



DEPARTMENT OF THE ARMY
U.S ARMY CORPS OF ENGINEERS
SOUTH PACIFIC DIVISION
450 GOLDEN GATE AVENUE
SAN FRANCISCO CALIFORNIA 94102-3661

CESPD-ZA

March 30, 2023

MEMORANDUM FOR RECORD

SUBJECT: Revocation of Department of the Army Permit Number SPL-2008-00816-MB

1. Introduction: This memorandum for record documents my determination to revoke the permit issued on 08 March 2019, to the Rosemont Copper Company (Rosemont), a subsidiary of Hudbay Minerals, Inc. (Hudbay), for the discharge of fill material into waters of the U.S. as a result of clearing, grubbing, and grading activities on the Rosemont Mine site, construction of off-site roads and utility lines, and construction of compensatory mitigation at the Sonoita Creek Ranch/Rail X Ranch site, Gunsight Pass stock tank, McCleary Canyon stock tank, Rosemont Crest stock tank, and Barrel Canyon East stock tank.

2. Background: In July 2007, the applicant submitted a preliminary mine plan of operations to the Coronado National Forest (the Coronado), requesting approval to construct, operate, reclaim, and close an open pit mine for development of the Rosemont ore deposit on and adjacent to National Forest System lands administered by the Coronado.

a. **NEPA and EIS.** The United States Forest Service was the lead Federal agency for the preparation of an Environmental Impact Statement (EIS) pursuant to the National Environmental Policy Act (NEPA). The U.S. Army Corps of Engineers (Corps), three other federal agencies (Department of the Air Force, Bureau of Land Management, and the Smithsonian Astrophysical Observatory), nine state agencies, and three local agencies were cooperating agencies in the development of the EIS. A Notice of Intent to prepare an EIS was published in the Federal Register (73 FR 13527) on 13 March 2008. A Notice of Availability of the Draft EIS for review and comment was published in the Federal Register by the U.S. Environmental Protection Agency (USEPA) on 21 October 2011. The Final EIS was published in the Federal Register by USEPA on 13 December 2013 (78 FR 75919). The Forest Service determined that preparing a Supplemental Information Report (SIR) was appropriate to address extensive issues identified during the objection period. The SIR was released to the public on 22 May 2015. After release of the May 2015 SIR, the Forest Service received additional information that warranted the preparation and publication of a second SIR. The Forest Service released the second SIR to the public on 21 July 2016. The Forest Service issued their final Record of Decision (ROD) for the proposed action on 06 June 2017.

b. **DA Permit.** On 26 October 2011, the permittee submitted its application for a Department of the Army (DA) standard individual permit to the Corps, Los Angeles District under Section 404 of the Clean Water Act to discharge dredged or fill material

into waters of the U.S. The District issued a public notice, dated 06 December 2011, announcing the availability of the Draft EIS, the receipt of an application for a DA permit, and requesting comments on the proposed action from interested parties by 05 January 2012. On 2 January 2012, the Corps issued a public notice extending the comment period to 19 January 2012. The District determined that it was not in the public's interest to issue the permit.

On 04 March 2014, then Arizona Governor Janice K. Brewer submitted a letter to the District stating the public interest would be advanced by approval of the proposed action and issuance of a permit by the Corps. On 28 May 2015, Arizona Governor Douglas A. Ducey submitted a letter to the District reaffirming the position of Arizona that the public's interest would be served by approval of the proposed action. As identified in 33 C.F.R. § 325.8(b)(2), a district engineer will refer applications to the division engineer for resolution when the recommended decision is contrary to the written position of the Governor of the state in which the work would be performed. On 25 July 2016, the District referred the application to the Division Engineer, Brigadier General D. Peter Helmlinger, for resolution, recommending the application for the proposed action be denied.

