

**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 SANANTONIO WATER SYSTEM BOARD OF TRUSTEES, TEXAS STATE UNIVERSITY – SAN MARCOS, AND THE TEXAS PARKS AND WILDLIFE DEPARTMENT**

**and**

**U.S. FISH AND WILDLIFE SERVICE**

**TO IMPLEMENT THE HABITAT CONSERVATION PLAN FOR THE EDWARDS AQUIFER RECOVERY IMPLEMENTATION PROGRAM**

This Implementing Agreement (“Agreement”), is made and entered into by and among the Edwards Aquifer Authority (“EAA”), the City of New Braunfels, Texas (“New Braunfels”), the City of San Marcos, Texas (“San Marcos”), the City of San Antonio, Texas, acting by and through its San Antonio Water System Board of Trustees (“San Antonio”), Texas State University – San Marcos (“the University”) (collectively “the Permittees”), the Texas Parks and Wildlife Department (the “Department”), and the UNITED STATES FISH AND WILDLIFE SERVICE (“USFWS” or the “Service”). Each Permittee, the Department, and the USFWS may be referred to in this Agreement as a “Party,” and may be collectively referred to as the “Parties.”

**1.0 RECITALS AND PURPOSES**

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

**1.1.1** The Edwards Aquifer is a karstic 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.

**1.1.2** 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 recreation 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.

**1.1.3** The following Covered 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 the Comal River and associated riparian areas within New Braunfels: (1) Fountain Darter (*Etheostoma fonticola*), (2) Comal Springs Riffle Beetle (*Heterelmis comalensis*), and (3) Comal Springs Dryopid Beetle (*Stygoparnus comalensis*), and (4) Peck's Cave Amphipod (*Stygobromus pecki*).

**1.1.4** The following Covered 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 the San Marcos River and associated riparian areas within San Marcos: (1) Fountain Darter (*Etheostoma fonticola*), (2) Comal Springs Riffle Beetle (*Heterelmis comalensis*), (3) Texas Wild Rice (*Zizania texana*), (4) Texas Blind Salamander (*Eurycia nana*), San Marcos Gambusia (*Gambusia george*), and San Marcos Salamander (*Eurycia nana*).

**1.1.5** The following Covered 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 Comal Springs as well as instream flows proximately downstream of the springs in the Comal River and associated riparian areas within New Braunfels: (1) Comal Springs Salamander (*Eurycea sp.*).

**1.1.6** The following Covered 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 the San Marcos River and associated riparian areas within San Marcos: (1) Texas Cave Diving Beetle (*Haideoporus texanus*), and (2) Texas Troglotic Water Slater (*Lirceolus smithii*).

**1.1.7** To provide for the necessary and effective management of the Edwards Aquifer to sustain the diverse economic and social interests associated with the Aquifer and foster the interests of the Covered Species, the EAA was created in 1993. The EAA manages the Edwards Aquifer under the Edwards Aquifer Authority Act, Act of May 30, 1993, 73<sup>rd</sup> Leg., R.S., ch. 626, 1993 Tex. Gen. Laws 2350, as amended.

**1.1.8** Permittees are seeking authorization from the USFWS for the "take" of the Covered Species as authorized by Section 10(a)(1)(B) of the ESA which is incidental to, and not for the purpose of, the carrying out of the otherwise lawful activities of the regulation and production of groundwater from the Edwards Aquifer for beneficial use for irrigation, industrial, municipal and domestic and livestock uses, and

the use of the instream flows in Comal River and San Marcos River for municipal use and recreational use.

**1.1.9** The Parties, with technical assistance from the Service, and with guidance and approval from the Edwards Aquifer Recovery Implementation Program, have developed a series of measures, described in the HCP to minimize and mitigate to the maximum extent practicable the effects of the take of the Covered Species incidental to Permittee's Covered Activities.

**1.1.10** The Service has approved the Permittee's application for an incidental take permit, including the HCP, and issued to the Permittees Incidental Take Permit Number \_\_\_\_\_, dated \_\_\_\_\_, 2012 (the "Permit").

**1.2 Purposes.** The purposes of this Agreement are:

**1.2.1** To ensure implementation of each of the terms of the Program Documents and further benefit the Covered Species;

**1.2.2** To describe remedies and recourse should any party fail to perform its obligations as set forth in this Agreement;

**1.2.3** To provide assurance to the Permittees that as long as the terms of the HCP, the Permit, and this Agreement are performed, no Additional Conservation Measures will be required of the Permittees, with respect to the Covered Activities for the Covered Species except as provided for in this Agreement or as may otherwise be required by applicable law or regulations; and

**1.2.4** Assure Permittees that compliance with the terms of the HCP and this agreement is sufficient for Permittees to obtain and retain the Permit and adequately provides for the mitigation of the effects of the incidental take of the Covered Species resulting from the Covered Activities.

**THEREFORE**, the Parties hereto do hereby agree as follows:

## **2.0 DEFINITIONS**

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

**2.1** "Adaptive Management Process" or "AMP" means the iterative process described in Chapter 7 of the HCP designed to develop information gathered through monitoring and research, and the review and use of the results to confirm the efficacy of or the need to adjust the Minimization and Mitigation Measures described in Chapters 5 and 6 of the HCP. The AMP is attached to this Agreement as Appendix A and incorporated herein for all purposes.

