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United States Department of the Interior

FISH AND WILDLIFE SERVICE

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February 28, 2019

Colonel Lars N. Zetterstrom
Galveston District, Corps of Engineers
Attn: Elizabeth Shelton
P.O. Box 1229
Galveston, Texas 77553-1229

Dear Colonel Zetterstrom:

Thank you for the opportunity to comment on the public notice for U.S. Army Corps of Engineers (Corps) permit application SWG-2016-00384, dated December 27, 2018. The applicant, Romerica Investments, LLC, proposes to discharge fill into 42.35 acres of wetlands and 771 linear feet of streams adjacent to the San Jacinto River for the construction of a mixed residential-commercial-retail development, including a marina. The project is located in waters and wetlands adjacent to the West Fork of the San Jacinto River, in Kingwood, in Harris County, Texas.

The U.S. Fish and Wildlife Service's (Service) comments are provided in accordance with the provisions of the Endangered Species Act (Act) (16 U.S.C. 1531 et seq.), the Migratory Bird Treaty Act (MBTA) (16 U.S.C. 703 et seq.), the Bald and Golden Eagle Protection Act (the Eagle Act) (16 U.S.C. 668 et seq.), the Fish and Wildlife Coordination Act (16 U.S.C. 661-667(e)), and the National Environmental Policy Act (42 U.S.C. §4321-4347 et seq.).

The Service reviewed the public notice materials and participated in an interagency site visit on February 14, 2019. Personnel representing the applicant, its environmental consultant, the Environmental Protection Agency (EPA), Texas Parks and Wildlife Department (TPWD), and the Texas Commission on Environmental Quality (TCEQ) also participated. Based on the following concerns and lacking receipt of additional project specific information, the Service recommends that application SWG-2016-00384 be denied. Our concerns are as follows:

- From statements made by the applicant and its environmental consultant onsite during the site inspection, it appears to the Service that the footprint acreage impact to aquatic resources in the Corps public notice is an underestimate of the likely extent of impacted waters and wetlands resulting from the proposed discharge of fill material. The applicant indicated that the building footprints in the plans are not intended to be built at-grade, but rather elevated above the surface on constructed pilings. However, the construction of

buildings and infrastructure in this manner is very likely to result in the fill of wetlands within and well beyond the boundaries depicted. Site clearing and preparation, including the installation of utilities and construction access, in forested areas will require the grading of these areas. Such activities typically constitute a regulated discharge under the Clean Water Act. Regardless, the Service is concerned that the applicant's account of the footprint impact of this proposal is misleading and recommends the reasonable necessary construction footprint and wetland impact be disclosed in a revised set of plan and profile drawings. Thus, the Service recommends the Corps re-notice this project for public review and comment.

- Given the inclusion of high-rise buildings in this proposal, the Service is concerned with bird strikes and mortalities and recommends the applicant consider measures to minimize the effects of their proposal on avian species. The Service recommends profile drawings of the proposed pile-supported structures and commercial/retail facilities be included in the revised coordination for the project. The Service also recommends that the Corps re-notice this project for public review and comment for revisions to this proposal.
- As mentioned previously, the elevation of buildings above grade as pile-supported structures is likely to result in the discharge of fill material into these wetlands. Even if some of the buildings are elevated and the surface remains as a "wetland", these areas will be cleared of all vegetation, presumably graded, with 60 to 500-foot structures built atop what are currently highly functioning forested wetlands. Such activities will result in significant reduction in biological functions, particularly those related to fish and wildlife habitat. Similarly, we would anticipate reductions of the physical and chemical functions of these wetlands and resultant water quality issues, including increased erosion, reduced flood attenuation, and reduced pollutant sequestration. The Service recommends the applicant develop a compensatory mitigation plan to offset all of the project-related impacts to aquatic resources in accordance with Corps of Engineers regulations at 33 CFR 332. The Service also recommends this plan be developed in coordination with the resource agencies and provided for review and public comment in a revised public notice.
- This site, particularly the "marina district" has been subject to repeated flooding (e.g., Memorial Day flood of 2015, Tax Day flood of 2016, Hurricane Harvey in 2017). The site occurs entirely within the floodplain and *floodway* of the West Fork of the San Jacinto River. While some onsite flood detention is acknowledged, it is unclear to the Service how this project will offset its increase in impervious area, including more than 42 acres of wetland fill in the floodplain and *floodway* of the West Fork San Jacinto River. The Service is concerned with the hydrologic modification of this site and the effects of the project on fish and wildlife habitat onsite and offsite that will likely be irrevocably altered in the absence of appropriate stormwater management. The Service recommends the applicant provide information in the project revisions that address floodplain impacts and measures to mitigate such and that the Corps re-notice this project with this information for public review and comment.
- Regarding the existing proposal's plans, the marina basin includes a proposed channel that extends outside the depicted boundaries of the project area (see Corps public notice Exhibit 9) and into the adjacent golf course. The Service is concerned that the applicant

may not possess the requisite legal right to build this critical component of their project and that the associated impacts to wetlands have not been fully disclosed. Thus, we recommend the applicant resolve this concern, update the exhibits and impacts to aquatic resources, and the Corps re-notice this project for public review and comment.

