

As explained above, Twin Pines is attempting to skirt the regulatory requirements pertaining to avoidance and minimization. By sidestepping avoidance, in particular, Twin Pines is attempting to advance directly to compensatory mitigation. In short, Twin Pines is attempting to simply pay for the damage it intends to do to the environment. It is a violation of the Section 404(b)(1) Guidelines to attempt such a maneuver.

But even if Twin Pines were permitted to sidestep the Guidelines in this manner, the compensatory mitigation it is proposing for the 522 acres of wetlands in the mining area, is equally brazen. Twin Pines' plan is in clear violation of the Clean Water Act. Under Twin Pines' compensatory mitigation plan, it would completely destroy the 522 acres of wetlands and then attempt to create them again within 90 days. As explained below, such an approach is should be given little credence.

1. Twin Pines will not be able to create functioning wetlands in 90 days.

The Section 404(b)(1) Guidelines provide that: "The fundamental objective of compensatory mitigation is to offset environmental losses resulting from unavoidable impacts to waters of the United States authorized by DA permits."¹⁵⁵ If compensatory mitigation is needed, "[t]he amount of required compensatory mitigation must be, to the extent practicable, sufficient to replace lost aquatic resource functions."¹⁵⁶ The Guidelines go on to provide that the Corps "must require a mitigation ratio greater than one-to-one where necessary to account for the method of compensatory mitigation (e.g., preservation), the *likelihood of success*, differences between the functions lost at the impact site and the functions expected to be produced by the compensatory mitigation project, *temporal losses* of aquatic resource functions, the difficulty of restoring or establishing the desired aquatic resource type and functions"¹⁵⁷

To ensure that compensatory mitigation is successful into the future, applicants must develop maintenance, monitoring, and long-term management plans.¹⁵⁸ The applicant is also supposed to have an adaptive management plan and financial assurances should the compensatory mitigation fail.¹⁵⁹ With regard to financial assurances, the Guidelines provide that: "The district engineer shall require sufficient financial assurances to ensure a high level of confidence that the compensatory mitigation project will be successfully completed, in accordance with applicable performance standards."¹⁶⁰

Due to a high failure rate of on-site mitigation, the Corps and EPA issued a rule in 2008 that required applicants to purchase mitigation credits from banks rather than undertake on-site or off-site compensatory mitigation themselves.¹⁶¹

¹⁵⁵ 40 C.F.R. § 230.93(a).

¹⁵⁶ 40 C.F.R. § 230(f)(1).

¹⁵⁷ 40 C.F.R. § 230.93(f) (2)(emphasis added).

¹⁵⁸ 40 C.F.R. § 230.93(f) (8), (10) & (11).

¹⁵⁹ 40 C.F.R. § 230.94(c)(12) § (13).

¹⁶⁰ 40 C.F.R. § 230.93(n)(1).

¹⁶¹ Compensatory Mitigation for Losses of Aquatic Resources under CWA Section 404 (Final Rule), 73 Fed. Reg.19,593, 19,601 (Apr. 10, 2008).