- 2.2 “Additional Conservation Measure” means a Conservation Measure beyond those provided in Chapters 5 and 6 of the HCP.
- 2.3 “Agreement” or “IA” means this Implementing Agreement.
- 2.4 “Biological Goals and Objectives” means the long-term biological objectives to be achieved as described in Section 7.1 of the HCP.
- 2.5 “Certificate of Inclusion” means a certificate issued by a Permittee to a non-federal person, firm or entity that has agreed to be bound by the terms of the HCP and the Permit pursuant to Section \_\_\_ of this Agreement. A form for the certificate is attached hereto and incorporated herein for all purposes as Exhibit C, and has been approved by the Service.
- 2.6 “Changed Circumstances” means changes in circumstances affecting a Covered Species or the Permit Area that can reasonably be anticipated by the Permittees and that can reasonably be planned for in the HCP. Changed Circumstances and the remedial responses to those circumstances are described in Section 10.4 and 10.5 of the HCP.
- 2.7 “Conservation Measure” means a measure identified in Chapters 5 and 6 of the HCP, or developed pursuant to the Adaptive Management Process, to minimize or mitigate impacts to the Covered Species.
- 2.8 “Covered Activities” means those activities described in Chapter 2 of the HCP, for which incidental take authorization of Covered Species is authorized pursuant to the Permit.
- 2.9 “Covered Species” means the species identified in Subsections 1.1.3, 1.1.4, 1.1.5, and 1.1.6 of this Agreement and also identified in Section 1.5 of the HCP, each of which the HCP addresses in a manner sufficient to meet all of the criteria for issuing the Permit.
- 2.10 “Days” means calendar days unless otherwise specified. If the date of any performance falls on a Saturday, Sunday, or observed state, Federal or local holiday, the date of performance is the next business day following the calculated date of performance.
- 2.11 “EAA Act” means the Edwards Aquifer Authority Act, Act of May 30, 1993, 73<sup>rd</sup> Leg., R.S., ch. 626, 1993 Tex. Gen. Laws 2350, as amended.
- 2.12 “EARIP” means the Edwards Aquifer Recovery Implementation Program, which was developed through the consensus-based process under Section 1.26A of the EAA Act.

- 2.13** “Edwards Aquifer” means the San Antonio Segment of the Edwards Aquifer as defined in Section 1.03(1) of the EAA Act.
- 2.14** “Effective Date” means the date on which this Agreement takes effect, as provided in Section 8 of this Agreement.
- 2.15** “ESA” means the Federal Endangered Species Act of 1973, as amended (16 U.S.C. §§ 1531-1544).
- 2.16** “Funding and Management Agreement” or “FMA” means that certain agreement attached to this Agreement as Appendix B and incorporated herein for all purposes which provides for the funding and management of the EARIP HCP.
- 2.17** “HCP” means the Habitat Conservation Plan required by Section 10(a)(2)(A) of the ESA to be prepared by the Permittees and submitted to and approved by the Service as part of the Permittees’ application for an incidental take permit pursuant to Section 10(a)(1)(B) of the ESA for the EARIP.
- 2.18** “Permit” means the incidental take permit Number \_\_\_\_\_, dated \_\_\_\_\_, 2012, issued by the Service to the Permittees pursuant to Section 10(a)(1)(B) of the ESA.
- 2.19** “Permit Area” means (1) 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 part of Atascosa, Guadalupe, Comal, Caldwell, and Hays Counties; (2) the Comal Springs, and the portion of the Comal River and associated areas riparian thereto within the municipal boundaries of New Braunfels in Comal County, Texas; (3) and the San Marcos Springs, and the portion of San Marcos River and associated areas riparian thereto within the municipal boundaries of San Marcos in Hays County, Texas, all as depicted in Figure [x] in Section 1.3 of the HCP.
- 2.20** “Permittees” means the EAA, New Braunfels, San Marcos, San Antonio, and the University, but does not include the Department.
- 2.21** “Program Documents” means this Agreement, the HCP, the FMA, and the Permit.
- 2.22** “Program Manager” means the employee of the EAA identified in the AMP whose responsibility it is to administer the implementation of the HCP pursuant to the provisions of the Program Documents.

- 2.23** “Substantially Alter the Biological Goals and Objectives” means any reduction in the quantification of a biological goal or objective as stated in the HCP for the Phase 1 period of the HCP.
- 2.24** “Third Party Authorized to Take” means any person, firm, or entity that receives a take authorization pursuant to the HCP and Section 13 of this Agreement, including that person’s, firm’s, or entity’s employees, officers, agents, and representatives.
- 2.25** “Unforeseen circumstances” means changes in circumstances affecting the Covered Species or Permit Area covered by the HCP that could not reasonably have been anticipated by the Permittees or the Service at the time of the HCP’s and this Agreement’s negotiation and development, and that result in a substantial and adverse change in the status of the Covered Species. The term Unforeseen Circumstances is intended to have the same meaning as “extraordinary circumstances” as used in No Surprises policy.

### **3.0 HABITAT CONSERVATION PLAN AND ADAPTIVE MANAGEMENT**

#### **3.1 The Habitat Conservation Plan**

Pursuant to the provisions of Section 10(a) (1) (B) of the ESA, Permittees have prepared and the Service has approved the HCP, and the Service has issued the Permit. The HCP will involve two phases, consisting of Phase One and Phase Two, to be conducted during the Permit term. The effectiveness of the HCP in minimizing and mitigating the effects of the Covered Activities on the Covered species will be considered on the basis of the implementation of the Conservation Measures set forth in the HCP, or as modified through the AMP.

#### **3.2 Importance of Adaptive Management**

The Conservation Measures proposed to be funded and implemented by the Parties meet the incidental take permit issuance criteria of the ESA and applicable regulations. However, the the number of Covered Species, the quantity and quality of the data and information regarding some species, and the dynamic nature of the habitats of the Covered Species and the pursuit of the Covered Activities makes implementation of a science-based AMP that relies on the best available scientific information and knowledge an essential component of the HCP. The Adaptive Management Process will provide guidance to all Parties regarding monitoring, research, and management practices to benefit the Covered Species. Each Party shall, to the maximum extent practicable, fully cooperate with the Adaptive Management Program.

#### **3.3 Adaptive Management Process**

As more particularly described in Chapter 7 of the HCP and in Appendix A, the Parties shall implement an iterative Adaptive Management Process for the HCP that utilizes the best scientific and commercial data and information available, together with the results of monitoring and research, to evaluate the successes and shortcomings of the HCP.

**3.3.1** Because changes over time and adaptive responses are contemplated by the HCP, changes proposed as the result of the AMP, or as a result of Changed Circumstances, will not require an amendment to the HCP, the Permit or the Agreement, unless the changes constitute material changes to the HCP as described in section 11.4.2 of the HCP.

