By Certified U.S. Mail, Return Receipt Requested

April 14, 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 Save the Scenic Santa Ritas, Center for Biological Diversity, Arizona Mining Reform Coalition, and Sierra Club Grand Canyon Chapter (collectively, Conservation Groups), 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 filled, dumped, or otherwise caused rock, soil, and other material to bury ephemeral streams or portions thereof on the west side of the Santa Rita Mountains and imminently plans to undertake operations that will clear and grade the site, including the discharge of dredge or fill material into waters of the United States without a Clean Water Act section 404 permit, 33 U.S.C. § 1344.

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Rosemont's operations violate the Clean Water Act's strict prohibition on any unpermitted discharges of pollutants 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, including discharges of dredge or fill material, remediate any dredge or fill activities, and apply for a section 404 permit, as the Clean Water Act requires.

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 Rosemont mine site:

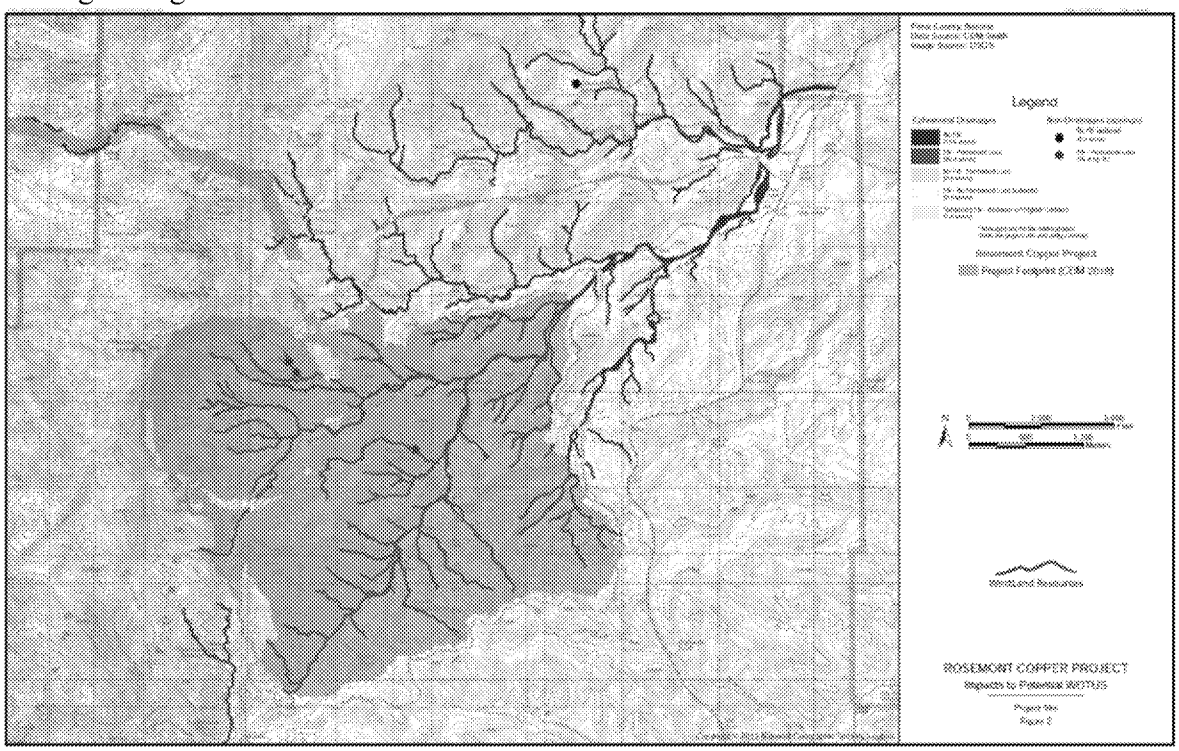

Figure 1: Depiction of the dense network of tributaries running through the Rosemont Mine site

Rosemont also prepared a preliminary jurisdictional determination for the west side of the mountains, which identified 21.58 acres of potentially jurisdictional waters, including

[1] WestLand Resources, Inc., Preliminary Jurisdictional Determination for the Rosemont Project, Pima County, Arizona at 4 (2009).