On 08 March 2019, the Division Engineer issued a Record of Decision (Attachment A), adopting the Final EIS, and determining that issuing a permit for the proposed action complies with the USEPA's Section 404(b)(1) Guidelines and would not be contrary to the public interest. The Division Engineer also issued a permit (Attachment B) for the proposed action on 08 March 2019.

c. Court Decisions and Suspension of DA Permit. Multiple lawsuits were filed against the federal government over approvals related to the proposed mine. Several lawsuits were filed by the Tribes (Tohono O'odham Nation, Pascua Yaqui Tribe, and Hopi Tribe) and environmental groups against the Forest Service, challenging the compliance with NEPA. After the Division Engineer's decision to issue the permit, two lawsuits were filed by the Tribes and environmental groups against the Corps challenging the permit decision. On 31 July 2019, the U.S. District Court for the District of Arizona issued a decision, vacating and remanding the Forest Service's Final EIS upon which both the Forest Service and Corps relied, as well as the Forest Service's ROD. This decision was appealed to the Ninth Circuit and on 12 May 2022, the Ninth Circuit affirmed the lower court's decision.

As a result of the District Court decision, on 23 August 2019, the Division Engineer found that immediate suspension (Attachment C) of the 08 March 2019, permit was in the public interest and directed the permittee to stop work in the permit area. This determination was made because the Corps relied upon and adopted the Final EIS prepared by the Forest Service which the District Court vacated.¹ On 18 October 2019, the District Court then issued a stay in the cases against the Corps. More recently, on 23 May 2022, those cases were dismissed as moot after Rosemont indicated to the court that it was "surrendering" its permit. As Corps regulations do not recognize the

surrender of a permit, the Corps viewed this surrender as a request to revoke the permit.

d. **Approved Jurisdictional Determinations.** In response to a request from Hudbay, the District completed two approved jurisdictional determinations (AJDs) under the Navigable Waters Protection Rule (NWPR), on 24 March 2021, determining that the Rosemont Copper site and off-site infrastructure area (utility corridor) do not contain waters of the U.S. subject to Section 404 of the Clean Water Act. The AJDs geographic area is coextensive with the permit area whereas the Preliminary Jurisdictional Determination (PJD) that informed the original permit included washes outside of the permit area. The permittee was directed to discuss its permit with the Division if it wished to proceed with its project based on the AJDs. The permittee did not reach out to Division to discuss the status of the permit in light of the AJDs at that time. The current status of the AJDs is that they remain valid. The Rosemont AJDs are: (a) final agency actions, in that each action “mark[s] the consummation of the agency’s decision-making process” and “is one by which rights or obligations have been determined, or from which legal consequences will flow,” *U.S. Army Corps of Eng’rs v. Hawkes Co.*, 578 U.S. 590, 597 (2016) (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)); (b) “binding on the Government” within the meaning of the 1989 Memorandum of Agreement between the United States Environmental Protection Agency and the United States Department of the Army concerning the determination of the geographic jurisdictional scope of “waters of the United States” for purposes of Clean Water Act section 404; (c) “valid for a period of five years” within the meaning of Regulatory Guidance Letter 05-02; and (d) subject to revision within the five-year period per Regulatory Guidance Letter 05-02, such as based on “new information.” Like all AJDs issued under the now vacated Navigable Waters Protection Rule, there are a few limitations on how they can be used or relied upon. The Environmental Protection Agency and the Corps outlined those limitations in a Public Notice issued on 5 January 2022. That notice is available here: <https://www.usace.army.mil/Media/Announcements/Article/2888988/5-january-2022-navigable-waters-protection-rule-vacatur/>.

e. **Revocation Process.** On 19 April 2022, the Tribes and environmental plaintiffs filed to reopen the stayed court cases filed against the Corps due to the permittee’s activities on the western side on the Santa Rita Mountains. During the pendency of that litigation, on 28 April 2022, Mr. Javier Del Rio, Vice President South America and USA for Hudbay, notified the Division Operations and Regulatory Chief, Ms. Tori White, he was surrendering the suspended permit on behalf of Rosemont (Attachment D). On 04 May 2022, Ms. White responded, acknowledging receipt of the letter, and identifying that there is no regulatory process to surrender a DA permit. In addition, Ms. White identified that the Corps would view the permittee’s letter as a request to revoke the DA permit and would process the request under 33 C.F.R § 325.7(d) (Attachment E). By subsequent letter dated 03 June 2022 (Attachment F), to Hudbay, Ms. White confirmed the Court’s dismissal of the Corps’ cases did not revoke the permit notified Hudbay and the Corps is continuing its revocation review process. By letter dated 27 July 2022

(Attachment G), Mr. Del Rio notified Ms. White Rosemont's position is the permit no longer exists and Rosemont is no longer committed to avoiding areas covered by the permit. By electronic mail on 03 August 2022, Ms. White acknowledged receipt of the letter and reaffirmed the Corps' position.

