

IMPLEMENTING AGREEMENT

by and among

**The Edwards Aquifer Authority, The City of New Braunfels,
The City of San Marcos,
The City of San Antonio acting by and through its
San Antonio Water System Board of Trustees,
Texas State University – San Marcos, Texas Parks and Wildlife Department**

and

United States Fish and Wildlife Service

**to implement the Habitat Conservation Plan
for the Edwards Aquifer Recovery Implementation Program**

This Implementing Agreement ("Agreement"), made and entered into as of the ____ day of _____, 2012, by and among THE EDWARDS AQUIFER AUTHORITY, THE CITY OF NEW BRAUNFELS, THE CITY OF SAN MARCOS, THE CITY OF SAN ANTONIO ACTING BY AND THROUGH ITS SAN ANTONIO WATER SYSTEM BOARD OF TRUSTEES, TEXAS STATE UNIVERSITY and the UNITED STATES FISH AND WILDLIFE SERVICE (FWS), hereinafter collectively called the "Parties," defines the Parties' roles and responsibilities and provides a common understanding of action that will be undertaken to minimize and mitigate the effects on the subject listed and unlisted species and their habitats of the Comal and San Marcos springs.

1.0 RECITALS

This Agreement is entered into with regard to the following facts:

WHEREAS, the Edwards Aquifer is a karstic aquifer system characterized by complex geology, prolific recharge, very high permeability, and the capability to produce large quantities of high-quality water. The Aquifer is the primary source of water for the residents of South Central Texas in the San Antonio, Texas region, and is vital to the general economy and welfare of the State of Texas;

WHEREAS, the Edwards Aquifer discharges at, among other locations, Comal Springs and San Marcos Springs. These springs are important to the quality of life and economies of New Braunfels and San Marcos, respectively, as well as providing instream flows for recreational uses downstream of these springs in the Comal River and San Marcos River. The flow from these springs is influenced by the water level of the Aquifer, which in turn is influenced by the ratio of recharge over time in relation to natural discharge through springs and artificial discharge through wells.

WHEREAS, certain species listed as threatened or endangered under the ESA have been identified to occupy, be associated with, or depend upon discharges from the Edwards Aquifer at Comal Springs, as well as instream flows proximately downstream of the springs in Landa Lake and the Comal River and associated riparian areas within New Braunfels. The listed Covered Species related to Comal Springs are: (1) the fountain darter (*Etheostoma fonticola*), (2) the Comal Springs riffle beetle (*Heterelmis comalensis*), (3) the Comal Springs dryopid beetle (*Stygoparnus comalensis*), and (4) the Peck's cave amphipod (*Stygobromus pecki*).

WHEREAS, certain species listed as threatened or endangered under the ESA have been identified to occupy, be associated with, or depend upon discharges from the Edwards Aquifer at San Marcos Springs, as well as instream flows proximately downstream of the springs in Spring Lake and the San Marcos River and associated riparian areas within San Marcos. The listed Covered Species related to San Marcos Springs are: (1) the fountain darter (*Etheostoma fonticola*), (2) the Comal Springs riffle beetle (*Heterelmis comalensis*), (3) Texas wild rice (*Zizania texana*), (4) the Texas blind salamander (*Eurycea rathbuni*), (5) the San Marcos gambusia (*Gambusia georgei*), and (6) the San Marcos salamander (*Eurycea nana*).

WHEREAS, a certain species petitioned for listing as either threatened or endangered under the ESA has been identified to occupy, be associated with, or depend upon discharges from the Edwards Aquifer at Comal Springs, as well as instream flows proximately downstream of the springs in Landa Lake and the Comal River and associated riparian areas within New Braunfels. The petitioned species related to Comal Springs is the Comal Springs salamander (*Eurycea sp.*).

