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**From:** Kenneth Teague

**Sent:** Monday, September 30, 2019 4:15 PM

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**Subject:** Comments on SWG-2015-00114 Draft Mitigation Plan

Dear Sir/Ms: I have reviewed the subject PN and I have the following comments:

- Do not approve the current version of this draft mitigation plan. It still requires considerable work, including effort to demonstrate that the approach is consistent with the Mitigation Rule.
- I recommend that the Corps require the applicant to describe the unavoidable loss of aquatic resources, which triggers the need for compensatory mitigation and this draft mitigation plan, in the plan. This will assist in evaluating the mitigation proposal. More specifically, the type of wetlands that will be impacted should be described, especially the depressional PEM wetlands, and more information should be provided explaining why those aquatic resources cannot be mitigated for in-kind and onsite. Further, the applicant should be required to describe the types of PEM wetlands they are proposing to enhance and re-establish at the MMS site. This should result in a clear understanding on the part of the reader, regarding the similarities and differences in the impacted depressional PEM wetlands, and the proposed PEM compensatory mitigation wetlands.
- It appears that the applicant, and perhaps the Corps, continue to assert that the proposed pipeline will have no permanent impacts to waters of the US. If so, note that this is an unsupported assertion, that will not be borne out by facts or science. I realize this has become a “boiler-plate” assertion in the case of pipelines, but given that one can see pipeline rights of way from space, decades after they are “restored”, it is clear that they have permanent impacts. I strongly recommend that an unbiased observer monitor the construction impacts, restoration efforts, and whatever natural restoration may occur. The applicant should be required to fully mitigate for any failure to achieve 100% restoration within a few growing seasons. Conversion from forested or scrub-shrub wetlands to herbaceous wetlands should require compensation.
- The PN combines its estimate of impacts to palustrine scrub-shrub and estuarine scrub-shrub wetlands, making it impossible to know how many acres of each wetland type is required for compensatory mitigation. I recommend the Corps require the applicant to separately quantify the impacts to these two wetland types, and to propose appropriate mitigation.
- No mitigation is proposed for impacts to streams from pipeline stream crossings. See comment above. It is highly unlikely that proposed stream crossings using methods other than HDD, will be constructed without impacts to the streams, including riparian areas. At a minimum, stream crossings not constructed using HDD methods, must be monitored during and after construction. Any failure of stream crossings to be completely restored must be mitigated for.
- No mitigation is proposed for the applicant’s proposed filling of 106.1 ac of open water (estuarine). Appropriate mitigation for the filling of estuarine open water is possible. One way to mitigate for these impacts would be to excavate an equivalent area of estuarine open water that had been previously filled. Another approach might be to restore hydrology to an area that was previously part of the lagoon system, but was cut off from flows somehow. I recommend the applicant be required to propose mitigation for filling of open water.

- The Draft Compensatory Wetland Mitigation Plan goes to some lengths to try to explain various deliberations with the Corps and other agencies during the process of developing alternative mitigation plans. I am glad to see that the Corps and other agencies are taking the limitations on preservation-only in the Mitigation Rule seriously, and not simply accepting it without any justification, as they have done for some other permits in that area.  
However, these descriptions are far from complete. The public has only seen two versions of this mitigation plan- the version originally proposed by the applicant and the current version. Apparently a lot happened in between these two versions that we, the public, are not privy to. And while that might be acceptable if the current version included details of alternatives considered, and a detailed justification in support of preservation, it does not. So, I must ask:
  - What mitigation alternatives did you consider, other than the original proposal, and this proposal?
  - Demonstrate that in-kind establishment, restoration, and enhancement of the aquatic habitat types impacted by the proposed project, in the amounts required, are not possible.
  - With the restrictions of the Mitigation Rule in mind, what is your detailed justification for including in your mitigation proposal, a preservation-only option? The Draft Compensatory Wetland Mitigation Plan mentions this, kind of makes a big deal about it, but avoids actually providing any justification for preservation only.
- I do not understand the possible nuances surrounding the relationship between this proposal for *mitigation of unavoidable impacts to aquatic resources*, with mitigation for impacts to upland endangered species. I do not wish to undermine appropriate and necessary mitigation for impacts to upland endangered species, but I am also unwilling to support what may be efforts to relax restrictions on preservation only in the Mitigation Rule, for impacts to aquatic resources, in order to support proposed mitigation for upland endangered species. I recommend the Corps require the applicant to explain if there is some pressure on the effort to mitigate for impacts to aquatic resources, to subjugate some of the requirements for mitigation for impacts to these resources, in an effort to address separate needs to mitigate for impacts to upland endangered species.

