

RESOLUTION NO. 08-12-001

OF THE IMPLEMENTING COMMITTEE OF THE EDWARDS AQUIFER HABITAT CONSERVATION PLAN PROGRAM TO APPROVE A CERTIFICATE OF INCLUSION PROGRAM FOR CERTAIN MEMBERS OF THE IMPLEMENTING COMMITTEE

**WHEREAS**, the Implementing Committee of the Edwards Aquifer Habitat Conservation Plan Program (“EAHCPP”) was created pursuant to Section 7.7 of the Funding and Management 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, and Texas State University – San Marcos to fund and manage the Habitat Conservation Plan for the Edwards Aquifer Recovery Implementation Program (“FMA”) (eff. Jan. 1, 2012); and

**WHEREAS**, under Section 7.7 of the FMA, the purpose of the Implementing Committee is to supervise the implementation of the EAHCPP; and

**WHEREAS**, the Conservation Measures in Sections 5.2.3 and 5.3.2.1 of the EAHCPP’s draft Habitat Conservation Plan (“HCP”) include a Certificate of Inclusion Program for the Cities of New Braunfels and San Marcos; and

**WHEREAS**, the purpose of this program is to allow these cities to provide certain persons who are not Permittees under an Incidental Take Permit (“ITP”), but whose activities fall under the take prohibitions of Section 9 of the federal Endangered Species Act of 1973 (“ESA”), the option of complying with the terms of the Permittees’ ITP instead of having to obtain a separate ITP under the ESA for those activities; and

**WHEREAS**, the issuance of a Certificate of Inclusion will provide incidental take coverage to such persons if the persons take a Covered Species incidental to, and not the purpose of, the carrying out of an otherwise lawful activity; and

**WHEREAS**, the HCP provides standards and general requirements for participation in the Certificate of Inclusion Program, and more specific procedural requirements for participation in the Program were included in a draft Implementing Agreement submitted to the United States Fish and Wildlife Service (“USFWS”) along with the ITP Application and HCP; and

**WHEREAS**, subsequently, those provisions were removed from the Implementing Agreement as agreed to and approved by USFWS; and

**WHEREAS**, in light of this action by the USFWS, the members of the Implementing Committee desire to approve the Certificate of Inclusion Program by resolution to provide for the procedures necessary to implement the Program; and

**WHEREAS**, a regular meeting of the Implementing Committee was held on August 16, 2012, at 9:00 a.m., notice having been duly and properly posted in accordance with Section 7.7.4

of the FMA; and

**WHEREAS**, Agenda Item 5 was listed for the following purpose:

Discussion and take action on the Template Implementing Agreement and Resolution 12-8-001 regarding the Certificate of Inclusion; and

**WHEREAS**, all members of the Implementing Committee were present and constituted a quorum; and

**WHEREAS**, a unanimous vote of the Implementing Committee passed on, voted in favor of, and adopted the following resolution; and

**WHEREAS**, it is in the public interest that the Implementing Committee approve the Certificate of Inclusion Program to support the acquisition of an ITP from the USFWS.

NOW, THEREFORE, BE IT RESOLVED BY THE IMPLEMENTING COMMITTEE of the EDWARDS AQUIFER HABITAT CONSERVATION PLAN THAT:

- Section 1. The recitals set out above are found to be true and correct, and they are hereby adopted by the Implementing Committee and are made a part of this resolution for all purposes.
- Section 2. The Implementing Committee hereby approves the Certificate of Inclusion Program as attached to this Resolution.
- Section 3. The terms and provisions of this Resolution shall be deemed to be severable and if the validity of any section, subsection, sentence, clause, or phrase of this Resolution should be declared to be invalid, the same shall not affect the validity of any other section, subsection, sentence, clause, or phrase of this Resolution.
- Section 4. This Resolution shall become effective from and after its adoption.

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Thomas Taggart  
Chairman, Implementing Committee

ATTEST:

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William Nance  
Secretary, Implementing Committee

APPROVED AS TO FORM:

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Darcy Alan Frownfelter  
General Counsel  
Edwards Aquifer Authority

## **CERTIFICATE OF INCLUSION PROGRAM**

### **1.1. Purpose and Applicability.**

1.1.1 The purpose of the issuance of Certificates of Inclusion is to provide certain Persons whose activities fall under the take prohibitions of Section 9 of the ESA the option and benefits of complying with the terms of the Permit instead of having to obtain a separate incidental take permit under the ESA for those activities. Any Person, other than a Permittee, who desires to undertake one or more Covered Activities within the Permit Area may apply to a Permittee for a Certificate of Inclusion for that Person's activities to be covered under the Permit. A Certificate of Inclusion will provide incidental take coverage to the Person to take Covered Species as an incidental result of Covered Activities within the Permit Area pursuant to the terms of the Permit and this Agreement.

1.1.2 This program applies to the City of New Braunfels and the City of San Marcos, and may be implemented only by these cities.