WHEREAS, certain species petitioned for listing as either threatened or endangered under the ESA have been identified to occupy, be associated with, or depend upon discharges from the Edwards Aquifer at San Marcos Springs, as well as instream flows proximately downstream of the springs in Spring Lake and the San Marcos River and associated riparian areas within San Marcos. The petitioned species related to San Marcos Springs are (1) the Edwards Aquifer diving beetle (*Haideoporus texanus*) and (2) the Texas troglotic water slater (*Lirceolus smithii*).

WHEREAS, to provide for the necessary and effective management of the Edwards Aquifer, to sustain the diverse economic and social interests associated with the Edwards Aquifer, and to foster the interests of the Covered Species, the EAA was created by the Texas Legislature in 1993. The EAA manages the Edwards Aquifer pursuant to the EAA Act.

WHEREAS, Applicants have sought a Permit from the Service, as authorized by Section 10(a)(1)(B) of the ESA, to allow the take of the Covered Species which is incidental to, and not for the purpose of, the carrying out of the otherwise lawful Covered Activities.

WHEREAS, the Applicants, with technical assistance from the Service, and with guidance and approval from the Edwards Aquifer Recovery Implementation Program through the consensus-based process under Section 1.26A of the EAA Act, have developed a Habitat Conservation Plan (HCP).

THEREFORE, the Parties hereto do hereby understand and agree as follows:

2.0 DEFINITIONS

The following terms as used in this Agreement shall have the meanings set forth below

2.1 The term "Permit" shall mean an incidental take permit issued by the Service to Applicants pursuant to Section 10(a)(1)(B) of the Endangered Species Act (ESA).

2.2 The term "Permit Area" shall mean the geographic jurisdictional area of the EAA as defined in Section 1.04 of the EAA Act in all of Uvalde, Medina, and Bexar Counties, and in part of Atascosa, Guadalupe, Comal, Caldwell, and Hays County, all in the State of Texas, as depicted in Figure 1-2 of the Habitat Conservation Plan which includes the Comal Springs, Landa Lake, and the portion of the Comal River and associated areas riparian thereto within the municipal boundaries of New Braunfels in Comal County, Texas, and the San Marcos Springs, Spring Lake, and the portion of the San Marcos River and associated areas riparian thereto within the municipal boundaries of San Marcos in Hays County, Texas.

2.3 The term "Permittee" shall mean each Applicant.

2.4 The term "Conservation Plan" shall mean the Habitat Conservation Plan prepared for the proposed activities.

2.5 The term "Plan Species" shall mean species adequately covered in the HCP and identified in Section 1.0 of this Agreement.

2.6 The term "unforeseen circumstances" means any significant, unanticipated adverse change in the status of species addressed under the HCP or in their habitats; or any significant unanticipated adverse change in impacts of the project or in other factors upon which the HCP is based. The term "unforeseen circumstances" as defined in this Agreement is intended to have the same meaning as "extraordinary circumstances" as used in the No Surprises policy.

2.7 The term "EAA Act" shall mean the Edwards Aquifer Authority Act, Act of May 30, 1993, 73rd Leg., R.S., ch. 626, 1993 Tex. Gen. Laws 2350, as amended.

2.8 The term "Covered Activities" means those activities described in Chapter 2 of the HCP covered by the Permit.

2.9. The term "Funding and Management Agreement" or "FMA" shall mean that certain agreement effective January 1, 2012, to which the Permittees are parties, which provides for the funding and management of the HCP.

3.0 HABITAT CONSERVATION PLAN

Pursuant to the provisions of Section 10(a)(1)(B) of the Applicants, hereinafter referred to as Permittees, have prepared a Habitat Conservation Plan (HCP) and submitted it to the Service with a request that the Service issue a Permit (Permit) to allow subject Plan Species to be incidentally taken within the Permit Area as depicted and described in Section 1.2 of the HCP. The HCP proposes a mitigation program for the subject Plan Species and their habitats.

