

Submitted via e-mail to okefenokee@fws.gov

December 13, 2024

Martha Williams
Director
U.S. Fish and Wildlife Service
1849 C Street, NW
Washington, DC 20240

Re: U.S. Fish and Wildlife Service's Proposed Expansion of Okefenokee National Wildlife Refuge Boundary

Dear Director Williams:

The undersigned organizations appreciate the opportunity to provide input on the U.S. Fish and Wildlife Service's (Service) proposed expansion of the Okefenokee National Wildlife Refuge (Refuge) Boundary.¹ Our organizations represent a large and diverse cross-section of America's agriculture, construction, energy, forestry, manufacturing, and mining sectors. Our members are vital to building a thriving national economy and are essential to achieving the nation's critical infrastructure, supply chain, transportation, and energy goals. Our members also create much needed and good-paying jobs in communities across the country. Our members are committed to both protecting the environment and ensuring responsible development.

The proposal is the latest step in the Service's efforts to stop a development project that it opposes but has no authority to explicitly disapprove. As such, the proposal's finalization will set a harmful precedent by creating significant regulatory uncertainty for businesses that operate within proximity of a unit of the National Wildlife Refuge System. The potential impacts could be significant as there are more than 571 national wildlife refuges across the country encompassing 95 million land acres and 760 million marine acres.² With national refuges found in all 50 states, the Department of the Interior's (DOI) recent blog post correctly noted that "national wildlife refuges are found from sea to shining sea, spanning almost every type of habitat imaginable."³

As explained below, the Service's and DOI's opposition to this development project is long-standing. The proposed refuge expansion is the latest step by the Service and DOI to undermine the project. The boundaries of the proposed expansion deliberately

¹ U.S. Fish and Wildlife Service, Press Release, "U.S. Fish and Wildlife Service is Seeking Public Input on Proposal for Minor Expansion of Okefenokee National Wildlife Refuge Boundary," Oct. 18, 2024, available at <https://www.fws.gov/press-release/2024-10/okefenokee-proposed-expansion>.

² See, FWS Webpage, Public Lands and Waters, National Wildlife Refuge System, "By the Numbers," available at <https://www.fws.gov/library/collections/public-lands-and-waters>.

³ Department of Interior Blog, "Celebrating Our National Wildlife Refuges," Oct. 11, 2024, available at <https://www.doi.gov/blog/celebrating-national-wildlife-refuges#:~:text=Back%20in%201903%2C%20President%20Theodore%20Roosevelt%20designated,million%20acres%20of%20submerged%20lands%20and%20waters>.

encompass the opposed project, a small business entity enterprise,⁴ currently undergoing a state permitting process. The Service explains in its 2025 Land and Water Conservation Fund land acquisition budget justification that the refuge expansion will “create a buffer around the swamp from future development, such as ranchette subdivisions and mineral mining.”⁵ Given the precedential nature of the Service’s effort, which will inflict harmful and unnecessary uncertainty into a lawful ongoing permitting process, we urge the Service to withdraw the proposed Refuge expansion. We also offer the following comments.

The administration has sought novel approaches to stop this mining project, from simple urging of permit denial to threats of litigation. Initially, the Service attempted to leverage the authority of the U.S. Army Corps of Engineers (USACE) over wetlands at the project site. But the USACE’s initial determination found that the project would not impact federally jurisdictional waters under the Clean Water Act (CWA).

Another effort was a November 22, 2022, letter from Secretary of the Interior Deb Haaland to Georgia Governor Brian Kemp “strongly recommend[ing] that the state of Georgia not move forward with approval for this proposed mine.”⁶ Secretary Haaland’s letter referenced alleged “risks the proposed mine could have on the ecosystem” and “potential impacts to cultural values” but failed to identify any specific federal authority through which DOI could assert jurisdiction over the site.⁷ Several months later, on March 17, 2023, the Service asked the Georgia Environmental Protection Division (EPD) to defer action on the permit to consider additional modeling data that could lead to an USACE reconsideration of CWA jurisdiction over the potentially impacted wetlands.⁸ Ultimately, the Service was forced to accept that the USACE “will not be issuing a Clean Water Act [permit],” while still pressing EPD to consider “the ecological

⁴ U.S. Fish and Wildlife Service, Frequently Asked Questions, “Okefenokee National Wildlife Refuge and Twin Pines Mine,” (April 4, 2024), “The U.S. Fish and Wildlife Service opposes the proposed Twin Pines Minerals LLC, mining project and reclamation activities adjacent to the Okefenokee National Wildlife Refuge.” *available at* <https://www.fws.gov/story/2024-04/faq-okefenokee-nwr-and-twin-pines-mine>.

