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Regional Forester
Southwestern Region
333 Broadway SE
Albuquerque, NM 87102

By email to: objections-southwestern-regional-office@fs.fed.us

RE: OBJECTION to the Rosemont Copper Project Final EIS (FEIS) and Proposed Record of Decision (Draft ROD)

Submitted on behalf of Tucson Audubon Society by Paul Green and Christina McVie

Responsible Official: James Upchurch, Forest Supervisor, Coronado National Forest, Nogales Ranger District

I. Introduction

Pursuant to 36 CFR Part 218, Tucson Audubon files this Objection to the FEIS and Proposed ROD (including the proposed amendment to the Coronado National Forest Plan) issued by James Upchurch for the Rosemont Copper Project (RCP). Tucson Audubon filed comments on the Draft EIS on January 28, 2012 (recorded by the Forest Service as being from Paul Green and Christina McVie) and has fully participated in the Forest Service (USFS)'s review of the Project. Pursuant to 36 CFR 218.8, we state that the following content of this Objection demonstrates the connections between the January 29, 2012 comments (or "previous comments") for all issues raised herein, unless the issue or statement in the Draft ROD or FEIS arose or was made after the opportunity for comment on the DEIS closed, as detailed herein. Pursuant to the Administrative Procedure Act, 5 U.S.C. §553-706, and USFS requirements, the Regional Forester's Office must provide a detailed response to each of the issues/objections raised in this Objection.

Please note that while the website

https://cara.ecosystem-management.org/Public/Letter/18741?project=24544
records our comments, Tucson Audubon Society is not included in the list of organizations p1158 who commented on the DEIS.

II. The proposed project would violate Federal and State Laws and cannot be approved as proposed in the draft ROD.

The agency admits that the Project "must comply with applicable Federal and state environmental protection laws." Draft ROD at 10. As detailed herein, however, and as noted in the January 28, 2012 comments, the Project would violate federal and state, public lands, environmental, and wildlife, laws, regulations, and policies. As such, the USFS cannot approve the proposed Plan of Operations(PoO), as amended by any of the action alternatives, including the "Barrel Alternative" proposed to be approved in the Draft ROD. These laws (with their implementing regulations and policies) include, but are not limited to:

the National Environmental Policy Act (NEPA),

the National Forest Management Act (NFMA),

the Endangered Species Act (ESA),

the Migratory Bird Treaty Act (MBTA),

the Bald and Golden Eagle Protection Act (BGEPA),

the Federal Land Policy and Management Act (FLPMA),

Arizona State wildlife, air, water, and related statutes, Presidential Executive Orders related to wildlife, wetlands, and other resources potentially affected by the Project.

The remedy for these violations is for the USFS to not issue any Final ROD that would authorize approval of any PoO for any action alternative reviewed in the FEIS (i.e., the USFS must deny/reject any such PoO). This includes the proposed operation as modified by the Barrel Alternative, if it does not fully comply with each and every law, regulation, policy, and Executive Order noted herein.

The Regional Forester must send the FEIS and Draft ROD back to the Coronado National Forest with instructions to correct all errors noted herein before the USFS can consider approving any operations at the site. USFS is obligated to complete a Supplemental EIS prior to authorizing the proposed Rosemont Mine to move forward.

III. The Coronado National Forest must prepare a revised or supplemental Draft Environmental Impact Statement.

For the reasons that we go on to detail, and in Tucson Audubon's January 28, 2012 comments, the FEIS is substantially inadequate and violates NEPA. The FEIS is fundamentally flawed because of inaccurate and incomplete information contained throughout the FEIS and it presents an imbalanced analysis of the effects of the proposed Rosemont mine.

Critical and explanatory data, methodologies, and analyses are absent, which goes to the heart of NEPA's requirements regarding full and transparent disclosure of issues so that the public can credibly comment on the proposal. Furthermore, the FEIS contains considerable quantification of benefits but little to no quantification of adverse effects. Such unbalanced commentary is no help to a public trying to provide meaningful comment, and it is not helpful to the CNF in trying to make a credible analysis of the project. Furthermore, as explained in detail

below, the putative temporal and spatial "bounds of analysis" used in preparation of this FEIS are simply too constricting and inadequate for the public to understand fully the immediate and cumulative impacts. As such, the remedy for these inadequacies is for the USFS to prepare and publish a revised EIS for public and agency comment. At a minimum, a supplemental EIS must be published for public comment to meet NEPA's legal requirements.