**3.3.2** If Unforeseen Circumstances occur as provided in Section 12.5.3 of this Agreement, pursuant to Service regulations at 50 C.F.R. §17.22, the Service shall not require the commitment of additional land, water, or financial compensation or additional restrictions on the use of land, water or other natural resources beyond the level otherwise agreed upon for the Covered Species in the HCP without the unanimous consent of Permittees. If Unforeseen Circumstances occur, they will be resolved through the AMP. Any Additional Conservation Measures agreed to by the Permittees and the Service as a result of Unforeseen Circumstances do not require an amendment to the HCP, the Permit, or this Agreement.

#### **3.4 Reporting of Changes Resulting From Adaptive Management Process**

All proposed changes as a result of the Adaptive Management Process will be identified in the annual implementation report, work plan, and budget submitted to the Service for review, comment and approval as provided in Section 11.1.3 and Appendix A of this Agreement.

### **4.0 INCORPORATION OF PROGRAM DOCUMENTS**

#### **4.1 Program Documents**

The HCP, Permit, and the FMA and each of their 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 will control. In the event of a direct contradiction between the FMA and this Agreement, the FMA will control. In all other cases, the terms of this Agreement and the terms of the HCP and the FMA will be interpreted to be complementary to each other.

#### **4.2 Permit Controls**

The terms of the Permit and the terms of the other Program Documents are intended by the Parties, and will be interpreted, to be complementary. In the event of any conflict among the terms of the Permit and other Program Documents, the terms of the Permit will control.

## **5.0 LEGAL REQUIREMENTS**

In order to fulfill the requirements that will allow the Service to issue the Permit, the HCP sets forth Conservation Measures that are intended to ensure that any take occurring as a result of the Covered Activities 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 for developing measures to provide for Unforeseen Circumstances are included; 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 Covered Species in the wild. The HCP also includes measures that have been suggested by the Service as being necessary or appropriate for purposes of the HCP.

## **6.0 COOPERATIVE EFFORT**

Each of the Parties to this Agreement will perform certain specific tasks as more particularly set forth in the Program Documents. The Program Documents thus describe a cooperative program by Federal, State, and local agencies to minimize and mitigate the effects of the Covered Activities on the Covered Species.

## **7.0 TERMS USED**

Terms defined and utilized in the Program Documents will have the same meaning as defined in the ESA and applicable regulations, except as explicitly provided to the contrary in this Agreement.

## **8.0 EFFECTIVE DATE AND TERM**

### **8.1 Effective Date**

This Agreement shall become effective on the date that the Service issues the Permit.

### **8.2 Term of Agreement**

This Agreement shall remain effective for a term of fifteen (15) years from the Effective Date, unless terminated or extended prior to that date

### **8.3 Extension of the Permit**



The Service may, with the agreement of the Permittees, from time to time extend the Permit beyond its current term in compliance with the applicable law and regulations in effect on the date of any such extension.

## **9.0 FUNDING AND MANAGEMENT**

The Permittees have entered into the FMA, which provides for the sharing of the costs of implementing the HCP. A Permittee's share of the annual HCP costs shall be determined and paid in accordance with Section 9 of the FMA. In addition, the FMA provides the terms and conditions agreed upon between the Permittees regarding the financing, implementation, and administration of the HCP. Execution of this Agreement and the FMA constitutes each Permittee's commitment to the Service to meet their funding obligations in accordance with the FMA (subject to financial assistance as described in the FMA) to implement the HCP. The Permittees will promptly notify the Service, if any Permittee's funding resources (including financial assistance as described in the FMA) have materially changed from information currently available to the Permittees. The notification will include an explanation of the funding change.

## **10.0 RESPONSIBILITIES OF THE PARTIES IN HCP IMPLEMENTATION; MONITORING RESPONSIBILITIES OF THE SERVICE; AND RESPONSIBILITIES OF THE DEPARTMENT**

### **10.1 Responsibilities of the Permittees**

**10.1.1** The HCP will achieve its purpose if the terms of the Program Documents have been or are being fully implemented.

**10.1.2** The Permittees will undertake all activities set forth in the HCP in order to meet the terms of the HCP and comply with the Permit, including the AMP.

**10.1.4** The Permittees will submit an Annual Report describing their activities and an analysis of whether the terms of the HCP were met for the reporting period. The Annual Report shall provide all reasonably available data regarding the incidental take, and where requested by the Service, changes to the overall population of Covered Species that occurred in the Permit area during the reporting period.

### **10.2 Responsibilities of the Department**

The Department will undertake all activities assigned to it as set forth in the HCP and fully cooperate with the Permittees in the preparation and development of the Annual Report provided for in Section 10.1.3.

### **10.3 Responsibilities of the Service**

**10.3.1** To the extent the Service has its own funds available, it shall cooperate and provide technical assistance to the Permittees as detailed in Section 8.4 of the HCP. Nothing in this Agreement shall require the Service to act in a manner contrary to the requirements of the Anti-Deficiency Act.

**10.3.2** The Service shall monitor Permittees implementation of the Permit, including each of the terms of this Agreement and the HCP in order to ensure compliance with the Permit, the HCP and this Agreement

#### **10.3.3 Assurances Regarding the HCP**

After opportunity for public review and comment, based on the best available current scientific and commercial data, the Service has found that the HCP, as implemented by this Agreement: (i) is consistent with and will complement other applicable conservation planning and regulatory programs and efforts addressing fish and wildlife within the Permit Area; (ii) minimizes and mitigates, to the maximum extent practicable, the effects of the Covered Activities on the Covered Species; (iii) will ensure that the Conservation Measures agreed upon by the Permittees and the Service will be met; and (iv) will be implemented. The Service shall not take a position inconsistent with the acknowledgments set forth in this subsection, including, without limitation, in the form of comments offered by the Service in the context of any process associated with approvals for Covered Activities with regard to effects on Covered Species.

