

December 20, 2021

**VIA ELECTRONIC MAIL**<sup>1</sup>

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**Re: File No. SAS-2018-00554, Twin Pines Minerals, LLC**

Dear Mr. Connor, Mr. Pinkham, and Ms. Jensen:

We write to request that the Corps rescind the negative approved jurisdictional determination (NJD) issued to Twin Pines Minerals in October 2020. That determination, issued under the now-vacated Navigable Waters Protection Rule (NWPR), removed protections from nearly 400 acres of wetlands that the Corps had previously determined to be jurisdictional under the long-standing regulatory scheme now in place.

The affected wetlands sit at the doorstep of the Okefenokee National Wildlife Refuge, one of the most celebrated natural resources in the world. If the October 2020 NJD remains in place, Twin Pines intends to strip mine titanium dioxide and other heavy minerals from the wetlands without any federal oversight, placing the ecological integrity of the Okefenokee at significant risk.

Since issuing the October 2020 NJD, it has come to light that the Corps failed to conduct a government-to-government consultation with, or otherwise notify, any affected tribe of the NJD process ahead of time, including the Muscogee (Creek) Nation—a federally recognized tribe that strenuously objects to the mine and the damage it will likely cause the Okefenokee. Moreover, the Corps has expressly acknowledged that the NWPR, which formed the basis for the

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<sup>1</sup> The attachments to this letter are available at <https://southernenvironment.sharefile.com/d-s83dfae41e9764afea47bb95cfaaafc48>.

NJD, is “inconsistent with the objective of the Clean Water Act, the science, and the case law.”<sup>2</sup> Given this new information, the unique circumstances surrounding the proposed mine, and the irreplaceable resources at stake, we urge the Corps to rescind the October 2020 NJD as contemplated by Regulatory Guidance Letter 05-02 and the text of the NJD itself, and to restore Clean Water Act protections to the nearly 400 of acres of at-risk wetlands provided under the approved jurisdictional determination made (AJD) in December 2018 (less than five years ago) under the present “waters of the United States” rule. Because of the extreme harm posed by the wetland losses and other striking circumstances, we have also requested that EPA exercise its “special cases” authority to revoke the October 2020 NJD. If the Corps declines to revoke the NJD itself, we ask that you support our request for designation by EPA of the mine site as a “special case.”

## A. Background

The Okefenokee Swamp is one of the largest remaining intact freshwater ecosystems in the world. In 1937, Congress designated the Okefenokee as a National Wildlife Refuge, and it remains the largest refuge in the eastern United States.<sup>3</sup> It is also a National Wilderness Area and a National Natural Landmark, a designation reserved for “the best examples of biological and geological features” in the country.<sup>4</sup> On an international scale, the Okefenokee National Wildlife Refuge is a “Wetland of International Importance” under the United Nations Ramsar Convention and is also a candidate for designation as a UNESCO World Heritage Site.<sup>5</sup> EPA considers the Okefenokee an “Aquatic Resource of National Importance.”<sup>6</sup>

The Okefenokee was once home to thousands of Native Americans, including the Muscogee (Creek) Nation, Seminole Nation of Oklahoma, and the Seminole Tribe of Florida, who consider the Swamp an important cultural and historic site.<sup>7</sup> The Okefenokee is also just down the road from the Cherokee of Georgia Tribal Grounds, where the Tribe holds semi-annual Tribal PowWows.<sup>8</sup>

In addition to its ecological, historical, and cultural significance, the Okefenokee Swamp is an irreplaceable resource in the pursuit of climate resilience. The Swamp’s extensive, largely undisturbed peat beds provide important carbon storage services.<sup>9</sup> Peatlands like those in the

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<sup>2</sup> Revised Definition of Waters of the United States, 86 Fed. Reg. 69372, 69395 (Dec. 7, 2021).

<sup>3</sup> U.S. Fish and Wildlife Serv., Okefenokee National Wildlife Refuge, *About the Refuge*, <https://perma.cc/WC5R-NWKM>.

<sup>4</sup> Nat’l Park Serv., National Natural Landmarks Program, <https://perma.cc/YG7E-68WB>.

<sup>5</sup> Ramsar Sites Information Service, Okefenokee National Wildlife Refuge, <https://perma.cc/A2ZE-NJUB>; UNESCO, World Heritage Convention, Tentative List, Okefenokee National Wildlife Refuge, <https://perma.cc/R3HY-XTSG>.

<sup>6</sup> Letter from Jeananne Gettle, U.S. Env’t. Prot. Agency, to Col. Daniel Hibner, U.S. Army Corps of Eng’rs (Sep. 12, 2019) [hereinafter EPA 3(a) Letter] (provided as Att. 1).

<sup>7</sup> See Andy McGlashen, Proposed Georgia Mine Next to Okefenokee Swamp Raises Alarms, Audubon Magazine (May 22, 2020), <https://perma.cc/U4VS-Y8P4>.

<sup>8</sup> *Spring “PowWow” April 1-3*, The Baker County Press, <https://perma.cc/AHW5-C25H>.

<sup>9</sup> See International Union for Conservation of Nature, Peatlands and Climate Change (2017), <https://perma.cc/Y5JN-MH2N>.

Okefenokee are the largest natural terrestrial carbon stores in the world<sup>10</sup>; once damaged, however, peatlands are a major source of harmful greenhouse gases.<sup>11</sup>



(Photo Credit: Michael Lusk, U.S. Fish & Wildlife Service)

The Okefenokee Swamp is also among the most biodiverse places in the country. It is home to more than 620 species of plants, 234 species of birds, 39 species of fish, 37 species of amphibians, 64 species of reptiles, and 50 species of mammals.<sup>12</sup> Several of these species, like the red-cockaded woodpecker, indigo snake, and wood stork, are federally protected.<sup>13</sup> The Okefenokee also serves as the headwaters of two major rivers, the Suwannee and St. Marys, which provide important habitat for federally protected shortnose, Atlantic, and gulf sturgeon.<sup>14</sup> The Okefenokee and the Suwannee River also provide habitat for the Suwannee alligator snapping turtle, which the U.S. Fish and Wildlife Service proposed for threatened species protections this

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> U.S. Fish and Wildlife Serv., Okefenokee National Wildlife Refuge Amphibians, Fish, Mammals and Reptiles List (July 2009), <https://perma.cc/FJB8-LWW3>.

