EARTHJUSTICE

Via Email

March 9, 2022

Mr. Michael Connor
Assistant Secretary of the
Army (Civil Works)
Department of the Army
108 Army Pentagon
Washington, D.C. 20310-0108
Michael.l.connor.civ@mail.mil

Mr. Jaime Pinkham
Principal Deputy Assistant Secretary of the
Army (Civil Works)
Department of the Army
108 Army Pentagon
Washington, D.C. 20310-0108
Jamie.a.pinkham.civ@mail.mil

Ms. Stacey Jensen
Assistant for Environment, Tribal and
Regulatory Affairs
Office of the Assistant Secretary of the Army
(Civil Works)
Department of the Army
108 Army Pentagon
Washington, DC 20310-0108
stacey.m.jensen.civ@mail.mil

Re: Letter on Clean Water Act Section 404 Permit No. SPL-2008-0816-MB Approved Jurisdictional Determinations for the Rosemont Copper Mine

Dear Mr. Connor, Mr. Pinkham, and Ms. Jensen:

The Tohono O'odham Nation, Pascua Yaqui Tribe, and Hopi Tribe (collectively, the Tribes) respectfully request that the U.S. Army Corps of Engineers (Corps) rescind the Approved Jurisdictional Determinations (AJDs) for the Rosemont Copper Mine. As discussed in greater detail below, new information demonstrates that those AJDs were based on: (1) application of a rule that was vacated by the courts due to its fundamental, substantive flaws, and (2) serious technical errors identified by the Environmental Protection Agency (EPA). In addition, the Corps finalized the AJDs without adequate coordination with EPA or formal consultation with the Tribes, which have a well-documented attachment to the waters at issue. As a result, the AJDs improperly eliminated Clean Water Act protections for hundreds of acres of jurisdictional waters in the Santa Rita Mountains, threatening significant degradation to some of the highest quality streams and ecosystems in the desert southwest.

The Tribes respectfully request that (1) the Corps rescind the AJDs;[1] (2) conduct a technically and legally adequate delineation of the jurisdictional waters on the mine site; and (3) engage in meaningful consultation with the Tribes during the process, as contemplated by the Corps' guidance.[2] In the alternative, if the Corps is unable or unwilling to take the requested corrective actions, the Tribes respectfully request that the Corps support EPA's designation of the site as a special case so that EPA can make a final jurisdictional determination consistent with the Clean Water Act.

A. The Corps Should Revoke the Negative AJDs Due to Their Serious Errors.

The Corps has broad authority to revise or revoke an AJD based on "new information." *See* U.S. Army Corps of Eng'rs, Regulatory Guidance Letter No. 05–02, § 1(a) (June 2005), [hereinafter "RGL 05–02"]; *see also U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 598 (2016) ("The Corps may revise an approved JD within the five-year period based on 'new information.'"). Since the Corps issued the Rosemont mine AJDs on March 24, 2021, new information has come to light underscoring serious flaws in those AJDs.

First, two federal courts vacated the Navigable Waters Protection Rule ("NWPR"), which the Corps relied on to issue the AJDs for the Rosemont mine. *See Pascua Yaqui Tribe v. EPA*, No. CV-20-00266-TUC-RM, 2021 WL 3855977 (D. Ariz. Aug. 30, 2021); *Navajo Nation v. Regan*, No. 20-CV-602-MV/GJF, 2021 WL 4430466 (D.N.M. Sept. 27, 2021). As both courts concluded, the problems with the NWPR were "not mere procedural errors or problems that could be remedied through further explanation," but rather involved "fundamental, substantive flaws that [could not] be cured without revising or replacing the NWPR's definition of 'waters of the United States.'" *Pascua Yaqui Tribe*, No. CV-20-00266-TUC-RM, 2021 WL 3855977, at *5; *Navajo Nation*, No. 20-CV-602-MV/GJF, 2021 WL 4430466, at *3 (quoting *Pascua Yaqui Tribe*). Indeed, both EPA and the Corps admitted to "significant concerns" with the legality of the NWPR, including its adverse effects "on the chemical physical, and biological integrity of the nation's waters," particularly in the desert southwest. *Navajo Nation*, No. 20-CV-602-MV/GJF, 2021 WL 4430466, at *3; *Pascua Yaqui Tribe*, No. CV-20-00266-TUC-RM, 2021 WL 3855977, at *5 (same). Those flaws pervade the AJDs, which relied on the NWPR to categorically exclude ephemeral streams on the mine site and strip protections for other intermittent features.

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[1] The Corps has already notified Hudbay Minerals, Inc., that it cannot rely on those AJDs, which failed to accurately delineate jurisdictional waters on the mine site. Email from Dena O'Dell, U.S. Army Corps of Eng'rs, to Tony Davis (Jan. 14, 2022) [hereinafter "O'Dell Email"] (attached); *see also* U.S. Army Corps of Eng'rs, Navigable Waters Protection Rule Vacatur (Jan. 5, 2022) [hereinafter "NWPR Vacatur Guidance"].

