EARTHJUSTICE

By Certified U.S. Mail, Return Receipt Requested

April 4, 2022

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Re: 60-Day Notice of Intent to Bring Citizen Suit for Rosemont Copper Company's Violations of the Clean Water Act at the Copper World Expansion Mine

Dear Mr. del Río:

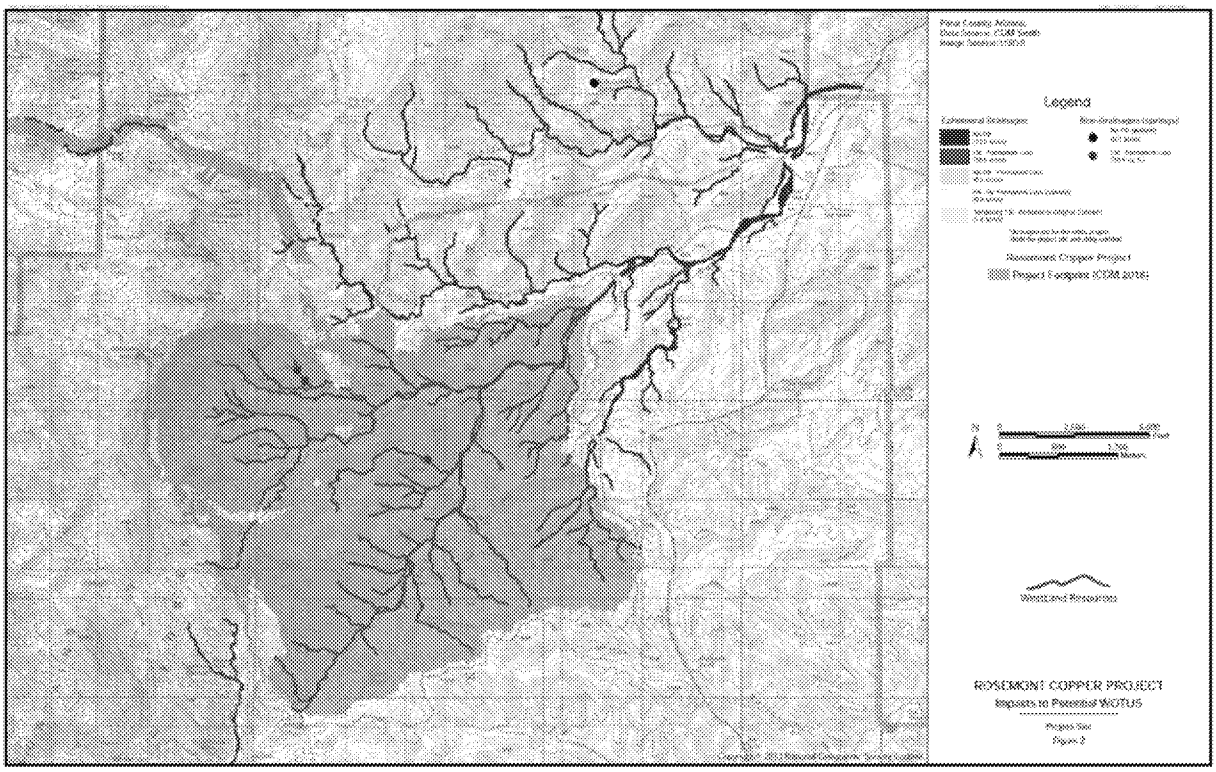
On behalf of the Tohono O'odham Nation, Pascua Yaqui Tribe, and Hopi Tribe (collectively, the Tribes), we ask that you immediately remedy and cease any violations of the Clean Water Act at the Rosemont Copper World Expansion. The proposed mine site contains a dense network of ephemeral streams that qualify as jurisdictional waters of the United States protected by the Clean Water Act. Yet, the Rosemont Copper Company (Rosemont) has or imminently plans to clear and grade the site, including the discharge of dredge and fill material into waters of the United States without a Clean Water Act section 404 permit, 33 U.S.C. § 1344.