⁵ U.S. Fish and Wildlife Service, LWCF Land Acquisition Requested Line-Item Project List for FY2025, *available at* <https://www.doi.gov/sites/default/files/documents/2024-03/1-fwsfy2025-lwcf-request-pds508.pdf>.

⁶ Letter from Secretary Haaland to Governor Kemp, Nov. 22, 2022, *available at* <https://georgiarecorder.com/wp-content/uploads/2022/12/HaalandLetter.pdf>.

⁷ In fact, talking points provided to Secretary Haaland in advance of a Sept. 2022 visit to the Refuge, in case she got questions about the project, acknowledged that because there are “currently no federal jurisdictional wetlands proposed to be impacted by the proposed project, there are **no federal regulatory protections** in place for the Refuge.” (emphasis added). See Greenwire, “Emails reveal how Halland’s staff approached mining battle,” Sept. 13, 2023, *available at* <https://subscriber.politicopro.com/article/eenews/2023/09/13/emails-reveal-how-haaland-staff-approached-mining-battle-00114594> (subscription required).

⁸ Letter from Fish and Wildlife Service Acting Regional Director Oetker to Georgia EPD Director Dunn, March 17, 2023, *available at* https://www.fws.gov/sites/default/files/documents/Letter_RD%20to%20GA-EPD_TwinPines%20Signed.pdf.

significance of these wetlands . . . as a major factor, regardless of whether or not they are under the USACE’s jurisdiction.”⁹

Lacking a federal nexus through a USACE permit and already several years into this process, in early 2024 the administration formally asserted federal reserved rights for the Refuge – a move to try to force EPD to defer its permit decision while the agency and EPD “work together to quantify the amount of water the [Refuge] needs to maintain its primary purpose.”¹⁰ As noted by various legal experts, the federal government has rarely asserted such rights in the Eastern U.S., likely due to lack of clear legal precedent.¹¹

In case the state is not swayed by threat of litigation over reserved water rights, the Service now proposes the current “minor expansion” of the Refuge as an alternative tactic, creating additional uncertainty over the project’s future. While the proposal does not force the acquisition of the project area, it creates additional pressure on the state and significantly undermines investment certainty. This maneuver is consistent with the Service’s approach in several similar actions where it is exceeding its authority in the guise of protecting federal lands from projects occurring outside of federal boundaries.

In short, we are very concerned that the Service’s proposal will act as a bellwether for further federal overreach, resulting in chilled investment in U.S. businesses and infrastructure, and thwart important development projects domestically. We therefore urge the Service to withdraw its proposed refuge boundary acquisition that clearly targets a domestic development project going through a lawful state permitting process.

Please contact Caitlin McHale at cmchale@nma.org if you have any questions or would like to discuss further.

⁹ Letter from Acting Regional Director Oetker to Director Crown, April 9, 2024, *available at* https://www.fws.gov/sites/default/files/documents/2024-04/usfws-letter_ga-epd_twinpines_permits_508.pdf.

¹⁰ Letter from Acting Regional Director Oetker to Director Crown, Jan. 31, 2024, *available at* <https://www.southernenvironment.org/wp-content/uploads/2024/05/2024-USFWS-reserved-water-rights-letter.pdf>.

¹¹ See Greenwire, “Feds assert water rights to fight mine near Okefenokee swamp,” May 14, 2024, *available at* <https://subscriber.politicopro.com/article/eenews/2024/05/14/feds-asserts-water-rights-to-fight-mine-near-okefenokee-swamp-00157871> (subscription required) (providing interview with Pat Parenteau, professor of law emeritus and senior fellow for climate policy at the Vermont Law and Graduate School). Professor Parenteau commented that “there’s been a number of federal water rights legal cases in the West, but it’s rare east of the Mississippi. That’s probably because there is no clear legal precedent and water rights have not been a huge concern in Eastern refuges until now . . . The Department of Justice would have to file suit, and it would be a case of first impression in the East. . . The argument against it is that the reserved rights doctrine only applies to public lands that were originally owned by the federal government, not to lands later acquired.”). See also, E&E News PM, “Miner can’t tap water needed for Okefenokee wildlife refuge, US says,” March 4, 2024, *available at* <https://subscriber.politicopro.com/article/eenews/2024/03/04/miner-cant-tap-water-needed-for-okefenokee-wildlife-refuge-us-says-00144755> (subscription required) (providing interview with Ryan Rowberry, a Georgia State University law professor, who commented that “while federal agencies commonly assert water rights for public lands in the West, where the arid climate makes water more scarce, they have rarely done so in the eastern U.S.”).

Respectfully,

American Coke and Coal Chemicals Institute
American Farm Bureau Federation
American Mining and Exploration Association
Associated General Contractors of America
Essential Minerals Association
Georgia Mining Association
National Mining Association
National Stone, Sand & Gravel Association
The Fertilizer Institute
Treated Wood Council