## **11.0 REMEDIES AND ENFORCEMENT**

### **11.1 Good Faith Resolution**

The Parties agree to work together in good faith to resolve disagreements using informal meetings and conferences to reach mutually satisfactory conclusions to matters in dispute.

### **11.2 Notice of Alleged Default**

In the event that any Party fails or refuses to undertake or complete any obligation required by the Program Documents, the Party alleging such default shall notify the Party alleged to be in default, the Service, the Program Manager and the other Parties of the alleged default. The Party alleged to be in default

shall be given reasonable opportunity, but in no event fewer than 60 days, to cure the alleged default.

### **11.3 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:

#### **11.3.1 No Monetary damages**

No Party shall be liable in damages to 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:

(a) **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.

(b) **Land Owner Liability**

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

(c) **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 and other applicable laws. However, so long as the HCP is being properly implemented in accordance with the Program Documents, the Service shall not seek civil or criminal penalties or otherwise enforce the take prohibitions of the ESA and other applicable laws for incidental take of Covered Species that is in accordance with the terms of the Permit.

#### **11.3.2 Injunctive Relief and Temporary Relief**

The Parties acknowledge that the Covered 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.

#### **11.3.3 No Allocation of Individual Responsibility**

The Parties have quantified the effects of the Covered Activities for development of the HCP. The Parties have not identified specific impacts that individual Covered Activities have had or will have upon the Covered Species and their habitats because the possible decline of species and habitats in the Permit Area has been caused by many factors.

### **11.4 The Permit**

#### **11.4.1 Severability**

If any part or provision of this Agreement shall be held invalid or unenforceable by a court having jurisdiction under applicable law, and after exhaustion of all available appeals, said part or provision shall be ineffective only to the extent of such invalidity without in any way affecting the remaining parts of said part or provision or the remaining provisions of this Agreement. Notwithstanding the foregoing, in the event such invalidity or any rescission pursuant to this section alters the relative balance of benefits of the Parties to the significant disadvantage of a Party, the Parties shall attempt to negotiate a modification of the terms of the Agreement in order to reestablish the original balance of benefits, and if such agreement is not reached, the disadvantaged Party may rescind the Agreement. Nothing in this provision constrains the authority of the Service to suspend or revoke the Permit in the event that the benefits to the Covered Species pursuant to the Permit are substantially lessened as a result of a court ruling invalidating a part or provision of this Agreement.

#### **11.4.2 Permit Suspension**

- (a) Consistent with 50 C.F.R §§ 13.27-13.29, in the event of a material violation of the Permit or this Agreement by a Permittee, the Service may suspend the Permit in whole or in part. The Service may suspend the Permit relative to an individual Permittee if a Permittee is not in compliance with the conditions of the Permit, this Agreement, or any applicable Federal Law. The Service recognizes and agrees that Conservation Measures are to be implemented by different Permittees

with differing legal authorities and contractual commitments to perform the measures, and that the Conservation Measures, while interrelated, have not been measurably compared to each to identify the effects of non-performance of a particular measure on the efficacy of another particular Conservation Measure. Thus, the Service may also suspend the Permit relative to other Permittees due to the non-compliance of another Permittee if the non-compliance materially affects the Permit issuance criteria or the efficacy of the Conservation Measure being implemented by another Permittee in the judgment of the Service. A Permittee's Permit may not be suspended, revoked, or terminated against its will due solely to the actions or inactions of any other Permittee unless the Service finds that a material relationship between Conservation Measures is found by the Service. For the purposes of the HCP, the procedures applicable to any suspension shall be in accordance with the Federal regulations in effect at the time of the suspension; provided however, that, at a minimum, the Permittee for whom the Permit has been suspended shall be afforded the procedural rights set forth in 50 C.F.R. §13.27 in existence on the Effective Date. In addition, the procedural rights shall be afforded to the other Permittees, including the right to notice and opportunity to cure or mitigate on behalf of the non-performing Permittee. The suspension shall remain in effect until the Service determines that the Permittees have corrected the deficiencies. The Permit may be partially suspended with respect to specified Covered Species, or to a portion of the Permit Area or Covered Activities, or in relation to a specific Permittee or specific Permittees. In the event of a partial suspension, the portion of this Permit not subject to suspension shall remain in full force and effect. Permit suspension as a result of changed circumstances shall be in accordance with the applicable terms of this section and paragraph 11.3.1.

- (b) [Insert reinstatement of suspended permit]

#### **11.4.3 Permit Revocation**

- (a) The Service shall not revoke the Permit for any reason except those listed in 50 C.F.R. 13.28(a)(1)-(4), or unless the Covered Activities would be inconsistent with the criteria set forth in 16 U.S.C. § 1539(a)(2)(B)(iv) and this inconsistency has not been remedied. Notwithstanding the foregoing, the Permit will be revoked only if the Service, the Permittees, and other interested parties have not been successful in remedying any inconsistency through other means.
- (b) The Permit may be partially revoked with respect to specified Covered Species, to a portion of the Permit Area or the Covered

Activities, or in relation to a specific Permittee or specific Permittees. In the event of a partial revocation, the portion of this Permit not subject to revocation shall remain in full force and effect. All Conservation Measures in the HCP that are continued in effect after any Permit revocation shall be taken into account by the Service and credited toward any future efforts by the Permittees to ensure that any Covered Activities are in compliance with requirements of the ESA.

- (c) Procedures applicable to any revocation shall be in accordance with the federal regulations in effect at the time of the revocation; provided, however, that, at a minimum, the Permittee shall be afforded the procedural rights set forth in 50 C.F.R. §13.28 in existence on the Effective Date. In addition, these procedural rights shall be afforded to the other Permittees, including the right for notice and opportunity to cure or mitigate on behalf of the non-performing Permittee. This provision shall survive any revocation of the Permit in whole or in part and shall remain in full force and effect thereafter.

## **112.5 Limitations and Extent of Enforceability**

### **11.5.1 No Surprises Policy**

For the purposes of the No Surprises Rule (50 C.F.R. §§17.32(b)(5)), the Service has determined that the Covered Species are adequately covered by the HCP and that the Permittees are entitled to all of the assurances provided in such rule.