Rosemont's operations violate the Clean Water Act's strict prohibition on any unpermitted discharges into jurisdictional waters of the United States. *Id.* § 1311(a). This letter constitutes a 60-day notice of intent to file a citizen suit against Rosemont for these violations pursuant to section 505 of the Clean Water Act, *id.* § 1365(a)(1). It also serves as notice for any future violations at the site that occur after the violations outlined in this letter. We urge

Rosemont to cease any construction activities, remediate any dredge and fill activities, and apply for a section 404 permit, as required by the Clean Water Act.

I. Factual Background

Southern Arizona's Santa Rita Mountains—the site of the proposed Rosemont open-pit copper mine—contain some of the highest-quality streams and ecosystems in the desert southwest. Rosemont prepared a preliminary jurisdictional determination for the east side of the mountains, which identified at least 101.6 acres of potentially jurisdictional waters at the Rosemont Mine site, including 154 individual ephemeral streams and springs that encompass 18 stream miles and two wetlands.[1] The map below depicts this dense network of tributaries running throughout the mine site:



Rosemont also prepared a preliminary jurisdictional determination for the west side of the mountains, which identified 21.58 acres of potentially jurisdictional waters, including 95 ephemeral streams, along the Rosemont Mine utility corridor.[2] Rosemont subsequently identified an additional 0.8 acres of potentially jurisdictional waters in two addendums to the preliminary jurisdictional determination for the utility corridor.[3]

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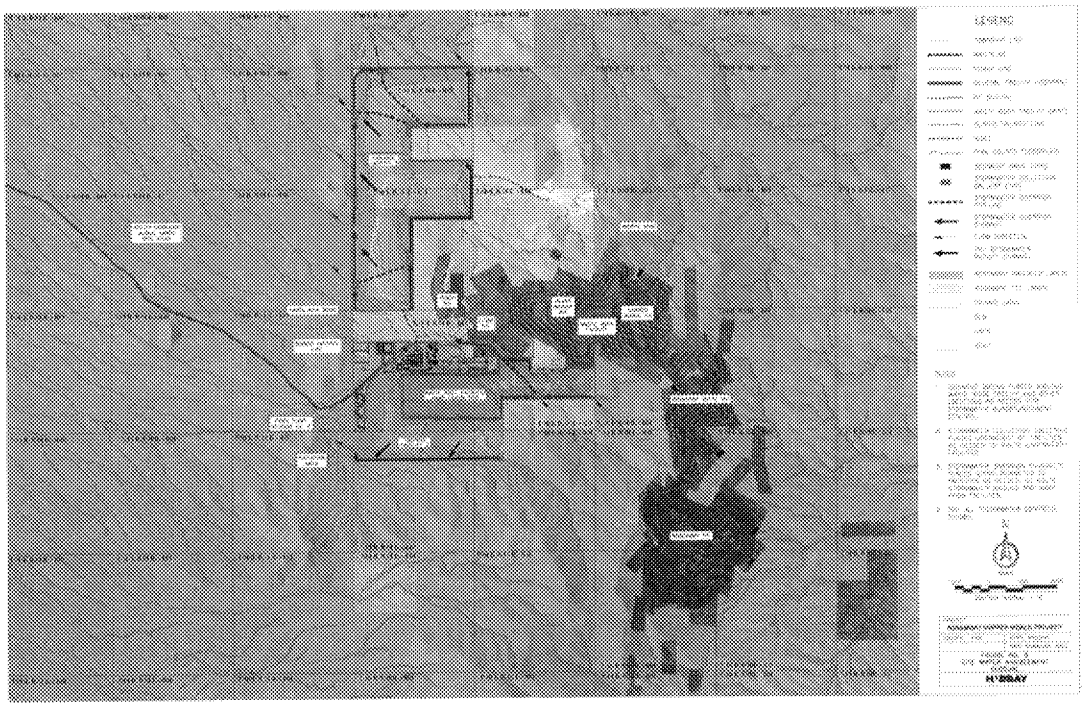
[1] WestLand Resources, Inc., Preliminary Jurisdictional Determination for the Rosemont Project, Pima County, Arizona at 4 (2009).
[2] WestLand Resources, Inc., Preliminary Jurisdictional Determination: Santa Rita Road Waterline for the Rosemont Project, Pima County, Arizona (March 1, 2010).
[3] WestLand Resources, Inc., Addendum to the Preliminary Jurisdictional Determination for Rosemont's Santa Rita Road Utility Line: 38 Acres Near the Helvetia Townsite, Pima County,