<sup>13</sup> U.S. Fish and Wildlife Serv., *About the Refuge*, <https://perma.cc/WC5R-NWKM>.

<sup>14</sup> Letter from William W. Sapp, S. Env't Law Ctr., to Col. Daniel Hibner, U.S. Army Corps of Eng'rs 50–53 (May 28, 2020) [hereinafter SELC Comment Letter] (provided as Att. 2).

year.<sup>15</sup> Protecting the Okefenokee Swamp and its surrounding ecosystems is critical to preserving this rich biodiversity.

Twin Pines' proposed mine directly threatens the hydrogeology and ecological integrity of the Okefenokee and nearby rivers. The mine would be located at the edge of the Swamp on an elevated geological feature called Trail Ridge.<sup>16</sup> According to the U.S. Fish and Wildlife Service, the ridge forms a "geomorphological 'dam'" on the east side of the Swamp, keeping its waters contained.<sup>17</sup> Twin Pines plans to excavate portions of Trail Ridge (and hundreds of acres of wetlands) to an average depth of around 50 feet.<sup>18</sup> After the minerals are removed, the company would return the leftover material, or tailings, to the excavated pits.<sup>19</sup> At that point, the tailings would be homogenized, or mixed, and Trail Ridge would no longer have the distinct layers it had before mining—layers that are critical to maintaining the Swamp's and the region's hydrogeology.<sup>20</sup>

This excavation process, coupled with Twin Pines' proposed groundwater withdrawals from the Floridan aquifer, could substantially alter the way water moves into, through, and around the Okefenokee Swamp.<sup>21</sup> Disturbing the sediments that comprise Trail Ridge is also likely to release toxic contaminants, including heavy metals and radionuclides, into the Swamp and nearby rivers.<sup>22</sup> It will destroy the aquatic functions of the nearly 400 acres of currently jurisdictional wetlands slated for excavation and have indirect impacts on hundreds of acres of surrounding jurisdictional wetlands.<sup>23</sup> The U.S. Fish and Wildlife Service has voiced these concerns, as well as concerns that the strip mining would result in the destruction of endangered species and their habitats, and in the degradation of the wilderness experience for refuge visitors.<sup>24</sup>

Because of these risks, the EPA, U.S. Fish and Wildlife Service, and Georgia Department of Natural Resources all expressed serious concerns during the initial Clean Water Act permitting process about the proposed mine, warning that it could result in "unacceptable,"

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<sup>15</sup> 86 Fed. Reg. 18,014 (Apr. 7, 2021).

<sup>16</sup> Letter from TTL, Inc., to U.S. Army Corps of Eng'rs re: Individual Permit Application for Twin Pines Minerals, LLC, Saunders Demonstration Mine 1 (Mar. 4, 2020), <https://perma.cc/UP8N-ELA6> [hereinafter Saunders Application].

<sup>17</sup> Letter from U.S. Fish & Wildlife Serv. to U.S. Army Corps of Eng'rs 3 (Feb. 20, 2019) [hereinafter USFWS Feb. 2019 Letter] (provided as Att. 3).

<sup>18</sup> Saunders Application, *supra* note 16, at 14.

<sup>19</sup> *Id.* at 37.

<sup>20</sup> USFWS Feb. 2019 Letter, *supra* note 17, at 3.

<sup>21</sup> *Id.*

<sup>22</sup> Letter Report from Mark A. Hutson, P.G., to William Sapp 2, 6 (April 12, 2020) [hereinafter Hutson Report] (provided as Att. 4); *see also* SELC Comment Letter, *supra* note 14.

<sup>23</sup> *See generally* SELC Comment Letter, *supra* note 14.

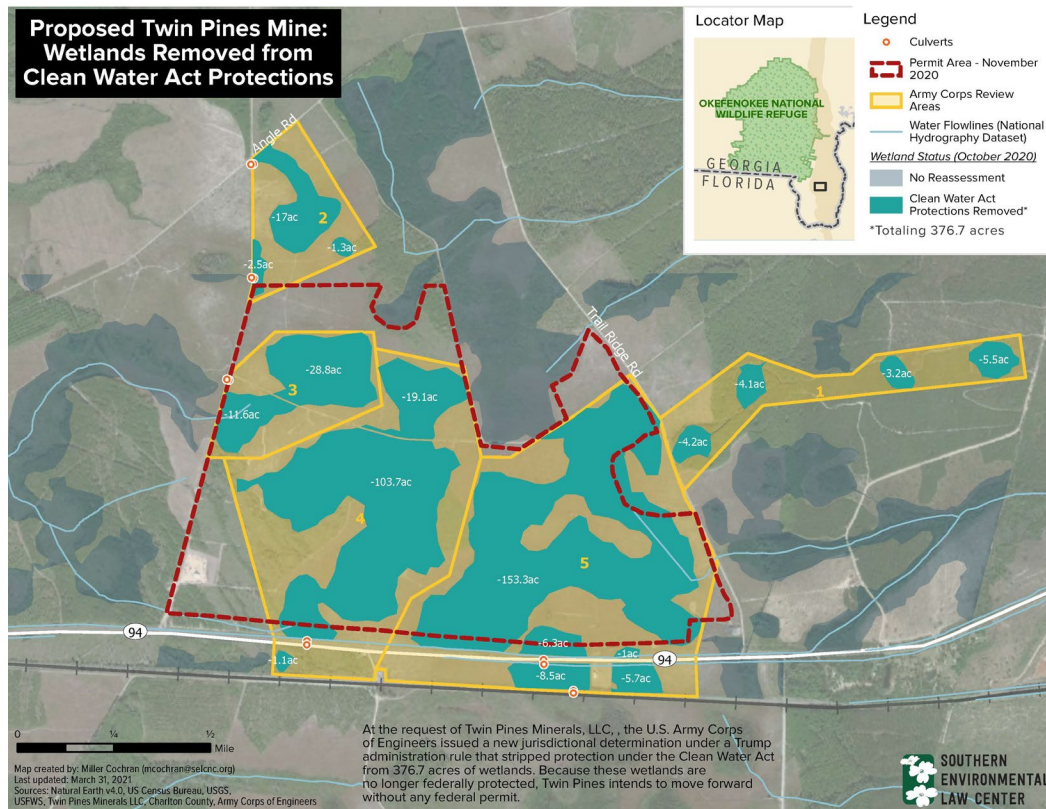
<sup>24</sup> Sara Aichner, Okefenokee National Wildlife Refuge, Information Sheet on Ramsar Wetlands (2006), <https://perma.cc/M2XX-A3ZF>.