### **11.5.2 Changed Circumstances in General**

Section \_\_\_ and Table \_\_\_ of the HCP identify certain Changed Circumstances affecting Covered Species or their habitats that have been reasonably anticipated and planned for in the EARIP HCP and describes the remedial measures that will be implemented by Permittees in the event that such changed circumstances occur.

### **11.5.3 Unforeseen Circumstances in General**

Any change in circumstances not identified as a changed circumstance in Section \_\_\_ and Table \_\_\_ of the HCP shall be considered an unforeseen circumstance. The obligations of the Service in regard to unforeseen circumstances are set forth in 50 C.F.R. §17.22 and 50 C.F.R. §17.32.

#### **11.5.4 Response to Unforeseen Circumstances**

Provided that the Conservation Plan is being properly implemented by the Permittees, upon a determination that an unforeseen circumstance exists and that additional Conservation Measures neither identified in the Conservation Plan nor capable of implementation within the budget set forth in Chapter 9 of the HCP are required to address the unforeseen circumstance, Permittees shall not be required to undertake additional conservation or mitigation measures not already provided for by the Conservation Plan without the express, written consent of the Permittees.

If the Service determines, in accordance with 50 C.F.R. §17.22, that additional conservation and mitigation measures are deemed necessary to respond to unforeseen circumstances, the Service may require additional measures of Permittees only to the extent such measures are limited to modifications within conserved habitat areas or to changes to the Conservation Plan's conservation program for the affected species. Any such modifications must maintain the original terms of the Conservation Plan to the maximum extent possible. Without the express and written consent of Permittees, under no circumstance shall the Service require additional conservation and/or mitigation measures that would involve the commitment of additional land, water, or financial compensation or any additional restrictions on the use of land, water, or other natural resources otherwise available for development or use under the terms of the Conservation Plan.

In accordance with this Paragraph, to the extent the Service determines that additional conservation and/or mitigation measures are necessary to respond to unforeseen circumstances, any costs associated with modifications to the Conservation Plan resulting from any such Conservation Measures shall be dealt with in accordance with applicable regulations and Section \_\_\_ of the FMA.

#### **11.5.5 Avoidance of Effect on Permittees**

If additional actions are required, in accordance with applicable regulation and Paragraph 12.5.4 above, for the benefit of one or more of the Covered Species as the result of an unforeseen circumstance, the Service shall endeavor to pursue and adopt those actions or measures that will have the least effect upon the Permittees and the respective constituents served by the Permittees. Prior to undertaking or attempting to impose any such additional action, the Service shall consider all practical alternatives, including but not limited to additional public education, translocation programs, propagation programs, and acquisition

of conservation easements. Any such considerations shall not require additional land, water, or financial commitments of the Permittees.

#### **11.5.6 Cooperation of Permittees**

If an unforeseen circumstance should occur, the Permittees shall cooperate with and assist the Service to address the unforeseen circumstance.

#### **11.5.7 Remedial Measures**

If any Party discovers that a changed circumstance has occurred, it will give notice to the Program Manager who will then give notice to the other Parties as soon as practicable after learning of the changed circumstance. In the event any changed circumstance occurs, the Program Manager shall implement the remedial measures, or cause those measures to be implemented, as specified in Table \_\_\_\_ of the HCP.

#### **11.5.8 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 or water constituting the Permit Area; provided, that nothing in this Agreement shall absolve the Permittees 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 FUTURE SECTION 7 CONSULTATIONS**

#### **12.1 Covered Activities**

##### **12.1.1 Notice**

In the event that, despite implementation of the HCP and cooperative efforts among the Service and the Permittees, the Service determines that a section 7 consultation or re-initiation of consultation is required pursuant to applicable Federal law for any Covered Activities, the Service shall give notice to the Program Manager and the Permittees, and such Permittees shall be treated as applicants in any section 7 consultation, and be entitled to fully and completely participate in all matters involved in such consultation or re-initiation of consultation. Costs associated with modifications to the HCP resulting from any such consultation shall be dealt with in accordance with Section \_\_\_\_ of the



FMA. The Service has evaluated the direct, indirect and cumulative effects of the Covered Activities in its Biological Opinion issued in connection with the HCP and issuance of the Permit.

#### **12.1.2 Contents of Biological Opinion**

As a result, and to the maximum extent allowable, in any consultation under section 7 ESA subsequent to the Effective Date with regard to the Covered Activities, including consultations involving the Permittees or an entity that is a Third Party Authorized to Take with regard to Covered Species, the Service shall ensure that the biological opinion issued in connection with the proposed action or project that is the subject of the future consultation is consistent with the Biological Opinion issued in connection with the Permit.

### **12.2 Other Actions and Activities**

#### **12.2.1 Notice**

In any section 7 consultation subsequent to the Effective Date involving activities, other than Covered Activities, undertaken by any person, firm or entity that could have an effect upon Covered Species and their habitats within the Permit Area, the Service shall, to the maximum extent allowed by Federal statutes and regulations, give notice thereof to the Program Manager and the Permittees.

#### **12.2.2 Contents of Biological Opinion**

The Service agrees that the terms of any biological opinion issued in connection with projects that are independent of the Covered Actions and the Covered Activities shall not impose or result in any additional obligation, cost, or expense to the Parties.