Rosemont sought a Clean Water Act section 404 permit before undertaking any construction activities at the Rosemont Mine site. Before it could proceed, however, the U.S. District Court for the District of Arizona invalidated multiple federal agency approvals for the Rosemont Mine.[4] The U.S. Army Corps of Engineers (Corps), in turn, suspended the section 404 permit for the Rosemont Mine.

Faced with these court rulings, Rosemont has since pursued a new strategy to expand its mining operations to the west side of the Santa Rita Mountains. The Rosemont Copper World Expansion covers approximately 3,503 acres of land in the Santa Rita foothills southeast of Sahuarita, Arizona.[5] The proposed mine would require digging two new pits, constructing three tailings waste piles, and dumping at least 64 million tons of waste.[6] To construct the mine, Rosemont must fill the network of ephemeral streams that flow across the mine site on their way downstream to Sahuarita and the Santa Cruz River, as depicted in the map below.[7]



Arizona (March 13, 2012); WestLand Resources, Inc., Addendum to the Preliminary Jurisdictional Determination for Rosemont's Santa Rita Road Utility Line: Approximately 49.7 Acres Along Corto, County Club, Santa Rita, And Dawson Roads, Pima County, Arizona (March 15, 2012).

[4] *See Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 409 F. Supp. 3d 738 (July 31, 2019); *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 441 F. Supp. 3d 843 (Feb. 10, 2020).

[5] *See* Rosemont Copper World Reclamation Plan (Aug. 2021).

[6] *Id.* at 3-1, 5-1.

[7] *See* Letter from Javier Del Rio, Vice President, Hudbay Minerals, Inc., to Pima County Regional Flood Control District at fig.6 (March 10, 2022).

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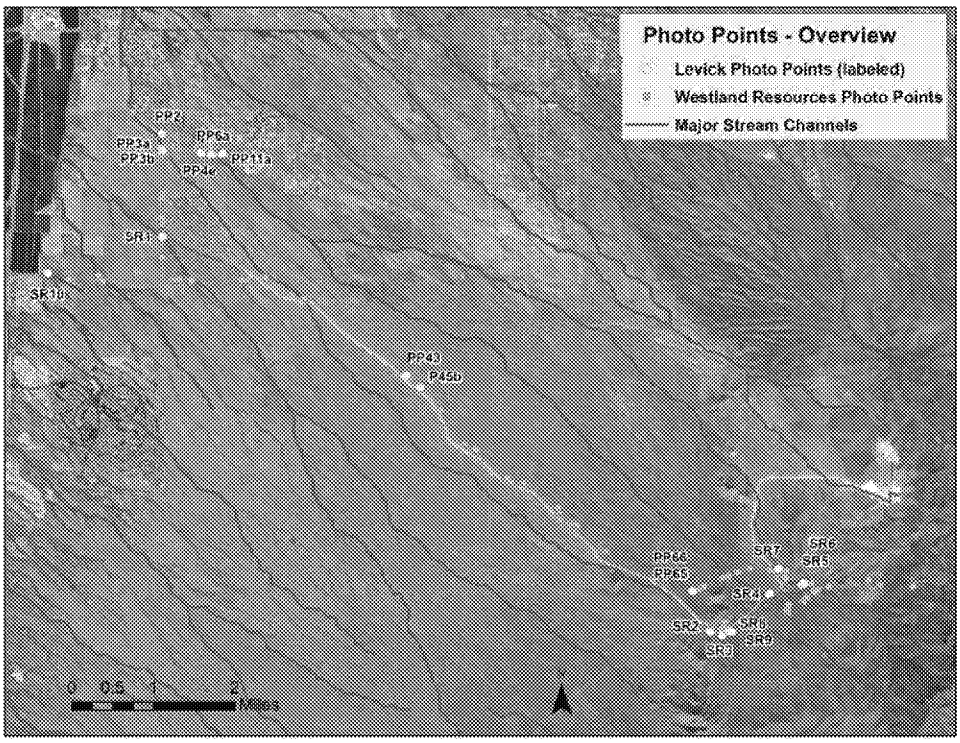
These ephemeral streams perform significant functions that maintain the chemical, physical, and biological integrity of downstream waters, including Study Reach B of the Santa Cruz River.[8] They also exhibit evidence of bed, bank, and high-water mark, including indicators of recent flows, as documented by field visits plotted on the map below.[9]