3. Permittee: Rosemont Copper Company
5255 East Williams Circle, Suite 1065
Tucson, Arizona 85711

4. Work Authorized and Locations: In the 08 March 2019 DA permit, the Division authorized the permittee to permanently and temporarily discharge fill material into 48.48 acres of waters of the U.S. through clearing, grubbing, and grading activities on the Rosemont Mine site, construction of off-site roads and utility lines, and construction of compensatory mitigation at the Sonoita Creek Ranch/Rail X Ranch site, Gunsight Pass stock tank, McCleary Canyon stock tank, Rosemont Crest stock tank, and Barrel Canyon East stock tank, at multiple locations within the overall project area and off site. The Rosemont Copper Mine is located in southern Arizona about 25 miles southeast of downtown Tucson. The site is situated on both private lands owned by Hudbay and on Coronado National Forest Lands. The mine itself would be located generally on the east slope of the Santa Rita Mountains; a utility corridor serving mine operations would extend from the mine site to a point northwest of the mine in the vicinity of Suaharita, Arizona. The utility line is located on the western side of the Santa Rita Mountains.

A complete detailed description of the authorized work and specific locations for each component are listed in the ROD and the permit. See Record of Decision for the Rosemont Copper Project (SPL-2008-00816-MB), dated 08 March 2019, and Department of the Army Permit Number SPL-2008-00816-MB, issued on 08 March 2019.

5. Tribal Input and Consultation: In May 2022, I decided to seek tribal consultation on the revocation of the permit. In June 2022 and August 2022, the Assistant Secretary of the Army for Civil Works directed the Los Angeles District to engage in tribal consultation on the AJDs discussed above. On 01 September 2022, the Division transmitted letters to the chairmen of the Tohono O'odam Nation, Hopi, and Pasqua Yaqui Tribes (Tribes), soliciting any input that they wished to provide for consideration, in making the decision as to whether to revoke the Rosemont Copper Mine permit and seeking government-to-government consultation on the revocation decision.

On 23 September 2022, Earthjustice, on behalf of the three Tribes, responded and proposed that tribal consultation on the AJDs take place before tribal consultation on the revocation process. The letter further stated that "[i]n the meantime, the Corps should not revoke the suspended permit, which provides crucial safeguards for our Nation's waters and cultural resources." (Attachment H). Earthjustice asserted that, in signing the permit, Hudbay agreed that there are jurisdictional waters at the Rosemont mine site

and that it cannot dredge, fill, or discharge any pollutants into those waters while the permit remains suspended. Earthjustice concluded that “[t]he permit should therefore remain in place, albeit suspended, until the Corps and Tribes can engage in the requisite consultation.”

On 05 January 2023, staff from Division, District, and the Environmental Protection Agency, met with staff and attorneys from the three Tribes, as well as attorneys from Earthjustice for a technical meeting. The Division staff explained the three separate and independent federal actions associated with the mining operations by Hudbay in the Santa Rita Mountains: 1) The Division clarified the next step is to consider input from the Tribal Leaders on the permit revocation process, 2) The District discussed the status of the AJDs, and 3) USEPA discussed their role with regard to mining operations. Earthjustice provided a presentation on impacts of mining operations on the western slope of the Santa Rita Mountains and stated Hudbay had expanded operations to both sides of the mountains and that the project was now the Copper World Complex. Earthjustice asserted that the Copper World Complex should be treated as a single project, for which a new AJD should be completed. Further, Earthjustice and the Tribes asserted that Hudbay was working in washes and that Hudbay had “refused” to obtain a permit, arguing that they were exempt. Earthjustice provided a report by their expert (Murphy) asserting the washes on the western slope of the Santa Rita Mountains in the Copper World site are jurisdictional. The Murphy Report did not analyze washes and/or potential waters of the US in the permit area.