[2] Letter from Stuart Gillespie, Sr. Att'y, Earthjustice, and Caitlin Miller, Assoc. Att'y, Earthjustice, to Brigadier General D. Peter Helmlinger, N.W. Div. Commander, U.S. Army Corps of Eng'rs, et al. (Dec. 8, 2020) [hereinafter "Tribes Dec. 2020 Letter"] (attached).

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In the wake of these court decisions, the Corps informed Rosemont that it may not rely on the negative AJDs because they are based on the illegally-issued and invalid NWPR.[3] The Corps explained that the negative AJDs do not "accurately delineat[e] all jurisdictional waters under the current regulatory regime within the AJD's review area."[4] Given that acknowledgment, and the courts' orders vacating the NWPR, the Corps should exercise its authority to rescind the inaccurate AJDs.

Second, the AJDs suffer from a series of technical errors, as highlighted by new hydrological information and analysis. Both Pima County and EPA reviewed the Corps' negative AJD for the East Review Area and concluded that the Corps' analysis under the NWPR was flawed. On May 7, 2021, Pima County sent the Corps a letter explaining that it had "a number of significant concerns regarding [the East Review Area] AJD and how the Corps performed the required analyses" under the NWPR, which call into question the legitimacy of the agency's decision."[5] Pima County concluded that (1) the Corps' "typical year analysis" for mine site streams was "fatally flawed," and (2) the Corps "erroneously rejected, contradicted, and ignored a plethora of available evidence" showing that waters along Barrel Canyon are intermittent.[6] EPA also provided a review of the Corps' AJD for the East Review Area on May 7, 2021, incorporating Pima County's letter of the same date.[7] EPA concluded that there are at least five jurisdictional intermittent or perennial streams at the mine site under the NWPR.[8] EPA further concluded that the wetlands adjacent to Rosemont Spring also satisfied the requirements of the NWPR, such that they would be jurisdictional waters under that rule (assuming it was still in effect, which it is not).[9] EPA's review, thus, showed that the Corps' jurisdictional analysis for the East Review Area was "flawed in several crucial areas[,] leading to erroneous conclusions."[10]

Compounding these technical errors, the Corps did not adequately comply with the requisite process for ensuring sound jurisdictional determinations, as set forth in the 1989

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[3] O'Dell Email.
[4] *Id.*
[5] Letter from C.H. Huckleberry, Pima Cty. Admin., to Colonel Julie A. Batten, L.A. Dist., U.S. Army Corps of Eng'rs at 1 (May 7, 2021) (attached).
[6] *Id.* at 1-2.
[7] Memorandum from Robert A. Leidy, EPA Region 9 Wetlands Off, RE: EPA Review of Los Angeles Corps District Memorandum for the Record (March 24, 2021), Approved Jurisdictional Determination, East Review Area, Rosemont Copper Mine Project, Pima Co., Arizona at 1 (May 7, 2021) [hereinafter "Leidy 2021 Memo"] (attached).
[8] EPA identified Rosemont Spring, MC-2, East Dam Complex, McCleary Dam, and Wasp Canyon as jurisdictional waters under the NWPR. *Id.* at 3-6, 8-9, 15 tbl.2.
[9] *Id.* at 4-6.
[10] *Id.* at 3.

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Memorandum of Agreement with EPA. In particular, the Corps did not formally coordinate with EPA, and thereby failed to resolve the significant flaws in its analysis.[11]

Third, the Tribes respectfully request that the Corps revoke the negative AJDs because it did not engage in government-to-government consultation with the Tribes, despite promising to do so. In December 2020, the Tribes sent the Corps a letter highlighting the cultural and hydrological importance of mine site waters, and requesting formal government-to-government consultation with the Corps on the AJDs.[12] The Corps initially accepted the Tribes' request for consultation,[13] but abruptly rescinded its agreement to engage in consultation based on a January 4, 2021, policy memorandum.[14] The January 2021 memorandum set forth a "nationwide programmatic policy [that the Corps] shall not initiate tribal consultation on any future AJDs" and specifically directed that the Corps' LA District rescind its letter initiating consultation with the Tribes on the Rosemont AJDs.[15] However, shortly after taking office, Principal Deputy Assistant Secretary of the Army for Civil Works Jaime Pinkham issued a memorandum on April 20, 2021, revoking the Corps' January 2021 memorandum and restoring the Corps' commitment to government-to-government consultation.[16] Assistant Secretary Pinkham noted that the Army Civil Works Program has a "long history of productive consultation with Tribal Nations on its . . . regulatory permit actions," and stated that the Civil Works Program "is committed to maintaining and enhancing its record on consultation."[17]

Based on the new information and circumstances described above, the Corps should revoke the flawed Rosemont mine AJDs.

B. The Corps Should Delineate the Jurisdictional Waters on the Mine Site or Request that EPA Designate the Mine Site as a Special Case.