### **13.0 THIRD PARTY TAKE AUTHORIZATIONS**

Incidental take authorization of Covered Species in accordance with the terms of the Permit shall be available to (1) the Permittees; (2) persons authorized under the EAA Act and the EAA's rules to withdraw groundwater from the Edwards Aquifer within the jurisdictional boundaries of the EAA, including by permit, exempt status, or otherwise;; (3) all universities, municipalities, public utilities, contractors, consultants, scientists, landowners, water rights owners, developers, and farmers; (4) persons, firms and entities that support or facilitate recreational activities in the Permit Area in conformance with all conditions in a Certificate of Inclusion issued by New Braunfels, San Marcos, or the University; and persons who participate in recreational activities in

the Permit Area in conformance with all rules of New Braunfels, San Marcos, or the University applicable to the activities; and (5) other individuals and private and public entities undertaking Covered Activities who are: (i) under the direct control of a Permittee, in conformance with any approval granted by that Permittee, and in compliance with the Permit and this Agreement and the HCP, or (ii) subject to a Certificate of Inclusion authorized by the Permittee for the jurisdiction within which the activity is to occur. A Certificate of Inclusion shall authorize the person, firm, or entity 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. Persons who have received a Certificate of Inclusion shall be referred to as a Third Party Authorized to Take. Permittees shall include as part of any Certificate of Inclusion, among other provisions: (1) a condition requiring compliance with the Permit, the HCP, this Agreement, the FMA, and any applicable independent funding agreement entered into to ensure funding for the HCP; and (2) a description of the Covered Activity for which the Permit was granted. The Permittee(s) issuing the Certificate of Inclusion shall report the identity of the entity to whom such Certificate was issued to the Service, the Permittees, and the Program Manager in writing. Incidental take by any Third Party Authorized to Take shall be authorized only if it is in full compliance with all relevant requirements of the Permit, any issued entitlements, and all other applicable legal requirements. Any Third Party Authorized to Take may carry out the Covered Activity authorized by the Permit and shall have the same rights and obligations under this Agreement as the Permittees.

#### 14.0 FORCE MAJEURE

If the Permittees are wholly or partially prevented from performing obligations under this Agreement because of unforeseeable causes beyond the reasonable control of and without the fault or negligence of the Permittees (Force Majeure), including, but not limited to, acts of God, Labor disputes, sudden actions of the elements, involuntary expansion of utility service obligations imposed by statute, vote of the electorate, or state or federal judicial or administrative order, or actions of non-participating Federal or state agencies or local jurisdictions, the Permittees shall be excused from whatever performance is affected by such unforeseeable cause to the extent so affected, and such failure to perform shall not be considered a material violation or breach of the Permit or this Agreement, provided that nothing in this Section shall be deemed to authorize any Party to violate the ESA and provided further that: (i) the suspension of performance is of no greater scope and no longer duration than is required by the Force Majeure; (ii) within fifteen (15) days after the occurrence of the Force Majeure, affected Permittees shall give the Service, the other Permittees, and the Program Manager written notice describing the particulars of the occurrence; and (iii) Permittees use their best efforts to remedy their inability to perform (however, this section shall not require the settlement of any strike, walk-out, lock-out, or other labor dispute on terms which in the sole judgment of the Permittees are contrary to their interest).

**Comment [s1]:** Myron Hess has proposed that this section be struck in its entirety. This is a substantive issue that will have to be resolved.

## **15.0 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.

## **16.0 MISCELLANEOUS PROVISIONS**

### **16.1 Response Times**

The Parties agree that time is of the essence in performance of the obligations of this Agreement. Except as otherwise set forth herein or as required by applicable laws or regulations, the Parties shall use reasonable efforts to respond to written requests within forty-five (45) days

### **16.2 No Partnership**

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

### **16.3 Nullification of Agreement**

In the event that the Permit is revoked in its entirety or substantially modified without the consent of the Parties, this Agreement shall be null and void, and in such event, no Party shall be bound by its terms.

### **16.4 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 and their respective successors and assigns, including Third Parties Authorized to Take. Assignment or other transfer of the Permit or any rights or authorities granted thereunder shall be governed by ESA permit regulations

### **16.5 Notice**

Any notice permitted or required by this Agreement shall be in writing, and either delivered personally, or by United States mail, certified and postage prepaid, return receipt requested to the addresses on file with the Program Manager and to the persons set forth below. Notwithstanding the foregoing, notices may be delivered by facsimile or other electronic means, provided that receipt is acknowledged and such notices are also delivered personally or by overnight or certified mail. Notices shall be transmitted so that they are received within the specified deadlines. Notices delivered via certified mail shall be

deemed received seven (7) days after deposit in the United States mail. Notices delivered personally shall be deemed received on the date they are delivered. Notices delivered by facsimile transmission or other electronic means shall be deemed received on the date sent, subject to the requirement for acknowledgement and for an additional method of notification. Notices delivered via overnight delivery shall be deemed received on the next business day after timely deposit with the overnight mail delivery service.

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 78180  
(830) facsimile number

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  
[Street Address or Post Office Box]  
Austin, Texas [Zip Code]

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

#### **16.6 Entire Agreement**

This Agreement, together with the Program Documents, 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.

#### **16.7 Preparation by All Parties**

This Agreement shall not be construed as if it had been prepared by any one Party, but rather as if all the Parties had prepared the Agreement.

#### **16.8 Attorneys' Fees**

If any action at law or equity, including any action for declaratory relief, is brought to enforce or interpret the provisions of this Agreement, each party to the litigation shall bear its own attorneys' fees and costs, provided that attorneys' fees and costs recoverable by or against the United States shall be governed by applicable Federal law.

#### **16.8 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.

#### **16.9 Availability of Funds**

Implementation of this Agreement and the HCP by the Service is subject to the requirements of the Anti-Deficiency Act, the laws of the State of Texas, 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.

#### **16.10 Multiple Original Counterparts**

**Comment [s2]:** Mark Taylor has proposed to strike this section entirely with the following comment: "The proposed language for attorneys' fees is not appropriate given the broad range of size and financial resources of the Permittees. Rather than changing the language to allow attorneys' fees to a prevailing party, I [Mark T.] propose leaving the agreement silent as to attorney fees." PSK comment: This is a substantive issue that will need to be resolved. The provision was included to discourage litigation and encourage dispute resolution. I would prefer to have a workgroup recommendation on this issue, rather than toss it to the stakeholders. Let me know your thoughts.

This Agreement may be executed in multiple counterparts, and each shall be deemed an original. A complete original of this Agreement shall be maintained in the official records of each of the Parties hereto.

#### **16.11 Third Party Beneficiaries**

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 it 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.