Hopefully, appropriate and necessary mitigation for impacts to upland endangered species is not dependent on mitigation of impacts to aquatic habitats being provided via preservation, which again, is discouraged under the Mitigation Rule. I would hope that mitigation for upland endangered species could be accomplished separately from that for impacts to aquatic habitats. And it would not be appropriate to link the two simply to save the applicant money or for the convenience of the applicant, particularly if that required ignoring the low priority placed on preservation as compensation for impacts to aquatic habitats, by the Mitigation Rule.

Alternately, if any of the agencies disagree with the Mitigation Rule, and prefer preservation over restoration and enhancement as mitigation for impacts to aquatic resources, it would not be appropriate for that to be a factor in this decision regarding how to mitigate for impacts to aquatic resources. With all this in mind, the Corps or the applicant need to explain to the public:

- Why a preservation-only mitigation component is proposed for compensation of impacts to aquatic resources.
- Why all impacts to aquatic resources aren't being mitigated for by establishment, restoration or enhancement.

- Is the need for preservation as mitigation for impacts to upland endangered species resulting in pressure to mitigate for impacts to aquatic resources by preservation as well?
- Clearly, the applicant has not explained very well in the Draft Compensatory Wetland Mitigation Plan, the various complications that have arisen due to the nature of the unique aquatic environments being impacted by the proposed project, in this unique landscape, the requirements of the Mitigation Rule, and limitations imposed by various unspecified factors. I would like to clarify this comment, but I am unable to do so because the Draft Compensatory Wetland Mitigation Plan does not provide the clarity necessary for me to reference the possible unspecified factors. However, some of these unspecified factors might include:
  - Some organization (e.g. government agency, applicant) might be placing a high priority on preservation-only for mitigation of impacts to aquatic resources, in contradiction to the Mitigation Rule.
  - The applicant might be trying to save money by satisfying requirements under the Clean Water Act and Endangered Species Act with a single mitigation proposal. While this might be acceptable under some circumstances, it would not be acceptable if this required weakening of the requirements of the Mitigation Rule.
  - One of the more obvious factors is likely the availability of real estate for purchase. However, the public is not provided any insight into this limitation, if it is in fact a limitation. If this is a factor in the complicated decision-making process for mitigating impacts to aquatic resources for this proposed project, the Corps should require the applicant to disclose some of the details for public review and comment.
- Why can't the PEM wetlands proposed to be impacted be mitigated for in-kind? There is no explanation for this critical assertion. The Corps should require the applicant to explain this, in detail.
- Why can't impacts to mangrove wetlands be mitigated via establishment, restoration, or enhancement rather than preservation?
- Why can't impacts to "mud flats" be mitigated for using methods other than preservation? This has come up before, but the applicant has not disclosed any details. I recommend the Corps require the applicant to provide a detailed description of the issues surrounding mitigation for impacts to south Texas "mud flats". If it is the opinion of some that south Texas "mud flats" cannot be established, restored, or enhanced, the applicant should be required to discuss this. If it is established that this is in fact the case, I want to point out that the agencies involved in this issue, and the scientific community, have failed to address the issue with scientific research and development, over a very long period of time. While, if that is the case, it doesn't change the outcome in this case, it would be important to begin discussing these research and development needs for future proposed mitigation needs.
- Are the aquatic habitats proposed for preservation under any known or suspected risk of development? If so, would such development be regulated under Section 404 of the Clean Water Act? I recommend the Corps require the applicant to explain this risk in detail. If not, why would preservation of these aquatic habitats be consistent with the Mitigation Rule.
- The mitigation plan mentions that a decision was made not to use iHGM methods to estimate impacts to functions of aquatic habitats because PEM wetlands that would be impacted at the project site are depressional, and the iHGM models weren't created to address depressional PEM wetlands. Virtually no detail is provided regarding this important decision. I recommend the Corps require the applicant to disclose details regarding this important decision. First, details should be provided about the above specifically. In addition, however, apparently this

