

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,
Texas State University – San Marcos**

**to fund and manage the Habitat Conservation Plan
for the Edwards Aquifer Recovery Implementation Program**

This Funding and Management Agreement (Agreement), effective on the Effective Date provided in Section 8.1, is an interlocal cooperation contract made pursuant to Texas Government Code Chapter 791 by and among the Edwards Aquifer Authority (EAA), the City of New Braunfels (New Braunfels), the City of San Marcos (San Marcos), the City of San Antonio acting by and through its San Antonio Water System (San Antonio), and Texas State University – San Marcos (University) (collectively, Parties, and individually, Party).

Recitals

Recital A. Purpose. The purposes of this Agreement are to (1) provide the terms of the rights and duties agreed to by the Parties for managing and funding the Edwards Aquifer Recovery Implementation Program (Program) to implement the Habitat Conservation Plan (HCP) and the related Implementing Agreement (Implementing Agreement) entered into by the Parties and the United States Fish and Wildlife Service (Service) to support the Parties' application (Application) for issuance of an incidental take permit (Permit) by the Service; and (2) provide for the adaptive management process (AMP) relating to the species protected by the HCP and the continuing involvement of Edwards Aquifer stakeholders in making certain AMP decisions.

Recital B. Legislative Directives. By Act of May 28, 2007 (Senate Bill 3 or SB 3), the 80th Legislature of the State of Texas directed the EAA to cooperatively develop a recovery

implementation program (RIP) for threatened or endangered species associated with the Edwards Aquifer (Covered Species) through a facilitated, consensus-based process that involves participation by the Service, other appropriate federal agencies, and interested Edwards Aquifer stakeholders (Stakeholders). The EAA and other RIP participants were further directed to jointly prepare, under the oversight and with the assistance of a Steering Committee of representatives of certain Stakeholders designated by S.B.3, a program document that may be in the form of a habitat conservation plan as the basis for the issuance of an incidental take permit by the United States Secretary of the Interior, through the Service, under Section 10 of the federal Endangered Species Act of 1973.

Recital C. Cooperative Development. The EAA and other Stakeholders, in compliance with the S.B. 3 directives, have worked cooperatively since 2007 to develop a RIP program document and have determined that, in the interest of protecting the Covered Species, the RIP program document requirement is met by the development of the HCP to be submitted jointly by the Parties to the Service to support the Application.

Recital D. Independent Determinations by Each Party. Each of the Parties has independently found and determined that

- (1) the Party is authorized under applicable law to individually seek an incidental take permit from the Service for certain activities (Covered Activities) associated with the Edwards Aquifer;
- (2) the Party's respective cooperative actions to jointly submit the Application for a single permit will increase the efficiency and effectiveness of the Party and will most effectively discharge the direction in S.B. 3 to the parties and other Stakeholders to develop a recovery implementation program for threatened or endangered species associated with the Edwards Aquifer;
- (3) it is in that Party's interest to enter into each of the Program Documents;
- (4) the Party is both individually and, along with the other Parties, collectively responsible to the Service for the successful implementation of the HCP pursuant to the terms of the Implementation Agreement; and

- (5) the performance of the specific duties and responsibilities of the Party, as described in the HCP, this Agreement, and other Program Documents, is integrally related to the achievement of the long term biological goals, key management objectives and flow-related objectives described in Chapter 4 of the HCP.

Recital E. Program Phases and Adaptive Management Process. The Program consists of two phases of the 15-year Permit term: Phase I commences with the effective date of the Permit and continues for seven years; Phase II commences on the seventh anniversary of the effective date of the Permit and continues for eight years. The Program provides for an adaptive management process (AMP) that requires the continuing cooperation of the Parties to monitor the results of certain conservation measures (Conservation Measures) and to consider and take needed adaptive management actions by the Parties throughout Phase I and Phase II. The AMP described in Article Seven of this Agreement provides procedures for three levels of adaptive management decision by the Parties: routine, nonroutine, and strategic. Each Phase I Conservation Measure will be undertaken as soon as reasonably practicable after the effective date of the Permit, and, subject to any adjustment made by the Parties through the AMP, will continue during Phase I and Phase II unless the Conservation Measure is discontinued as a result of an AMP decision. Each Phase II Conservation Measure that is implemented in addition to any continuing Phase I Conservation Measures will be undertaken as soon as reasonably practicable after the commencement of Phase II.

Therefore, for the mutual consideration expressed in this Agreement, the Parties agree as follows:

Article One – Definitions and Other References

Section 1.1. Terms Defined in this Agreement. The following terms as used in this Agreement have the meaning provided in this Article One.

- 1.1.1.** “Adaptive Management Process” or “AMP” means an iterative process designed to develop information through monitoring and research, and the review and use of the

results to confirm the efficacy of or to adjust the Conservation Measures described in Chapter 5 of the HCP, all as described in Article 7.