Among other inadequacies noted herein, the FEIS

- fails to properly review all direct, indirect, and cumulative impacts (as well as connected actions),
- fails to conduct the required baseline analyses (and defers consideration of critical information until after the NEPA process is concluded)
- fails to conduct the proper mitigation analysis (including the effectiveness of all mitigation measures),
- presents significant new issues upon which the public did not have the proper opportunity to comment before the close of the comment period on the DEIS,
- fails to adequately respond to public and other agency comments (including the January 28, 2012 comments by Tucson Audubon), and
- presents a misleading and disorganized FEIS against the requirements of NEPAIV. Specific Issues Related to Tucson Audubon's Previous Objections

Birds, Biodiversity, and Ecological Function.

In our January 28, 2012 letter, we commented on the scale and scope of the destruction of ecological function. In the FEIS this has been revised on p xxxii. The FEIS Area of Analysis for Biological Resources p574 is considerably less inclusive than the model developed by Larry Winter, Ph.D. (Professor and Head, Department of Hydrology and Water Resources, University of Arizona), and W. R. Osterkamp, Ph.D. (Research Hydrologist, Emeritus, National Research Program, U. S. Geological Survey) in the Sonoran Institute's Statement of Concern—Ground-water Resources of the Sonoita Plain. This model quantifies drawdown of groundwater, and indicates effects that reach Sonoita (300m decline) and Elgin (200m decline).

Clearly there is scope for "significant vegetation losses and changes in the area, resulting in a decrease in nesting, overwintering, foraging, and roosting habitat for dozens of species of migratory and resident birds." Migratory bird species selectively use such habitat patches. The work of Dr Charles van Riper has revealed the importance of even small patches of trees to migratory songbirds. The lost of even individual trees in significant to the successful migration of passerines.

"There would be significant vegetation losses and changes in the area, resulting in a decrease in nesting, overwintering, foraging, and roosting habitat for dozens of species of migratory and resident birds. Every species currently occupying the area would potentially experience a

reduction in individuals and population size."

We noted that "for many species, surveys were not conducted, and it is not known whether these species actually occur within the analysis area." We also noted that 26 species "were retained for further analysis of impacts for the proposed RCP" but potential impacts were not addressed in the DEIS (p.354). We did not see analyses of this broader array of species, especially the effects of the loss of 63 springs due in part to lowered water table as a result of groundwater pumping and the effects of that pumping on birds that depend upon such sites.

The FEIS is restricted because of its lack of base-line information for a wide array of bird species, including year-round residents, passage migrants, summer visitors, and winter visitors. By way of example, on January 5th, 2012, the US District Court for Arizona found that the Forest Service failed to monitor populations of the Mexican Spotted Owl as required by a 2005 agreement with the U.S. Fish and Wildlife Service (USFWS) and that, in October 2008, the Service issued a report admitting it had not done the monitoring. The District Court's more recent ruling prevents the Forest Service from implementing several large-scale forest projects in New Mexico and Arizona that could have a negative impact on the Mexican Spotted Owl until USFWS can approve a new plan for protecting the bird. The Forest Service failed to address this outstanding issue when evaluating impacts of the proposed Rosemont mine on the Mexican Spotted Owls in the Santa Rita Mountains.

The FEIS falls back on the statement that "the project area does not contain typical Mexican spotted owl **habitat** of mixed conifers, pine-oak, ponderosa pine, and pinyon-juniper required for foraging and nesting/roosting. There are no known occurrences of this species within the project area, and surveys for this species *have not been conducted* (emphasis added) within the analysis area for the purposes of the proposed project. However, the Coronado compiled information on Mexican spotted owl protected activity center locations in the northern Santa Rita Mountains, and there are no documented Mexican spotted owl records or protected activity centers within the analysis area. The closest is the Ramanote Canyon Protected Activity Center, which is located approximately 0.7 mile to the west-southwest." We note that no monitoring has been done, p. 689

We reiterate that the Forest Service fails to, and must, include a detailed plan that will monitor the population trends of the Mexican Spotted Owl and fulfill its obligation to conserve its most imperiled wildlife in the Rosemont DEIS.