4.0 INCORPORATION OF HCP

The HCP and each of its provisions are intended to be, and by this reference are, incorporated herein. In the event of any direct contradiction between the terms of this Agreement and the HCP, the terms of this Agreement shall control. In all other cases, the terms of this Agreement and the terms of the HCP shall be interpreted to be supplementary to each other.

5.0 LEGAL REQUIREMENTS

In order to fulfill the requirements that will allow the Service to issue the Permit, the HCP sets forth measures that are intended to ensure that any take occurring within the Permit Area will be incidental; that the impacts of the take will, to the maximum extent practicable, be minimized and mitigated; that procedures to deal with unforeseen circumstances will be provided; that adequate funding for the HCP will be provided; and that the take will not appreciably reduce the likelihood of the survival and recovery of the Plan Species in the wild. It also includes measures that have been suggested by the Service as being necessary or appropriate for purposes of the HCP.

6.0 TERMS USED

Terms defined and utilized in the HCP and the ESA shall have the same meaning when utilized in this Agreement, except as specifically noted.

7.0 PURPOSES

The purposes of this Agreement are:

7.1 To ensure implementation of each of the terms of the HCP;

7.2 To describe remedies and recourse should any Party fail to perform its obligations, responsibilities, and tasks as set forth in this Agreement; and

7.3 As stated in paragraph 11.3.a hereof, to provide assurances to the Permittees that as long as the terms of the HCP and the Permit issued pursuant to the HCP and this Agreement are fully and faithfully performed, no additional mitigation will be required except as provided for in this Agreement or required by law.

8.0 TERM

This Agreement shall become effective on January 1, 2013, and shall remain in full force and effect for a period of 15 years or until termination of the Permit, whichever occurs sooner.

9.0 FUNDING

Permittees will provide, as set out in Section 7 of the HCP, and amplified on in Article 5 of the FMA, such funds as may be necessary to carry out its obligations under the HCP. The Permittees should notify the Services, if the Permittees' funding resources have materially changed, including a discussion of the nature of the change, from the information provided in Section 7 of the HCP.

10.0 RESPONSIBILITIES OF THE PARTIES IN MITIGATION PROGRAM IMPLEMENTATION AND MONITORING RESPONSIBILITIES OF THE PERMITTEES

10.1 Responsibilities of the Permittee.

- a. The HCP will be properly functioning if the terms of the Agreement have been or are being fully implemented.
- b. The Permittee shall undertake all activities set forth in the HCP in order to meet the terms of the HCP and comply with the Permit, including adaptive management procedures described in subparagraph (c) below, if applicable.

- c. The Conservation Measures proposed to be funded and implemented by the Permittees meet the incidental take permit issuance criteria of the ESA and applicable regulations. The Parties recognize, however, that because of the number of Covered Species, the quantity and quality of the data and information regarding some of the Covered Species, and the dynamic nature of the habitats of both the Covered Species and the pursuit of the Covered Activities, an essential component of the HCP is science-based management that adapts to changing information about the Covered Species. The Permittees have, thus, developed and incorporated into this Agreement the description of the Adaptive Management Plan in Section 6 of the HCP and as amplified in Article Seven of the FMA. This iterative AMP process requires the Permittees to rely on the best available scientific and commercial information and knowledge for monitoring, research, and management practices to minimize and mitigate, to the maximum extent practicable, the impacts of the authorized taking of the Covered Species. Each Party will, to the maximum extent practicable, fully cooperate in implementing the AMP. The Permittees will comply with the AMP to evaluate the effectiveness of the Conservation Measures and to make appropriate adjustments if warranted.
- d. The Permittees shall submit an annual report describing its activities and an analysis of whether the terms of the HCP were met for the reporting period. The report shall provide all reasonably available data regarding the incidental take, and where requested by the Service, changes to the overall population of Plan Species that occurred in the Permit area during the reporting period.

10.2 Responsibilities of the Service.

- a. The Service shall cooperate and provide, to the extent funding is available, technical assistance to the Permittees. Nothing in this Agreement shall require the Service to act in a manner contrary to the requirements of the Anti-Deficiency Act.
- b. After issuance of the Permit, the Service shall monitor the implementation thereof, including each of the terms of this Agreement and the HCP in order to ensure compliance with the Permit, the HCP and this Agreement.