- 1.1.2.** “Additional Conservation Measure” means a measure to minimize or mitigate impacts to one or more Covered Species that differs from the Conservation Measures and that is proposed by the Service in response to (a) an Unforeseen Circumstance; or (b) a Changed Circumstances not provided for in Chapter 8 of the HCP or that is planned for in Chapter 8 of the HCP but for which the Service proposes a measure different from those included in that chapter.
- 1.1.3.** “Agreement” means this Funding and Management Agreement.
- 1.1.4.** “Annual Escalator” has the meaning assigned in Subsection 5.2.1.
- 1.1.5.** “Annual Program Budget” has the meaning assigned in Section 4.4.
- 1.1.6.** “Annual Party Work Plan and Cost Estimate” has the meaning assigned in Section 4.4.
- 1.1.7.** “Application” means the application submitted by the Parties to the Service for a Permit.
- 1.1.8.** “Biological Opinion” means the biological opinion issued by the Service in connection with its approval of the Permit.
- 1.1.9.** “Certificate of Inclusion” means a certificate issued by a Party 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 10.2 of the Implementing Agreement.
- 1.1.10.** “Changed Circumstances” means changes in circumstances affecting one or more Covered Species or the Permit Area that reasonably could have been anticipated by the Parties and the Service during the negotiation and development of the HCP and this Agreement and includes the circumstances that have been specifically planned for as provided in Chapter 8 of the HCP.
- 1.1.11.** “Comprehensive Phase I Work Plan” has the meaning assigned in Section 4.2.
- 1.1.12.** “Conservation Measure” means a measure identified in Chapter 5 of the HCP, as such measure may be modified or developed pursuant to the Adaptive Management Process, to minimize or mitigate to the maximum extent practicable the impacts of the authorized taking of the Covered Species or contribute to the recovery of the Covered Species.

- 1.1.13.** “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.
- 1.1.14.** “Covered Species” means the species identified in Table 1-3 of the HCP, each of which the HCP addresses in a manner sufficient to meet all of the criteria for issuing the Permit.
- 1.1.15.** “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.
- 1.1.16.** “Department” means the Texas Parks and Wildlife Department.
- 1.1.17.** “EAA Act” means the Edwards Aquifer Authority Act, Act of May 30, 1993, 73rd Leg., R.S., ch. 626, 1993 Tex. Gen. Laws 2350, as amended.
- 1.1.18.** “EAA Funding Obligation” has the meaning assigned in Section 5.2.
- 1.1.19.** “EARIP” means the Edwards Aquifer Recovery Implementation Program, which was developed through the consensus-based process under Section 1.26A of the EAA Act as amended.
- 1.1.20.** “Edwards Aquifer” means the Southern (or San Antonio) Segment of the Edwards Aquifer as defined in Section 1.03(1) of the EAA Act and within the boundaries of the EAA.
- 1.1.21.** “Effective Date” means the date on which this Agreement takes effect, as provided in Section 8.1 .
- 1.1.22.** “ESA” means the Federal Endangered Species Act of 1973, as amended (16 U.S.C. §§ 1531-1544).
- 1.1.23.** “Excess Fund Balance” has the meaning assigned in Subsection 5.5.4.
- 1.1.24.** “Fund Balance” is the accumulation of the excess of Program Aquifer Management Fees and other funds deposited to the HCP Program Account over Program Expenditures.
- 1.1.25.** “Fund Balance Cap” has the meaning assigned in Subsection 5.5.4.
- 1.1.26.** “HCP” means the Habitat Conservation Plan required by Section 10(a)(2)(A) of the ESA that has been prepared by the Parties and submitted to and approved by the

Service as part of the application of the Parties for an incidental take permit pursuant to Section 10(a) of the ESA.

- 1.1.27.** “HCP Program Account” means the restricted account, composed of a reserve fund and an operations fund, created by the EAA in accordance with Section 5.4 to accumulate and disburse funds for the implementation of the Program.
- 1.1.28.** “Implementing Agreement” means the agreement entered into by the Parties to this Agreement and the Service to implement the Program.
- 1.1.29.** “Implementing Committee” means the committee created in accordance with Section 7.7 .
- 1.1.30.** “Party” individually or “Parties” collectively means the EAA, New Braunfels, the San Marcos, San Antonio, and the University. The Parties are defined as the “Permittees” in the Implementing Agreement.
- 1.1.31.** “Permit” means the incidental take permit to be issued by the Service to the Parties pursuant to Section 10(a) of the ESA.
- 1.1.32.** “Permit Amendment” means an amendment of the Permit that does not meet the Service’s criteria for a clarification, administrative change, or minor amendment to the Permit.
- 1.1.33.** “Permit Area” means 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, all in the State of Texas, as depicted in Figure 1-3 of the HCP, 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 San Marcos River and associated areas riparian thereto within the municipal boundaries of San Marcos in Hays County, Texas.
- 1.1.34.** “Person” means an individual and any organization, such as a business or a governmental unit, that has a legal identity apart from its members.
- 1.1.35.** “Phase I Conservation Measure” means a Conservation Measure described in Chapter 5 of the HCP that will be initiated in Phase One, as that measure may be changed through the AMP.

- 1.1.36.** “Phase II Conservation Measure” means a Conservation Measure that will be initiated in Phase II, as that measure may be changed through the AMP.
- 1.1.37.** “Presumptive Phase II Conservation Measure” means the Conservation Measure described in Subsection 5.5.2 of the HCP.
- 1.1.38.** “Program” means all activities related to implementation of the Permit and HCP as described in the Program Documents.
- 1.1.39.** “Program Administration Costs” means costs necessary to manage the Program as described in Chapter 7 of the HCP.
- 1.1.40.** “Program Aquifer Management Fees” means special aquifer management fees collected by the EAA from the holders of municipal and industrial Edwards Aquifer groundwater permits to fund the costs of the Program.
- 1.1.41.** “Program Documents” means this Agreement, the Implementing Agreement, the HCP, the Application, and the Permit.
- 1.1.42.** “Program Expenditures” means the costs included in the Annual Program Budget associated with the Program as provided in Section 5.6.
- 1.1.43.** “Program Funding” means funds provided by the EAA from the HCP Program Account to reimburse the Parties for costs associated with the Program.
- 1.1.44.** “Program Manager” means the employee of the EAA identified in Section 2.3 whose responsibility it is to administer the Program pursuant to the provisions of the Program Documents.
- 1.1.45.** “Recitals” means the Recitals in this Agreement.
- 1.1.46.** “Scientific Record” means a compilation of all the best scientific and commercial data currently available used to develop the Program , as supplemented by the results of new research and data made available during the term of the Permit in accordance with Section 7.12 .
- 1.1.47.** “Service” means the United States Fish and Wildlife Service.
- 1.1.48.** “Term” or “Permit Term” includes any extension of the initial 15-year permit term as may be approved by the Parties and the Service.
- 1.1.49.** “Unforeseen Circumstances” means changes in circumstances affecting one or more Covered Species or the Permit Area that could not reasonably have been anticipated by the Parties and the Service at the time of the negotiation and development of the