“permanent,” and “irreversible” damage to the Refuge.<sup>25</sup> In 2019, EPA Region 4 requested elevation of that permitting decision pursuant to the 1992 Section 404(q) Memorandum of Agreement between the EPA and the Corps<sup>26</sup>—a rare step only taken for “aquatic resources of national importance.”

In the 1990s, DuPont proposed a similar mine on Trail Ridge. But, citing the irreparable, long-term damage the mine would cause to the Okefenokee’s ecosystem, the U.S. Department of the Interior, the Georgia Board of Natural Resources, Governor Zell Miller, and the people of Georgia prevailed and the company abandoned the project.

Unfortunately, during the federal permitting process for the currently proposed mine, the Trump Administration issued the NWPR. As shown in the timeline below, Twin Pines immediately took advantage of the NWPR to request a revised jurisdictional determination leaving 400 acres of previously protected wetlands open to destruction without federal oversight.



<sup>25</sup> Letter from Mary S. Walker, U.S. Env’t. Prot. Agency, to Col. Daniel M. Hibner, U.S. Army Corps of Eng’rs 1 (Oct. 3, 2019) [hereinafter EPA 3(b) Letter] (provided as Att. 5); EPA 3(a) Letter, *supra* note 6, at 3; Letter from Catherine Phillips and David Viker, U.S. Fish & Wildlife Serv., to Col. Daniel Hibner, U.S. Army Corps of Eng’rs (Oct. 8, 2019) [hereinafter USFWS Oct. 2019 Letter] (provided as Att. 6); USFWS Feb. 2019 Letter, *supra* note 174, at 2; E-mail from Stephen Weidl, Ga. Env’t. Protection Div., to Holly Ross, U.S. Army Corps of Eng’rs 3 (Dec. 2019) [hereinafter GA EPD comments] (provided as Att. 7).

<sup>26</sup> See generally EPA 3(b) Letter, *supra* note 25; EPA 3(a) Letter, *supra* note 6.

## **B. Timeline of Jurisdictional Determinations and Permitting Process to Date**

- **August 7, 2018**: Twin Pines meets with the Corps and proposes “to operate a 12,000-acre sand-derived minerals mine ... [which] would be mined in 1,000-acre phases over an approximate 30-year time period.”<sup>27</sup>
- **December 18, 2018**: The Corps issues an AJD for the Loncala and Keystone Tracts<sup>28</sup> finding that over 45 percent of the property is made up of jurisdictional wetlands.
- **February 20, 2019**: The U.S. Fish and Wildlife Service submits preliminary comments to the Corps expressing serious concerns about the hydrological and biological impacts to the Okefenokee National Wildlife Refuge.<sup>29</sup>
- **July 3, 2019**: Twin Pines submits its initial permit application for “Phase One” of the proposed 12,000-acre mine, requesting permission to fill at least 587 acres of jurisdictional wetlands and 4,658 linear feet of jurisdictional streams.
- **July 12, 2019 – September 12, 2019**: More than 20,000 individuals, along with local, regional, and national organizations, submit comments opposing the mine and calling for heightened environmental review.
- **September 12, 2019**: EPA Region 4 sends a letter to the Corps expressing concerns over mining impacts and stating that it “considers the Okefenokee NWR an Aquatic Resource of National Importance that is subject to the 1992 Section 404(q) Memorandum of Agreement between the EPA and the Corps.”<sup>30</sup>
- **October 3, 2019**: EPA Region 4 sends a second letter to the Corps stating “Based on the limited information made available, pursuant to [the 1992 Section 404(q) Memorandum of Agreement], the EPA finds that the proposed project will have a substantial and unacceptable impact on aquatic resources of national importance.”<sup>31</sup>
- **December 2019**: Georgia Environmental Protection Division (EPD) sends a letter to the Corps expressing concerns about the harmful impacts of the mine on the Okefenokee Swamp.<sup>32</sup>

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<sup>27</sup> U.S. Army Corps of Engineers, Issue Paper: Twin Pines Minerals Mining Project (2018) (provided as Att. 8); USFWS Feb. 2019 Letter, *supra* note 17, at 1.

<sup>28</sup> U.S. Army Corps of Eng’rs, Approved Jurisdictional Determination SAS-2018-00554 (Dec. 18, 2018) [hereinafter Dec. 2018 AJD] (provided as Att. 9). The original 12,000-acre mining site is comprised of four separate property tracts: the Loncala, Keystone, TIAA, and Adirondack tracts. The October 2020 NJD for the “demonstration mine,” or first phase, covers portions of the Keystone and Adirondack tracts.