#### **16.12 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.

#### **16.13 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.

#### **16.14 Changes in the Environmental Laws**

It is acknowledged and agreed by the Service that the Permittees are agreeing to perform substantial minimization and mitigation of the effects of the Covered Activities on the Covered Species due to the implementation of the Conservation Measures as set forth in the HCP. If a change in, or an addition to, any Federal law governing or regulating the impacts of Covered Activities occurs as they relate to Covered Species, including, but not limited to, ESA and NEPA, the Service shall give due consideration to the measures required under the HCP in applying the new laws and regulations to the Permittees.

#### **16.15 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.

**16.16 Headings**

The section headings used in this Agreement are for the convenience of the Parties and are not intended to be used as an aid to interpretation.

**16.17 Faxed Signatures**

Any Party may deliver its signed duplicate of this Agreement to any other Party by facsimile transmission, and such delivery shall be deemed made and completed upon receipt of such facsimile transmission by the other Party. Any Party delivering a signed duplicate by facsimile transmission shall promptly send the duplicate original bearing its original signature to the other Party, provided that a delay or failure to do so shall not negate the effectiveness of the delivery made by the facsimile transmission.

**16.18 Further Instruments**

Each of the Parties shall, promptly upon the request of another Party, execute, acknowledge, and deliver to the other Party any and all further instruments as are reasonably requested or appropriate to evidence or give effect to the provisions of this Agreement.

**16.19 Applicable Law**

With respect to the ESA and other applicable Federal laws, the laws of the United States shall govern the construction and interpretation of this Agreement. With respect to Texas state laws pertaining to the non-federal Parties, the laws of the State of Texas shall govern the construction and interpretation of this Agreement. Further, nothing in this Agreement shall require any Party to: 1) violate any Federal statute or regulation, or 2) exceed its legal authority, as defined by applicable statute, regulation, rule, or order lawfully promulgated.

**16.20 No Admission**

Neither the application for the Permit nor the execution of this Agreement or any other Program Document by the Permittees shall be construed, considered, or deemed to be an admission by the Permittees that any take of any Covered Species has occurred or will occur.

**16.21 General Obligations of Parties**

Each Party shall fully and faithfully perform all obligations undertaken or assigned to them pursuant to the Program Documents.

**16.22 Authority**

Each Party represents and warrants for the benefit of every other Party hereto that: (i) the execution of this Agreement has been duly authorized; (ii) no other authorization or approval, whether of governmental bodies or otherwise, will be necessary in order to enable that Party to enter into and comply with the terms of this Agreement; and (iii) the person executing this Agreement on behalf of each Party has the authority to bind that Party.

IN WITNESS WHEREOF, THE PARTIES HERETO have executed this Implementing Agreement to be in effect as of the date last signed below.

Edwards Aquifer Authority

BY \_\_\_\_\_ Date: \_\_\_\_\_

Karl J. Dreher  
General Manager

ATTEST:

BY \_\_\_\_\_ Date: \_\_\_\_\_

Enrique P. Valdivia  
Secretary, Board of Directors

APPROVED AS TO FORM:

BY \_\_\_\_\_ Date: \_\_\_\_\_

Darcy Alan Frownfelter  
General Counsel

City of New Braunfels

BY \_\_\_\_\_ Date: \_\_\_\_\_

[name]  
City Manager

ATTEST:



BY \_\_\_\_\_ Date: \_\_\_\_\_  
[name]  
[title]

APPROVED AS TO FORM:

BY \_\_\_\_\_ Date: \_\_\_\_\_  
[name]  
City Attorney  
  
City of San Marcos

BY \_\_\_\_\_ Date: \_\_\_\_\_  
[name]  
City Manager

ATTEST:

BY \_\_\_\_\_ Date: \_\_\_\_\_  
[name]  
[title]

APPROVED AS TO FORM:

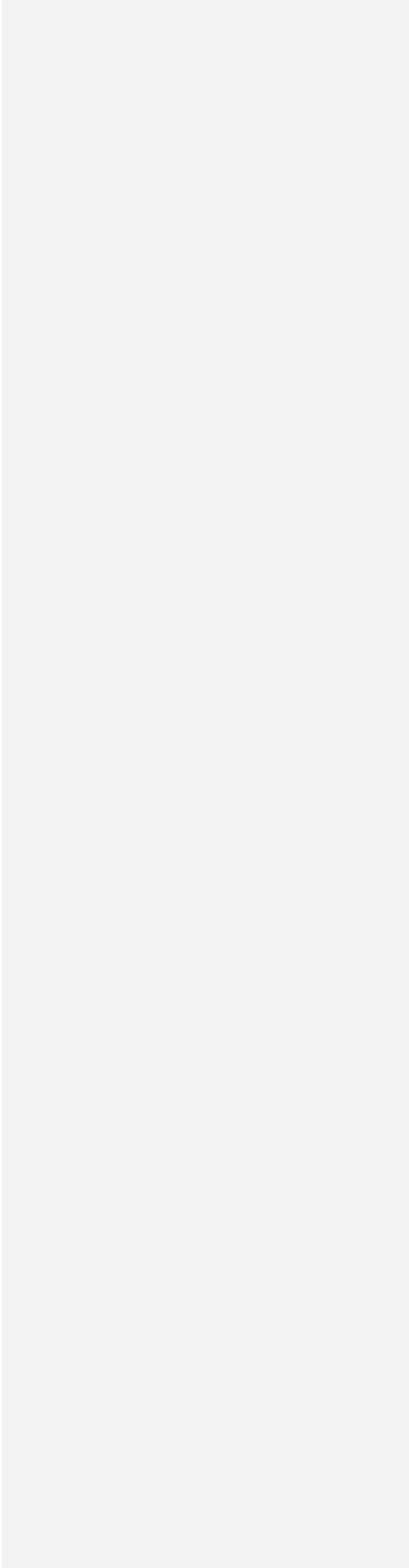
BY \_\_\_\_\_ Date: \_\_\_\_\_  
[name]  
City Attorney  
  
