

agency and the consulting agency must proceed to formal consultation for those species.²⁶⁴ To complete formal consultation, if the consulting agency determines that the agency action is not likely to result in jeopardy or destruction or adverse modification of critical habitat (a “no jeopardy” finding), the Service must issue a biological opinion, explaining how the proposed action will affect the listed species or habitat, together with an incidental take statement and any reasonable and prudent measures necessary to avoid jeopardy.²⁶⁵ If the consulting agency, however, determines that the action is likely to jeopardize the species or result in the destruction or adverse modification of critical habitat, it “shall suggest those reasonable and prudent alternatives which [it] believes” would not result in jeopardy or adverse modification.²⁶⁶

Twin Pines has not demonstrated that it will not jeopardize the continued existence of any threatened or endangered species or result in the destruction or adverse modification of the critical habitat of these species.²⁶⁷ At best, there are too many gaps in the science and data presented in the application to know with certainty whether a “no jeopardy” finding is warranted for certain species. At worst, it appears likely that for some species, the mine would indeed result in jeopardy. The Corps, therefore, must engage the Service and the National Marine Fisheries Service (NMFS) for all listed species that may be affected by the proposed project within its action area.

This analysis must span “all areas to be affected directly or indirectly” by the project and not merely the immediate area involved in the action.²⁶⁸ The impacts will likely carry far downstream of the 12,000-acre site and also within the Refuge. Therefore, the Corps and the appropriate consulting agency must consult on the below listed species that either may, will likely, or almost certainly be impacted.

²⁶⁴ *Id.* § 402.14.

²⁶⁵ 16 U.S.C. § 1536(b); 50 C.F.R. §§ 402.14(g)–(i).

²⁶⁶ 16 U.S.C. § 1536(b)(3)(A).

²⁶⁷ Under the CWA Section 404(b)(1) guidelines, the Corps may not permit a dredge and fill activity that “jeopardizes the continued existence” of an endangered species – the standard for prohibiting federal activities under section 7 of the ESA, 16 U.S.C. § 1536(a)(2); 40 C.F.R. § 230.10(b)(3). Because the Permit Application has failed to establish that the Project will not cause jeopardy to the above listed species, potentially among others, any approval of the Project by the Corps will also violate Section 404(b)(1).

²⁶⁸ 50 C.F.R. § 402.02(d).