



# TUWaterWays

Water News and More from the Tulane Institute on Water Resources Law & Policy

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## Mine Swamp? No, OUR Swamp!

More drama unfolds in the [Okefenokee National Wildlife Refuge](#), which encompasses 354,000 acres of wetland habitat across southern Georgia and into Florida. It's even classified as a Wetland of International Importance under the [RAMSAR Convention](#). What could go wrong when you try to build a titanium mine on the boundary of such an ecosystem? Unfortunately, that's not an [imaginary](#) scenario. [Twin Pines](#) Mining Company has had plans to build a mining project on the eastern rim of the [Okefenokee](#). Last month, the company sought a permit to withdraw 1.4 million gallons of groundwater per day from the Floridan Aquifer for processing mining waste.

Pumping that much groundwater on the rim of the refuge could seriously deplete the surface water retained in the swamp. The U.S. Fish & Wildlife Service have a legal argument up their sleeves. In a letter to Georgia's environmental agency, the U.S. FWS wrote that "[federal law prohibits diverting water from the Okefenokee National Wildlife Refuge in quantities that would harm its function as a protective habitat for native animal and plant species.](#)" Back in 1908, the Supreme Court held in [United States v. Winters](#) that, when Congress reserves land for a particular purpose, like a tribal reservation or a national wildlife refuge, it also impliedly reserves sufficient water to fulfill that purpose. In 1976, the Court extended the Winters doctrine to apply to groundwater in [Cappaert v. United States](#). Normally you hear about federal reserved rights in western states, often with respect to Native American tribes' water rights. As we know, there is a lot less water in the West, and the legal system of prior appropriation isn't the most flexible – so it makes [sense](#) that this judicial doctrine developed primarily in Western disputes. It's kind of a big deal for this assertion to be made in the Eastern United States, where riparianism and a water-abundant environment reigned. However, as climate change impacts weather patterns, and drought becomes increasingly more frequent in the East, that presumption of sufficient water to share is slowly eroding.

It's also a big deal in that it could bring the project back under federal oversight. The Army Corps usually handles permits in this realm pursuant to Clean Water Act Section 404 (yes, we are once again [reminding you](#) about WOTUS). In 2020, the Trump Administration rolled back protections for a large swath of the nation's wetlands, and Twin Pines sued the Army Corps, arguing that the site was no longer jurisdictional. The Army Corps subsequently revised its previous jurisdictional determination, thereby removing its oversight of the project ([a decision that resulted in another suit](#)). Now, with an even more restrictive WOTUS definition, that Army Corps' hook is further out of reach. Though it's unclear for now how much the U.S. FWS assertion of water rights will impact the final permit decisions, Georgia regulators are required work alongside federal agencies. This could be the start of a new era as a federal water right doctrine migrates back across the Mississippi River. [Wagons east!](#)

## You Can Either Build Land or Build A Case

Yes, it's time for another Mid-Barataria Sediment Diversion update! The past few months have been anything but smooth sailing for the project – two lawsuits have been filed since the project's groundbreaking back in August. One is an [Endangered Species Act case against the Army Corps](#), focused on threats to bottlenose dolphins. The other was brought by Plaquemines Parish against the state Coastal Protection and Restoration Authority, arguing that 1)

the diversion would increase flood risk and impact local premiums under the National Flood Insurance Program, and 2) the diversion will disrupt the shrimp industry.

The parish's case has been returned to Plaquemines after an appeals court ruled it should be heard there and not in Baton Rouge. Then the parish issued [second stop work order last week](#). Just days after that, FEMA finally weighed in on the matter and [determined that the project will not impact flood insurance in the parish](#). Nevertheless, parish officials are not letting go that easily. Yes, the rising flood insurance rates are a real cause for concern. But given the alarming land loss and sea level rise projections for Plaquemines in the next 50 years if no action is taken, it's not easy to see how this diversion would be the tipping point when its main goal is to build land. And all this arguing about flood risk and threats to the parish takes place as a massive LNG facility is being constructed there that [sprawls](#) 630 acres of the floodplain between the Mississippi River and Gulf, contributes to an ongoing [public water supply crisis](#), and has already racked up [2,000 permit deviations](#).

The Mid-Barataria Diversion project also dedicates [millions in funding to support local fisheries and to make infrastructure upgrades to offset and mitigate impacts](#) from the project. If the project doesn't move forward, neither would the mitigation funding. Once federal dollars have been dedicated to a project, they can't simply be taken back and spent on something else.

## No Matter What You Do, You Can't Make Everyone Happy

If you ask federal agencies these days, they'd probably say the old adage should be "no matter what you do you can't make ANYONE happy." The Securities and Exchange Commission is the latest to experience the phenomenon this week. After two years of work, it [finally unveiled the long-anticipated climate disclosure rule](#) that would require publicly traded companies to report two categories of emissions in its annual filings to the top financial regulator. This comes amidst an ongoing backlash against environmental, social, and governance (ESG) policies in Republican states. And if you're wondering how long it will take for the new rule to end up in court, [wonder no more](#). A [ten-state coalition led by West Virginia and Georgia filed a petition with the 11<sup>th</sup> Circuit](#), arguing that the rule exceeds the SEC's statutory authority and raised "some First Amendment problems." The final rule had already been chopped down, removing reporting requirements for Scope 3 emissions, which would have accounted for a company's indirect emissions from suppliers and consumers. That action has also upset [environmental groups, who may very well file suit](#) on the grounds that the SEC didn't go far enough. To be clear, these rules aren't environmental regulations themselves, but they do aim to inform investors and the public about how well a company is prepared for the future and what liability it may be exposed to. Surely everyone would have been happy if they had just included water footprint and risks in the disclosure requirements. That's something everyone can agree on, right? Right?!?

Of course, none of this could matter in a few months depending on whether the Supreme Court overrules *Chevron* deference. [Just a quick recap](#): the Chevron deference gives discretion to federal agencies in interpreting federal laws within the field where Congress gives such agency authority, instead of courts offering their own interpretation on the matter.

As climate risks continue to grow, it seems that collecting this sort of information would be useful. Unfortunately, [the Department of Treasury just halted its plan to seek property insurers' climate data](#), instead kicking it back to the states to gather the information. Because things have been going so well with the states handling property insurance crises on their own.

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### Coming Up:

[Coastal Law In Louisiana CLE](#); New Orleans, LA;  
April 18-19, 2024

[WWNO Sea Change live at The Broadside](#); New Orleans, LA; March 19, 2024

### Water jobs:

[Environmental Reporter](#); The Times-Picayune; New Orleans, LA

[Gulf of Mexico Campaign Manager, Offshore Wind Energy](#); National Wildlife Federation; Gulf Region

[Policy Manager, Mississippi River Water Initiative](#); National Audubon Society; Holly Springs, MS

[National Environmental Leadership Fellow](#); Rachel Carlson Council; Washington, DC



The [Tulane Institute on Water Resources Law and Policy](#) is a program of the Tulane University Law School. The Institute is dedicated to fostering a greater appreciation and understanding of the vital role that water plays in our society and of the importance of the legal and policy framework that shapes the uses and legal stewardship of water.

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