San Antonio Water System

BY \_\_\_\_\_ Date: \_\_\_\_\_  
President  
  
Texas State University – San Marcos

BY \_\_\_\_\_ Date: \_\_\_\_\_  
[name]  
President

ATTEST:

BY \_\_\_\_\_ Date: \_\_\_\_\_



[name]  
[title]

APPROVED AS TO FORM:

BY \_\_\_\_\_ Date: \_\_\_\_\_

[name]  
General Counsel

Texas Parks and Wildlife Department

BY \_\_\_\_\_ Date: \_\_\_\_\_

[name]  
Executive Director

ATTEST:

BY \_\_\_\_\_ Date: \_\_\_\_\_

[name]  
[title]

APPROVED AS TO FORM:

BY \_\_\_\_\_ Date: \_\_\_\_\_

[name]  
General Counsel

United States Fish and Wildlife Service

BY \_\_\_\_\_ Date: \_\_\_\_\_

Regional Director  
Albuquerque, New Mexico

ATTEST:

BY \_\_\_\_\_ Date: \_\_\_\_\_

[name]  
[title]

APPROVED AS TO FORM:

BY \_\_\_\_\_ Date: \_\_\_\_\_

[name]

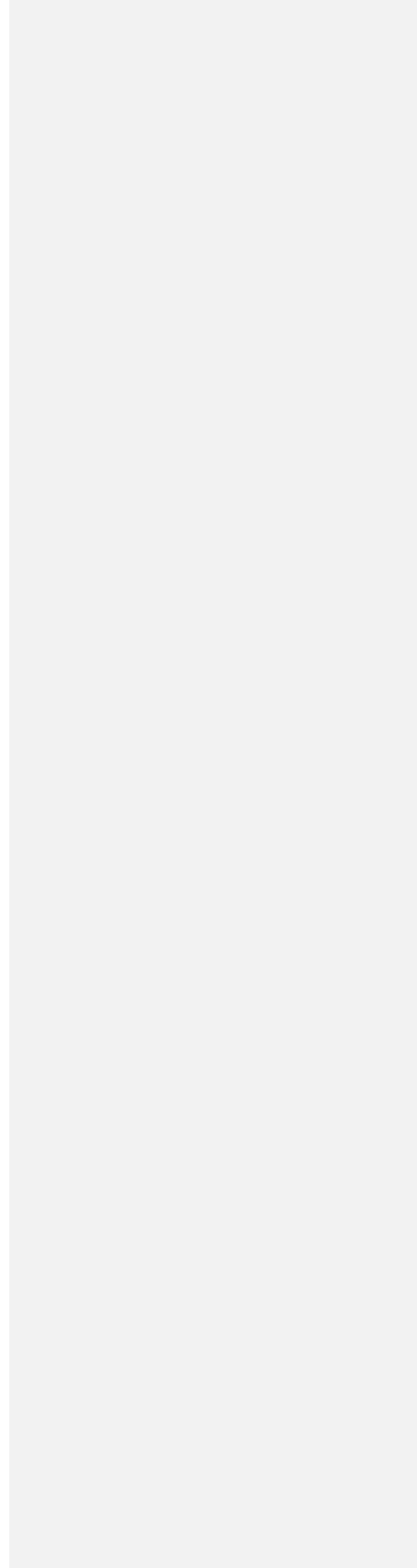
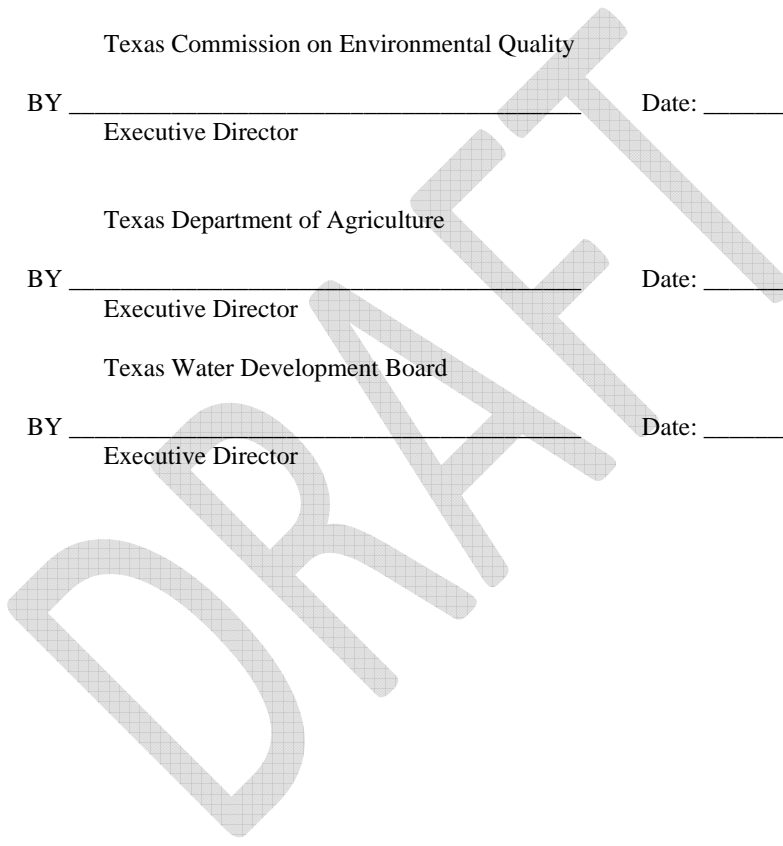
[title]

The signatures of state agencies below are provided for the sole purpose of indicating their approval of this Agreement and the HCP pursuant to Section 1.26A(d)(3) of the EAA Act. The state agencies below are not permittees nor are they parties to this Agreement.

Texas Commission on Environmental Quality  
BY \_\_\_\_\_ Date: \_\_\_\_\_  
Executive Director

Texas Department of Agriculture  
BY \_\_\_\_\_ Date: \_\_\_\_\_  
Executive Director

Texas Water Development Board  
BY \_\_\_\_\_ Date: \_\_\_\_\_  
Executive Director



DRAFT