<sup>29</sup> USFWS Feb. 2019 Letter, *supra* note 17, at 1.

<sup>30</sup> EPA 3(a) Letter, *supra* note 6, at 2.

<sup>31</sup> EPA 3(b) Letter, *supra* note 25, at 1.

<sup>32</sup> GA EPD Comments, *supra* note 25.

- **December 2019/January 2020**: Multiple state and local officials submit letters to the Corps opposing the mine and/or calling for heightened environmental review.<sup>33</sup>
- **December 2019/January 2020**: The Corps alerts Twin Pines that its July 2019 application would likely trigger the need to prepare an Environmental Impact Statement (EIS) under NEPA.<sup>34</sup> Twin Pines tells the Corps that preparing an EIS would be “unacceptable for [its] business.”<sup>35</sup>
- **January 24, 2020**: The Corps issues an AJD for the Adirondack and TIAA tracts, finding that over 45 percent of the combined area—hundreds of acres total—is made up of wetlands that are jurisdictional as “waters of the United States” under the *Rapanos* guidance.<sup>36</sup>
- **February/March 2020**: Twin Pines withdraws its permit application after learning that the Corps would likely require the preparation of an EIS. Twin Pines then submits a new application, slightly reducing the initial mining footprint and calling the initial phase a “demonstration mine.”<sup>37</sup> The March 2020 application seeks to mine approximately 898 acres and fill over 475 acres of jurisdictional wetlands.<sup>38</sup>
- **March 13, 2020 – May 28, 2020**: More than 44,000 individuals from all fifty states and more than thirty countries submit comments opposing the March 2020 application. The Corps holds a virtual public hearing and is forced to open additional telephone conference options after the number of preregistered participants exceeds the Corps’ video-conferencing capacity.

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<sup>33</sup> Letter from Sen. William Ligon to Col. Daniel Hibner, U.S. Army Corps of Eng’rs (Jan. 27, 2020); Letter from Camden County Joint Development Authority (Jan. 27, 2020); Letter from Dr. C. Grayson Day, Jr., Mayor, Kingsland, GA (Dec. 5, 2019); Letter from John F. Morrissey, Mayor, St. Marys, Georgia (Dec. 3, 2019); Letter from Steve Parrot, Mayor, Woodbine, Georgia (Dec. 3, 2019); Letter from John A. Miller, Mayor, Fernandina Beach, FL (Dec. 2, 2019) (collectively provided as Att. 10).

<sup>34</sup> E-mail from Holly Ross, U.S. Army Corps of Eng’rs, to Resource Agencies (Dec. 11, 2019) (provided as Att. 11); E-mail from Steven Metivier, U.S. Army Corps of Eng’rs, to Col. Daniel Hibner, U.S. Army Corps of Eng’rs (Jan. 16, 2020) (provided as Att. 12); E-mail from Steven Metivier, U.S. Army Corps of Eng’rs, to Cindy House-Pearson (Jan. 11, 2020) (provided as Att. 13).

<sup>35</sup> E-mail from Steven Metivier to Col. Daniel Hibner, *supra* note 34.

<sup>36</sup> U.S. Army Corps of Eng’rs, Approved Jurisdictional Determination SAS-2018-00554 (Jan. 24, 2020) [hereinafter Jan. 2020 AJD] (provided as Att. 14).

<sup>37</sup> See U.S. Army Corps of Eng’rs, Joint Public Notice, Savannah District/State of Georgia, SAS-2018-00554, at 2 (Mar. 13, 2020), <https://perma.cc/2GYB-QCFZ>.

<sup>38</sup> *Id.* at 1.

- **April 10, 2020**: The Muscogee (Creek) Nation send the Corps a letter expressing concern that it had not been consulted on the new application and reiterating its request for consultation on important issues going forward.<sup>39</sup>
- **April 21, 2020**: The Corps and the EPA publish the final NWPR in the Federal Register.<sup>40</sup> The very same day, Twin Pines emails the Corps to discuss a revised jurisdictional determination.<sup>41</sup>
- **June 22, 2020**: The NWPR becomes effective.
- **Summer 2020 – Fall 2020**: Conservation organizations, Native American tribes, states, and other plaintiffs file at least fourteen cases across the country challenging the NWPR and seeking its vacatur, putting Twin Pines on notice that the rule may be vacated.
- **July 17, 2020**: A U.S. Fish and Wildlife Service hydrologist prepares a report stating that the Twin Pines hydrologist's conclusions regarding the mine's impact on the Swamp are "unsupported given the uncertainties and errors" in his report and noting that "the predictive capacity of [Twin Pines'] model is, at a minimum, poor to speculative, and at best unknown."<sup>42</sup>
- **July 20, 2020**: Twin Pines submits new request forms for a revised jurisdictional determination to be made under the NWPR.
- **October 14, 2020**: The Corps issues the new NJD covering portions of the Adirondack and Keystone Tracts, applying the NWPR.<sup>43</sup> The new NJD removes federal Clean Water Act protections from nearly 400 acres of wetlands, allowing Twin Pines to proceed with the first phase of mining with no federal review.<sup>44</sup>
- **March 21, 2021**: The Corps issues another new NJD covering portions of the proposed mine site applying the NWPR. The new NJD finds no jurisdictional waters on the site and removes protections from nearly 200 more acres of wetlands.

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<sup>39</sup> Letter from Turner Hunt, Muscogee (Creek) Nation, to Col. Daniel Hibner, U.S. Army Corps of Engr's 1 (Apr. 10, 2020) (provided as Att. 15).

<sup>40</sup> The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22,250, 22,339 (Apr. 21, 2020) (33 C.F.R. § 328.3(c)(13)).

