From:	Richard Kamp
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Subject:	Wickenvironment: Rosemont and mountaintop mining?; Coronado and EPA
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The Coronado National Forest is in final stages to approve the Rosemont mine in spite of Supervisor Jim Upchurch's admission that it will have substantial water quality and quantity impacts. Meanwhile, US EPA Region 9 has made very clear that a November 7 letter, that rejects the Rosemont mine as having unacceptable water impacts under a Clean Water Act permit that the Army Corps might or might not issue, is the formal agency stance on Rosemont. Where is this going poltically and legally based on 2013 EPA court decisions on West Virginia mountaintop coal mining? **See the analysis by Wick Communications Environmental Liaison Dick Kamp at: http://enviro.wickcommunications.com/author/bepdick/**

The Coronado on Track One; EPA on Track Two: Analysis by Dick Kamp, Wick Communications Environmental Liaison
December 21, 2013

The Forest Service has a Proposed Final Environmental Impact Statement posted on their website and they've issued a draft record of decision (ROD) in favor of the "Barrel Alternative" for the Augusta Resource Rosemont mine on the grounds that they have no choice. Coronado Supervisor Jim Upchurch is frank that Cienega Creek and groundwater levels will be impacted, but the 1872 Mining Act and 20th century updates guides his hand. On January 1, a 45 day comment period on the EIS will be provided for those who commented on the earlier scoping and draft EIS documents.

Sometime between April 1 and July 1, 2014, Southwestern Regional Forester Cal Joyner will respond to the objections to the final Proposed FEIS "which may include instructions to the appropriate official to incorporate additional changes in the draft ROD or to move forward with the project."

Upchurch announced December 16 that the President's Council on Environmental Quality is working to strengthen communication, but not resolve disputes, between agencies on the Rosemont issue. He stressed that BLM and the Forest Service are close to developing mitigative strategies to address their differences which BLM agrees is the case. Laws at issue still could govern archaeological protection, endangered species, air quality and of course water quality and quantity.

Litigation, barring a legal miracle according to several attorneys for the mine opponents, will begin once the Forest Service issues its final ROD in favor of Rosemont and it will be based on the quality of the Forest Service EIS. Litigation against the EIS cannot be based on agency approval of the mine even if it was demonstrated that laws cannot be complied with under the National Environmental Policy Act. But EIS litigation against the Forest Service would be based on claims that the document was not thorough enough.

Separate legal challenges can be expected based on the final decision approving Rosemont, itself. The ROD must be based on the EIS, and the EIS must demonstrate

that the Rosemont mine will not violate the Clean Water Act—and any others—under NEPA. As far as lawsuit details: no attorneys are dumb enough to lay out their planned litigative strategy for a newspaper article or column as they frequently tell me.

The Forest Service drama will soon be over. Mine opponent suits against the state challenging their authority to protect groundwater and air will continue for awhile. ADEQ has long been adamant that they are not required to regulate a mine pit's impacts on groundwater under state law.

Parallel 404 Dance: **The EPA and the Army Corps of Engineers have a parallel but separate dance underway as they jointly evaluate a Clean Water Act Section 404 (c) permit that the Corps would issue that would allow the mine to impact waterways under the CWA. The 404 decision must be based on the final ROD and EIS.**

EPA Has Made It's Rosemont Decision**: On November 7th, EPA Region 9 sent a letter to the Army Corps of Engineers, It explicitly stated that their analysis of the Augusta Resource proposals, documentation to develop the Rosemont mine, and the draft final EIS circulated to various agencies could justify the issuing of a 404 permit Blunt and clear, it included their earlier January 2013 analysis that essentially was quite similar.**

On December 16, Coronado's Upchurch said that there has been "progress made" since the November 7 letter that Augusta emphasized was out of date. As of December 20, Region 9 EPA disagreed. Agency spokeswoman Margot Perez Sullivan said, "The November 7 letter is where we're at," as she has for the past month. In the past, Region 9 has been extremely vocal with this writer on their concerns over the exact same issues; now they've adopted a bunker attitude to further discussion, or rather they haven't changed their minds.