On 01 February 2023, I met with the Tribes as part of the Government-to-Government consultation. The Tribes conveyed their concern with Hudbay’s ongoing and planned work. The Tribes conveyed the importance of their cultural ties to the Santa Rita Mountains, as well as the threat to important cultural sites, including burial sites, from that on-going and planned work. The Environmental Protection Agency also attended the tribal consultation in Phoenix, Arizona. During the tribal consultation, the Tribes requested that the Corps enforce the suspended permit in the permit areas and also that the Environmental Protection Agency take enforcement action against Hudbay for activity on the western side of the Santa Ritas.

On 3 March 2023, Earthjustice, on behalf of the Tribes, provided additional comments on the revocation, stating that because Hudbay has been conducting work on the Copper World Complex, including filling waters of the United States, the Corps should interpret the Copper World proposal as a new application for a permit under Section 404 of the Clean Water Act. (Attachment I). Earthjustice also identified that the Corps should refrain from deciding on the revocation until both the Corps and the Environmental Protection Agency have completed a jurisdictional analysis on waters across the project site, stating that revoking the permit would “give Hudbay a pass for its continued illegal fill activities in the face of multiple Corps orders to stop work.” Earthjustice also provided its view of the factors outlined in 33 C.F.R. § 325.7(a). The Corps has considered the Tribes’ views in the analysis of the factors and reasons below.

On 7 March 2023, staff from Division, District, and the Environmental Protection Agency met with tribal and Earthjustice attorneys for another technical meeting. Earthjustice summarized the letter it had sent on 3 March 2023. The federal agencies provided updates on the status of the AJDs and the permit revocation process. The Corps also responded to the enforcement request by explaining that given the lack of compliance with NEPA and the AJDs stating that there are no jurisdictional waters in the permit area that enforcement of the suspended permit would be extremely difficult.

6. Permittee Input: In its letter dated 28 April 2022, Hudbay stated that it had surrendered the permit. In its letter, dated 27 July 2022, Hudbay stated that Copper World was no longer committed to avoiding washes covered by the Permit. Hudbay asserted that the status of the Permit was directly at issue in the case of *Save the Scenic Santa Ritas v. U.S. Army Corps of Engineers*, No. 4:19-cv-177 (D. Ariz.). The letter cited the 23 May 2022, Order, from U.S. District Judge James Soto, dismissing the plaintiffs' claims on mootness grounds because Rosemont had surrendered the permit. The letter asserted that Judge Soto's Order directly addressed the argument that Rosemont was unable to surrender the permit because the Corps has no regulatory process specifically governing permit surrender. *Save the Scenic Santa Ritas*, Order at 7-8 (23 May 2022). The letter stated that Judge Soto held that the permit had been legally surrendered and was not able to be vacated because it did not exist and that his ruling was not appealed. As a result, the letter concluded it is now final and binding on the parties to the lawsuit, including the Corps.

In a letter dated 31 January 2023, Hudbay, as Copperworld, Inc., stated that it believed that it had surrendered its permit and disagreed that the suspended permit restricts activities, within the area covered by the suspended permit. The letter asserted that the Corps cannot legally order Copper World to stop work on its private land on the basis of the permit. The letter stated that a federal judge has already ruled that the permit was effectively surrendered and rejected the reasoning supporting the need to go through the revocation process. The letter went on to say that Copper World would like to maintain a cooperative relationship with the Corps and that they had always tried to be open and transparent in communications. The letter concluded that, in the spirit of cooperation and transparency, they would confirm that they did not have any plans to impact washes covered by the surrendered permit until 27 February 2023, at the earliest.

On 27 January 2023, the permittee requested a meeting with me to discuss their position on revocation. That meeting with held on 15 March 2023. At that meeting, the permittee reiterated its position that the permit is no longer valid based on Judge Soto's decision on mootness. I stated that the Corps was going to complete the revocation process. The permittee stated that they would not do any work in the permit areas until the conclusion of the revocation process.