<sup>41</sup> E-mail from Christopher Terrell, TTL, to Holly Ross, U.S. Army Corps of Eng'rs (April 21, 2020) (seeking to "discuss how the new Rule may affect the jurisdictional nature of aquatic features within the footprint of the proposed project footprint of the Twin Pines heavy minerals mining demonstration project") (provided as Att. 16).

<sup>42</sup> Report by S. Braumiller, U.S. Fish & Wildlife Serv., Groundwater Hydrologist 19–20 (July 17, 2020) (provided as Att. 17).

<sup>43</sup> U.S. Army Corps of Eng'rs, Approved Jurisdictional Determination SAS-2018-00554 (Oct. 14, 2020), <https://perma.cc/WAW7-X2YC> [hereinafter Oct. 2020 NJD].

<sup>44</sup> *Id.*



- **August 30, 2021**: The United States District Court for the District of Arizona remands the NWPR to the agencies and vacates the rule nationwide in *Pascua Yaqui Tribe v. EPA*.<sup>45</sup>
- **September 27, 2021**: The United States District Court for the District of New Mexico remands the NWPR and vacates the rule nationwide in *Navajo Nation v. Regan*.<sup>46</sup>
- **December 2021**: The Corps and EPA publish a proposed rule repealing the NWPR and revising the definition of “waters of the United States.” The preamble to the proposed rule describes the NWPR as, among other flaws, “inconsistent with the objective of the Clean Water Act, the science, and the case law.”<sup>47</sup>

As of the date of this letter, four state permit applications are pending with the Georgia Environmental Protection Division. These permits, unfortunately, are not designed to protect against or mitigate for wetland loss.

### **C. The Corps should revoke the October 2020 NJD based on “new information.”**

Pursuant to Regulatory Guidance Letter 05-02 and the October 2020 NJD, the October 2020 NJD is valid for five years, “unless new information warrants revision of the determination before the expiration date.”<sup>48</sup> Here, there is ample new information to justify the Corps’ revocation of the NJD—most notably, it has come to light that the Corps failed to consult with the Muscogee (Creek) Nation and other tribes. In addition, since issuing the NJD, the Corps, along with EPA, has reviewed the NWPR and concluded that “the NWPR’s interpretation [is] inconsistent with the objective of the Clean Water Act, the science, and the case law.”<sup>49</sup>

In determining whether this new information warrants revocation in this particular case, a number of factors weigh in favor of revocation:

First, the Corps should revoke the NJD because the Corps did not engage in government-to-government consultation with the Muscogee (Creek) Nation, the Seminole Nation of

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<sup>45</sup> *Pascua Yaqui Tribe v. U.S. Env’t Prot. Agency*, No. CV-20-00266-TUC-RM, 2021 WL 3855977 (D. Ariz. Aug. 30, 2021).

<sup>46</sup> *Navajo Nation v. Regan*, No. 20-CV-602-MV/GJF, 2021 WL 4430466 (D.N.M. Sept. 27, 2021).

<sup>47</sup> Revised Definition of Waters of the United States, 86 Fed. Reg. 69372, 69395 (Dec. 7, 2021).

<sup>48</sup> U.S. Army Corps of Eng’rs, Regulatory Guidance Letter 05-02 (June 14, 2005).

<sup>49</sup> Revised Definition of Waters of the United States, 86 Fed. Reg. 69372, 69395 (Dec. 7, 2021).

Oklahoma, the Seminole Tribe of Florida, or any other tribe, as required by Executive Order 13,175<sup>50</sup> and the Corps' Tribal Consultation Policy.<sup>51</sup>

These Tribes each have important cultural and historical roots in the Okefenokee, with ancestral ties dating back to well before European colonists first entered North America. Indeed, the word “Okefenokee” itself, a Muscogee word meaning “trembling earth,”<sup>52</sup> is a testament to the region's Native American history. In 1790, naturalist William Bartram described one of the Swamp's hammocks by noting, “the present generation of Creeks represent [it] as the most blissful spot on earth”<sup>53</sup>—a sentiment still held by many. Although the Muscogee (Creek) Nation ceded the Okefenokee Swamp to the United States in the 1814 Treaty of Fort Jackson, it remains an important cultural place, codified in the Tribe's oral history.<sup>54</sup>

Because of these ties, this project has been one of the few cases where the Muscogee (Creek) Nation has affirmatively reached out to the Corps about a proposed project before receiving official correspondence from the Corps—a testament to the importance of the Okefenokee to the Tribe and the Tribe's substantial concerns about the effects of the proposed mine.<sup>55</sup> Despite the Tribe making its interest in the project and desire for consultation very clear to the Corps, the Corps failed to consult with the Muscogee (Creek) Nation in March 2020 about substantial changes to the scope of the proposed mine.<sup>56</sup> Upon learning of the proposed changes, the Muscogee (Creek) Nation wrote the Corps to request that the Tribe be notified and allowed to comment on any such changes:

For this current rendition of SAS-2018-00554, and the reason why we are writing this letter, we had to reach out for clarification that the permit had been resubmitted after being pulled (01 Apr 2020). Unfortunately, with our office [*sic*] proactive interest in the

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<sup>50</sup> See Executive Order 13,175, Consultation and Coordination with Indian Tribal Governments (Nov. 6, 2020).

<sup>51</sup> U.S. Army Corps of Eng'rs, Memorandum for Commanders, Directors and Chiefs of Separate Offices re: Tribal Consultation Policy (Nov. 1, 2012), <https://perma.cc/59H5-HQ3J> [hereinafter “Tribal Consultation Policy”]. Although the Corps briefly abandoned this long-standing policy of consulting on jurisdictional determinations in early 2021, see Letter from Colonel Julie A Balten, Commander & Dist. Eng'r, LA Dist., U.S. Army Corps of Eng'rs, to Mr. Stuart C. Gillespie, Earthjustice, Tribal Consultation Concerning HudBay Mineral's Approved Jurisdictional Determination Requests (AJDs) related to the Rosemont Copper Mine (January 8, 2021) and accompanying memorandum, <https://perma.cc/GE8N-LB42>, the Biden administration has since reaffirmed its commitment to “robust consultation.” Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships (Jan. 26, 2021); Memorandum from Jaime A. Pinkham, U.S. Army Corps of Eng'rs, to Commanding Gen., U.S. Army Corps of Eng'rs, Rescission of Previous Guidance — Tribal Consultation Associated with Approved Jurisdictional Determinations (April 20, 2021), <https://perma.cc/4SKQ-Q89E>.