EPA potentially approved of one mitigative action to offset Rosemont's impact submitted to the Corps to enhance water flow below Pantano Dam. However the agency analyzed "information…in the Preliminary Agency FEIS dated July, 2013, Rosemont (documentation from September, 2013, meetings with Rosemont, the Corps and Pima County; site visits by EPA staff and other information contained in documents from multiple sources (that) leads us to conclude that the proposed Rosemont Mine project does not comply with 40CFR 230.10(b),(c) and (d) (that is Section 404 of the Clean Water Act) and should not be permitted as proposed."

In EPA words: **Under the preferred "Barrel Canyon alternative" proposed by the Coronado, in addition to degradation of the "Outstanding designated waters of Cienega Creek and Davidson canyon", the mine lying within the Cienega Creek watershed would "permanently fill approximately 18 miles of streams on a 5000 acre footprint…fragment an intact natural hydrologic landscape unit composed of hundreds of miles of streams stretching many linear miles. The mine pit will reverse groundwater flow direction well beyond the project and cause permanent drawdown of groundwater sustaining hundreds of acres of springs, seeps, streams and wetlands and their aquatic and wetland dependent fish, wildlife and plant species." Aquatic resources associated with Cienega Creek and its tributaries: "Barrel Canyon (alternative) Davidson Canyon, Empire Gulch, and Gardner Canyon are dependent on the waters that will be impacted**

by the mine."

Something may change, even though EPA can't see how according to their November 7 letter. They will keep on dialoging with Augusta and the Corps, but they clearly expect to continue recommending a veto of any potential Corps approval under environmental authority to do so under the Clean Water Act. Nobody knows what the Corps will decide.

The politics of the 404 permit: **It is the Army Corps that issues or denies a 404 permit. However, EPA's Administrator has exercised Clean Water Act authority to veto a Corps permit approval 13 times in 30 years, most recently with mountaintop coal mining in West Virginia.**

As many remember in Southeast Arizona, the most relevant Corps action that involved the EPA was the approval of the Santa Cruz River as a "navigable body of water" in 2008.
Politics and environmental precedent played a role then, and may again in 2014. In 2008, both Bush EPA and Corps succumbed to political pressure from a then-Democratic House of Representatives led by Henry Waxman to declare much of the Santa Cruz River and the Los Angeles River navigable, and therefore protected, under a more legally impotent Clean Water Act than in the past following a Supreme Court action.

Santa Cruz protection raised the bar on the degree of protection that the Rosemont mine would have to provide the Santa Cruz River and its ephemeral tributaries under a 404 permit that include most of the streams under question. More to the point, however: Obama's Region 9 EPA, under direct guidance from EPA in Washington, is more likely to take a stand to interpret the Clean Water Act more stringently and literally than a Bush EPA did.

This issue moves to a high level in Washington, if the Corps does NOT reject the section 404 permit. Prior to November 7, and agency silence, EPA in DC consistently commented that they were fully behind the Region 9 analysis of Rosemont.

EPA's current legal 404 position: **In January, 2011, EPA issued a final decision to reject a 404 permit allowing the West Virginia mountaintop Spruce coal mine to operate under the Clean Water Act. To quote from their 99-page decision: "EPA's 404 (c) authority does not require a finding that the particular circumstances are unique, rather it requires a finding of unacceptable adverse impacts to protected resources… authority is discretionary and the agency evaluates unacceptability based on the context of the adverse impacts including their relative size and whether or not it is an impact the aquatic resource can incur without significant environmental effects." Sounds parallel to the November 7 Region 9 letter wording. The Spruce Mine authority was held up in April, 2013 by a conservative DC court of appeals. Spruce Mine owner Mingo Logan Coal Mining petitioned the Supreme Court to overturn that authority on November 14, 2013.**

2014 will prove interesting on this "discretionary" 404 issue