7. Evaluation Factors for Revocation: As identified in 33 C.F.R. § 325.7(d), "following completion of the suspension procedures in paragraph (c) of this section, if revocation

of the permit is found to be in the public interest, the authority who made the decision on the original permit may revoke it.” Factors to be considered in making this determination are identified in 33 C.F.R. § 325.7(a), and are further discussed below:

a. The extent of the permittee’s compliance with the terms and conditions of the permit: The 08 March 2019 permit was suspended on 23 August 2019. Prior to the suspension of the permit, the permittee had been conducting actions related to the compensatory mitigation required in Special Conditions 1-8 of the permit. Specifically, the permittee was completing required documentation for creation of the short-term financial assurance required by Special Condition 5 of the permit, and documentation required for establishment of the preserve required in Special Condition 6.

On 20 May 2022, the permittee filed a notice in the district court stating that “[w]hile preparing for the Corps’ site inspection, Rosemont determined that native material comprised of soil and rocks had been placed in or inadvertently fallen into washes that run parallel to and cross an unimproved road on the western side of the ridgeline near Helvetia, within the utility corridor for the Rosemont Copper Project.” Dkt. No. 158. On 23 and 24 May 2022, representatives of District, Division, and Hudbay conducted a site visit to the Rosemont Copper mining site, off-site infrastructure area, and Sonoita Creek compensatory mitigation area. During the site-visit, District and Division staff identified a potential discharge of fill material into an ephemeral drainage (wash) in the off-site utility corridor covered by the permit at one location, identified as Checkpoint 6. As identified in the Memorandum for Record *SUBJECT: Results of Field Inspection within Rosemont Mine Permit Area (Corps File No.: SPL-2008-00816)* (Attachment J), this discharge resulted from soil and rock that had fallen into the drainage from the construction of drill pads constructed in adjacent uplands. The discharge of fill material at Checkpoint 6 was associated with Hudbay’s Copper World project, and not with the Rosemont Copper project.

During a technical meeting with representatives of the Tohono O’odham Nation, Hopi Tribe, Pascua Yaqui Tribe, and Earthjustice on 5 January 2023, they alleged Hudbay was working within the area covered by the Rosemont permit. On 5 January 2023, following this meeting, Ms. White contacted Mr. Bingham (Hudbay) and asked if any work was occurring within areas covered by the permit. Mr. Bingham told Ms. White that the Company was doing work on the western side in the utility corridor. On 13 January 2023, the Corps sent a letter to Hudbay reminding the company that they cannot do work in the suspended permit area consistent with the regulations and requested information describing the extent of work that has taken place within the permit area (Attachment K). By letter dated 31 January 2023, Hudbay responded it had changed the name Rosemont Copper Company to Copper World Inc., provided maps showing the footprint of phase I of Copper World relative to Rosemont, and confirmed it had not performed earthwork activities in any washes authorized to be filled under the permit and did not have plans to fill any washes before 27 February 2023 (Attachment L). By email on 24 February 2023, Hudbay further stated they would not fill any of the washes prior to a meeting with me and my staff scheduled for 15 March 2023.

On 3 February 2023, the Corps provided Earthjustice and the three Tribes a copy of Hudbay's 31 January 2023, letter. On 7 February 2023, Earthjustice replied indicating it had obtained drone footage identifying two recent locations where Hudbay had filled ephemeral streams along the Rosemont utility corridor near Lopez Pass. Earthjustice identified the GPS coordinates without onsite ground truthing and placed the GPS coordinates on a close-up map of the jurisdictional waters covered by the permit. On 9 February 2023, District staff reviewed the location data sent over by Earthjustice, compared available data from Google Earth, and determined the work appeared to be related to Copper World activities on the west slope of the Santa Rita Mountains and not associated with the Rosemont suspended permit. The Corps responded to Earthjustice with the following summary:

- Point No. 1: 31.8574308, -110.7647187 This point is located outside of the AJD and permit review area and outside of the Ordinary High Water Marks (OHWMs) mapped in support of the original permit. This point is located about 250 feet from the utility corridor and about 35 feet from the mapped wash in the original PJD.
- Point No. 2: 31.855722, -110.760574. This point is located outside of the AJD review area and outside of the OHWMs mapped in support of the original permit. This point is located about 215 feet from the utility corridor. There are no resources nearby that were mapped during the original PJD.
- The work on the western slope is outside of the AJD review area and outside of the mapped PJD areas for the permit. We will forward this information to EPA as they are lead investigating agency for Copper World.