HCP, the Implementing Agreement, and this Agreement, and that result in a substantial and adverse change in the status of one or more of the Covered Species. The term Unforeseen Circumstances is intended to have the same meaning as “extraordinary circumstances” as used in the No Surprises policy.

1.1.50. “Year” means calendar year (January 1 through December 31), unless the context clearly indicates otherwise.

Section 1.2. Terms Defined in the Implementing Agreement. Each capitalized and other special term not expressly defined in this Agreement has the meaning assigned in the Implementing Agreement, unless the context specifically indicates otherwise.

Section 1.3. References to Sections. References to any Article, Section, or Subsection refer to the corresponding subdivision of this Agreement unless another document is specified.

Section 1.4. References to Other Program Documents. This Agreement at times refers to provisions in one or more of the other Program Documents executed by the Parties and other persons in connection with, and related to, the Edwards Aquifer HCP: the Application, the HCP, the Implementing Agreement, the Permit, and the Biological Opinion. Any such reference refers to the applicable provision in the executed document, as it may have been amended.

Article Two – Permit Application and Program Management

Section 2.1. Application for Permit. On or about December 1, 2011, the Parties will jointly submit to the Service the Application along with the Program Documents listed below:

- (1) the HCP;
- (2) the Implementing Agreement, executed by the Parties; and
- (3) this Agreement, executed by the Parties.

Section 2.2. General Management. The EAA has responsibility for the general management and oversight of the Program subject to the duties and responsibilities held solely or jointly by the other Parties in accordance with the terms of the Program Documents.

Section 2.3. Program Manager. The EAA will employ a person (Program Manager) whose job responsibility will be to direct, under the supervision of the General Manager of the EAA, the management of the Program consistent with the Program Documents. The Program Manager will be employed, and the Program Manager's job performance will be reviewed, as provided in this Section.

2.3.1. Job Description. The EAA will develop the job description, job title, responsibilities, accountability, and salary that it determines is appropriate for the Program Manager, provided that the EAA will engage the Implementing Committee in (a) the development of the job description; (b) the conduct of candidate interviews; (c) the review of candidate qualifications; and (d) the selection of the preferred candidate. The EAA will make all reasonable efforts to accommodate the views and comments of the Implementing Committee in making the final hiring decision and will also solicit and consider the comments of the Implementing Committee when reviewing the performance of the Program Manager.

2.3.2. Program Manager Duties. In addition to any duties and responsibilities the Program Manager will have as an employee of the EAA, the Program Manager will have the following duties:

- a. to serve as the primary point of contact between the Parties and the Service;
- b. to cooperate with, coordinate, and generally support the activities and decision-making processes of the Implementing Committee, Stakeholder Committee, Science Review Panel, and the Science Committee;
- c. to use all reasonable efforts to seek to secure unanimous action by the Implementing Committee, and consensus action by the Stakeholder Committee and the Science Committee, for matters brought before each of these committees pursuant to the Program Documents;
- d. to cooperate with and coordinate with the Service;
- e. to oversee and monitor compliance by the Parties with the Permit and other Program Documents;

- f.** to prepare and provide all reports as may be directed by the Implementing Committee or the Program Documents;
- g.** to compile and maintain the Scientific Record as described in this Agreement and as may be directed by the Implementing Committee;
- h.** to timely prepare work plans and cost estimates for the activities to be performed by the Program Manager during Phase I and Phase II for inclusion in the EAA's work plan and cost estimates to be consolidated in the Comprehensive Phase I Work Plan and Comprehensive Phase II Work Plan, respectively, as described in Sections 4.2 and 4.3;
- i.** to timely prepare for each year during the Permit term an annual work plan and cost estimate for activities to be performed by the Program Manager for inclusion in the EAA's Annual Party Work Plan and Cost Estimate as described in Section 4.4;
- j.** to assist the Implementing Committee with developing and, if required, amending the Comprehensive Phase I Work Plan and Comprehensive Phase II Work Plan, which will include the activities to be performed by the Program Manager;
- k.** to assist the EAA with timely preparing the EAA's Annual Party Work Plans and Cost Estimates, which will incorporate descriptions and costs for the activities to be performed by the Program Manager, and will be submitted for approval in the same manner as the Party Annual Party Work Plans and Cost Estimates submitted by the other Parties;
- l.** to ensure that the EAA's website reflects all current science and research reports, and reports and activities of the Implementing Committee, Stakeholder Committee, Science Review Panel, and Science Committee;
- m.** to perform other duties as may be assigned from time to time by the Implementing Committee, in consultation with the EAA General Manager; and
- n.** to perform any other duties and responsibilities as may be described in the job description developed by the EAA General Manager with the participation of the Implementing Committee.