10.3 Responsibilities of the Texas Parks and Wildlife Department.

The Texas Parks and Wildlife Department will undertake all Conservation Measures assigned to it as provided in Chapter 5 of the HCP and fully cooperate with the Permittees in the preparation and development of the annual report provided for in Subsection 11.1.d.

11.0 REMEDIES AND ENFORCEMENT

11.1 REMEDIES IN GENERAL

Except as set forth below, each Party shall have all remedies otherwise available to enforce the terms of this Agreement, the Permit, and the HCP, and to seek remedies for any breach hereof, subject to the following:

- a. NO MONETARY DAMAGES

No Party shall be liable in damages to the any other Party or other person for any breach of this Agreement, any performance or failure to perform a mandatory or discretionary obligation imposed by this Agreement or any other cause of action arising from this Agreement. Notwithstanding the foregoing:

(1) Retain Liability

All Parties shall retain whatever liability they would possess for their present and future acts or failure to act without existence of this Agreement.

(2) Land Owner Liability

All Parties shall retain whatever liability they possess as an owner of interests in land.

(3) Responsibility of the United States

Nothing contained in this Agreement is intended to limit the authority of the United States government to seek civil or criminal penalties or otherwise fulfill its enforcement responsibilities under the ESA.

b. INJUNCTIVE AND TEMPORARY RELIEF

The Parties acknowledge that the Plan Species are unique and that their loss as species would result in irreparable damage to the environment and that therefore injunctive and temporary relief may be appropriate to ensure compliance with the terms of this Agreement.

11.2 THE PERMIT

a. SEVERABILITY

The Service recognizes that the measures in Chapter 5 of the HCP will be implemented by different Permittees, each having differing legal authorities and jurisdictions. Therefore, without limiting in any way its enforcement discretion in any decision regarding whether to suspend or revoke the Permit with respect to Permittees otherwise in compliance, the Service will consider whether any non-compliance by one or less than all of the Permittees materially affects compliance with relevant Permit issuance criteria.

b. PERMIT SUSPENSION OR REVOCATION

Except as otherwise provided for under the terms of the Agreement, the Permit shall be suspended or revoked in conformance with the provisions of 50 CFR 13.27 through 13.29 (2011), as the same exists as of the date hereof.

11.3 LIMITATIONS AND EXTENT OF ENFORCEABILITY

a. NO SURPRISES POLICY

No further mitigation for the effects of the proposed activities upon the Plan Species may be required from the Permittees who have otherwise abided by the terms of the HCP, except in the event of unforeseen circumstances; provided that any such additional

mitigation may not require additional land use restrictions or financial compensation from the Permittees without their written consent.

b. **PRIVATE PROPERTY RIGHTS AND LEGAL AUTHORITIES UNAFFECTED**

Except as otherwise specifically provided herein, nothing in this Agreement shall be deemed to restrict the rights of the Permittees to the use or development of those lands, or interests in lands, constituting the Permit Area; provided, that nothing in this Agreement shall absolve the Permittee from such other limitations as may apply to such lands, or interests in lands, under other laws of the United States and the State of Texas.

12.0 AMENDMENTS

Except as otherwise set forth herein, this Agreement may be amended consistent with the ESA and with the written consent of each of the Parties hereto.

13.0 MISCELLANEOUS PROVISIONS

13.1 NO PARTNERSHIP

Except as otherwise expressly set forth herein, neither this Agreement nor the HCP shall make or be deemed to make any Party to this Agreement the agent for or the partner of any other Party.

13.2 SUCCESSORS AND ASSIGNS

This Agreement and each of its covenants and conditions shall be binding on and shall inure to the benefit of the Parties hereto and their respective successors and assigns.