decision was also applied to all the other aquatic habitats that would be impacted. I recommend the Corps require the applicant to disclose details regarding the decision not to use iHGM methods to estimate impacts to aquatic habitat functions. Presumably, impacts to “mud flat” habitats were not estimated using iHGM, because SWG does not have an iHGM model for this habitat type, in spite of its importance to south Texas coastal ecosystems. Similarly, presumably impacts to mangrove wetland habitats were not estimated using iHGM, because SWG does not have an iHGM model for this habitat type, in spite of its importance to south Texas coastal ecosystems. I recommend the Corps require the applicant to disclose information regarding these decisions.

- Why hasn't the applicant proposed mitigation for impacts to PSS habitats? Couldn't this habitat type be mitigated for at the proposed MMS site? If not, why not? Isn't there some other way of mitigating for PSS impacts?
- I recommend the Corps require the applicant to provide a detailed explanation for the following statement: *RG Developers were unable to find suitable PRM through off-site and/or out-of-kind mitigation within the 12-digit HUC 121102080900.* What did they look for? What did they find or not find?
- 5.1 MMS; p. 7; Regarding the following statement: *Historically, the area consisted of freshwater herbaceous wetlands, coastal prairie, and thornscrub habitat prior to being manipulated for agricultural production (e.g., sorghum, cotton, and cattle).* How does the applicant know this?
- 5.2 LEP Preservation Site: The mitigation plan states that this site includes 1325.5 ac of wetlands. However, it doesn't state whether all of these wetlands are jurisdictional under the Clean Water Act or not. While the preamble to the Mitigation Rule discusses this issue and indicates that the agencies decided that it was not necessary for mitigation wetlands to be jurisdictional, I respectfully disagree with that decision. At a minimum, all else being equal, if the impacted wetlands are jurisdictional, and the mitigation wetlands are not, they are not of equivalent function. The Corps should require the applicant to clarify whether all wetlands proposed as mitigation via preservation only at the LEP site, are jurisdictional under the Clean Water Act. If they are not, we must have a conversation regarding whether or not the mitigation wetlands constitute appropriate compensatory mitigation.
- P. 8; Regarding the following statement: *The LEP preservation site is part of the larger, approximate 4,400-acre BND property that is currently under lease to the USFWS until 2023.* So, the proposed mitigation based on the LEP site, would not begin until the current lease expires in 2023. How does the applicant intend to mitigate for aquatic impacts prior to that point in time? If this is the case, I recommend the Corps require the applicant to provide mitigation for temporal impacts for the time between the applicant destroys aquatic habitat, and the USFWS lease expires.
- Is this site at risk of impact to aquatic habitats in the future? Provide evidence of any assertions. Regulated or unregulated development? Provide details. If it is not under any real risk, then preservation does not achieve anything, and should not be allowed as compensatory mitigation for unavoidable impacts to aquatic resources.
- 6.1 MMS Site; p. 9; 1<sup>st</sup> complete paragraph: I recommend the Corps require the applicant to commit in the mitigation plan, to fully compensate for any unmitigated impacts to the aquatic habitats on the MMS mitigation site, if subsurface mineral right holders exercise their rights, develop the property, and for some reason, their impacts are not fully addressed by the regulatory process. No unmitigated loss in area or function of aquatic habitats can be allowed on the proposed mitigation site.
- 6.2 LEP Preservation Site: So BND will continue to own the property?