On 10 February 2023, Earthjustice provided two additional examples for locations of alleged unauthorized fill within ephemeral streams in the utility corridor covered under the suspended permit. On 13 February 2023, District staff reviewed these coordinates and determined the locations appear to be within or very close to washes identified in the PJD but outside of the AJD review area and likely outside of the area associated with the work described in the original DA permit. For that reason, the activities at all four locations were referred to USEPA for evaluation.

In summary, it does not appear that work has been undertaken by Hudbay in waters covered by the suspended permit. I acknowledge that it is difficult to ascertain this with 100 percent assurance. However, I note that the issues discussed directly below in factor (b) weigh strongly in favor of revocation. Given the lack of compelling and clear-cut evidence that Hudbay has undertaken work in waters covered by the suspended permit, and the significantly changed circumstances discussed below, it is reasonable to proceed with revocation of the permit.

Special condition number 16 of the permit (Attachment B) required the permittee to implement the 2013 Memorandum of Agreement (MOA), that supports compliance with Section 106 of the National Historic Preservation Act (NHPA). Per the MOA, the Forest

Service was required to ensure the treatment measures in the approved *Utilities Historic Properties Treatment Plan* (HPTP) on Federal and private lands was implemented. The Corps was required to ensure the treatment measures in the approved Utilities HPTP on State land within its permit area were implemented. It is my understanding that Hudbay completed data recovery at two sites located within the utility corridor as required by the MOA. In letters dated 06 July 2022 (Attachment M) and 07 September 2022 (Attachment N), Hudbay indicated its intent to terminate the MOA. In a letter from Forest Service to Ms. White on 09 January 2023 (Attachment O), the Forest Service indicated that due to federal court decisions that resulted in its EIS and ROD being vacated, the Forest Service no longer has an undertaking. The Forest Service has been leading coordination with the Advisory Council on Historic Preservation Officer and signatories to the MOA regarding termination of the MOA. USACE will remain engaged in accordance with the provisions of the MOA.

b. Whether or not circumstances relating to the authorized activity have changed since the permit was issued or extended, and the continuing adequacy of or need for the permit conditions: Since the permit was issued in 2019, the District Court vacated and remanded the Final EIS and the Biological Opinion issued by the US Fish and Wildlife Service. As a result of the vacatur, the Corps' review of the proposed project is no longer in compliance with the National Environmental Policy Act (NEPA) or the Endangered Species Act (ESA). As the lead federal agency, the Forest Service is responsible for ensuring compliance with the NEPA and Section 7 of the ESA. In order to ensure compliance with the NEPA and the ESA, the Forest Service would need to prepare and finalize a new EIS and ROD and reinstate consultation with the USFWS. It has been more than three years since the District Court decision vacating the Final EIS, and there has been no indication from Forest Service that it intends to issue a new EIS or restart the NEPA process. The biological opinion issued by US Fish and Wildlife Service remains invalidated.

Because of the uncertainty related to the preparation of a new EIS and completion of additional ESA consultation, I do not know the extent that the authorized project may be modified or changed. It may be many years before the permittee pursues another permit for the Rosemont Mine, if they do so at all. Modifications to the permitted action may necessitate modification to both the project description and special conditions of the permit. If project modifications result in an increase or decrease in the discharge of fill material into waters of the U.S., modification of the Special Conditions related to compensatory mitigation may be necessary. At this time the full extent of any necessary modification is unknown, but, at a minimum, the Forest Service would need to comply with NEPA and ESA.