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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]

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. The Corps has stated that "Rosemont Copper Company is not authorized to discharge fill material into waters of the United States under its suspended permit."[5]

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.[6] The proposed Copper World Expansion mine would require digging two new pits, constructing three tailings waste piles, and dumping at least 64 million tons of waste.[7] To construct the Copper World Expansion mine, Rosemont must discharge fill material into 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 Figure 3.[8] Rosemont's March 1, 2022 letter to Pima County, and as shown in Figure 2, indicates that there are additional pits that have been identified. This brings the proposed total of mine pits up to six, and the pits are proposed to cross the entirely of the Santa Rita Mountains from the east to west.[9]

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[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.

[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] *Save the Scenic Santa Ritas, et al. v. U.S. Army Corps of Eng'rs, et al.* 19-cv-00177-JAS, ECF No. 98 (Sept. 27, 2019). Judge Soto granted a stay in this case: "This Court GRANTS the pending motion (Doc. 98) to stay the two consolidated cases captioned above until the United States Army Corps of Engineers takes further action to reinstate, modify, or revoke the suspended Clean Water Act permit. The Corps will notify the Court of such further action. These cases are STAYED. Federal Defendants shall notify the Court within five (5) days of reinstating, modifying, or revoking the suspended Clean Water Act permit." *SSSR et al. v. U.S. Army Corps of Eng'rs*, 19-cv-00177-JAS, ECF No. 102 (Oct. 18, 2019).

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

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

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

[9] These six pits are from west to east are: Peach Pit, Elgin Pit, Heavy Weight Pit, Copper World Pit, Broadtop Butte Pit, and Rosemont Pit. *See* Figure 2.

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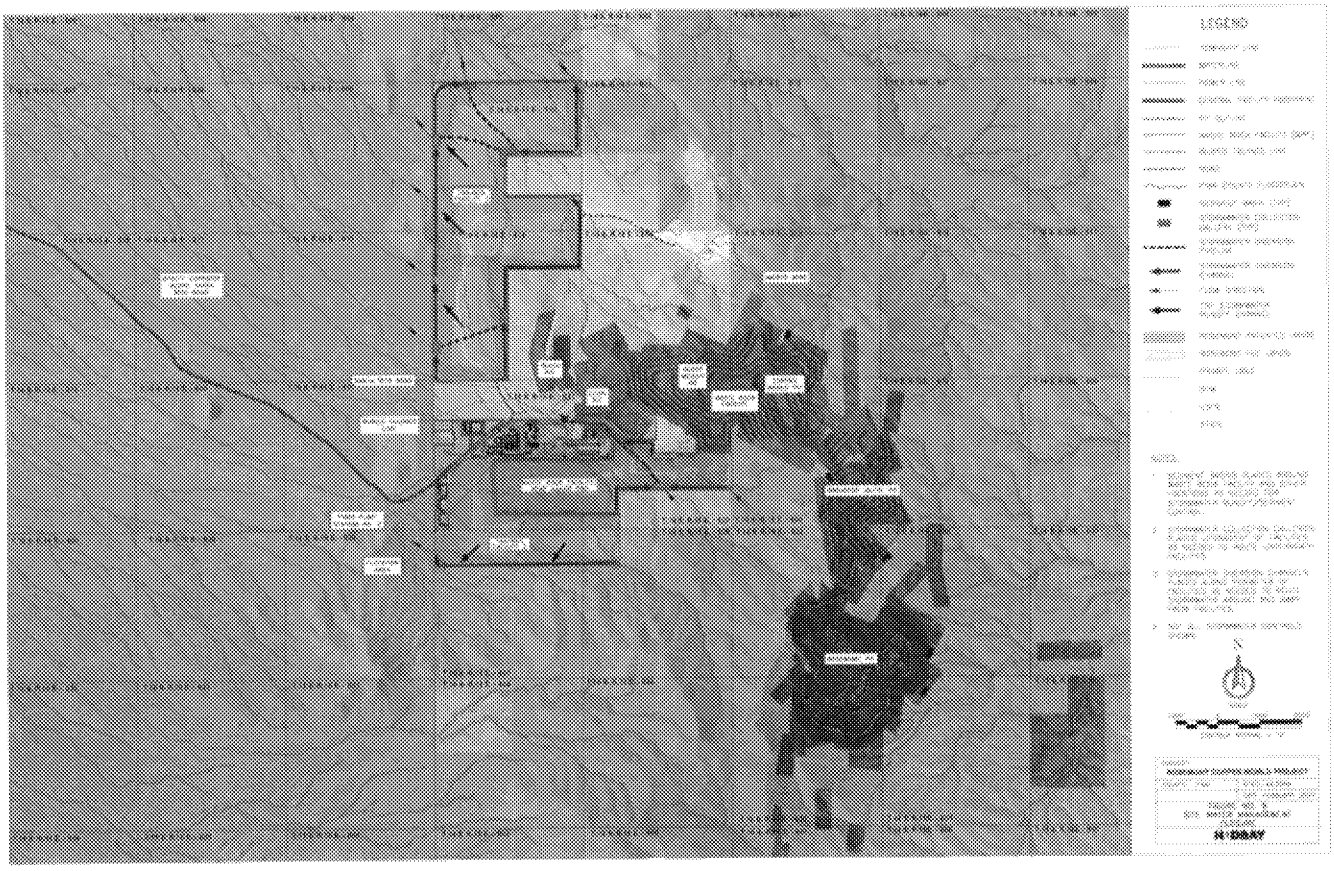