13.3 NOTICE

Any notice permitted or required by this Agreement shall be delivered personally to the persons set forth below or shall be deemed given five (5) days after deposit in the United States mail, certified and postage prepaid, return receipt requested and addressed as follows or at such other address as any Party may from time to time specify to the other Parties in writing:

Assistant Regional Director
United States Fish and Wildlife Service
500 Gold Avenue, SW
Albuquerque, New Mexico 87102

General Manager
Edwards Aquifer Authority
1615 N. St. Mary's Street
San Antonio, Texas 78215

City Manager
City of New Braunfels
424 South Castell Avenue
New Braunfels, Texas 78130

City Manager
City of San Marcos
630 East Hopkins
San Marcos, Texas 78666

President
San Antonio Water System
2800 U.S. Highway 281 North
San Antonio, Texas 78212

President
Texas State University – San Marcos
601 University Drive
San Marcos, Texas 78666

Executive Director
Texas Parks and Wildlife Department
4200 Smith School Road
Austin, Texas 78744

Senior Program Manager – Endangered Species
Edwards Aquifer Authority
1615 N. St. Mary’s Street
San Antonio, Texas 78215

13.4 ENTIRE AGREEMENT

This Agreement, together with the HCP and the Permit, constitutes the entire Agreement between the Parties. It supersedes any and all other Agreements, either oral or in writing among the Parties with respect to the subject matter hereof and contains all of the covenants and Agreements among them with respect to said matters, and each Party acknowledges that no representation, inducement, promise or Agreement, oral or otherwise, has been made by any other Party or anyone acting on behalf of any other Party that is not embodied herein.

13.5 ELECTED OFFICIALS NOT TO BENEFIT

No member of or delegate to Congress shall be entitled to any share or part of this Agreement, or to any benefit that may arise from it.

13.6 AVAILABILITY OF FUNDS

Implementation of this Agreement and the HCP by the Service is subject to the requirements of the Anti-Deficiency Act and the availability of appropriated funds. Nothing in this Agreement will be construed by the parties to require the obligation, appropriation, or expenditure of any money from the U.S. Treasury. The Parties acknowledge that the Service will not be required under this Agreement to expend any Federal agency’s appropriated funds unless and until an authorized official of that agency affirmatively acts to commit to such expenditures as evidenced in writing.

13.7 DUPLICATE ORIGINALS

This Agreement may be executed in any number of duplicate originals. A complete original of this Agreement shall be maintained in the official records of each of the Parties hereto.

13.8 THIRD PARTY BENEFICIARIES

Except as provided in Sections 2, 5.2.2 and 5.3.2 of the HCP, and without limiting the applicability of the rights granted to the public pursuant to the provisions of 16 U.S.C. § 1540(g), this Agreement shall not create any right or interest in the public, or any member thereof, as a third party beneficiary hereof. Nor shall this Agreement authorize anyone not a Party to this Agreement to maintain a suit for personal injuries or property damages pursuant to the provisions of this Agreement. The duties, obligations, and responsibilities of the Parties to this Agreement with respect to third parties shall remain as imposed under existing Federal or State law.

13.9 RELATIONSHIP TO THE ESA AND OTHER AUTHORITIES

The terms of this Agreement shall be governed by and construed in accordance with the ESA and other applicable laws. In particular, nothing in this Agreement is intended to limit the authority of the Service to seek penalties or otherwise fulfill its responsibilities under the ESA. Moreover, nothing in this Agreement is intended to limit or diminish the legal obligations and responsibilities of the Service as an agency of the Federal government.

13.10 REFERENCES TO REGULATIONS

Any reference in this Agreement, the HCP, or the Permit to any regulation or rule of the Service shall be deemed to be a reference to such regulation or rule in existence at the time an action is taken.

13.11 APPLICABLE LAWS

All activities undertaken pursuant to this Agreement, the HCP, or the Permit must be in compliance with all applicable State and Federal laws and regulations.