Migratory Birds: Habitat Loss, Context, and the Toxic Pit Lake

In our comments of January 28, 2012, we commented that recent studies by scientists at the University of Arizona reveal the importance of the Sky Islands to migrating birds in the western US. This is especially true in the fall and for species that have an interrupted molt. The Santa Rita Mountains are one of the key Sky Islands upon which these birds depend to migrate successfully.

Our Sky Island habitats are vital to those western fall migrants that have an interrupted molt strategy. More eastern species tend to complete their molt on their breeding grounds before

heading south. Some western species, however, leave their breeding grounds and head south and then interrupt their migration to stop in favorable habitat to molt their feathers. Our Sky Islands, including the Santa Rita Mountains Important Bird Area (IBA), are important molting areas. This pattern of interrupted molt and migration is more prevalent in birds of the west—with approximately 50% of species and subspecies using this strategy—than the east where only about 10% exhibit this behavior. It is thought that this difference is due to arid conditions found throughout the west in early summer which diminishes available food when birds are undergoing this physiologically demanding process. The abundance of food found in the Sky Islands during the late summer and fall fill the gap in available resources and the birds travel to these areas to take advantage of these resources. These birds are following a chain of stopover sites and we need to preserve the integrity of this chain to ensure their survival. Some of the species that show interrupted molt and migration are Lazuli Bunting, Painted Bunting, Western Kingbird, Lucy's Warbler, Western Tanager, Lesser Goldfinch and Bullock's Oriole.

"Nesting, overwintering, foraging, roosting, and molt migration habitat for migratory and resident birds within this important bird area also could be indirectly impacted by any of the action alternatives. Habitat within the important bird area could experience impacts from fugitive dust and air pollutants within the project area and could experience impacts from decreased surface water flow in Barrel and Davidson Canyons, groundwater drawdown, noise, vibration, artificial night lighting, and increased traffic volumes on SR 83 and other roads in the analysis area, causing a decrease in food availability for some migratory bird species and resulting in a loss of nest sites and cover. Although unintentional take of migratory birds is expected to occur*, it would not contribute to a measurable decline in bird populations associated with the Santa Rita Mountains Important Bird Area* (p. 698). No evidence is provided for this conclusion. Since very large numbers of migrating birds pass through our area each year, how do we assess the effect on these broader populations that are with us briefly that are no longer able to stop in this region to refuel? It would be like us planning on refueling our empty gas tank at a remote interstate gas station, to find it closed down.

Migration and molt are very taxing on birds, and for many species migration is the time of greatest mortality. However, the benefits of superabundant resources and decreased competition at distant breeding locations outweigh the high costs of migration from winter quarters. The success of this gamble, however, depends on suitable migratory stopover sites along the way. The destruction of the section of the Santa Rita Mountains under the footprint of the mine, and the extensive habitat areas that will be affected by changes in surface and subsurface hydrology, will likely have significant negative influences on the molting grounds of these birds.

The proposed Rosemont Copper Mine falls within the Santa Rita Mountains Important Bird Area, our state's first IBA, recognized in 2003. As the founder of the IBA program in Arizona, it is Tucson Audubon's responsibility to identify and address any threats to this Important Bird Area as they might affect the birds and the habitats that support those birds in this region.

The proposed operations of Rosemont Copper would significantly and negatively affect the birds of this Important Bird Area, species which are not considered in the FEIS.

The Santa Rita Mountains IBA contains a number Species of Conservation Status of the Sierra Madre bird community. These species include: Montezuma Quail, Northern Goshawk, Gray

Hawk, Whiskered Screech-owl, Elf Owl, Elegant Trogon, Arizona Woodpecker, Lucy's Warbler, Black-throated Gray Warbler, Red-faced Warbler, and Virginia's Warbler.

The IBA designation is relevant to protecting critical habitats used by birds during some part of their life cycle (for breeding, migratory stopover, and over-wintering) and for conserving general biodiversity.

The Santa Rita Mountains IBA was designated in 2003 because of the significant populations of conservation status species identified in this region as the result of extensive bird surveys. Unlike the FEIS, we do not see evidence of comprehensive surveys of the project site or the broader area of water drawdown considered by the Sonoran Institute.