Figure 2: Hudbay's Site Water Management Closure for Rosemont Copper World Expansion[10]

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.[11] They also exhibit evidence of bed, bank, and high-water mark, including indicators of recent flows, as documented by field visits plotted on the following map, Figure 3.[12]

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[10] This map does not indicate additional footprints associated with the Rosemont Mine that have been proposed as part of the mines waste rock and tailings activities. This footprint is shown in Figure 1 and again in Figure 6.

[11] *See* U.S. Env'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.").

[12] Lainie Levick, A Report to Save the Scenic Santa Ritas (Nov. 8, 2021) (Ex. 1 to Tribes' Notice of Intent to Sue (April 4, 2022).

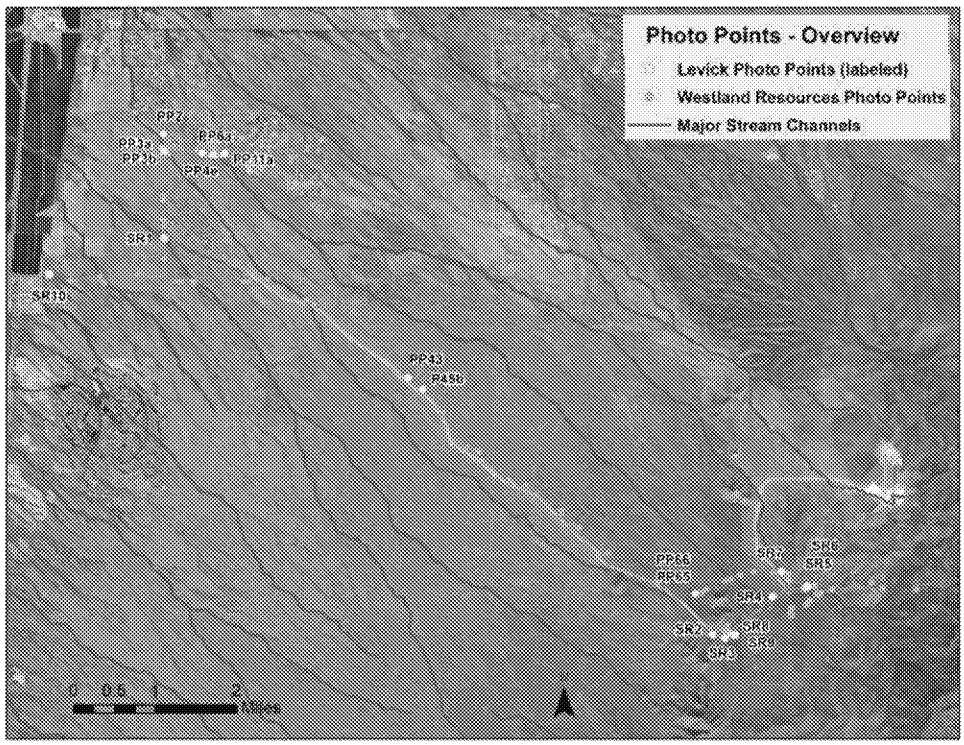

Figure 3: Ephemeral streams to Sahuarita and Santa Cruz River

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.[13] Rosemont prepared plans and figures showing the locations of the proposed activities, including discharges into the network of ephemeral streams running across the site.[14] Conservation Groups are aware that the Tohono O'odham Nation, Pascua Yaqui Tribe, and Hopi Tribe (collectively, Tribes) have asked the company for confirmation that it commenced construction activities, but has received no response.[15]

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

[13] Letter from Javier Del Rio, Vice President, Hudbay Minerals, Inc., to Pima County Regional Flood Control District (March 10, 2022).
[14] *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.
[15] *See* FN 13, Ex. 2 to Tribes' Notice of Intent to Sue (April 4, 2022).

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 and 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. As captured in the aerial photograph below, operations on the west side of the Santa Rita Mountains have resulted in rock, soil, and other material being discharged into at least one ephemeral stream in multiple places.

Figure 4: April 11, 2022 aerial photograph of ephemeral stream impacted by filling and dredging at Rosemont Copper World Expansion

The approximate location of this violation is identified in Figure 5 with a pin in T18S R15E 23 and appears to be within the utility corridor for the Rosemont Mine. Figure 5 also shows Rosemont's proposed mining operations on both the west and east side of the Santa Rita Mountains, although it does not depict the waste rock and tailings piles that are also proposed on the east side of the mountain range.