- Similarly, the Service examined detailed renditions of this proposal's online marketing, presumably its architect firm, and finds additional inconsistencies with the depiction of the marina's access road. In those materials, the main access is depicted as a widened extension of Hamblen Road and beyond what is currently depicted as the permit area. This would include areas within Kingwood Service Association's River Grove Park and additional impacts to aquatic resources. If the access to the marina is as currently depicted in the plans along LaCrosse Road at the northern boundary of the park, the Service questions the need to widen Woodland Hills Drive south beyond this access and impacting several additional wetlands and streams (see Corps public notice Exhibit 8). The Service recommends the applicant provide revised drawings depicting the project area in its entirety, including all necessary road improvements, access points, and impacts to aquatic resources. In addition, the Service recommends that the Corps re-notice this project for public review and comment.
- The discrepancies with the depiction of the marina access road also supports our question that the entirety of the project's footprint impacts have not likely been fully disclosed. The Service recommends the Corps re-notice this project for public review and comment when all of the proposal's impacts to aquatic resources have been identified and correctly depicted in a revised set of plans.
- The Service recommends the applicant be required to provide, for resource agency review and comment, an analysis of practicable alternatives to the proposed wetland and stream fill. As major components of the proposal are not water dependent to fulfill their basic purpose (e.g., residential housing), the applicant must demonstrate that their project meets the requirements of the EPA's CWA 404(b)(1) guidelines. The applicant's consultant admitted during the site inspection that this requirement had not been completed to any meaningful degree given the extent of the proposed wetland impacts.
- The Service recommends any proposal for compensatory mitigation properly assess the high level of functions of the onsite aquatic resources and surrounding upland habitats prior to developing a commensurate mitigation proposal. Such an assessment and the compensatory mitigation proposal should be provided to the resources agencies for review and comment.
- The Service recommends the applicant provide an analysis of the anticipated maintenance dredging frequency and long-term management plan for the excavated material (i.e., a location for the disposal of the material). Given the frequency of river flooding in this area, the potential volumes and frequency of such work would appear to be significant.
- In the public notice for this proposed project, it is stated that bald eagle nesting habitat is reported as present within the project area, and it is stated that no bald eagle nests were found. However, no details regarding the survey methods for locating nests were provided, including the dates or times of surveys, qualifications of those conducting the surveys, or how the surveys were conducted (aerial or otherwise). Surveys should be

conducted during the appropriate time of year, time of day, under appropriate weather conditions in order to determine the presence of eagle nests and activity within the area. Aerial surveys are recommended to determine the presence and occupancy status of eagle nests, especially in habitat such as described for this site, where ground based surveys are inadequate for documenting nests in or near the top of the forest canopy. Citizens of the local area have reported bald eagle activity at and around the site.

- Bald eagles are legally protected under “The Bald and Golden Eagle Protection Act” (Eagle Act). The Eagle Act (16 U.S.C. 668-668c), enacted in 1940, and amended several times since then, prohibits anyone, without a permit issued by the Secretary of the Interior, from “taking” bald eagles, including their parts, nests, or eggs. The Eagle Act provides criminal and civil penalties for persons who “take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or any manner, any bald eagle ... [or any golden eagle], alive or dead, or any part, nest, or egg thereof.” The Eagle Act defines “take” as “pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb.” “Disturb” means: "Disturb means to agitate or bother a bald or golden eagle to a degree that causes, or is likely to cause, based on the best scientific information available, 1) injury to an eagle, 2) a decrease in its productivity, by substantially interfering with normal breeding, feeding, or sheltering behavior, or 3) nest abandonment, by substantially interfering with normal breeding, feeding, or sheltering behavior."
- In addition to immediate impacts, this definition also covers impacts that result from human-induced alterations initiated around a previously used nest site during a time when eagles are not present, if, upon the eagle’s return, such alterations agitate or bother an eagle to a degree that injures an eagle or substantially interferes with normal breeding, feeding, or sheltering habits and causes, or is likely to cause, a loss of productivity or nest abandonment.
- A violation of the Eagle Act can result in a criminal fine of \$100,000 (\$200,000 for organizations), imprisonment for one year, or both, for a first offense. Penalties increase substantially for additional offenses, and a second violation of the Eagle Act is a felony.
- Changes to this site, as proposed for this project, are likely to cause either the direct loss of eagle nests and/or alterations of habitat to the degree that would interfere with normal breeding, feeding, or sheltering habits. An adequate and thorough survey of the area to be impacted is needed to ensure no take of bald eagles occurs as result of this proposed project.
- In addition to concerns regarding bald eagles, the MBTA, prohibits the taking of any migratory bird or any part, nest, or egg, except as permitted by regulation. The MBTA was enacted in 1918; a 1972 agreement supplementing one of the bilateral treaties underlying the MBTA had the effect of expanding the scope of the Act to cover bald eagles and other raptors. Implementing regulations define “take” under the MBTA as “pursue, hunt, shoot, wound, kill, trap, capture, possess, or collect. The intentional removal of a known active nest of any species protected under this act is considered “take”. Numerous species of breeding waterbirds have been observed and documented in the area, including great egret, great blue heron, little egret, brown pelican, and roseate

Colonel Zetterstrom

5

spoonbill, among others. It is expected that many other species of breeding terrestrial birds, waterfowl, and raptors also breed in the area.

The Service recommends permit denial due to the application's deficiencies noted herein and respectfully requests the Corps and applicant work to resolve these concerns. If you need additional information or clarification of our concerns or recommendations, please contact Jeff Hill, staff biologist, at 281/286-8282, ext. 16508.

Sincerely,


Charles Ardizzone *CA*
Project Leader