2.3.3. Acting Program Manager. The EAA General Manager may from time to time designate a qualified member of the EAA staff to serve as the Acting Program Manager for temporary periods which may occur either pending the hiring of the initial or any

successor Program Manager or in the event of the Program Manager's unavailability or incapacity. Any duties or acts assigned to the Program Manager in this Section 2.3 or in any other of the Program Documents will be undertaken during the temporary period by the acting person thus appointed.

Article Three – Duties and Responsibilities of the Parties

Section 3.1. Parties' Collective Duties and Responsibilities. The collective Program duties and responsibilities of the Parties include (a) implementing the Conservation Measures and the Adaptive Management Process; (b) collaborating on research and planning associated with the implementation of Conservation Measures and the Adaptive Management Process; and (c) participating in any federal program that may provide funding for the Program.

Comment [s1]: I have included the changes requested by MG but believe that some discussion may be necessary.

Section 3.2. Each Party's Individual Duties and Responsibilities. Each Party has sole responsibility for (a) undertaking and performing each of the specific Conservation Measures assigned to that Party in Chapter 5 of the HCP; (b) if the Party determines to issue Certificates of Inclusion as provided in Section 10.2 of the Implementing Agreement, taking action as may be appropriate for such issuance and monitoring and enforcing the terms of any Certificate of Inclusion issued; (c) undertaking and performing each additional duty and responsibility that may be assigned to that Party as a result of decisions made under the Adaptive Management Process; and (d) complying with the terms of this Agreement to implement the Program.

Article Four – Program Work Plan and Budget Approvals

Section 4.1. Implementing Committee. The Implementing Committee created in accordance with Section 7.7 will, as soon as reasonably practicable after January 1, 2012 convene its initial organizational meeting, adopt procedures, and take other actions as may be necessary to comply with the schedule in this Article Four.

Section 4.2. Comprehensive Phase I Work Plan. Not later than March 1, 2012, the Implementing Committee will develop and approve a Comprehensive Phase I Work Plan, which will include descriptions, schedules, and cost estimates for the Phase I Conservation Measures

and all Program activities conducted or managed by the Parties and Program Manager that are to be funded from the HCP Program Account for the period through December 31, 2019. The Comprehensive Phase I Work Plan may be amended from time to time by the Implementing Committee to accommodate new information and changes in Conservation Measures as may be approved and authorized in compliance with the AMP established by Article Seven and other provisions of this Agreement.

Section 4.3. Comprehensive Phase II Work Plan. Not later than March 1, 2019, the Implementing Committee will develop and approve a Comprehensive Phase II Work Plan, which will include descriptions, schedules, and cost estimates for ongoing Phase I Conservation Measures, for the Phase II Conservation Measures, and for all activities conducted or managed by the Parties and Program Manager pursuant to the Program that are to be funded from the HCP Program Account for the period from January 1, 2020 until expiration of the Permit. The Implementing Committee may amend the Comprehensive Phase II Work Plan from time to time to accommodate new information and changes in Conservation Measures as may be approved and authorized in compliance with the AMP established by Article Seven.

Section 4.4. Annual Party Work Plan and Cost Estimate Submittal. Not later than April 15, 2012, each Party will submit to the Program Manager and Implementing Committee for the Implementing Committee's review and approval its Annual Party Work Plan and Cost Estimate for the Conservation Measures and any other activities related to the Program that the Party is obligated to undertake during 2013. The EAA's Annual Party Work Plan and Cost Estimate will include all activities related to the Program to be conducted or managed by the Program Manager during 2013. Each Annual Party Work Plan and Cost Estimate will include descriptions and schedules of the tasks that are reasonable and necessary to perform each Party's respective Conservation Measures and other Program-related activities.

Section 4.5 Annual Program Budget. The Program Manager and Implementing Committee will review and recommend changes, if necessary, to each Annual Party Work Plan and Cost Estimate. Not later than June 30, 2012, the Implementing Committee will complete its review and approval of the Annual Party Work Plans and Cost Estimates for the 2013 budget year and

will consolidate them into an Annual Program Budget. Upon approval by the Implementing Committee, the Annual Program Budget will be forwarded to the EAA for consideration for inclusion in the EAA's 2013 budget.

Section 4.6. Subsequent Years. For the 2014 budget year and each subsequent budget year during Phase I and Phase II, and each budget year during any extension of the Permit, each Party will prepare and submit its Annual Party Work Plan and Cost Estimate in accordance with the requirements in Section 4.4. The schedule for the submittal of the Annual Party Work Plans and Cost Estimates and the development and approval by the Implementing Committee of the Annual Program Budget will be consistent with the schedule for the 2013 budget year, unless the Implementing Committee, with the approval of the EAA, establishes a different schedule.

Section 4.7. Limitation. The EAA will promptly notify the Program Manager and Implementing Committee if the EAA Board is unable to grant final approval during any year to an application for Program Funding because funds available for the Program are or are likely to be insufficient, or if the EAA Board of Directors does not assess Program Aquifer Management Fees sufficient to fund the Annual Program Budget for any year. In either event, the Implementing Committee will collaborate in a timely manner to amend the Annual Program Budget to incorporate less costly measures that still ensure compliance with the Program Documents, and each Party will amend its application for Program Funding consistent with the revised Annual Program Budget. The Implementing Committee will not approve an Annual Program Budget or any amendment to such Annual Program Budget that provides for expenditures greater than the funds that the EAA expects to have available for that year, including any available Fund Balance as provided in Subsection 5.5.4.