IN WITNESS WHEREOF, THE PARTIES HERETO have executed this Implementing Agreement to be in effect as of the date in Section 8 above.

EDWARDS AQUIFER AUTHORITY

By: _____

Date: _____

Roland Ruiz, Interim General Manager

ATTEST:

By: _____

Date: _____

Jennifer Wong-Esparza, Assistant to Board Secretary

APPROVED AS TO FORM:

By: _____

Date: _____

Darcy Alan Frownfelter, General Counsel

Signatures continue on next page

DRAFT

CITY OF NEW BRAUNFELS

By: _____

Date: _____

Michael Morrison, City Manager

ATTEST:

By: _____

Date: _____

Patrick Aten, City Secretary

APPROVED AS TO FORM:

By: _____

Date: _____

Paul Isham, City Attorney

CITY OF SAN MARCOS

By: _____

Date: _____

James R. Nuse, P.E., City Manager

ATTEST:

By: _____

Date: _____

Jamie Lee Pettijohn, City Clerk

APPROVED AS TO FORM:

By: _____

Date: _____

Michael Cosentino, City Attorney

Signatures continue on next page

**CITY OF SAN ANTONIO
ACTING BY AND THROUGH ITS SAN ANTONIO WATER SYSTEM**

By: _____ Date: _____

Robert R. Puente, President/CEO

ATTEST:

By: _____ Date: _____

Becky Gonzalez, Executive Administrative Assistant

APPROVED AS TO FORM:

By: _____ Date: _____

Phil Steven Kosub, Senior Water Resources Counsel

TEXAS STATE UNIVERSITY – SAN MARCOS

By: _____ Date: _____

Denise M. Trauth, President

ATTEST:

By: _____ Date: _____

William Nance, Vice President for Finance and
Support Services, Texas State University-San Marcos

APPROVED AS TO FORM:

By: _____ Date: _____

Diane Corley, Associate General Counsel, Texas
State University System

Signatures continue on next page

TEXAS PARKS AND WILDLIFE DEPARTMENT

By: _____ Date: _____

Carter Smith, Executive Director

ATTEST:

By: _____ Date: _____

Michelle Klaus, Executive Assistant

APPROVED AS TO FORM:

By: _____ Date: _____

Ann Bright, General Counsel

UNITED STATES FISH AND WILDLIFE SERVICE

By: _____ Date: _____

Benjamin Tuggle, Ph.D., Regional Director – Region 2

ATTEST:

By: _____ Date: _____

Donna Shoemaker, Executive Assistant

APPROVED AS TO FORM:

By: _____ Date: _____

Justin Tade, US Department of the Interior,

Office of the Solicitor, Attorney Advisor

Signatures continue on next page

STATE AGENCY SIGNATURES

The state agencies below are neither permittees nor parties to this Agreement and, accordingly, have no obligations under this Agreement or any of the Program Documents. Their signatures are solely for the purposes of compliance with Subsection 1.26A(d)(3) of the EAA Act.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

By: _____ Date: _____

Zak Covar, Deputy Executive Director

ATTEST:

By: _____ Date: _____

Kelly Keel, Executive Assistant to the
Deputy Executive Director

APPROVED AS TO FORM:

By: _____ Date: _____

Les Trobman, General Counsel

TEXAS DEPARTMENT OF AGRICULTURE

By: _____ Date: _____

Todd Staples, Agricultural Commissioner

ATTEST:

By: _____ Date: _____

Drew DeBerry, Deputy Commissioner

APPROVED AS TO FORM:

By: _____ Date: _____

Dolores Alvarado Hibbs, General Counsel

Signatures continue on next page

TEXAS WATER DEVELOPMENT BOARD

By: _____

Date: _____

Melanie Callahan, Executive Administrator

ATTEST:

By: _____

Date: _____

Joyce Bourenane, Executive Assistant for Legal Services

APPROVED AS TO FORM:

By: _____

Date: _____

Kenneth L. Petersen, General Counsel

DRAFT