<sup>52</sup> Megan Kate Nelson, *Trembling Earth: A Cultural History of the Okefenokee Swamp* 43–44 (2005).

<sup>53</sup> *Id.* at 44–45

<sup>54</sup> Letter from Turner Hunt to Col. Daniel Hibner, *supra* n. 39, at 1–2.

<sup>55</sup> *Id.* at 1.

<sup>56</sup> *Id.*

project it has created an issue where we have not been officially consulted regarding the project as published for public notice on 13 March 2020.<sup>57</sup>

In the letter, the Historic and Cultural Preservation officer for the Muscogee (Creek) Nation made clear that this project was important to both the National Council and the Tribe's Principal Chief, David Hill.<sup>58</sup> Ignoring the Muscogee (Creek) Nation's specific request for consultation on updates or changes to the application or proposed project, the Corps did not consult with the Tribe on—or even notify the Tribe of—its abrupt reversal of the existing AJDs.<sup>59</sup> Not only does this deviate from the Corps' long-standing practice of nation-to-nation consultation for significant NJDs, it also violates the Corps' written consultation policy, which provides, “all requests for consultation shall be honored.”<sup>60</sup> In light of this error, and the Biden Administration's express commitment to prioritizing “robust consultation” with Tribal Nations,<sup>61</sup> the Corps should rescind the October 2020 NJD.

Second, the October 2020 NJD relies almost exclusively on the portions of the NWPR that the EPA and the Corps have identified as most problematic (and therefore have expressly disavowed). For example, many of the wetlands on the site lost jurisdictional status under the NWPR because they are adjacent to ephemeral streams, which the NWPR explicitly excludes from the definition of “tributary.” But since issuing the NJD based on the NWPR, the Corps has concluded that categorically excluding ephemeral streams “is inconsistent with the [Clean Water] Act's text and objective and runs counter to the science demonstrating how such waters can affect the integrity of downstream waters, including traditional navigable waters, interstate waters, and territorial seas.... [T]here is overwhelming scientific information demonstrating the effects ephemeral streams can have on downstream waters and the effects wetlands can have on downstream waters when they do not have a continuous surface connection.”<sup>62</sup>

The Corps' determination was also based largely on the prior administration's fundamentally indeterminate “typical year” test.<sup>63</sup> Indeed, this test informed the negative jurisdictional determination for every water feature and wetland considered in the revised NJD.<sup>64</sup>

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<sup>57</sup> *Id.* This oversight is especially surprising because the Muscogee (Creek) Nation has had a very positive working relationship with the Corps' current Tribal Liaison.

<sup>58</sup> *Id.* at 2.

<sup>59</sup> The Corps also did not notify the Tribe about the NJD dated March 21, 2021. Nor did the Corps consult with the Fish & Wildlife Service for either the 2020 NJD or the 2021 NJD despite the FWS's keen interest in the mining project, which the FWS considered as a significant threat to the Refuge. Telephone Interview by Bill Sapp with Michael Lusk, Refuge Manager (Dec. 18, 2021).

<sup>60</sup> Tribal Consultation Policy, *supra* note 51, at 4.

<sup>61</sup> Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships (Jan. 26, 2021).

<sup>62</sup> *Id.* at 69398.

<sup>63</sup> Oct. 2020 NJD, *supra* note 43, at 7.

<sup>64</sup> *See, e.g., id.* at 2, 3, 4, 6 (“this ditch did not meet the flow requirements to be considered a tributary under the NWPR.”); *id.* at 1-6 (“This wetland does not abut any (a)(1)–(a)(3) waters, is not inundated or have a direct surface water connection to any (a)(1)–(a)(3) waters in a typical year.”).

But since relying on this test to reach its conclusions, the Corps has reached a different conclusion: “[I]n many important contexts, available tools, including the tools the NWPR recommends, cannot reliably demonstrate the presence of surface water connections in a typical year, which are a necessary element of most categories of jurisdictional waters under the NWPR.”<sup>65</sup>

Third, the Corps has already delineated the wetlands at issue under the current regulatory definition of “waters of the United States”—a definition that was in place for decades before the now-vacated NWPR. As discussed above, the Corps previously issued AJDs on December 18, 2018, and January 24, 2020, determining that the hundreds of acres of wetlands on the mine site *were jurisdictional*. Those AJDs, like the October 2020 NJD, stated they would “remain valid for a period of five years *unless new information warrants a revision*.”<sup>66</sup> Despite the five-year time frame for each, Twin Pines officially requested “formal re-consideration” of the AJDs in April 2020, immediately taking advantage of the prior administration’s rule change, and the Corps promptly complied, reversing its prior findings of jurisdiction. If a regulatory change was sufficient to warrant reconsideration of the December 2018 and January 2020 AJDs during their five-year duration, the removal of protections from nearly 400 acres of wetlands adjacent, and significant, to the health of a National Wildlife Refuge under a rule determined to be unlawful by the agencies should be sufficient to warrant revocation of the October 2020 NJD now.