The IBA contains a number of species of "conservation status" in Arizona and of the binational Sierra Madre bird community. These species include: Northern "Apache" Goshawk, Gray Hawk, Mexican Spotted Owl, Whiskered Screech-Owl, Bell's Vireo, Montezuma Quail, Elegant Trogon, Arizona Woodpecker, Violet-crowned Hummingbird, Lucifer Hummingbird, Costa's Hummingbird, Buff-breasted Flycatcher, and Varied Bunting.

Other "species of concern" that occur within the IBA include: Golden Eagle, Peregrine Falcon, Band-tailed Pigeon, Elf Owl, Eastern Bluebird (Azure Bluebird), Northern Beardless-Tyrannulet, Greater Pewee, Gray Flycatcher, Cordilleran Flycatcher, Bell's Vireo, Virginia's Warbler, MacGillivray's Warbler, Lucy's Warbler, Black-throated Gray Warbler, Grace's Warbler, Red-faced Warbler, Rufous-winged Sparrow, Arizona Grasshopper Sparrow, Cassin's Sparrow, and Botteri's Sparrow. Buff-collared Nightjar, a rare species in Arizona, is also present. Winter brings Red-naped Sapsucker, Black-chinned Sparrow, and Lawrence's Goldfinch to the IBA.

The USFS Sensitive and T & E Region 3 Species List – Birds (part of the table of AZ IBA avian species of conservation status), includes species that would be found within this IBA, and would be affected by Rosemont mine operations, they include: Northern "Apache" Goshawk, Gray Hawk, Gould's Turkey (high potential to impact), Yellow-billed Cuckoo (high potential to impact off-site), Whiskered Screech-Owl (potential to impact), Buff-collared Nightjar, Broad-billed Hummingbird (potential to impact), Violet-crowned Hummingbird (potential to impact), Lucifer Hummingbird (potential to impact), Northern Beardless-Tyrannulet (high potential to impact off-site), Buff-breasted Flycatcher, Abert's Towhee (potential to impact), Arizona Grasshopper Sparrow (high potential to impact), and the Varied Bunting (high potential to impact).

The mine project site ranges in elevation from 4,400 to 6,300 ft and supports a variety of upland habitat with vegetation characteristics of Madrean Evergreen Woodlands and Semi-desert Grassland. We see the development of this mine permanently affecting adversely the northern portion of the Santa Rita Mountains north of Box Canyon. The project will degrade the habitat of woodland and grassland dependent bird species. Some of these species find their prime habitat in Arizona in this region and habitat within the elevation range of the project, including (and most threatened by mine operations) the following Arizona conservation status species (all high potential to impact on-site): Montezuma Quail, Gould's Turkey, Eastern Bluebird (Azure Bluebird), Bell's Vireo, Lucy's Warbler, Rufous-winged Sparrow, Botteri's Sparrow, Arizona Grasshopper, Cassin's Sparrow, and Varied Bunting.

The most common statement in the FEIS regarding just the small portion of these species that are even considered in this document runs as follows: “Based on this, all action alternatives may impact individuals but are not likely to result in a downward trend toward Federal listing as threatened or endangered or in a loss of population viability (SWCA Environmental Consultants 2013b; WestLand Resources Inc. 2013a). p. 688.

These statements arise from some unspecified analysis taken related to the project site. However, the context is a broader one. A permitted Rosemont Copper Mine would likely lead to additional mine development in the Santa Ritas. A changing climate and greater drawdown of ground water will add to stress on these species. Tucson Audubon would like to see an analysis of a wider range of species in a broader context with more influencing variables, and conducted in a cooperative and transparent manner.

Habitat and hence bird population fragmentation has already led to endangered status and candidate status for two Arizona bird populations the FEIS mentions, the Southwestern Willow Flycatcher and the western population of the Yellow-billed Cuckoo. These changes could severely reduce populations of nesting birds of the ten species mentioned above, leading them down the path to endangered species status, something that we all want to avoid. Certainly, that is in part what Pima County’s decade long, national award winning conservation planning process has been designed to address. Pima County’s Section 10 Incidental Take Permit (ITP) and Multi-Species Habitat Conservation Plan (MSHCP) is close to being finished and their Sonoran Desert Conservation Plan (SDCP) and Conservation Land System (CLS) is designed to protect the county’s biodiversity and balance development while mitigating for any disturbances to our most valuable resources, such as the Santa Rita Mountain IBA. The FEIS is rather simplistic in how it considers bird populations will respond to the habitat destruction of the proposed mining operation.

