

We disagree that the rule should establish a preference for on-site compensatory mitigation, because the failure rate for such projects is quite high. On-site compensatory mitigation activities, especially wetland restoration or establishment, are particularly sensitive to land use changes. [...] In many cases, there are circumstances in which on-site mitigation is neither practicable nor environmentally preferable.¹⁶²

The Compensatory Mitigation Regulations also indicate that the Corps shares mitigation plans with the public in a meaningful way. As the regulations provide, “the rule requires that public notice for DA permits include a discussion of mitigation plans, including any compensatory mitigation.”¹⁶³ Public comment can then help inform the development of detailed planning documents.¹⁶⁴

And last, the agencies published a mitigation checklist to help applicants develop complete compensatory mitigation plans.¹⁶⁵ The checklist contains the twenty-three elements of a complete model plan.¹⁶⁶ Twin Pines’ mitigation plan contained only a handful of these twenty-three elements.

2. Twin Pine’s compensatory mitigation plan does not comply with the Guidelines and thus violates the Clean Water Act.

a. The proposed impacts are not temporary.

Under its compensatory mitigation plan, Twin Pines intends to destroy 522 acres of wetlands and then rebuild them within 90 days and ensure that the created wetlands will provide all of the functions of the wetlands destroyed.¹⁶⁷ It suggests that its mining would cause only temporary impacts.¹⁶⁸ Although it is true that in the mining context “temporary impacts” are determined by the district engineer on a case-by-case basis,¹⁶⁹ the impacts Twin Pines is proposing are not temporary, they are permanent. Twin Pines submits that the impacts are “temporary” because it plans to refill the holes it excavates with tailings and create functioning wetlands all within 90 days.¹⁷⁰ In its application for a state surface mining permit, Twin Pines tells a different story. In that application Twin Pines is more realistic. It says that it could take up

¹⁶² *Id.*

¹⁶³ *Id.* at 19,611.

¹⁶⁴ *Id.*

¹⁶⁵ U.S. Army Corps of Eng’rs and U.S. Env’tl. Prot. Agency, Memorandum to the Field, Model Compensatory Mitigation Plan Checklist for Aquatic Resource Impacts Under the Corps Regulatory Program Pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act (2003).

¹⁶⁶ *Id.*

¹⁶⁷ Permit application at 27.

¹⁶⁸ *Id.*

¹⁶⁹ 73 Fed. Reg. 19,593, 19,607.

¹⁷⁰ Permit Application at 27.