

Via Email and First Class Mail

July 14, 2008

Ms. Beverly Hague
State Office of Administrative Hearings and Rules
Michigan Department of Environmental Quality
Constitution Hall, Atrium South
525 West Allegan Street
Lansing, MI 48933

Re: *Petitions of Keweenaw Bay Indian Community, et al. on Permits Issued to Kennecott Eagle Minerals Company; File Nos. GW1810162 and MP 01 2007*

Dear Ms. Hague:

Enclosed for filing in the above-referenced proceeding please find *Petitioners' Response to Kennecott Eagle Minerals Company's Supplemental Bench Memorandum Regarding Rebuttal Testimony*. A related *Proof of Service* is also enclosed.

Please let me know if you have any questions concerning the above filing.

Very truly yours,

HONIGMAN MILLER SCHWARTZ AND COHN LLP


Eric J. Eggan

Enclosures

c: Hon. Richard A. Patterson (w/enclosures)
Steven C. Kohl and Rodrick W. Lewis (w/enclosures)
Robert P. Reichel (w/enclosures)

**STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES**

In the matter of	File Nos.	GW1810162 and MP 01 2007
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	Part:	31, Groundwater Discharge 632, Nonferrous Metallic Mineral Mining
	Agency:	Department of Environmental Quality
	Case Type:	Water Bureau and Office of Geological Survey

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**PETITIONERS' RESPONSE TO KENNECOTT EAGLE MINERALS COMPANY'S
SUPPLEMENTAL BENCH MEMORANDUM REGARDING REBUTTAL TESTIMONY**

In spite of Petitioners' several assurances that rebuttal in this case will be limited to evidence responsive to proofs and theories offered by Kennecott Eagle Minerals Company ("KEMC" or "the Company") and the Michigan Department of Environmental Quality ("MDEQ"), KEMC persists in its effort to exclude or limit the scope of Petitioners' rebuttal testimony. The Company's latest rumination on this issue takes the form of a Supplemental Bench Memorandum Regarding Rebuttal Testimony ("Brief") filed Friday July 11, 2008.

This Tribunal has already ruled that Petitioner may present rebuttal evidence. At the request of KEMC and MDEQ, this Tribunal mandated that Petitioners provide the parties a list of the witnesses to be called in rebuttal together with a brief recitation of the expected testimony of each rebuttal witness on Monday July 7, 2008. Petitioners provided this list and recitation to both KEMC and MDEQ on that date. When KEMC expressed concern over the scope of rebuttal, this Tribunal agreed with Petitioners that objections to the scope of rebuttal should await the actual testimony of Petitioners' witnesses. (Hearing Transcript at 7431). Apparently not satisfied with these rulings, KEMC's Brief revisits the issue, suggesting that Petitioners' list somehow indicates that Petitioners will raise new issues in rebuttal.

Petitioners disagree. The witnesses and evidence to be offered in rebuttal will be responsive to proofs and/or theories raised by KEMC and/or MDEQ in their respective cases in chief. Petitioners' rebuttal will be entirely proper and admissible under applicable Michigan case law.

KEMC misstates the standard this Tribunal should utilize in testing the propriety of Petitioners' rebuttal evidence. KEMC suggests that Petitioners' rebuttal must be limited to addressing "new contentions" raised by the defense, and cannot cover any of the same subject matter that either was, or "could have been," raised during Petitioners' case-in-chief. Brief at 1, 2, 4. This is not the law in Michigan. In fact, KEMC's purported limitation on rebuttal has been

specifically rejected by Michigan appellate tribunals.¹ According to the Michigan Supreme Court rebuttal evidence is admissible if it is properly responsive to evidence introduced or a theory developed by the defense, even if it could have been offered in the proponent's case in chief:

Rebuttal evidence is admissible to **“contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same.”** ... [T]he test of whether rebuttal evidence was properly admitted is **not whether the evidence could have been offered in the prosecutor's case in chief, but, rather, whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant.** As long as evidence is responsive to material presented by the defense, it is properly classified as rebuttal, even if it overlaps evidence admitted in the prosecutor's case in chief.

People v Figgures, 451 Mich 390, 399 (1996) (emphasis added) (citations omitted).²

Despite KEMC's assertions to the contrary, nothing in Petitioners' July 7, 2008 list of proposed rebuttal witnesses indicates that Petitioners intend to exceed the proper scope of rebuttal. The witness recitation clearly indicates that Petitioners' rebuttal testimony will respond directly to proofs and or theories offered by KEMC and MDEQ. This is proper and admissible under the Michigan standard for rebuttal testimony as delineated by the Supreme Court in *Figgures*, regardless of whether it addresses some of the same issues that were, or could have been, addressed during Petitioners' case-in-chief.