Migratory Birds: Context, and the Pit Lake

Given the rapid and widespread human growth in southern Arizona, our public lands are key to the survival of most of the Arizona wildlife legacy of southern and southeastern Arizona. Tucson Audubon therefore considers that it is absolutely critical to manage the Coronado National Forest within the Santa Catalina, Nogales, Sierra Vista, and Douglas Ranger Districts for wildlife and recreational values as of highest priority within the multiple use mandate of the National Forest.

Noise and light disturbance should be addressed as related to wildlife avoidance. We expect noise sensitive species such as the Golden Eagle to avoid the northern portion of the Santa Rita Mountains, and hence this species would lose significant foraging habitat. In combination with the encroaching development around the Santa Rita Mountains, the permitting of Rosemont mine operations may together cause local abandonment of this species from the mountain range. Other species sensitive to noise and lights, which would effectively lose significant habitat, include Montezuma Quail and Gould’s Turkey.

When mining operations cease, the operators do not plan to backfill the pit. Instead it will act as hydraulic sink and fill with water. The FEIS acknowledges that mine pit lake water quality would exceed the aquifer quality standard for thallium and ammonia and various surface water quality standards for cadmium, copper, lead, mercury, zinc, and selenium.

The mine pit lake, because of its contact with exposed rock formations, could develop further hazardous water quality conditions, which could cause impacts to groundwater, birds, and wildlife.

From a regulatory standpoint, the mine pit lake is neither a navigable water subject to surface water standards nor a discharging facility subject to aquifer water quality standards. However, as a useful tool for disclosing and analyzing water quality impacts in the pit lake, both standards are compared with the pit lake water quality in this section because the mine pit lake water quality could exceed wildlife standards for three contaminants that are known to bioaccumulate (i.e., cadmium, mercury, and selenium). Thus, indirect impacts to wildlife species could occur from eating aquatic invertebrates originating from the mine pit lake.

In our comments of 28 January 2012, we comment on the potential effects of the toxic pit lake on migratory birds. The pit lake will be the largest open water body in the region, and is almost certain to attract significant numbers of migrating waterfowl. Because the FEIS does not include waterfowl in its analysis, it is incomplete in its analysis of the pit lake and its short and long term effects on bird species that will be attracted to the pit lake. There is need for additional data to evaluate the effects of the agency action on migratory birds. The FEIS does not fully evaluate the "key risk factors" (Page 2, Migratory Bird Analysis SWCA (2013i)). Attachment #1. To the dangers of the pit lake itself must be added the dangers of surface pooling of intermediate leaching solutions. How many such pools would exist, when would they exist, and what effects would they have on migratory and resident bird species?

The surface area of the pit lake will be around 213 acres, just a little smaller than Patagonia Lake (260 acres) 24 miles to the south of the pit lake. In 20 years the pit lake would have the fourth largest surface area compared to the other lakes in southern Arizona and ultimately at 213 acres, it will have the second largest surface area, with only Patagonia Lake being larger.

The water of Patagonia Lake has attracted the following 53 species as recorded on eBird:

Pacific Loon, Horned Grebe, Eared Grebe, Pied-billed Grebe, Western Grebe, Clark’s Grebe Double-crested Cormorant, Neotropic Cormorant, Blue-footed Booby, Least Bittern, Great Egret Reddish Egret Tricolored Heron, Green Heron, Black-crowned Night-Heron, Mallard, Gadwall, Northern Pintail, American Wigeon, Eurasian Wigeon, Northern Shoveler, Cinnamon Teal, Blue-winged Teal, Green-winged Teal, Canvasback, Redhead, Ring-necked Duck, Lesser Scaup, Long-tailed Duck, Bufflehead, Common Merganser, Red-breasted Merganser, Ruddy Duck, Osprey, Common Gallinule, American Coot, Virginia Rail, American Avocet, Black-necked Stilt, Willet, Long-billed Curlew, Marbled Godwit, Western Sandpiper, Wilson’s Snipe, Wilson’s Phalarope, Ring-billed Gull, California Gull, Heerman’s Gull, Elegant Tern, Common Tern, Least Tern, Black Tern, Belted Kingfisher, and Green Kingfisher,