Rosemont, however, has refused to obtain a Clean Water Act section 404 permit prior to dredging and filling these streams to construct the Copper World Expansion. Instead, the company stated that it would start "clearing, grading, stockpiling, and other earthwork activities" on the West Side of the Santa Rita Mountains in April, unlawfully discharging pollutants into jurisdictional waters.[10] Rosemont prepared plans and figures showing the locations of the proposed activities, including discharges into the network of ephemeral streams running across

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[8] *See* U.S. Emv't Prot. Agency, Connectivity of Streams and Wetland to Downstream Waters: A Review and Synthesis of the Scientific Evidence at ES-2, B-39, B-59 (Jan. 2015) [hereinafter "Science Report"] (explaining that the scientific literature unequivocally shows that ephemeral streams exert a "strong influence on the integrity of the Nation's waters" and are "critical to the health and stability of arid and semiarid watersheds and ecosystems."); *see also* Technical Support Document for the Proposed "Revised Definition of 'Waters of the U.S.'" Rule, EPA-HQ-OW-2021-0602, at 62–89 (Nov. 18, 2021) [hereinafter "TSD"] (reaffirming the Science Report and finding that 100% of the publications since the Science Report show that ephemeral and intermittent streams "were physically, chemically, and/or connected to and exerted a strong influence on downgradient waters.").

[9] Lainie Levick, A Report to Save the Scenic Santa Ritas (Nov. 8, 2021) (attached as Ex. 1).

[10] Letter from Javier Del Rio, Vice President, Hudbay Minerals, Inc., to Pima County Regional Flood Control District (March 10, 2022).

the site.[11] The Tribes have asked the company for confirmation that it commenced construction activities, but received no response.[12] Rosemont has closed off public access to the mine site.[13]

II. Rosemont Violated the Clean Water Act's Prohibition on Discharging Any Pollutants into Waters of the United States.

Congress enacted the Clean Water Act to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To that end, the Clean Water Act prohibits "any [unpermitted] addition of any pollutant to navigable waters from any point source." *Id.* §§ 1362(12), 1311(a). The term "navigable waters" encompasses all waterbodies that have a "significant nexus" with a traditionally navigable water. *See Rapanos v. United States*, 547 U.S. 715, 779–80 (2006) (Kennedy, J., concurring). A stream possesses the requisite nexus if it, "either alone or in combination with" other similarly situated streams, "significantly affect[s] the chemical, physical, and biological integrity" of a traditionally navigable water. *Id.*

Here, Rosemont has violated or will violate the Clean Water Act by filling, grading, and destroying the network of ephemeral streams at the Copper World Expansion site without a section 404 permit. The scientific record demonstrates that these ephemeral streams are jurisdictional waters of the United States. They flow in a northwesterly direction from the Santa Rita foothills to the nearest traditionally navigable water, Study Reach B of the Santa Cruz River.[14] The overwhelming majority of studies, including almost every study analyzed by the EPA, demonstrate that ephemeral streams, such as those on the site, play a vital role in maintaining the chemical, physical, and biological integrity of downstream waters, and thus qualify as jurisdictional waters.[15]