- 7.1.1 Historical Ecological Characteristics of the Site: I recommend the term “dugout” be defined in the document.
- P. 12; 1<sup>st</sup> paragraph; 1<sup>st</sup> sentence: What was the site’s historic hydrology and topography? How does the applicant know? How completely does the applicant intend on restoring site hydrology? Is the sponsor really proposing to restore historic site hydrology, or are they proposing to manipulate the hydrology on the site in a way they think might be similar to that which may have existed on the site historically? They may not be the same thing. Be clear.
- 2<sup>nd</sup> paragraph; 2<sup>nd</sup> sentence: What kind of aquatic habitat is this “duckpond”? Is it a natural habitat, or is it man-made? What exactly do you propose to do to it, and what kind of mitigation credit are you claiming for this?
- *Enhance and create 1,186 acres of coastal prairie and thornscrub habitat*: How does this relate to required compensatory mitigation for impacts to aquatic resources?
- It appears that the continued existence of drainage ditches along the property boundaries, and development features (aquaculture ponds, etc) on properties abutting the proposed mitigation site (MMS), will significantly limit the scope of efforts to try to restore the site. The applicant should be required to determine what limitations these features will impose on the restoration effort, and disclose them in a revision of this document.
- 7.1.2 Current Ecological Characteristics of the Site; 1<sup>st</sup> paragraph; 1<sup>st</sup> sentence: Are the 13.8 acres of freshwater emergent wetland, 3.0 acres of freshwater ponds, and 15.4 acres of riverine wetland habitat, all jurisdictional under the Clean Water Act? While the preamble to the Mitigation Rule discusses this issue and indicates that the agencies decided that it was not necessary for mitigation wetlands to be jurisdictional, I respectfully disagree with that decision. At a minimum, all else being equal, if the impacted wetlands are jurisdictional, and the mitigation wetlands are not, they are not of equivalent function. The Corps should require the applicant to clarify whether all wetlands proposed as mitigation via preservation only at the LEP site, are jurisdictional under the Clean Water Act. If they are not, we must have a conversation regarding whether or not the mitigation wetlands constitute appropriate compensatory mitigation.
- Similar to the comment above regarding implications of a potential lack of consistency between impact wetlands and mitigation wetlands at MMS, with respect to Clean Water Act jurisdiction, there appear to be an issue regarding consistency between sites with respect to FEMA 100 year floodplains. While the impacted wetlands appear to be in the FEMA 100 year floodplain, the proposed MMS mitigation site does not appear to be in the FEMA 100 year floodplain. SWG policy dictates that only wetlands in the FEMA 100 year floodplain can be jurisdictional. So in addition to the proposed MMS mitigation wetlands likely being non-jurisdictional under the Clean Water Act, they will not be in the FEMA 100 year floodplain. This has important implications for their functions. In light of this there needs to be a discussion whether the proposed mitigation wetlands at MMS correctly compensate for unavoidable losses to aquatic habitats. Because of these and other drastic differences between the aquatic resources proposed to be impacted, and those proposed as compensatory mitigation at the MMS site, I recommend the Corps not approve this draft mitigation plan or issue the permit, unless and until the significance of differences in Clean Water Act jurisdiction, FEMA floodplain status, and functional differences, are understood by all parties involved, and the implications are thoroughly considered.
- 7.1.3 Current Site Vegetation: Are all of these habitats jurisdictional under the Clean Water Act? If not, I request the applicant be required to point out which ones are not. While the preamble to the Mitigation Rule discusses this issue and indicates that the agencies decided that it was

not necessary for mitigation wetlands to be jurisdictional, I respectfully disagree with that decision. At a minimum, all else being equal, if the impacted wetlands are jurisdictional, and the mitigation wetlands are not, they are not of equivalent function. The Corps should require the applicant to clarify whether all wetlands proposed as mitigation via preservation only at the LEP site, are jurisdictional under the Clean Water Act. If they are not, we must have a conversation regarding whether or not the mitigation wetlands constitute appropriate compensatory mitigation.