The pit lake is modeled as exceeding some surface water and aquifer water standards as described in the FEIS (Chapter 3, Groundwater Quality and Geochemistry), and effects of those modeled water quality exceedances on wildlife are also analyzed in the FEIS (Chapter 3, Biological Resources) (See Volume 6 - Appendix G Summary of Response to Public Comment, Groundwater Quality and Geochemistry Page G-36)

The words waterfowl or migratory waterfowl are not found anywhere in the FEIS. Although there is a definition of Migratory Birds on Page 1335, which is used throughout the FEIS that would seem to include these birds, waterfowl or migratory waterfowl are still excluded from the FEIS. The FEIS fails to review the adverse impacts to the specific migratory bird species listed by the FWS regulations. Although the FEIS mentions migratory birds in general, it focused on those species protected by other laws such as the NFMA and ESA. This is a failure under NEPA to review the direct, indirect, and cumulative impacts to these designated species.

The Groundwater Quality section states that neither aquifer nor surface water standards have binding regulatory standing with respect to the pit lake. However, this does not forestall the need for the Forest Service to analyze the potential effects on wildlife, including bird species. Attachment #2 The risk factors to wildlife, specifically bird species, are not analyzed or addressed in the FEIS. Based on the information in the FEIS, the pit lake will become one of the largest and deepest bodies of water in southern Arizona. The FEIS does not include the review, study, analysis, discussion or consideration of the potential short term or long term environmental impacts and the effects of the water quality exceedances to waterfowl, migratory waterfowl or other associated birds that will be attracted to what will be "standing water".

In Chapter 3, p364 we read that the mine pit lake, because of its contact with exposed rock formations, could develop hazardous water quality conditions, which could cause impacts to groundwater, birds, and wildlife. We do not see, however, any consideration in the FEIS of how the mine owners will prevent the migratory waterbirds and other species mentioned above from coming in contact with toxic standing water of the pit lake.

The FEIS needs to include a detailed review of the potential impacts to bird species that could specifically come into contact with the water of the lake, together with those species that would eat insects emerging from the lake (swallows, nighthawks, etc). Detailed mitigation plans, as implemented at other pit lakes, should be developed, reported, and implemented by the mine operators in perpetuity.

Under the NFMA and its implementing regulations, the USFS is required to protect the diversity of wildlife species, and manage and protect indicator and sensitive or special status species. The FEIS acknowledges that many such bird species rely on this area for their survival for all or parts of their life-cycle (FEIS at pp 623–631; 648–650). Of especial significance is that the site is within Arizona's first Important Bird Area (IBA), the Santa Rita Mountains IBA. (FEIS at 649). It is Tucson Audubon's responsibility to identify and address any threats to this Important Bird Area as they might affect the birds and the habitats that support those birds in this region Similar to the violations of the Organic Act/Part 228 and the MBTA and BGEPA, the failure to mitigate against the creation of the contaminated pit lake and its associated severe impacts to these species violates the NFMA and its implementing regulations.

The Migratory Bird Treaty Act ("MBTA") was enacted to fulfill the United States' treaty obligations to protect migratory birds. It provides that "unless and except as permitted by regulations made as hereinafter provided in this subchapter, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill . . . any migratory bird." 16 U.S.C. § 703(a). See Missouri v. Holland, 252 U.S. 416, 434-35 (1920) (describing the "national interest of very nearly the first magnitude" in protecting

migratory birds "that yesterday had not arrived, tomorrow may be in another State and in a week a thousand miles away").

FWS's list of species protected by the MBTA includes many birds that use the area where the Rosemont Project would be constructed and operated. See 50 C.F.R. § 10.13 (list of migratory birds).

[1]The MBTA strictly prohibits killing migratory birds without authorization from the Department of the Interior. Enacted to fulfill the United States' treaty obligations, the MBTA provides that "[u]nless and except as permitted by regulations made as hereinafter provided in this subchapter, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill . . . any migratory bird." 16 U.S.C. § 703(a) (emphasis added). The Secretary of Interior is authorized to permit the killing of birds otherwise protected by the MBTA when doing so would be compatible with migratory bird conventions. Id. § 704(a). See also Executive Order 13186.