Fourth, Twin Pines has not commenced mining—and it cannot do so until it obtains at least four state permits (none of which, unfortunately, are designed to protect against or mitigate wetlands loss). In other words, rescinding the October 2020 NJD would not disrupt any ongoing operations—as the D.C. Circuit has said, the egg is not yet scrambled.<sup>67</sup> It would simply put the mining company in the same place it was when it began the planning and permitting process in 2018, when it was subject to the longstanding definition of “waters of the United States.” To our knowledge, Twin Pines has not purchased or leased any additional property in reliance on the October 2020 NJD. And in any event, the company should have been on notice since at least June 2020 that the NWPR may be vacated and its NJD revoked, once conservation organizations, Native American tribes, states, and other plaintiffs filed more than a dozen challenges to the NWPR across the country.

Fifth, the wetlands that lost protection under the October 2020 NJD are unique and deserve special consideration. The Okefenokee is one of the largest remaining intact freshwater ecosystems in the world; the largest National Wildlife Refuge in the eastern United States; a National Wilderness Area; and a National Natural Landmark, a designation reserved for “the best examples of biological and geological features” in the country. With more than 600,000 annual visits, the Refuge is also a sustainable economic engine. The U.S. Fish & Wildlife Service reports that the Okefenokee supports 753 jobs, \$17,200,000 in annual employment income,

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<sup>65</sup> 86 Fed. Reg. 69372, 69410.

<sup>66</sup> See Dec. 2018 AJD, *supra* note 28, and Jan. 2020 AJD, *supra* note 36 (emphasis added).

<sup>67</sup> Cf. *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 97–98 (D.C. Cir. 2002).

\$5,400,000 in annual tax revenue, and \$64,700,000 in annual economic output.<sup>68</sup> Put simply, it is too valuable to jeopardize.

Sixth, the proposed mine could significantly degrade the ecological integrity of the iconic Okefenokee Swamp and nearby rivers. As explained above, Twin Pines' proposed wetland excavation will destroy all of the aquatic functions of the nearly 400 acres of wetlands previously found to be jurisdictional under the current regulatory regime, and it will have indirect impacts on hundreds of acres of surrounding wetlands.<sup>69</sup> It could alter the Okefenokee's hydrology and that of the nearby Suwannee and St. Marys rivers, which provide important habitat for federally protected shortnose, Atlantic, and gulf sturgeon.<sup>70</sup> It will destroy important wetland habitat relied on by numerous other species, including the federally listed red-cockaded woodpecker, eastern indigo snake, and wood stork.<sup>71</sup> And it could release toxic contaminants into the Swamp and nearby rivers.<sup>72</sup>

The EPA, U.S. Fish and Wildlife Service, and Georgia Department of Natural Resources have all expressed serious concerns about these and other risks, warning that the mine could result in "unacceptable," "permanent," and "irreversible" damage to the Refuge.<sup>73</sup> A similar mining proposal failed in the 1990s due to concerns over the irreparable, long-term damage it would cause to the Okefenokee's ecosystem. Given these significant issues, and the irreplaceable resources at stake, the Twin Pines mine should meet the same fate.

### **3. The vacatur of the NWPR provides an additional basis to revoke the 2020 NJD.**

Although the Corps has authority to revoke this specific NJD based on "new information" without relying on the vacatur of the NWPR, the rule's vacatur provides an additional reason for the Corps to withdraw the NJD.

Under established federal law, when a court vacates a rule, the rule is void *ab initio*—or null from the beginning. In other words, the vacated regulation is treated as if it never existed,<sup>74</sup>

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<sup>68</sup> James Caudill and Erin Carver, U.S. Fish and Wildlife Serv., *Banking on Nature 2017: The Economic Contributions of National Wildlife Refuge Recreational Visitation to Local Communities* 2–3 (2019), <https://perma.cc/4NHX-YX9T>.

<sup>69</sup> See generally SELC Comment Letter, *supra* note 14; USFWS Feb. 2019 Letter, *supra* note 17; USFWS Oct. 2019 Letter, *supra* note 25.

<sup>70</sup> SELC Comment Letter, *supra* note 14, at 50–53 (with supporting citations).

<sup>71</sup> USFWS Feb. 2019 Letter, *supra* note 17, at 4; USFWS Oct. 2019 Letter, *supra* note 25, at 7–10.

<sup>72</sup> Hutson Report, *supra* note 22, at 2, 6.

<sup>73</sup> EPA 3(a) Letter, *supra* note 6; at 3; EPA 3(b) Letter, *supra* note 25, at 1; USFWS Oct. 2019 Letter, *supra* note 25; USFWS Feb. 2019 Letter, *supra* note 17, at 2; GA EPD Comments, *supra* note 25, at 3.

<sup>74</sup> *Nat'l Fuel Gas Supply Corp. v. FERC*, 59 F.3d 1281, 1289 (D.C. Cir. 1995) (noting "norm of retroactive application" and not finding "any reason to believe that an agency may decline to apply a federal court decision retroactively").



and any permits, jurisdictional determinations, or other decisions based on the rule are void as well.<sup>75</sup> As one court reasoned:

[T]o vacate . . . means ‘to annul; to cancel or rescind; to declare, to make, or to render, void; to defeat; to deprive of force; to make of no authority or validity; to set aside.’ . . . Under [Supreme Court precedent] and consistent with the meaning of the word ‘vacate,’ we find that invalidation of the [] rule applies retroactively.”<sup>76</sup>

Here, two separate federal courts have vacated the NWPR nationwide, finding that it contains “fundamental, substantive flaws that cannot be cured without revising or replacing the NWPR’s definition of ‘waters of the United States’”<sup>77</sup>—flaws which the agencies themselves have acknowledged.

Because those same legal flaws existed in October 2020, and because vacatur orders are retroactive by default, the October 2020 NJD is void. If the Corps does not withdraw the NJD pursuant to RGL 05-02 based on “new information,” it should notify Twin Pines that any fill of currently jurisdictional wetlands (as delineated in the AJDs for the Keystone Tract dated December 18, 2018, and the Adirondack Tract dated January 24, 2020) will constitute an unauthorized fill in violation of Section 404 of the Clean Water Act.