The Corps' regulatory guidance states that it will not rely on jurisdictional determinations issued under the NWPR, such as the negative AJDs at issue here.[18] As a result, the Corps and

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[11] *See* Letter from Tomas Torres, Region 9 Dir., Water Div., U.S. Env't Prot. Agency, to Colonel Julie A Balten, Commander & Dist. Eng'r, LA Dist., U.S. Army Corps of Eng'rs, Federal Coordination Regarding the Approved Jurisdictional Determination for Rosemont Copper Mine in Arizona (April 8, 2021) [hereinafter "EPA Letter on JD Consultation"] (attached).
[12] Tribes Dec. 2020 Letter at 13-14.
[13] Letter from Colonel Julie A. Batten, U.S. Army Corps of Eng'rs, to Stuart Gillespie, Sr. Att'y, Earthjustice (Dec. 17, 2020) (attached).
[14] Memorandum from R.D. James, Asst. Sec. of the Army, Civil Works, to Commanding General, U.S. Army Corps of Eng'rs (Jan. 4, 2021) (attached).
[15] *Id.* at 3.
[16] Memorandum from Jaime Pinkham, Principal Deputy Asst. Sec. of the Army Civil Works, to Commanding General, U.S. Army Corps of Eng'rs (Apr. 20, 2021) (attached).
[17] *Id.* at 1.
[18] *See* NWPR Vacatur Guidance.

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Hudbay must continue to follow the preliminary jurisdictional determination for the mine site, which treated all waterways and wetlands on the site as geographically jurisdictional under the Clean Water Act.[19] Hudbay, however, has attempted to dispute that delineation in an effort to circumvent the Clean Water Act.

The Corps has two options for ensuring Clean Water Act protections at the mine site. First, it can issue new AJDs identifying jurisdictional waters on the mine site under the pre-2015 regulatory regime.[20] The scientific record overwhelmingly demonstrates that ephemeral and intermittent streams, such as those in the Santa Rita Mountains, significantly affect the chemical, physical, and biological integrity of downstream waters.[21] Furthermore, EPA documented the surface-water connection between the intermittent streams on the mine site and the downstream traditionally-navigable waters of the Santa Cruz River during a typical year.[22]

As part of the delineation process, the Corps should work closely with EPA to obtain additional data to identify the jurisdictional waters under either the significant-nexus or relatively-permanent waters test. The Tribes also renew their request for formal government-to-government consultation as the Corps performs additional analysis on the jurisdictional waters at the mine site.[23] The Santa Rita Mountains, including the Rosemont mine site, is a landscape imbued with cultural significance for the Tribes. In recognition of the area's importance to the Tribes, the Forest Service designated it as a Traditional Cultural Property and sought to list it on the National Register. The Tribes also hold the unique waters that run throughout the mine site as sacred, as they bring special spiritual and ecological importance to the land.

Alternatively, if the Corps is unable or unwilling to delineate the waters on the site, it should support the Tribes' request that EPA issue a final jurisdictional determination pursuant to its "special case" authority. As documented by the Tribes,[24] there are "significant issues or technical difficulties" that warrant EPA asserting its authority to issue a final jurisdictional determination consistent with the 1989 Memorandum of Agreement: Determination of Geographic Jurisdiction of the Section 404 Program and Application of Exemptions Under CWA Section 404(f).[25]

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[19] *See also* O'Dell Email.
[20] *See* NWPR Vacatur Guidance.
[21] Tribes Dec. 2020 Letter at 3-7.
[22] Leidy 2021 Memo at 4-5.
[23] Tribes Dec. 2020 Letter at 14.
[24] *See* Letter from Stu Gillespie, Senior Att'y, Earthjustice, and Caitlin Miller, Assoc. Att'y, Earthjustice, to Radhika Fox, Asst. Adm'r, U.S. Env't Prot. Agency, and Deborah Jordan, Acting Reg'l Adm'r, U.S. Env't Prot. Agency Region 9 (Nov. 12, 2021) (attached).
[25] Available at https://www.epa.gov/cwa-404/memorandum-agreement-determination-geographic-jurisdiction-section-404-program-and.

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Either way, the Tribes respectfully urge the Corps to ensure Clean Water Act protections at the mine site consistent with the science and law. We can be reached at the email addresses listed below to discuss steps forward.

Sincerely,

/s/ Draft
STUART C. GILLESPIE
Staff Attorney
Earthjustice, Rocky Mountain Office
633 17th Street, Suite 1600
Denver, CO 80202
T: 303.996.9616
F: 303.623.8083
sgillespie@earthjustice.org

CAITLIN MILLER
Associate Attorney
Earthjustice, Rocky Mountain Office
633 17th Street, Suite 1600
Denver, CO 80202
T: 303.996.9613
F: 303.623.8083
cmiller@earthjustice.org

Counsel for the Tohono O'odham Nation, Pascua Yaqui Tribe, and Hopi Tribe

CC: Martha Guzman
U.S. Environmental Protection Agency
Region 9 Administrator
Guzman.martha@epa.gov

Tomas Torres
U.S. Environmental Protection Agency
Region 9 Water Division Director
Torres.tomas@epa.gov

Sylvia Quast
U.S. Environmental Protection Agency
Region 9 Counsel
Quast.sylvia@epa.gov

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