

The proposed mine would likely have substantial secondary impacts on the biology of the aquatic ecosystem as well by damaging or destroying neighboring habitat and harming the biological productivity of neighboring ecosystems.

3. Cumulative Impacts

a. The application does not consider the cumulative effects of piecemeal impacts.

Although the first “phase” of the proposed mine is limited to 1,268 mined acres (on 2,414 acres of property), Twin Pines in fact intends to operate a 12,000-acre mine.⁹¹ Twin Pines’ application does not consider the remaining 9,586 acres at all. Instead, it entirely ignores the impacts caused by 80 percent of the proposed project.

As with NEPA, the 404(b)(1) Guidelines do not permit this type of piecemeal analysis. They require all wetlands impacts from all phases of a project to be considered together. As the Fifth Circuit Court of Appeals put it:

The [404(b)(1) Guidelines] . . . provide that the review may not be “piecemeal”—a few acres here, a small tract there. The rationale is simple. “Although a particular alteration of wetlands may constitute a minor change,” the regulations note, “the cumulative effect of numerous such piecemeal changes often results in a major impairment of the wetland resources.”⁹²

The proper question, then, is whether the proposed 12,000-acre mine would significantly degrade wetlands or other waters. Although the Phase One impacts alone should be disqualifying, the scale of potential impacts from the full mine is staggering. During Phase One Twin Pines intends to mine approximately 1,268 acres (746 acres of upland and 522 wetland) of the 2,414 site. Conservatively assuming a roughly proportional amount of mining (50%) and wetlands impacts (40%) across the 12,000-acre project area,⁹³ over **2,400 acres of wetlands**

⁹¹ USACE Issue Paper at 1; USFWS Letter at 1; *see also* Regional Map, Fig. 3, below (showing progression of DuPont’s Florida/Maxville Mines).

⁹² *Buttrey v. United States*, 690 F.2d 1170, 1180 (5th Cir. 1982); *see also United States v. Rueth Dev. Co.*, 335 F.3d 598, 600 (7th Cir. 2003) (noting that the Corps denied a § 404 permit application because the applicant had “present[ed] his development plans in a piecemeal fashion in an attempt to avoid a comprehensive review of their cumulative environmental impact”); *Salt Pond Associates v. U.S. Army Corps of Engineers*, No. CIV.A. 92-597-LON, 1993 WL 738478, at *11 (D. Del. Sept. 22, 1993) (noting that the Corps denied the initial permit application because the Corps “did not respond to piecemeal permit applications in ‘[f]ederally regulated wetlands associated with a single and complete project’”).

⁹³ Twin Pines will likely mine more than 50% of the 12,000 acres. First, 1,268 is 52.52% of the permit area of 2,414 acres. Second, the Phase One “permit area” is exaggerated westward into areas that Twin Pines had no intention of mining. *See* Section IV(E)(1) (Avoidance). Similarly, the tracts for future phases of the project more closely track Trail Ridge—where the heavy minerals are most concentrated.