

an action's impacts on species, the public is deprived of the opportunity to be fully informed of and comment on those impacts. NEPA regulations require the drafting agency to solicit comment from "those persons or organizations who may be interested or affected."⁶⁹ Thus, relying solely on ESA consultation to evaluate the significance of a proposal's impacts on ESA-listed species is wholly inadequate for NEPA purposes, because no opportunity for public comment is required prior to the issuance of the biological opinion. Public comment is one of the means by which NEPA promotes its purpose of "sensitizing all federal agencies to the environmental impacts of its actions."⁷⁰ The inclusion of these viewpoints in the decision-making process was the "paramount Congressional desire" in creating a statute that would increase agency awareness of environmental trade-offs.⁷¹ Thus, completing consultation does not supplant the need to also conduct a NEPA analysis on the impacts to listed species and the Corps must instead engage in both analyses.

C. The Corps and other agencies have recognized the need for an EIS.

The Corps has already recognized the need for an EIS. In its 2018 Issue Paper on the Twin Pines project, the Corps recognized:

Due to the location of the proposed project in relation to the Okefenokee National Wildlife Refuge, the potential for hydrologic alteration of groundwater and water flow into the Okefenokee, more than 1,000 acres of direct wetland and stream impacts (total is unknown at this time), the extent of indirect wetland impacts, pumping water from the Floridian aquifer for use in operation of the mine, and potential adverse (currently unknown) impacts to Cultural Resources, an Environmental Impact Statement will most likely be required if the applicant pursues the project as proposed.⁷²

Similarly, in their February 2019 comments to the Corps, the U.S. Fish and Wildlife Service wrote, "We opine and recommend that an Environmental Impact Statement be prepared for the proposed project."⁷³

Given the context and intensity of the proposed mine, as well as the request by the Service, NEPA plainly obligates the Corps to prepare an EIS. In the EIS, the Corps must take a

⁶⁹ 50 C.F.R. § 1503.1(a)(4).

⁷⁰ *Nat'l Audubon Soc. v. Dep't of Navy*, 422 F.3d 174, 184 (4th Cir. 2005) (citing *Andrus v. Sierra Club*, 442 U.S. 347, 350–51 (1979)).

⁷¹ *State of Cal. v. Block*, 690 F.2d 753, 771 (9th Cir. 1982).

⁷² USACE Issue Paper at 1.

⁷³ USFWS Letter at 1 (citing hydrologic, species, and wilderness area concerns throughout the letter).