Yet, Rosemont started constructing the Copper World Expansion in April according to its plans, or imminently plans such activities, thereby discharging dredge and fill material, and destroying the network of ephemeral streams woven across the site without the required section 404 permit. Those unpermitted activities violate the Clean Water Act. 33 U.S.C. § 1311(a). Rosemont must immediately cease any activities on the site and comply with the process for obtaining a section 404 permit from the Corps. *See id.* § 1344(a). That process, including the requisite review under the National Environmental Policy Act, must occur "*before* actions are

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[11] *Id.* at figs. 1-6. Rosemont provided the Pima County Flood Control district with twenty days to comment on the construction activities—that is, until March 30, just days before it planned to start construction. The Company did not provide the Tribes with any information or opportunity to comment.

[12] *See* Email from Stuart C. Gillespie, Senior Attorney, Earthjustice, to Javier del Rio, Vice President, Rosemont Copper Company (Mar. 31, 2022) (attached as Ex. 2).

[13] The company controls access to the site with fencing, security patrols, and by limiting locations for entry. Reclamation Plan at 9-1.

[14] Westland Resources, Inc., Jurisdictional Waters Determination for the Rosemont Copper Project Utility Corridor and West Side Operations, Pima County, Arizona at app'x 4 (Sept. 20, 2019) (identifying ephemeral reaches crossing project site); *See also* Levick Report at 2.

[15] Science Report at ES-2, B-39, B-59; TSD at 62-89.

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taken." 40 C.F.R. § 1500.1(b) (emphasis added). This pre-construction review is essential: while the Corps may grant a permit to discharge fill material into jurisdictional waters, it must first ensure compliance with the procedural and substantive restrictions set forth in the 404(b)(1) Guidelines. *See* 40 C.F.R. pt. 230. The Corps cannot permit any discharges where there is a less-environmentally damaging practicable alternative. *Id.* § 230.10(a). Furthermore, the Corps must deny any permit that would result in significant degradation or where the applicant has failed to ensure no net loss of aquatic function. *Id.* § 230.10(c), (d). Rosemont cannot circumvent this process by unlawfully destroying the jurisdictional waters on the Copper World Expansion site without first seeking a section 404 permit.

This notice encompasses these violations, as well as any similar violations committed subsequent to the date of this notice. Unless Rosemont remedies these violations, the Tribes reserve right to file a citizen suit within 60 days to ensure compliance with the Clean Water Act.

III. Identity of Persons Giving Notice and Their Counsel

In accordance with 40 C.F.R. § 135.3, notice is hereby provided of the Tribes' names, addresses, and telephone numbers, as well as the names, address, and telephone number of their legal counsel, Earthjustice.

Tribes:

Tohono O'odham Nation
P.O. Box 803
Sells, Arizona 85634
(520) 383-3410

Pascua Yaqui Tribe
7777 S. Camino Huivisim Bldg C.
Tucson, Arizona 85757
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Hopi Tribe
P.O. Box 123
Kykotsmovi, Arizona 86039
(928) 724-3142

Legal Counsel:

Stuart C. Gillespie
Caitlin Miller
Earthjustice, Rocky Mountain Office
633 17th Street, Suite 1600
Denver, CO 80202
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VI. Conclusion

Rosemont's unpermitted discharge of pollutants into waters of the United States violates the Clean Water Act, 33 U.S.C. § 1311. The Tribes hereby provide notice, pursuant to 33 U.S.C. § 1365, of these violations at the Copper World Expansion site, including any future similar violations. To remedy these violations, Rosemont must cease operations, remediate any dredge and fill activities, and proceed through the process of applying for a section 404 permit from the Corps. Unless these violations are cured within 60 days, the Tribes reserve the right to take appropriate legal action to enforce the Clean Water Act. We are available to meet with

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Rosemont or its representatives to attempt to resolve these issues within the 60-day notice period.

Sincerely,

/s/ Stuart Gillespie
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Caitlin Miller
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Counsel for the Tohono O'odham Nation, Pascua Yaqui Tribe, and Hopi Tribe

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