Where federal agencies themselves undertake a project which will inevitably result in migratory bird mortalities, regardless of whether the mortalities are intentional, without first obtaining authorization from the Interior Department to kill migratory birds, the agency's actions are unlawful. *See* Humane Society of the U.S. v. Glickman*,* 217 F.3d 882, 884-88 (D.C. Cir. 2000) (holding that federal agencies must obtain authorization from the Department of the Interior before they kill birds protected by the MBTA, or permit state agencies to do so); *see also* City of Sausalito v. O'Neill*,* 386 F.3d 1186, 1204 (9th Cir. 2004) (holding that "anyone who is 'adversely affected or aggrieved' by an agency action alleged to have violated the MBTA has standing to seek judicial review of that action"); United States v. Moon Lake Elec. Association*,* 45 F, Supp. 2d 1070 (D. Colo. 1999) (holding that the MBTA prohibits the unintentional killing of protected birds by power lines). In particular, courts have held that activities undertaken without an MBTA permit by federal agencies (including military agencies) that are predicted to result in incidental take of migratory birds constitute violations of the MBTA. *See* Ctr. for Biological Diversity v. Pirie, 191 F. Supp. 2d 161, 174-75 (D.D.C. 2002), *vac'd as moot sub nom.*, Ctr. for Biological Diversity v. England, No. 02-5163, 2003 WL 179848 (D.C. Cir. Jan. 23, 2003) (holding that Navy training exercises, which were not "directed at wildlife" but did have the predictable and "direct consequence of killing and harming migratory birds," violated the MBTA's take prohibition, and explaining that "the MBTA prohibits both intentional and unintentional killing").

The FEIS failed to review the adverse impacts to the specific migratory bird species listed by the FWS regulations. Although the FEIS mentions migratory birds in general, it largely focused only (albeit in a cursory manner) on those species protected by other laws such as the NFMA and ESA. This is a failure under NEPA to review the direct, indirect, and cumulative impacts to these designated species

The FEIS admits that, for migratory birds: "For all action alternatives, take (manifested as wound or kill, especially for eggs and nestlings) is expected to occur." FEIS at 697. "Activities resulting from all of the action alternatives that could result in unintentional take include the following

(SWCA Environmental Consultants 2013i): … Pit lake and process ponds." FEIS at 697. "Unintentional take of migratory birds is expected to occur." FEIS at 698.

Despite these admissions, according to the USFS, the killing/taking of migratory birds by the mine pit lake does not violate the MBTA since the killing/taking "would be unintentional, as the purpose of the action is extraction of minerals, rather than the taking of birds." FEIS at 697.

That is not a correct interpretation of the law. As noted herein, the agency's approval of a project which it knows will kill/take migratory birds is a violation of the MBTA. For example, in the civil and criminal cases noted above, the federal government has successfully charged operators of mining and energy projects with violations of the MBTA for such so-called "unintentional" killing/taking. The "purpose" of these projects was certainly not to kill birds, yet the injury to the birds resulting from the project operations was found to be a violation of the MBTA.

No mitigation or protective measures were reviewed or considered to prevent the creation of the contaminated pit lake and bird killing/taking, or the surface pooling of intermediate leaching solutions. The duty to protect the nest of a migratory bird, which the agency acknowledges must be done "to avoid a violation of the Migratory Bird Treaty Act," is not materially different from the duty under the MBTA to take "measures" to protect birds from the toxic pit lake and surface pools.

The fact that, at least according to the FEIS, the pit lake will be a "hydrologic sink" and will not discharge to groundwater is not an excuse to violate the MBTA. The USFS states that since the pit lake is not predicted to discharge to surface or ground waters, water quality standards do not apply. FEIS p 389. The issue is whether the toxic pit lake, and surface intermediate leaching pools, will kill or take any migratory bird species.

For these reasons alone the USFS is obligated to complete a Supplemental EIS prior to authorizing the proposed Rosemont Mine to move forward.

Sincerely

Dr Paul Green | Executive Director

Chris McVie | Conservation Chair