- Riverine: Is this habitat even considered to be wetland? Is it jurisdictional? If it is not wetland, the applicant should not receive mitigation credit for impacts to aquatic habitats. Even if it is wetland, if it is not jurisdictional, there needs to be a discussion regarding whether or not it constitutes acceptable compensatory mitigation for loss of aquatic resources. While the preamble to the Mitigation Rule discusses this issue and indicates that the agencies decided that it was not necessary for mitigation wetlands to be jurisdictional, I respectfully disagree with that decision. At a minimum, all else being equal, if the impacted wetlands are jurisdictional, and the mitigation wetlands are not, they are not of equivalent function. The Corps should require the applicant to clarify whether all wetlands proposed as mitigation via preservation only at the LEP site, are jurisdictional under the Clean Water Act. If they are not, we must have a conversation regarding whether or not the mitigation wetlands constitute appropriate compensatory mitigation.
- Non-Jurisdictional waters: The document should clearly state that the applicant receives no mitigation credit for impacts to aquatic resources, for this habitat.
- 7.1.4 Current Hydrology; 1<sup>st</sup> paragraph; 1<sup>st</sup> sentence: I recommend the applicant be required to provide a map of elevation of the site, based on the LIDAR data referenced here.
- Ditch Breaches: *Based off a regional regression analysis of the contributing watershed coupled with a 1-D hydraulic analysis, it is estimated that the 5-year peak flow rate would be enough to enter through these breaches (National Streamflow Statistics Software/NRCS Cross Section Analyzer).* I recommend the applicant be required to provide these analyses for review.
- P. 19; 1<sup>st</sup> sentence; I recommend the applicant be required to model hydrology of the site, and specifically frequency and duration of flooding (as well as area predicted to be flooded), following the proposed modifications for restoration of hydrology.
- P. 20-21; High Marsh: Are these specific habitats on this site jurisdictional wetlands under the Clean Water Act? If not, the applicant should receive no mitigation credit for them for impacts to aquatic resources.
- P. 21; South Texas Loma Grasslands: Presumably, these are not wetlands, and the applicant is not claiming mitigation credit for them for impacts to aquatic habitats.
- P. 22; 8.0 Determination of Credits; 2<sup>nd</sup> paragraph; 1<sup>st</sup> sentence: Will the PEM wetlands proposed to be created or enhanced be jurisdictional under the Clean Water Act? If not, the applicant must not receive mitigation credit for them.
- 2<sup>nd</sup> sentence: Is the high marsh technically a wetland under the USACE/EPA wetland delineation procedures? If not, the applicant cannot claim mitigation credit for them for impacts to aquatic resources. If they are, are they jurisdictional under the Clean Water Act? If not, the applicant cannot claim mitigation credit for them for impacts to aquatic resources.
- 3<sup>rd</sup> sentence: Will the MMS created/enhanced depressionnal wetlands consist of soil types that will allow surface water to recharge groundwater? Many Texas coastal depressionnal wetlands don't.
- Last sentence: Is the high marsh technically a wetland under the USACE/EPA wetland delineation procedures? If not, the applicant cannot claim mitigation credit for them for

impacts to aquatic resources. If they are, are they jurisdictional under the Clean Water Act? If not, the applicant cannot claim mitigation credit for them for impacts to aquatic resources.