#### **D. Conclusion**

For more than eight decades, the United States has taken an active role in protecting the Okefenokee Swamp, from designating the Swamp as a National Wildlife Refuge in the 1930s to forcefully opposing a similar mining proposal on Trail Ridge in the 1990s.<sup>78</sup> These efforts have allowed the Okefenokee to remain one of the most wild, pristine, and ecologically intact places in America. The Corps failure here to meet its government-to-government consultation obligation with several tribes constitutes new information warranting revocation of the October

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<sup>75</sup> Under Supreme Court case law, Supreme Court decisions “must be given full retroactive effect by all courts adjudicating federal law,” with limited exceptions that are not applicable here. *Harper v. Va. Dep’t of Taxation*, 509 U.S. 86, 96 (1993); *see also Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 755 (1995). The D.C. Circuit and other lower courts have applied this doctrine to lower court decisions vacating agency regulations or policies. *See, e.g., Nat’l Fuel*, 59 F.3d at 1289 (D.C. Cir. 1995); *United States v. Goodner Bros. Aircraft, Inc.*, 966 F.2d 380, 384–85 (8th Cir. 1992). *S. All. for Clean Energy v. Duke Energy Carolinas, LLC*, No. CIV 1:08CV318, 2008 WL 5110894, at \*4 (W.D.N.C. Dec. 2, 2008); Daniel H. Conrad, *Filling the Gap: The Retroactive Effect of Vacating Agency Regulations*, 29 Pace Env’t L. Rev. 1, 8 (2011) (“Taken literally, returning to the status quo ante [as a result of vacatur] would not only invalidate the regulations but also actions that relied upon the illegal regulation, since these actions would not have occurred or been permissible had the regulation not existed.”).

<sup>76</sup> *Goodner Bros.*, 966 F.2d at 384–85.

<sup>77</sup> *Pascua Yaqui Tribe*, 2021 WL 3855977, at \*5; *Navajo Nation*, 2021 WL 4430466, at \*3.

<sup>78</sup> In late October, a number of former federal and state officials, many of whom have played a direct role in protecting the Okefenokee Swamp, announced their opposition to mining on the doorstep of the Okefenokee. *See* Letter from Secretary Bruce Babbitt, *et al.* (Oct. 24, 2021), published as an advertisement in the Atlanta Journal Constitution (attached as Appendix A).

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2020 NJD. Moreover, the Corps should not allow a short-lived, now-vacated rule that the agency itself acknowledges has substantial legal and scientific flaws to jeopardize the integrity of the Okefenokee Swamp by allowing the proposed mine to move forward without any federal oversight or review. We therefore urge the Corps to revise the NJD made under the unlawful NWPR and restore protections to the wetlands slated to be destroyed by Twin Pines' mine.

Thank you for your consideration of this request. We welcome an opportunity to meet with you to discuss the path forward. Please call us at 404-521-9900 if you have any questions.

Sincerely,



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## Appendix A

Letter from Secretary of Interior Bruce Babbitt *et al.*  
(Oct. 24, 2021)



PAID ADVERTISEMENT

# The Doorstep of the Iconic Okefenokee Swamp Is No Place for a Mine

**T**he question facing the state of Georgia is whether to allow Twin Pines Minerals, LLC, an Alabama-based company, to mine for heavy minerals next to one of Georgia's most treasured natural resources.

Without adequate assurances of protection against disastrous impacts, the answer is a resounding no.

The Okefenokee Swamp is unlike any other place on Earth. One of the planet's largest freshwater ecosystems, it safeguards thousands of species, feeds the Suwannee and St. Marys Rivers, and is valuable to both wildlife and people.

With each phase of development, operations would creep closer, eventually coming within 400 feet of the swamp and consuming roughly 8,000 acres.

In the 1990s, DuPont proposed a similar mine. But the U.S. Department of the Interior, the Georgia Board of Natural Resources, Governor Zell Miller and the people of Georgia prevailed and the company abandoned the project.

According to the U.S. Fish and Wildlife Service, mining could draw down water levels and irreversibly damage the entire ecosystem. Surveys have found that **50% of visitors would be less likely to recreate at the Okefenokee if its water quantity were impacted.**

With as many as 700,000 annual visits, the refuge supports over 750 local jobs and generates \$64 million for local communities per year. Risking the continued growth of Georgia's recreational tourism economy to mine titanium dioxide—a product commonly used to whiten household paint—defies common sense.

There is a time and place for industry, but it's not on the edge of the Okefenokee. The state should engage national and local leaders in a stakeholder effort and provide the direction and leadership to permanently end the threat of mining near the Okefenokee National Wildlife Refuge.

**If a wild and pristine Okefenokee is lost, future generations will not forgive us.**



## SIGNEES

**Bruce Babbitt**, Secretary of the Interior (*President Clinton*)

**Henry M. Paulson, Jr.**, Secretary of the Treasury (*President George W. Bush*)

**Lynn Scarlett**, Deputy Secretary of the Interior (*President George W. Bush*)

**Lynn Greenwalt**, U.S. Fish and Wildlife Service Director (*Presidents Nixon, Ford, Carter*)

**Steve Williams**, U.S. Fish and Wildlife Service Director (*President George W. Bush*)

**Jamie Rappaport Clark**, U.S. Fish and Wildlife Service Director (*President Clinton*)

**Lonice Barrett**, Georgia Dept. of Natural Resources Commissioner (*Governors Miller, Barnes, Perdue*)

**Mike Worley**, President and CEO, Georgia Wildlife Federation

**Wendy Paulson**, Chairman, Bobolink Foundation

**Noel Holcomb**, Georgia Dept. of Natural Resources Commissioner (*Governor Perdue*)

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