

Report of the EARIP Implementing Agreement Drafting Workgroup

To: EARIP Steering Committee and Stakeholders

From: EARIP Implementing Agreement Drafting Workgroup

Date: April 22, 2011

Subject: Second Report

Meeting of April 15, 2011. The EARIP Implementing Agreement Drafting Workgroup met at 9:00 a.m. on April 15, 2011, at the offices of the Gardner Law Firm in San Antonio. Workgroup members present were Darcy Frownfelter, Myron Hess, Mary Kelly, Steve Kosub, Kirk Patterson Mark Taylor, and Alan Wayland. Also present were Mike Gershon representing the City of New Braunfels, and Dr. Robert Gulley. Dr. Todd Votteler joined the meeting by telephone.

The workgroup considered the following issues referred by the EARIP stakeholders at their meeting of April 14, 2011:

1. Determination of the continuing role of EARIP stakeholders who are not Applicants for the Incidental Take Permit (“Applicants”) with regard to non-routine adaptive management decisions and adaptive strategic decision-making.
2. Enforcement of HCP responsibilities and whether cross-enforcement is advisable.

Based on its discussion, the workgroup identified a possible conceptual framework addressing the continuing role of EARIP stakeholders. Alternative approaches for some key aspects of the framework are shown below with brackets. The following key aspects are presented for consideration by the EARIP stakeholders:

- A new Implementing Agreement Stakeholder Committee will continue as a successor to the current EARIP Steering Committee in a process similar to that described in the straw man proposal presented to the stakeholders on April 14.
- The successor Stakeholder Committee will be prohibited by the terms of the Implementing Agreement from compelling action by any Applicant other than what has been committed in the Implementing Agreement.
- In the event agreement on any proposed revised biological goals is not reached through the EARIP adaptive decision-making process in a reasonable time and despite reasonable effort, the successor EARIP may terminate and the Incidental Take Permit [will terminate] [will terminate if termination is required by the USFWS].

- If the ITP is terminated, Applicants may reapply for a new permit, but not pursuant to the EARIP.
- On the other hand, if the Applicants are unwilling to accept a recommendation from the successor Stakeholder Committee, reached over the objection of the Applicants with regard to the implementation approach for achieving the agreed-upon long-term biological goals (beyond any commitment specifically described in the Implementing Agreement), they would not be precluded from working with the USFWS to develop an alternative implementation approach that is acceptable to the Service [provided that the approach is substantially equivalent, in terms of effectiveness in achieving those biological goals, to the approach recommended by the Stakeholder Committee].
- The Implementing Agreement will include recognition of the potential need for a presumptive Phase Two engineered project depending on the outcome of the adaptive management program and adaptive decision-making process undertaken during Phase One.
- A special protocol for the Phase Two decision-making process may be required to ensure a well-reasoned decision in light of the potential cost of a Phase Two project.
- The potential Phase Two project or menu of projects will be determined now by the current EARIP stakeholders and described in the Implementing Agreement.
- A funding commitment sufficient to implement the presumptive Phase Two project will also be included in the Implementing Agreement.
- No commitment can be required that is not otherwise agreed to by the Applicants.

The workgroup meeting adjourned at 12:00 p.m.

This draft report has been reviewed but not formally approved by the Implementing Agreement Drafting Workgroup.