- P. 23; 9.0 Mitigation Work Plan; 2<sup>nd</sup> paragraph; 1<sup>st</sup> sentence: There may be a typo here, but the sentence as written, doesn't make sense, and could cause some confusion. "*Coastal prairie habitat quality PEM*"?
- P. 24; Figure at top of page: This is the only mention of a reference site in this document. Is the proposed enhancement and restoration of the MMS site based on a reference area approach? If not, why not? I very strongly recommend that the applicant be required to take an explicit reference area approach to efforts to enhance and restore the MMS site. All proposed restoration of topography, hydrology, and plant communities should be based on reference area conditions.
- P. 24; 9.1 Hydrologic Restoration; 1<sup>st</sup> paragraph; 1<sup>st</sup> sentence: How does one enhance or restore depressional micro-topography to better harvest and capture rainfall? How do you know what it was historically? What will you actually do? Be careful with approaches based on construction of artificial berms. We have seen failures at mitigation banks using these approaches, when they captured too much water and target vegetation was excessively flooded and died.
- 2<sup>nd</sup> sentence: What "measures" will be implemented to harvest water from the main drainage ditch?
- 3<sup>rd</sup> sentence: I recommend the applicant be required to model hydrology of the site, and specifically frequency and duration of flooding (as well as area predicted to be flooded), following the proposed modifications for restoration of hydrology.
- Drainage Ditch Removal: While I generally agree with this proposal, how will these wetlands drain into the downstream watershed? If they will not, they will not be jurisdictional. If they aren't jurisdictional, the applicant can't receive mitigation credit for impacts to aquatic resources for them.
- Depressional Re-Contouring: I support this only if it is done correctly to restore depressions that have been modified, to their natural topography. Some effort should be undertaken to attempt to determine what the natural condition was, or at least base it on reference conditions.
- Berm/Loma construction: The proposed features should be included in hydrologic modeling to determine the possible risk of excessive flooding which may be created by constructing berms.
- Distribution Swale: Are these completely artificial features, or did they exist on this site/do they exist on reference sites? I do not support completely artificial features.
- Berm Breaches: The effects of these should be modeled. Are you sure they won't be capable of introducing too much water? If the applicant's approach results in excessive flooding, they should be required to modify the site to create the required hydrology, or compensate for their impacts to aquatic habitats in other ways.
- P. 25; 2<sup>nd</sup> paragraph; 6<sup>th</sup> sentence: If natural revegetation does not occur within 2 growing seasons, "seeding", as proposed, may not be sufficient to establish the desired vegetation. Vegetative plantings may be required. The applicant should be required to use vegetative plantings if natural revegetation and seeding does not produce the desired vegetation.
- P. 26; Table 6: Are these species based on one or more reference areas? If not, why not?
- P. 27; 10.1 General Mitigation Maintenance; 1<sup>st</sup> paragraph: Will the applicant provide funding to TPWD for maintenance of the LEP site? If not, why not? If yes, how was the amount of funding required determined? Has TPWD acknowledged its sufficiency in writing?
- 2<sup>nd</sup> paragraph: "Reseeding" may not be sufficient if the desired vegetation does not become established. Vegetative plantings may be necessary.

- This is the first place monitoring is mentioned. Monitoring is needed not just during maintenance, but to determine sooner, whether enhancement and restoration objectives have been met. Further, the proposed monitoring is nowhere near being sufficient. Monitoring should include the following: post construction monitoring of topography at the site, and topography of the reference site; hydrology- flooding area, frequency, and duration for the mitigation site and reference site; vegetation-wetland vegetation species and cover. Finally, wetland delineation indicators should be measured at the mitigation site and reference site. In addition, there is no mention of monitoring frequency anywhere. Topography should be monitored once. Hydrology should be monitored continuously for at least 3 years. Wetland delineation indicators should be measured once per year at the mitigation site and reference site, during an appropriate index period (to be determined), for at least 5 years, and every 5 years thereafter.
- P. 28; 11.0 Ecological Performance Standards: Nothing in this section says anything about ecological performance standards. The applicant should be required to commit to appropriate ecological performance standards in this mitigation plan. Appropriate ecological performance standards would include: appropriate flooding frequency and duration on x acres of PEM depressional wetlands enhanced and restored at MMS, based on flooding frequency and duration at one or more reference PEM depressional wetland. Appropriate plant species composition in PEM depressional wetlands enhanced or restored at MMS, based on plant species composition in one or more reference PEM depressional wetlands.
- In addition to Ecological Performance Standards for MMS, there should be some for LEP as well, in contradiction to what the applicant is proposing. First, there must be no human modifications inconsistent with the conservation easement. Second, the applicant should be responsible for ensuring that undesirable vegetation isn't allowed to alter the vegetative communities of the proposed preservation only mitigation site. The applicant should be required to provide funds to the long term steward for long term management, including management of undesirable invasive vegetation, and monitoring.
- 12.0 Monitoring Requirements: The applicant should be required to provide funds to the long term steward for monitoring to ensure that no human impacts inconsistent with the conservation easement occur on the LEP site, and to monitor for undesirable vegetation changes due to invasive species.
- 3<sup>rd</sup> paragraph; bullets; MMS site: The proposed monitoring is not sufficient. Again, I strongly recommend the applicant be required to provide the following: post construction monitoring of topography at the site, and topography of the reference site; hydrology- flooding area, frequency, and duration for the mitigation site and reference site; vegetation-wetland vegetation species and cover. Finally, wetland delineation indicators should be measured at the mitigation site and reference site. In addition, there is no mention of monitoring frequency anywhere. Topography should be monitored once. Hydrology should be monitored continuously for at least 3 years in at least 3 depressions, and in at least 3 reference depressional wetlands. Wetland delineation indicators should be measured once per year at the mitigation site and reference site, during an appropriate index period (to be determined), for at least 5 years, and every 5 years thereafter.
- P. 29; Initial Success Criteria; 1<sup>st</sup> sentence: This is very poorly written and it is unclear what it means. What does the applicant mean by "the hydrology" and "maintain water"? Be specific. I strongly recommend that flooding frequency and duration be determined, and this be compared to a reference area, and possibly compared to literature reports for these kinds of wetlands (if there are any).