### **1.2. Development of Standards and Procedures.**

Each Permittee that accepts applications for the issuance of Certificates of Inclusion will issue such certificates only: (i) after approval of the form of the certificate by the Implementing Committee; and (ii) in accordance with the standards and procedures set forth in Subsections 5.2.3 and 5.3.2.1, as may be appropriate, of the HCP for issuance of Certificates of Inclusion. The standards and procedures will be consistent with this Section and other applicable provisions of the Program Documents. A Permittee may establish an application fee schedule from time to time for applications for a Certificate of Inclusion and may determine the amount of the fee on a case-by-case basis, taking into account the level of effort required by the Permittee or its consultants or staff to process the application.

### **1.3. Application Process.**

A Person seeking to have an activity included in take coverage provided by the Permit will submit a complete application for the proposed activity to the Permittee with jurisdiction over the activity sought to be covered by the Permit. Each Permittee that issues Certificates of Inclusion will develop an application form consistent with the approved standards and will independently process applications that may be submitted by Persons seeking to conduct Covered Activities within the Permittee's jurisdiction. Each application will contain a detailed description of the proposed activity, a map indicating the location of the proposed activity, an analysis of the potential impacts to Covered Species, and any other requested information, and will be accompanied by the application fee set by the Permittee. Each Permittee that issues Certificates of Inclusion will encourage compliance with the HCP through the Certificate of Inclusion process. The Permittee will deny an application for a Certificate of Inclusion if it determines, in its sole

discretion, that the proposed inclusion is not consistent with the Permit, the HCP or this Agreement. Upon receiving from an applicant for a Certificate of Inclusion the required application materials and application fee, the Permittee will conduct any assessment and evaluation necessary for the Permittee to determine whether it should approve the application and grant the Certificate of Inclusion.

#### **1.4. Issuance of Certificate of Inclusion.**

Upon a finding by the Permittee with jurisdiction over the Covered Activity that the applicant for a Certificate of Inclusion has: (i) complied with that Permittee's application requirements, standards and procedures; (ii) paid any application fees set by the Permittee; (iii) demonstrated, to the Permittee's satisfaction, that the proposed activity complies with all terms and requirements of the Program Documents, and that issuance of the Certificate of Inclusion will not compromise the Long-Term Biological Goals, Key Management Objectives, and Flow-Related Objectives described for each Covered Species in Section 4.1 of the HCP, the Permittee may approve the application and issue a Certificate of Inclusion to the applicant. The Certificate of Inclusion will be signed by the issuing Permittee and the applicant. By signing the Certificate of Inclusion, the applicant agrees to be bound by and comply with the terms of the Certificate of Inclusion, the Permittee's standards and procedures, and all applicable terms of the Program Documents. Upon obtaining the required signatures, the Permittee will cause the fully executed Certificate of Inclusion to be recorded in the Real Property Records in the applicable county and thereafter, during the term of the Certificate, the holder of the Certificate of Inclusion will be provided with incidental take coverage under the Permit. A breach of the obligations imposed upon the holder of the Certificate of Inclusion will not be considered a violation by the Permittee issuing the Certificate of Inclusion or any other Permittee or other third party provided with incidental take coverage.

#### **1.5. Terms of Certificate of Inclusion.**

Incidental take coverage for any person who is provided with incidental take coverage pursuant to a Certificate of Inclusion will be available only to the extent the Person is in full compliance with all relevant requirements of the Certificate of Inclusion, the Program Documents, the standards and procedures adopted by the Permittee issuing the Certificate of Inclusion, and all other applicable legal requirements. Permittees will include as part of any Certificate of Inclusion, among other provisions:

- (1) a condition requiring compliance with the Program Documents;
- (2) a specific designation of the land or property to which the Certificate of Inclusion applies;
- (3) a description of the Covered Activity for which the Certificate of Inclusion was issued;
- (4) in the event of a breach of the Certificate of Inclusion, and if after

reasonable notice by the Permittee and an opportunity to cure, the person provided with incidental take coverage pursuant to a Certificate of Inclusion fails to cure, remedy, rectify, or adequately mitigate the effects of the breach, the Permittee will suspend or revoke the Certificate of Inclusion;

(5) that the Certificate of Inclusion is valid for a specific term not to exceed two years, and that the person provided with incidental take coverage pursuant to a Certificate of Inclusion must submit an application to renew a Certificate of Inclusion prior to the expiration of the current term in order to renew the Certificate;

(6) a requirement that a copy of the recorded Certificate of Inclusion be posted in public view at the holder's site at any time Covered Activities are being conducted by the holder and, if applicable, that the holder provide notice of the Certificate of Inclusion to any purchaser of its services or goods that are sold or used within the Permit Area; and

(7) that the Certificate of Inclusion is not transferable unless approved by the issuing Permittee, and such Permittee will not approve a transfer unless the Permittee determines, to its satisfaction, that the transferee will comply with all terms and conditions of the Certificate of Inclusion and that the transferee will not cause any deviation from any Covered Activity described in the Certificate of Inclusion.

#### **1.6. Notice Required After Issuance of Certificate of Inclusion.**

Any Permittee issuing a Certificate of Inclusion will promptly notify, and within 30 days of issuance, will provide a copy to the Service, the Implementing Committee, and the Program Manager. The Permittee will also notify such Persons of any suspension, revocation, transfer, or renewal of the Certificate.

#### **1.7 Term of the Program.**

These provisions will govern the implementation of the Certificate of Inclusion Program unless and until they are revoked, replaced, or modified through the Adaptive Management Process.