Even if KEMC's proposed rebuttal standard was valid (which it is not), the Administrative Rules governing evidence in this case, specifically R 324.64(2) vest in this

¹ It is well settled that the admission of rebuttal evidence is within the sound discretion of the trial judge and will not be disturbed absent a clear abuse of discretion. *Fireman's Fund American Ins Cos v General Electric Co*, 74 Mich App 318, 327 (1977). See also *People v DeLano*, 318 Mich 557, 570 (1947).

² The cases cited on page 4 of KEMC's Brief, *People v Kraai*, 92 Mich App 398 (1979) and *Sullivan Indus, Inc v Double Seal Glass Co, Inc*, 192 Mich App 333 (1991) actually supports the ruling in *Figgures*, as both cases involved rebuttal that did not directly respond to issues raised by the defense. Moreover, to the extent that either of those cases contradict *Figgures*, they would be abrogated by the more recent Supreme Court decision.

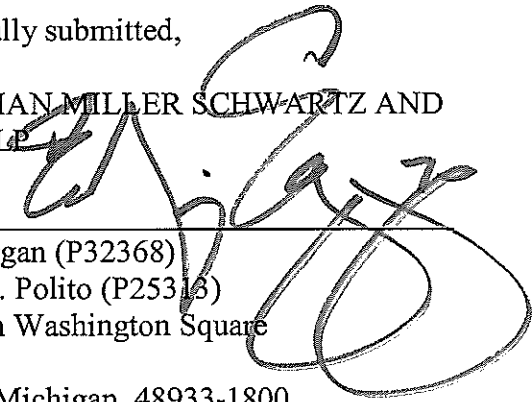
Tribunal the discretion to allow rebuttal testimony in a manner appropriate to the circumstances.³ Here, a limitation on Petitioners' rebuttal in the fashion suggested by KEMC – which would fault Petitioners for not somehow anticipating every argument or counterargument raised by the defense and addressing those during Petitioners' case-in-chief – is unwarranted. As this Tribunal knows, these proceedings have been compressed—preparation time was severely limited. The parties were not allowed to conduct discovery of any of the numerous technical expert witnesses prior to the hearing. As a result, in many instances the parties were left to guess what the substance of opposing experts' testimony would be. These unique circumstances lead to testimony and/or scientific theories that, in the absence of discovery or other means to anticipate them, were unanticipated. Petitioners' inability to anticipate proofs or theories was exacerbated by recitations of expected KEMC and MDEQ witness testimony that provided almost no useful information, and by the introduction of dozens of exhibits after the April 1, 2008 exhibit disclosure deadline. Petitioners have been forced to conduct highly technical cross-examination on complex scientific subjects with little or no ability to consult with their technical experts concerning the many technical theories raised by KEMC and MDEQ. Rebuttal will, therefore, be Petitioners' first true opportunity to respond to these proofs and/or theories. For these reasons, adoption of the limitations proposed by KEMC would not only be legally incorrect; it would preclude the "fundamental fairness" that must lie at the heart of any judicial or administrative proceeding. See *Ansell v Dep't of Commerce*, 222 Mich App 347, 360 (1997); see also R 324.64(3) (this Tribunal "shall regulate the order of the hearing to promote the fair and efficient determination of the issues presented").

³ R 324.64(2) provides that: "The administrative law judge may allow rebuttal testimony and may permit further testimony as deemed appropriate."

In light of the foregoing, Petitioners' rebuttal testimony should be allowed if it meets the test established in *Figures*, in other words, if it responds directly to issues raised by the defense. As already determined by this Tribunal, the time to make that evaluation is during the testimony, not before it. Therefore, all of the requests in KEMC's Brief should be denied.

Respectfully submitted,

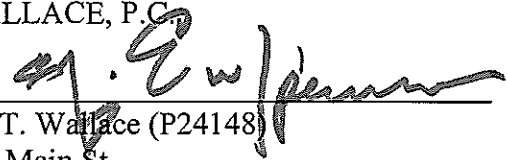
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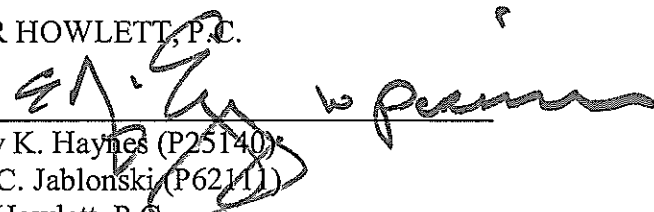
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Dated: July 14, 2008

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PROOF OF SERVICE

STATE OF MICHIGAN)
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COUNTY OF INGHAM)

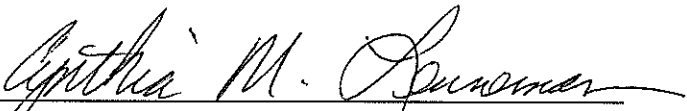
The undersigned states that on July 14, 2008, she caused to be served a copy of *Petitioners' Response to Kennecott Eagle Minerals Company's Supplemental Bench Memorandum Regarding Rebuttal Testimony* upon the following parties via email, and by hand delivery at the proceeding at Constitution Hall:

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