Article Five –Program Costs and Funding

Section 5.1. Implementation Costs. Subject to the terms and limitations described in this Agreement, the cost of implementing the Program as described in Chapter 7 of the HCP will be funded by Program Aquifer Management Fees, and by other contributions, grants and funds received by the EAA for implementation of the Program, all as described in this Article Five.

Section 5.2. EAA Funding Obligation.

5.2.1 Level of Funding. The EAA Funding Obligation is to provide Program Funding for the costs of implementing the Program at the level indicated in Table 7.1 of the HCP, adjusted to allow for an increase by an amount not to exceed 2% over the prior year's budget. Variable costs covered by expenditures from the reserve account are not intended to be included in the 2% limit. Any increase will be based on an increase in the costs of implementing the Program as certified by the EAA based on the Annual Program Budget for the next calendar year as approved by the Implementing Committee under Section 4.5 and by the EAA Board of Directors. The EAA will continue the level of funding approved for each year of Phase I and Phase II, unless, consistent with revised estimates of Program costs, that amount is adjusted by the Implementing Committee and approved by the Board of Directors of the EAA. The EAA will ensure that any funds collected or received for the Program that are in excess of Program Expenditures, as defined in Section 5.6, during any year and result in a Fund Balance, as defined in Subsection 5.5.4, will be applied to Program Expenditures in subsequent years, subject to the provisions of Subsection 5.5.4.

5.2.2 Assessment of Fees by EAA. The EAA will assess Program Aquifer Management Fees annually to provide funding for the costs of the Program in accordance with Subsection 5.2.1. The EAA Board of Directors may, at its sole discretion, assess Program Aquifer Management Fees in an amount that will generate more funds than the amount required by Subsection 5.2.1 subject to the provisions of Subsection 5.5.4. If the funds collected through the Program Aquifer Management Fees are or will be insufficient to fund the Annual Program Budget and associated applications for Program Funding for any year, the EAA will promptly notify the Implementing Committee of the expected amount of the insufficiency and the Implementing Committee will collaborate in a timely manner to amend the Annual Program Budget as set forth in Section 4.7, and each Party will amend its respective application for Program Funding consistent with the revised Annual Program Budget.

5.2.3 Initial Fee Assessment. The parties acknowledge that the EAA is expected to impose and begin collecting Program Aquifer Management Fees prior to the submittal by the Implementing Committee to the EAA of the Annual Program Budget for 2013 in order to ensure that sufficient funding will be available on January 1, 2013 to pay Program Expenditures, as defined in Section 5.6, during the initial year of the Comprehensive Phase I Work Plan.

Section 5.3. Funding Contributions by Other Persons and Entities. The Parties acknowledge that other persons and entities, including but not limited to the Guadalupe Blanco River Authority, have committed to make, beginning in 2013, annual contributions of funds to the EAA to be used solely for the Program. The Parties will pursue applications for grants and funds for the Program from state and federal agencies and other potential funding sources.

Section 5.4. The HCP Program Account. Not later than October 1, 2012, the EAA will take action to create within the EAA a restricted account known as the Habitat Conservation Plan Program Account (the HCP Program Account). The EAA will deposit funds in either the reserve fund or operations fund of the HCP Program Account as appropriate, and will disburse funds from the operations fund of the HCP Program Account for costs and expenses approved by the EAA in the annual Program Budget in accordance with this Article Five. The HCP Program Account will allow for the accumulation of a Fund Balance in the reserve fund of the HCP Program Account as provided in Subsection 5.5.4.

Section 5.5. Sources of Funds in the HCP Program Account. Amounts deposited in the HCP Program Account will include the funds described in this Section 5.5.

5.5.1 EAA Fees. All funds collected by the EAA through the imposition of Program Aquifer Management Fees, as provided in Section 5.2, will be deposited in the HCP Program Account.

5.5.2 Contributions and Grants. All funds from contributions, grants, and other sources of funds the EAA may receive to support the Program during the term of the Permit will be deposited in the HCP Program Account.

5.5.3 Earnings on Investments. All earnings on the investment of funds deposited to the HCP Program Account will be deposited in the HCP Program Account.

5.5.4 Fund Balance. In recognition that Program Expenditures may be higher in years in which Edwards Aquifer levels are low or are anticipated to be low, the HCP Program Account will allow for the accumulation of a Fund Balance capped as provided in this subsection. The Fund Balance represents the accumulation of the excess of Program Aquifer Management Fees and other funds deposited to the HCP Program Account over Program Expenditures and will also be referred to as the Reserve Fund. The accumulated Fund Balance will be capped at \$46 million (Fund Balance Cap), unless amended by the Implementing Committee. Any amount that accumulates in the reserve fund of the HCP Program Account at the end of each budget year in excess of the Fund Balance Cap (Excess Fund Balance) may be used to reduce the EAA Funding Obligation otherwise required under Section 5.2. The EAA will reduce the Program Aquifer Management Fees charged for the next following year to reflect the use of the Excess Fund Balance in that year.

Section 5.6. Uses of Funds in the HCP Program Account. Except as provided in Subsection 5.6.1 with regard to certain costs incurred by the EAA in 2012, funds deposited in the HCP Program Account in accordance with Section 5.5 may be used only for Program Expenditures as described in this Section 5.6 that have been approved in the Annual Program Budget for funding in accordance with Sections 4.5 and 4.7.