- 2<sup>nd</sup> sentence: How many? I also recommend groundwater monitors. In order to meaningfully assess the data, I strongly recommend a reference approach, in which the same data are collected at a site that the agencies agree is a good reference. Water level recorders (and groundwater monitors) should be located in the enhanced and restored depressional PEM wetlands (and at reference wetlands).
- 4<sup>th</sup> sentence: What kind of soil monitoring will occur?
- 5<sup>th</sup> sentence so all WAAs will be monitored?
- Interim Success Criteria; 1<sup>st</sup> sentence: This is very poorly written and it is unclear what it means. What does the applicant mean by “the hydrology” and “maintain water”? Be specific. I strongly recommend that flooding frequency and duration be determined, and this be compared to a reference area, and possibly compared to literature reports for these kinds of wetlands (if there are any).
- P. 30; Long Term Monitoring: First, this section is a good example of a problem that exists throughout this document- The document repeatedly discusses requirements in the wrong sections. For example, this section should discuss monitoring, but instead it talks about how the applicant intends to deal with the conservation easement and long term management of the site. What we should be talking about here is long term monitoring. The applicant should be required to commit to long term monitoring to ensure that the terms of the conservation easement are met (e.g. no human impacts that are not allowed), and there should be a commitment to monitoring for exotic or invasive plant species, and possibly exotic or invasive animals, such as feral hogs, which could damage the habitat.
- All of the inappropriate discussion of how the conservation easement will change hands when the final success criteria are met, needs to be documented somewhere else. The proposal for the applicant to hold the conservation easement is unacceptable. The applicant must be required to make a well-known conservation organization the long term conservation easement holder. The following language is unacceptable: *The property ownership can change hands to a third party at this time as long as the new owner maintains the long-term easement or the new owner provides a suitable replacement for the long-term easement that last for a sufficiently long time.*
- The applicant should be required to commit to long term monitoring, and demonstrate that it will provide funding for it.
- 13.0 Long Term Management Plan; 1<sup>st</sup> paragraph; 1<sup>st</sup> sentence: The applicant needs to commit to providing funding for long term monitoring also.
- This section includes a lot of language that is unacceptably uncertain, regarding roles and responsibilities for the site in the future. Do not approve this Draft Mitigation Plan until this is all clarified, and ensured to be fully consistent with the Mitigation Rule and SWG practice.
- 2<sup>nd</sup> paragraph: Who is the National Wildlife Foundation (NFWF)? Do you mean the National Wildlife Foundation or the National Fish and Wildlife Foundation? Provide documentation that they have agreed to assume this responsibility. Note that these assertions are not consistent with those under “Long Term Monitoring”. Why would the long term management go to the National Wildlife Foundation, but the conservation easement go to the applicant? A lot of this doesn’t make sense.
- P. 30; last paragraph; 1<sup>st</sup> sentence: This assumption seems somewhat unreasonable to me. The applicant should be required to provide evidence and arguments to support their assumption of 3% return above inflation.
- P. 31; Table 7: This should include funds to support defending the terms of the conservation easement. While this would not be an annual expense, if there are any attempts to alter the

site, inconsistent with the terms of the conservation easement, or if there is a legal challenge to the conservation easement, legal efforts would be required, which would not be free. There should also be a contingency fund. Stuff happens.

