and, therefore, the FDO does not meet the requirements of the Michigan Constitution, APA, and MDEQ contested case rules, including, but not limited to, Mich Const art VI, §28, MCL 24.285, and R 324.74.

93. In the alternative, if MDEQ did incorporate those findings in the FDO, MDEQ's findings are in violation of the constitution or statute; are in excess of the statutory authority of the agency; 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 error of law for reasons including, but not limited to:

a. MDEQ's finding rejecting Petitioners' claim that monitoring is inadequate between the discharge point and the presumed venting location, **Exhibit B** at 166, is based on an error of law, is arbitrary and capricious, and is not supported by the whole record.

b. MDEQ did not address or resolve Petitioners' claims that the monitoring system fails to meet the requirements of Part 31 and its rules because the discharge flow path is not defined; wells are in the wrong locations and screened at the wrong depths; and the monitoring system is not sufficient to determine compliance with R 323.2204(2)(f). Therefore, MDEQ's holding in the FDO does not meet the requirements of the Michigan Constitution, APA, and MDEQ contested case rules,



including, but not limited to, Mich Const art VI, §28, MCL 24.285, and R 324.74. In the alternative, if MDEQ found that Petitioners' claims are not valid, that finding is based on an error of law, is arbitrary and capricious, and is not supported by the whole record.

94. The record demonstrates that neither the Part 31 Permit's monitoring system, nor the information that KEMC submitted in support thereof, meet the requirements of Part 31 and its rules.

**K. MEPA.**

95. MDEQ's holdings that the Part 31 Permit meets all requirements of Part 31 and its rules, and that KEMC's discharges as authorized by the Part 31 Permit will not likely cause "pollution, impairment, or destruction of natural resources, or the public trust therein" in violation of MEPA, **Exhibit A** at 18, para. 59 and conclusions of law 1-2, are in violation of a statute; are in excess of the statutory authority of the agency; 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 error of law.

----- 96. The violations of Part 31 and its rules established by Petitioners constitute prima facie MEPA violations.

97. MDEQ's issuance of the Part 31 Permit, MDEQ's issuance of the FDO affirming the issuance of the Part 31 Permit, and KEMC's permitted discharges under the Part 31 Permit are likely to pollute, impair, or destroy the air, water, or other natural resources or the public trust in these resources.

98. KEMC's discharges into the mine, and MDEQ's failure to require the submission of information concerning those discharges and to appropriately limit those discharges in the Part

31 Permit, are likely to pollute, impair, or destroy the air, water, or other natural resources or the public trust in these resources

**L. Injurious Discharges.**

99. Part 31 and its rules require, *inter alia*, that MDEQ may not authorize a discharge that will be “injurious” to the waters of the State, and that, before receiving the Part 31 Permit, KEMC must provide sufficient information to enable MDEQ to make that determination. See, e.g., MCL 324.3106, MCL 324.3109(1), R 323.2204(2)(a), R 323.2218(1), and R 323.2206(1).

100. MDEQ’s holdings in the FDO that the Part 31 Permit meets all requirements of Part 31 and its rules, and that KEMC’s discharges as authorized by the Part 31 Permit will not be “injurious,” **Exhibit A** at 18, para. 59 and conclusions of law 1-2, are in violation of a statute; are in excess of the statutory authority of the agency; 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 error of law.

101. The record demonstrates that the issuance of the Part 31 Permit violated Part 31 and its rules because KEMC did not provide adequate information to enable MDEQ to determine that the discharge will not be injurious; the Part 31 Permit fails to prevent such injury; and KEMC’s permitted discharge is likely to be injurious.

**M. Incorporation Of Factual Findings.**

102. MDEQ incorporates into the FDO the findings set forth on pages 1-52 of the PFD, *see Exhibit A* at 9 and **Exhibit B** at 1-52, and holds that those findings “accurately reflect the substantive evidence on this record.” That holding is incorrect because many of those findings, including, but not limited to, findings concerning KEMC’s wastewater treatment system (**Exhibit B** at 16-17), are not supported by competent, material, and substantial evidence on the

whole record and are arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion.

103. MDEQ incorporates several findings proposed by MDEQ and holds that those findings “constitute the substantive and credible evidence on this record.” **Exhibit A** at 15, 18. Those findings are not credible or supported by the whole record. In addition, if MDEQ’s holding can somehow be construed as a holding that Petitioners’ evidence to the contrary is not “credible,” that holding is not supported by competent, material, and substantial evidence on the whole record and is arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion.

#### **N. Conclusions Of Law.**

104. MDEQ’s conclusions of law on Part 31 issues, **Exhibit A** at 18, are in violation of a statute; are in excess of the statutory authority of the agency; 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 error of law.

#### **VI. RELIEF SOUGHT**

105. Based on the foregoing grounds for relief in this Petition for Review, Petitioners request that this Court:

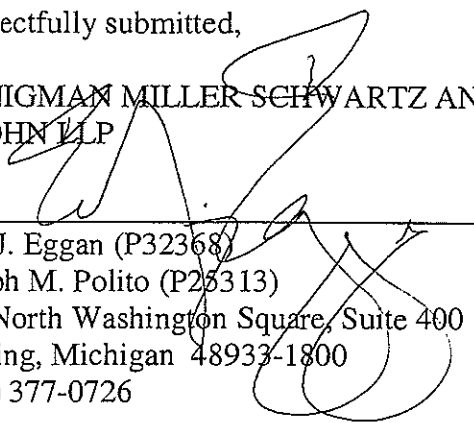
- a. Upon receipt of the record from MDNRE, establish a schedule for briefing and oral argument.
- b. In light of the volume and complexity of the record below, issue an order permitting briefs to be filed in excess of existing page limitations to be determined by the Court.

c. Hold unlawful, set aside, and/or vacate the FDO, and order that the Part 31 Permit be denied.

d. Award Petitioners costs and such other relief as this Court finds to be in the interests of justice.

Respectfully submitted,

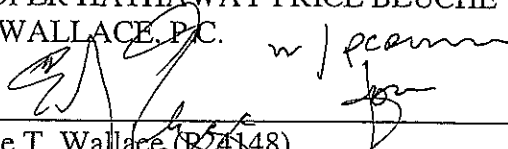
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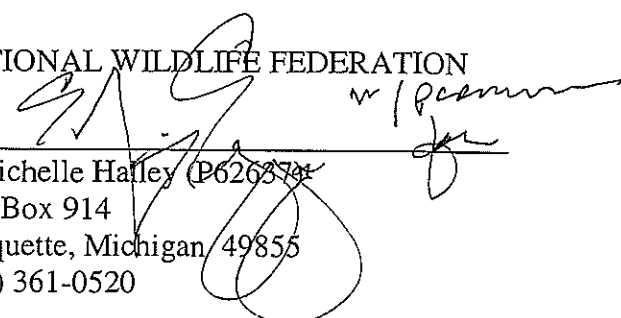
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Dated: March 12, 2010

LANSING.450159.13

**INDEX OF EXHIBITS**  
**FOR PETITION FOR REVIEW**

- A. January 14, 2010 Final Determination and Order
- B. August 18, 2009 Proposal for Decision
- C. January 5, 2010 Order of Delegation

LANSING.451451.1