5.6.1 Use of Funds in 2012. Funds may be used for Program Administration Costs incurred by the EAA from the Effective Date through December 31, 2012 up to the total amount of \$375,000.

5.6.2 Costs of Conservation Measures. Funds may be used for the costs of implementation of the Conservation Measures described in Chapter 5 of the HCP.

5.6.3 AMP Costs. Funds may be used for the costs of the AMP described in Article Seven.

5.6.4 Federal Program Participation Costs. Funds may be used for the costs of qualification for participation in any federal program that may provide funding for the Program.

5.6.5 Limitations on Use of Funds - Employees and Administrative Costs. Funds may not be used for (a) costs of any Party's employees, or (b) any Party's administrative costs, such as costs of overhead, management, administration, research, planning, engineering, or legal services, or any other ancillary costs that are not directly required for the Program, except for Program Administration Costs of the EAA.

5.6.6 Limitations on Use of Funds – MS4 Permit Costs. Funds may not be used for the cost of measures required to be undertaken by any Party in order to obtain a Small Municipal Separate Storm Sewer System (MS4) permit under the Texas Pollution Discharge Elimination System Program as required by the Texas Commission on Environmental Quality (TCEQ) or the laws of the State of Texas, but may be used for the cost of measures and activities included in a MS4 program to the extent that they implement Conservation Measures which exceed minimum requirements for obtaining the MS4 permit.

Article Six – Applications for Program Funding

Section 6.1. Applications from a Party for Program Funding. An application from a Party to the EAA for Program Funding to implement a Conservation Measure which it is the duty of the Party to implement may be made and will be considered for approval by the EAA only as provided in this Article Six.

6.1.1 Required Contents. The application will be filed in writing in affidavit form and include the following information:

- a. the name and contact information of the applicant and its principal offices;
- b. a resolution of the applicant representing that the filing of the application has been duly authorized by the governing body or other appropriate official of the applicant;
- c. a description of the purposes for which Program Funding is sought;
- d. a statement that the Implementing Agreement, HCP, the Permit or other appropriate regulatory document authorizes the proposed Conservation Measure to be performed;
- e. citations to all appropriate Program Documents demonstrating that the proposed Conservation Measure is authorized to be performed;
- f. the Work Plan for the proposed Conservation Measure for the period for which Program Funding is sought, including the project schedule, budget, and contractors or subcontracts who will be performing the work;
- g. a description of the procurement process utilized by the applicant to secure bids or proposals and a demonstration that the bid or proposal selected is lawful and reasonable;
- h. the amount of Program Funding requested; and
- i. the proposed schedule of payments.

6.1.2 Application Deadline. Except under extenuating circumstances as approved by the Implementing Committee, an application for Program Funding will be filed with the EAA not later than October 1 of the year preceding the year for which financial assistance is sought.

6.1.3. Application Approval Criteria. No later than 30 days after the EAA Board of Directors approves the Annual Program Budget for the next year, the EAA will approve a party's application if the applicant demonstrates the following considerations:

- a. the applicant is a Permittee under the Implementing Agreement;

- b.** the applicant is authorized to file the application;
- c.** each proposed Conservation Measure or other Program-related activity is authorized for Program Funding pursuant to Article Five and Chapters 5 and 6 of the HCP;
- d.** each proposed Conservation Measure or other Program-related activity is identified by the Implementing Agreement, this Agreement, the HCP, or other Program Document to be performed by the applicant, or the applicant, as authorized by the Implementing Committee, is acting to cure the failure of another Party to perform one or more Conservation Measures or other Program-related activities ;
- e.** the approved Comprehensive Phase I Work Plan or Phase II Work Plan and Annual Program Budget include each proposed Conservation Measure or other Program-related activity for the period for which Program Funding is sought;
- f.** the approved applicable Comprehensive Phase I Work Plan or Phase II Work Plan and Annual Program Budget state the estimated total costs of each proposed Conservation Measure or other Program-related activity and the amount anticipated to be expended for the period for which Program Funding is sought;
- g.** The applicant's work plan and proposed project budget suitably describes each proposed Conservation Measure or other Program-related activity to be performed, the project schedule, and the proposed project cost; and
- h.** The recommended project cost based on the procurement process used by the applicant is reasonable.

6.1.4. Withholding Action on Application. The EAA may withhold action on an application if the funds in the HCP Program Account are insufficient to provide Program Funding in the requested amount or if the EAA identifies a consideration in Subsection 6.1.3 that is deficient and allows reasonable time for the filing of additional information before the application is reconsidered for final action. If the reason for withholding action is the insufficiency of money in the HCP Program Account, the EAA will advise the applicant and withhold action on the application until sufficient money is available. The EAA will promptly notify the Program Manager, and the Implementing Committee and

Parties will take action in accordance with Sections 4.7 and 5.5.2, and submit revised applications for EAA review and approval

Comment [s2]: MG has proposed a fairly substantive change to this section. PSSK has incorporated some, but not all, of the proposed change subject to further discussion.

6.1.5. Notice of Decision on Application. The EAA will notify the applicant in writing of its decision on the application.

6.1.6. EAA Delegation of Action on Applications. The EAA Board of Directors may delegate to the EAA General Manager or his designee its authority to take action on an application under this section.

6.1.7. Amendments to Application. An application for Program Funding may be amended in writing with a request to the EAA to take action on the application as amended. The EAA will take action on the amended application in the same manner as provided for the original application.