- P. 31; 2<sup>nd</sup> paragraph: This is unacceptable. Do not approve this draft mitigation plan, or issue the permit, unless and until this is changed. The applicant should be required to provide TPWD with funds to monitor the site (for human activities not allowed by the conservation easement, invasive/exotic sp), administer the long term management, and defend the terms of the conservation easement. Anything less would constitute Texas Parks & Wildlife subsidizing the legally required compensatory mitigation of the applicant, which is probably illegal, or at least, highly unethical. The people of the State of Texas would be very interested indeed to learn that their state government was subsidizing the legally required compensatory mitigation of the applicant.
- 14.0 Adaptive Management Plan: This theme keeps coming up- *Since TPWD is going to be the long term management, we don't have to do x, y, z.* All of these denials of responsibility are unacceptable. At a minimum, the applicant's crystal clear refusal to be responsible for anything following TPWD assumption of responsibility, should be rewritten to be more consistent with the Mitigation Rule and with expected language regarding these issues. So, instead, maybe this should read that if the mitigation habitat acres are negatively impacted after TPWD assumes long term responsibility, that TPWD will be legally responsible for adaptive management. Remember, the applicant is seeking authorization to permanently destroy aquatic habitats. The compensatory mitigation they provide is likewise expected to last indefinitely into the future, in order to compensate for the habitat the applicant was authorized to destroy. Somebody is responsible for ensuring that, within the scope of whatever limitations the Mitigation Rule allows. And if I were TPWD, I would want some financial resources for me taking on that additional risk, which the applicant is not currently offering.
- 2<sup>nd</sup> paragraph; 3<sup>rd</sup> sentence: *The Notice will define the deficiency and propose the adaptive management that is needed or required.* This is completely unacceptable. By this statement, the applicant is clearly signaling their intent to limit their responsibility for success of the proposed mitigation. It is unacceptable for the applicant to dictate that the Corps is to propose the adaptive management that is needed or required. Rather, it would be more consistent with the assumption of responsibility by the applicant, for continued, eternal aquatic habitat replacement value, if the applicant were required to proposed alternative adaptive management actions, for the Corp's (and other agencies') review and approval.
- P. 32; 15.0 Financial Assurances: Just because no reatoration, enhancement, or establishment has been proposed at the LEP sites, does not mean that the functions of the aquatic habitats on that site will be automatically protected indefinitely into the future, especially since the applicant is proposing no funds whatsoever for long term monitoring, administration, management, adaptive management, etc, for the site. Under no circumstances shall TPWD be allowed to subsidize the applicant's legally required compensatory mitigation for impacts to aquatic resources, in any way, shape, or form.
- 2<sup>nd</sup> paragraph; 2<sup>nd</sup> sentence: The Corps should not approve this draft mitigation plan, or issue the permit, unless and until it receives the bond committed to here, and the Corps has reviewed it and approved it.
- 3<sup>rd</sup> paragraph: While some minor "stepping down of assurances" might be acceptable based on completion of milestones, the main point of financial assurances is not simply to ensure that proposed construction is completed, but rather, that the performance measures are actually *achieved* and *maintained*, infinitely into the future. Given the seriousness of this, any "stepping

down” must be done extremely cautiously. I recommend the Corps not approve this draft mitigation plan, or issue the permit, unless and until this language is modified so as to be consistent with the point I made here. Note that there is nearly an entire page of carefully written attempts to minimize the applicant’s responsibility for providing compensation for the aquatic resources they are seeking authorization to destroy. None of this is acceptable.

Sincerely,  
Kenneth G. Teague, PWS (emeritus), Certified Senior Ecologist  
Austin, TX

Sent from [Mail](#) for Windows 10

Document Content(s)

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