Hudbay has indicated the Rosemont Copper Company has been renamed Copper World, Inc., and has stated it no longer intends to construct the Rosemont Copper Mine. Instead, Hudbay intends to proceed with the Copper World Project which is predominantly on the west slope of the Santa Rita Mountains where Rosemont Copper Mine was located predominantly on the east slope of the Santa Rita Mountains. The

Rosemont utility corridor and the privately owned Rosemont pit have been incorporated into Copper World project. If jurisdictional waters are present within the Copper World site, this would trigger a new permit evaluation separate and independent from the Rosemont permit. The Rosemont permit conditions would not be adequate for Copper World Project and there is no continuing need for permit conditions for a project the permittee does not intend to construct.

It should be noted that Hudbay's intent to terminate the MOA remains whether or not the permit is revoked.

c. Any significant objections to the authorized activity which were not earlier considered: Throughout the review period for the project, over 6,500 comments were submitted providing information, expressing concerns with, or objecting to the project. All comments received throughout the review process were reviewed, evaluated, and responded to in Attachment A of the ROD. As identified in Section 2, since issuance of the permit, two lawsuits were filed against the Corps challenging the permit decision by organizations that had previously provided comments and objections throughout the permit process. No new objections not already evaluated in the ROD were submitted after issuance of the permit. However, Earthjustice, on behalf of the Tribes did object to Hudbay's "surrender" of the permit, and to revocation of the permit, based on a belief that having the suspended permit in place provided protection to waters within the permit area.

d. Revisions to applicable statutory and/or regulatory authorities: While no new applicable statutes have been enacted since the permit was issued, several regulations have been revised and reissued, including those related to the definition of waters of the United States and Section 401 of the Clean Water Act, along with NEPA and ESA. As the lead federal agency, the Forest Service would determine to what extent the revised NEPA and ESA regulations affect the proposed action. At this time, I do not know the extent to which the revisions of regulations would affect the permit.

When the Navigable Waters Protection Rule (NWPR) became effective in June 2020, waters that were presumed to be jurisdictional at the time the permit was issued were determined to be not jurisdictional. Although NWPR has been vacated, the AJDs rendered by SPL on 24 March 2021, for the Rosemont Copper Mine project, are valid for five years. It should be noted the Rosemont AJDs were not issued for the Copper World Project and any future jurisdictional determination for the Copper World Project would be conducted based on the rules in place at the time of the request.

e. The extent to which modification, suspension, or other action would adversely affect plans, investments and actions the permittee has reasonably made or taken in reliance on the permit: As identified in Section 2, the permittee has indicated that they want to "surrender" the permit, which I consider a request for revocation of the permit. The permittee has indicated Rosemont Copper Company is now Copper World Inc., and it plans to construct the Copper World Mine in lieu of the

Rosemont Copper Mine. The revocation of the permit affects plans, investments, and actions taken and proposed by the permittee at the Rosemont site; however, because the permittee has requested the revocation, I presume they have reached a business decision that this is the best way for them to proceed in this matter and they are willing to accept whatever financial effects may occur.

8. Reason for Revocation: On 23 August 2019, the SPD Division Engineer determined immediate suspension of the permit was in the public interest because of the U.S. District Court decision to vacate and remand the Final EIS prepared by the Forest Service. After that decision, the U.S. District Court invalidated the USFWS Biological Opinion. As a result of these court decisions, the Corps could no longer rely on the Final EIS or the Biological Opinion, and the proposed action is currently not in compliance with NEPA or Section 7 of the ESA. I do not know what future actions the Forest Service may take or when it might take them to resolve these issues. However, the applicant no longer appears interested in pursuing the EIS or the permit. In addition, the permittee has expressed an interest in surrendering the permit, which I view as a request to revoke the DA permit.

With regards to comments provided by the Tribes and Earthjustice related to considering the Copper World Complex proposal as a request for a DA permit, the Corps regulations are clear that a permit application must be submitted on the standard application form (ENG Form 4345), or other local variation of the application, and must contain certain information to be complete, which includes a signature by the applicant (33 CFR 325.1(c)-(d)). To date, the Corps has not received a permit application from Hudbay for the Copper World Complex project. The Corps does not have the authority to evaluate a permit application that has not been submitted.