6.1.8. Program Funding Contracts. Funds may be disbursed by the EAA from the HCP Program Account only in the form of a Program Funding contract for the work to be performed by the applicant. If the EAA approves an application for Program Funding, it will make all reasonable efforts to enter into a contract not later than 30 days after it takes final action on the application and make available to the applicant the amount of the approved Program Funding according to the terms and conditions in the contract.

Section 6.2. Program Payments.

6.2.1. Submission of Invoices. Each Party will submit invoices to the Program Manager monthly for Program Funding for work to be performed or overseen by that Party in accordance with the Annual Program Budget and that party's applicable Program Funding contract and associated, approved application for Program Funding. Each invoice will be accompanied by appropriate documentation reflecting all costs to be incurred or paid by the Party and such other documentation as may be required by the EAA as a condition of the Program Funding. The EAA will not make any payment to any

Party for any work that is not included in the Annual Program Budget, as it may be amended from time to time, and a Party's applicable Program Funding contract and associated, approved application for Program Funding. The Program Manager will coordinate with the EAA and each Party submitting invoices to ensure that each invoice, if approved, is paid to the Party submitting the invoice within 30 days of invoice submission.

6.2.2. Documenting Expenditures. Each Party will submit to the Program Manager receipts or other appropriate documentation reflecting actual expenditures in accordance with the Party's applicable Program Funding contract.

6.2.3. Actual Costs at Variance with Budget. In the event actual expenditures for an action item are less than the line-item amount for that action in the Annual Program Budget, the funds committed to that action item may be used for other authorized purposes approved in accordance with the Annual Program Budget. In the event actual expenditures for an action item in the Annual Program Budget exceed the line-item amount in the Annual Program Budget, the Party responsible for that action item will provide written notice to the Program Manager of the cost-overflow with substantiation for the additional expenses. The Program Manager will review the notice and provide a recommendation to the Implementing Committee, after which the Implementing Committee members will consider recommending to EAA a line-item amendment to the Annual Program Budget. The Implementing Committee may recommend an amendment to the Annual Program Budget only if adequate funds are available in the Program Account and only with the approval of the Implementing Committee and the EAA.

Section 6.3. Reduction or Termination of Funding Obligations. The EAA Funding Obligation under this Agreement will be in effect only during the term of the Permit, and any extension thereof, and will be reduced or terminated on the date that the proceeds from a regional sales tax or other alternative funding mechanism are remitted to the EAA in amounts sufficient to fully or partially replace the need for the EAA to assess Program Aquifer Management Fees

pursuant Section 1.29 of the EAA Act to fund a portion or all of necessary Program Expenditures, after which the EAA Funding Obligation will be reduced or terminated.

Section 6.4. Alternative Funding. The Program Manager and the Implementing Committee will pursue cooperative and grant funding to the extent available from all state, federal, and other private sources for eligible activities included in the Program. The Parties acknowledge that action by the Texas Legislature or other efforts subsequent to the Effective Date may result in adoption of a regional sales tax or other alternative source to fund the Program.

6.4.1. Reduction or Termination of Funding Obligations. In the event that an alternative funding source to fund Program costs is created or secured, the EAA Funding Obligation will be reduced or terminated when and to the extent the alternative funding source is determined to be generating sufficient funding to displace or reduce the EAA Funding Obligation. Thereafter, funding responsibilities for the Program described in this Agreement, to the extent of funds available from any such alternative new funding source, will be the responsibility of the administrator of the tax as provided by the legislation establishing such a tax, or the terms of any agreement establishing the alternative funding source.

6.4.2. Use of Alternative Funding. To the maximum extent possible, funds collected from a sales tax or other alternative funding source will be used to provide funding for Program Expenditures, including without limitation, Phase I Conservation Measures and any Phase II Conservation Measures required by the HCP.

6.4.3. Use of Additional Funds. To the extent that additional funds, greater than the amount required to comply with ongoing Program obligations, are available in the HCP Program Account upon reduction or termination of the EAA Funding Obligation, the funds will be used only for approved purposes in accordance with the Program Documents.

Section 6.5. Refund Upon Termination of the Agreement. Upon termination of this Agreement, any available Fund Balance held by the EAA will be refunded pro rata to the permit holders and other funding parties from whom Program Aquifer Management Fees or funding contributions were collected during the immediately prior year, unless the Implementing Committee and EAA Board of Directors take action to transfer all or a portion of the Fund Balance to a successor program.

Article Seven - Adaptive Management Process

Section 7.1. Purpose. The Parties will follow the AMP, as described in this Article, during the term of the Permit to ensure the full implementation of species protection provided by the Program. This Article Seven provides the procedural steps and responsibilities of the Parties for making AMP decisions and the actions that will be taken as a result of such decisions. The decision-making procedures described in this Agreement do not affect decisions or activities of a Party that do not involve an expenditure from the HCP Program Account, and do not involve either (a) a Covered Activity described in Chapter 2 of the HCP conducted or managed by that Party, or (b) a Conservation Measure described in Chapter 5 of the HCP to be performed by that Party.

Comment [s3]: DF (and PSK) still want to give this some thought and may at a later time propose different language to ensure the scope is not broader than intended. MH has proposed some alternative language, but that language does not fully address the concerns of DF and PSK. This may be alright as is. Let's discuss on Wednesday morning.

Section 7.2. EAA Responsibilities.