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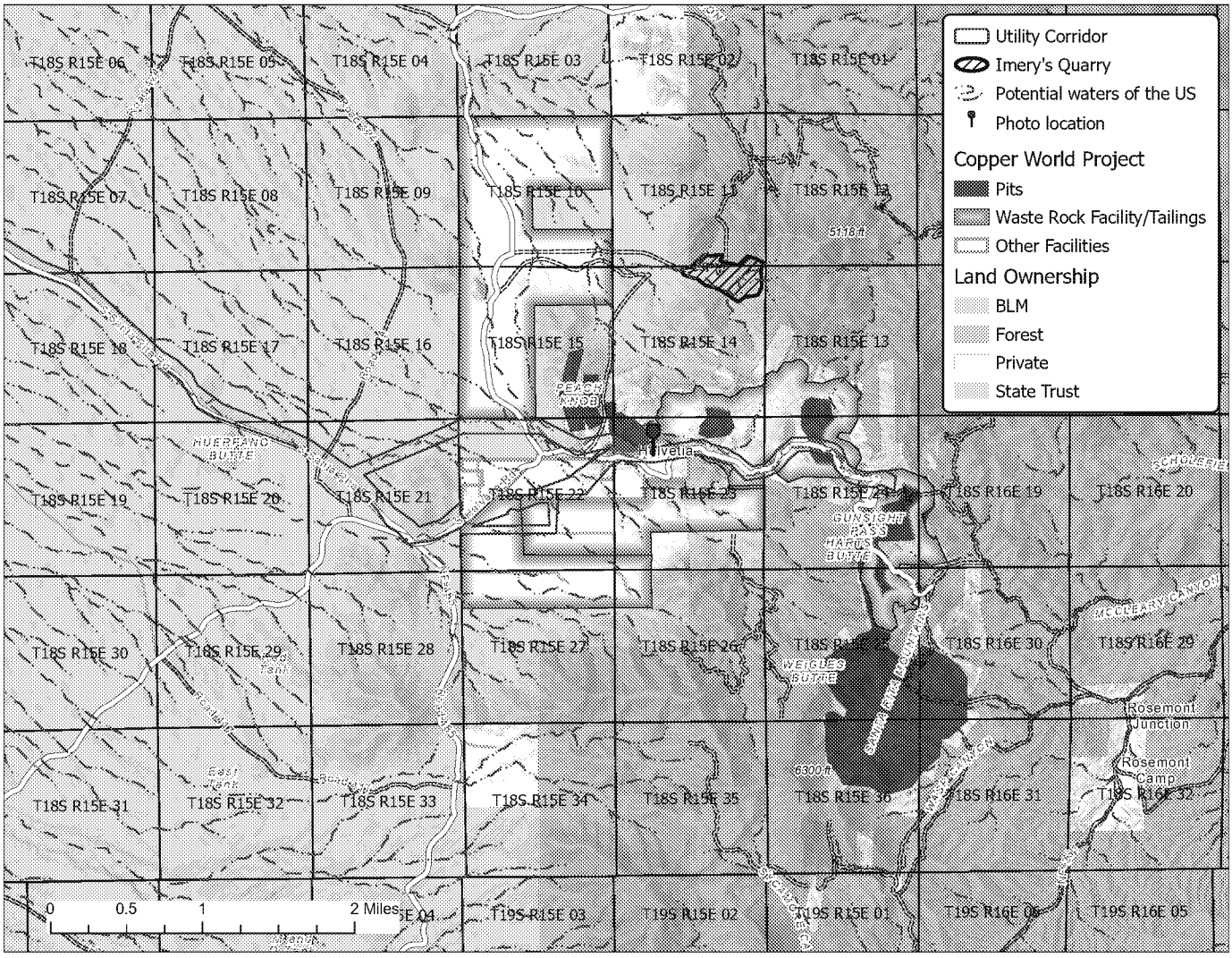

Figure 5: Map depicting approximate location of the filled ephemeral stream, Rosemont's Copper World Expansion, and the Rosemont Mine pit and the associated utility corridor, which is also slated to be used for both east and west side operations.

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.[16] The overwhelming majority of studies, including almost every study analyzed by the Corps and 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.[17]

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[16] 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.

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

Yet, Rosemont has undertaken activities filling at least one ephemeral stream in several places (Figure 4) related to its proposed development of the Copper World Expansion. According to Rosemont, it also imminently plans this month, April 2022, to undertake additional operations in the furtherance of its Copper World Expansion that will result in additional discharges of dredge or fill material, and destroy the network of ephemeral streams woven across the site without the required section 404 permit. These 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 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.

Rosemont cannot rely on the two Approved Jurisdictional Determinations (AJD's) that were issued under the now vacated Navigable Waters Protection Rule (NWPR) as a shield from lawful permitting for its operations at the Rosemont Copper World Expansion site. First, the Corps has been unequivocal that Rosemont cannot rely on the AJDs, stating on January 6, 2022, and again on April 6, 2022, that due to the vacatur of the NWPR "that you cannot rely on the March 2021 NWPR AJDs as accurately delineating all jurisdictional waters under the current regulatory regime with each AJD's review area."[18]

Second, the AJDs are based on a vacated rule that arbitrarily ignored science on ephemeral streams. In vacating the NWPR, two federal courts concluded that 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." *See Pascua Yaqui Tribe v. EPA*, No. CV-20-00266-TUC-RM, 2021 WL 3855977 at *5 (D. Ariz. Aug. 30, 2021); *Navajo Nation v. Regan*, No. 20-CV-602-MV/GJF, 2021 WL 4430466, at *3 (D.N.M. Sept. 27, 2021) (quoting *Pascua Yaqui Tribe*). Both EPA and the Corps admitted "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 that relied on the NWPR to categorically exclude ephemeral streams on the mine site and strip protections for other intermittent features.