In response to the comment provided by the Tribes and Earthjustice that the Corps should delay a decision on the revocation pending a determination on the jurisdictional status of aquatic resources within the Copper World Complex, I find that a determination on the revocation of the Rosemont Copper Project is not dependent upon a jurisdictional determination for the Copper World Complex Project. Revocation of the Rosemont Copper Project will not reduce any protections against the discharge of fill material into waters of the U.S. associated with the Rosemont Copper Project or the Copper World project. The permittee has not been authorized to discharge any fill material into waters of the U.S. associated with the Rosemont Copper Project since the permit was suspended on 23 August 2019. Therefore, revocation of this permit will not give Hudbay "a pass" to discharge fill material into waters of the United States. Any discharge of fill material into waters of the United States that is conducted without DA authorization is in violation of Section 404 of the Clean Water Act.

In addition, it should be noted the revocation of the permit for the Rosemont Copper Project is not a determination that a permit is not a required, nor is it a determination on the jurisdictional status of aquatic resources on the Rosemont Copper Project site. It is a determination that the permit issued on 8 March 2019 is no longer valid. Any

proposals by Hudbay to discharge fill material into waters of the U.S. on the Rosemont Copper Project site in the future would require them to apply for a Department of the Army Permit under Section 404 of the Clean Water Act.

I have considered whether revocation of the permit is a major federal action requiring NEPA review, a federal undertaking requiring compliance with Section 106 of the NHPA, a federal action requiring compliance with ESA, or an action triggering any other environmental compliance. I have concluded that revocation itself does not trigger environmental compliance because a revoked permit does not authorize the permittee to take any action.

Based on my review, I have determined the following: (1) the permitted action is not in compliance with NEPA or Section 7 of the ESA, (2) there is no estimated timeframe for if or when the action will be brought into compliance with NEPA or Section 7 of the ESA, (3) the applicant has requested revocation of the permit, and (4) during my evaluation of the five factors listed in 33 C.F.R. § 325.7(a), I have determined that revocation of the permit would be in the public interest. If at some point in the future the issues noted above at the Rosemont site are resolved and Rosemont (or a subsequent applicant) once again wishes to pursue a permit to discharge fill into waters of the U.S., they may submit a new permit application, which will be reviewed in accordance with applicable laws, regulations, and guidance in place at that time.

7. Conclusion: Based upon the above discussion, I find that immediate permit revocation is in the public interest. As identified in 33 C.F.R. § 325.7(d), I will notify the permittee in writing of the final decision. The notification will again inform the permittee it does not have authorization to discharge dredged or fill material into waters of the U.S. This determination does not preclude the permittee from submitting a new permit application for the action at a future date.

ANTOINETTE R. GANT, PMP
Brigadier General, USA
Commanding

Attachments:

- A Record of Decision for Rosemont Copper Project, 08 March 2019
- B Permit for Rosemont Copper Project, 08 March 2019
- C Notice of Permit Suspension, 23 August 2019
- D Letter from Javier Del Rio, Hudbay Vice President, 28 April 2022

CESPD-ZA

SUBJECT: Revocation of Department of the Army Permit Number SPL-2008-00816-MB

- E Letter from Tori White, SPD Regulatory Chief, 04 May 2022
- F Letter from Tori White, SPD Regulatory Chief, 03 June 2022
- G Letter from Javier Del Rio, Hudbay Vice President, 27 July 2022
- H Letter from Tribes, 23 Sept 2022
- I Letter from Tribes, 03 March 2022
- J Memorandum for Record re 23-24 May 2022 Field Inspection
- K Letter from Tori White, SPD Regulatory Chief, 13 January 2023
- L Letter from Javier Del Rio, Hudbay Vice President, 31 January 2023
- M Letter from Javier Del Rio, Hudbay Vice President, 06 July 2022
- N Letter from Javier Del Rio, Hudbay Vice President, 07 September 2022
- O Letter from Kerwin S. Dewberry, Forest Service Supervisor, 09 January 2023