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[18] Letter from Julie A. Balten, Colonel, U.S. Army Commanding, Dep't of the Army, U.S. Army Corps of Eng'rs to Matt Bingham, Hudbay Minerals, Inc. (April 6, 2022).

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Nor can Rosemont rely on the suspended 404 permit that was issued for the proposed Rosemont mine and the utility corridor associated with this mine on the west side of the Santa Rita Mountains. The Corps has been clear that "Rosemont Copper Company is not authorized to discharge fill material into waters of the United States under its suspended permit."[19] Yet, Rosemont is proposing to obliterate some of the very washes identified in the suspended 404 permit.

Additionally, this suspended permit does not cover the extent of impacts to waters of the United States that the proposed Copper World Expansion of the Rosemont mine would have. To the contrary, the analysis of the Rosemont Mine, which the Corps relied on in issuing the suspended 404 permit, expressly excluded consideration of any impacts from the proposed Copper World Expansion. This was because, according to the Forest Service, it was not reasonably foreseeable because there was no permit application or formal consideration of the proposal before a legislative body or agency at that time. Thus although "within the spatial and temporal bounds of the Rosemont Copper Project" "future mining by Rosemont Copper of other mineral deposits in the area, specifically including the Peach-Elgin, Copper World, and Broadtop deposits" was "considered to be speculative."[20] These areas excluded from analysis are the precise areas that are encompassed within Rosemont's Copper World Expansion.

As show on the next page in Figure 6, the utility corridor that was analyzed as part of the proposed Rosemont mine, although located predominantly on the western side of the Santa Rita Mountains, did not include filling of ephemeral streams to the extent or degree that would encompass Rosemont's proposed activities for Rosemont's Copper World Expansion. Yet, the Copper World Expansion overlaps with this area (Figure 5 and Figure 6) and the suspended permit, and extends beyond the suspended permit's boundaries to include additional grading and filling of these same jurisdictional waters for the construction of tailings piles, waste rock dumps, and mine pits on the western side of the Santa Rita Mountains.

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 Conservation Groups reserve right to file a citizen suit within 60 days to ensure compliance with the Clean Water Act.

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[19] *Save the Scenic Santa Ritas, et al. v. U.S. Army Corps of Eng'rs, et al.* 19-cv-00177-JAS, ECF No. 98 (Sept. 27, 2019).

[20] U.S. Forest Serv., Final Envtl. Impact Statement for the Rosemont Copper Project, Vol. 2 at 140 (Dec. 2013).

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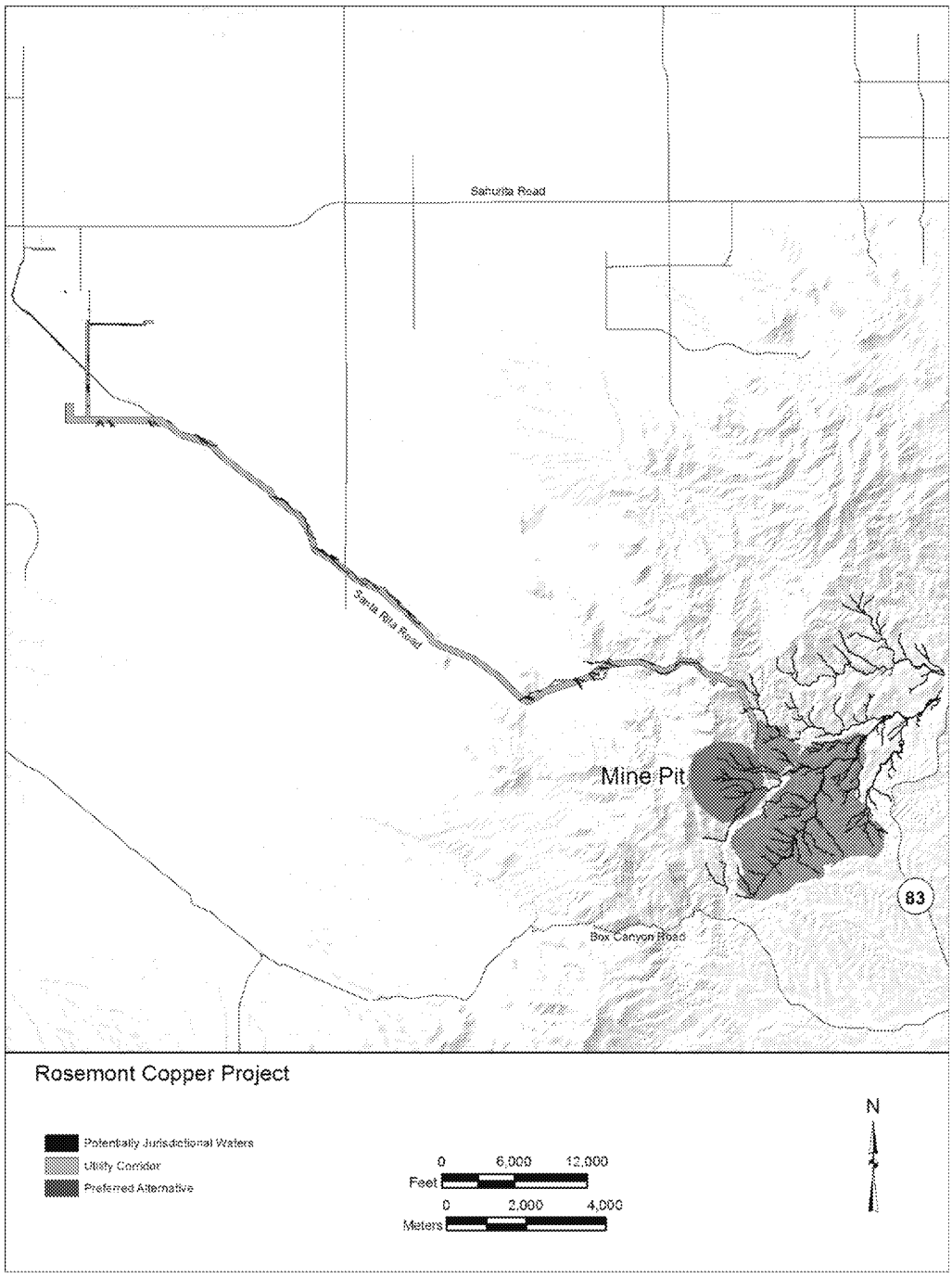

Figure 6: Potentially jurisdictional waters that were analyzed for the proposed Rosemont Mine project area. The shaded area to the east and north of the mine pit depicts areas that would be impacted by waste rock and tailings. The areas analyzed on the west side of the Santa Rita Mountains does not extend beyond the utility corridor or otherwise include the additional jurisdictional waters that will be impacted by the Copper World Expansion.

III. Identity of Persons Giving Notice and Their Counsel

In accordance with 40 C.F.R. § 135.3, notice is hereby provided of the Conservation Groups' names, addresses, and telephone numbers, as well as the names, address, and telephone number of their legal counsel, Center for Biological Diversity and Western Mining Action Project.

Conservation Groups:

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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 Conservation Groups 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 or 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 Conservation Groups reserve the right to take appropriate legal action to enforce the Clean Water Act. We are available to meet with Rosemont or its representatives to attempt to resolve these issues within the 60-day notice period.

Sincerely,

/s/ Allison N. Melton
Allison N. Melton
Senior Attorney

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