7.2.1. Management Responsibilities. Management of the implementation of the terms and conditions of the Program Documents is the overall responsibility of the EAA, except to the extent of the duties and responsibilities held solely or jointly by one or more Parties, or of the roles of the Department or the Service, as specifically provided in the Program Documents. The EAA will also:

- a. provide necessary staff support to the Implementing Committee established as provided in Section 7, the Stakeholder Committee established as provided in Section 8, the Science Committee established as provided in Section 9, and to the Program Manager, appointed as provided in Section 2.3;

b. cooperate and coordinate its management and implementation activities for the Program with the Service, the Implementing Committee, the Stakeholder Committee, and the Science Committee;

c. coordinate with and facilitate meetings of the Science Review Panel; and

d. to the extent required under the Program Documents, consult with and obtain recommendations or approval for its management and implementation activities from the Implementing Committee or the Service.

7.2.2. Procurement. Any procurement related to the Program, unless relating to the duties and responsibilities of another Party, will be made in compliance with the EAA procurement procedures.

Section 7.3. Adaptive Management in Program Phases. The Parties will engage in the Adaptive Management Process during the term of the Permit, as more fully described in this Agreement and the Program Documents. The Adaptive Management Process related to Phase I Conservation Measures will begin on the Effective Date and continue as long as any of those Conservation Measures is ongoing. The Adaptive Management Process related to Phase II Conservation Measures will begin no later than January 31, 2019, and continue for the duration of the Permit term and any extension of the Permit.

Section 7.4. Long Term Biological Goals, Key Management Objectives, Flow-Related Objectives, and Adaptive Management. The Parties recognize and affirm that the Long Term Biological Goals and the Key Management Objectives, and Flow-Related Objectives established in Chapter 4 of the HCP are central to the consensus developed by Stakeholders during the RIP and that those goals and objectives will not be changed except to the extent that the best available scientific and commercial information developed after the Effective Date demonstrates that such changes are appropriate in accordance with Section 7.11. The Parties also recognize that effective adaptive management will be critical to the success of the Program.

Section 7.5. Monitoring. As more fully described in Section 6.2 of the HCP, the Parties, with input from the Science Committee, Stakeholder Committee, and the Department, will develop and implement a monitoring program approved by the Service to meet the goals of the Adaptive

Management Process. The monitoring program will provide information for the Service and the Parties to (a) evaluate compliance with the HCP and the Permit; (b) determine if the Long Term Biological Goals, Key Management Objectives and Flow-Related Objectives are being met; and (c) provide scientific data and feedback information for the Adaptive Management Process.

7.5.1. Compliance Monitoring. The Parties will include Compliance Monitoring in the monitoring program to verify that the Parties are carrying out the terms of the Program Documents.

7.5.2. Effects and Effectiveness Monitoring. The Parties will include Effects and Effectiveness Monitoring in the monitoring program to evaluate the success of the Program in meeting the Long Term Biological Goals, Key Management Objectives and Flow-Related Objectives described in Chapter 4 of the HCP. The Parties will design and implement targeted studies to evaluate, at a minimum, each of the issues listed in Section 6.3 of the HCP. Utilizing, to the extent appropriate and available, the staff resources of the Parties, the Science Committee members, the Science Review Panel, and other persons, the Program Manager will regularly evaluate the data developed through the monitoring program, the results of the studies in the research facility as described in Section 6.3.4 of the HCP, other studies and modeling results, and other information as appropriate.

7.5.3. Monitoring Reports. As part of the Annual Report to be submitted to the Service pursuant to Section 7.1.3 of the Implementing Agreement and Sections 9.3.1 and 6.2. 4 of the HCP, the Parties will prepare and submit a Monitoring Report.

- a. In addition to any other information deemed appropriate by the Program Manager or requested by the Service, the Monitoring Report will include the information required by Section 9.3.1 (Monitoring Report) and Section 9.3 (Annual Reporting) of the HCP.
- b. The Program Manager will prepare and submit a draft of the Monitoring Report to the Implementing Committee, the Stakeholder Committee and the Science

Committee at least 60 days prior to the submittal to the Service of the Annual Report. The first Monitoring Report, for the year 2013, will be submitted for inclusion in the Annual Report in 2014. The Monitoring Report will also be made available to the Stakeholder Committee contemporaneously with its submission to the Service.

7.5.4. Technical Assistance. The Program Manager may engage technical assistance and consult with individual Parties, the Service, and the Department as necessary to ensure effective monitoring on a timely basis. Costs incurred under this subsection are subject to approval pursuant to the provisions in this Agreement governing the Comprehensive Phase I Work Plan, the Comprehensive Phase II Work Plan, Annual Party Work Plans and Cost Estimates, Program Annual Budgets, and applications for financial assistance.

Section 7.6. AMP Decisions. The Parties will consider and make AMP Decisions during the permit term for three types of Program purposes as provided in this Section 7.6.

7.6.1. Routine AMP Decisions. Routine AMP Decisions include decisions involving ongoing, day-to-day matters related to the management and administration of Phase I Conservation Measures and Phase II Conservation Measures (implemented through the Strategic AMP Decision Process). Routine AMP Decisions also include changes to any Phase I Conservation Measure and any a Phase II Conservation Measure implemented through the Strategic AMP Decision Process that does not require a Permit Amendment.

7.6.2. Nonroutine AMP Decisions. Nonroutine AMP Decisions are those decisions relating to Conservation Measures which are not Routine AMP Decisions or Strategic AMP Decisions. Nonroutine AMP Decisions include, but are not limited to, decisions to: (a) make changes to any Phase I Conservation Measure or to any Phase II Conservation Measure implemented through the Strategic AMP Decision Process that requires a Permit Amendment, (b) discontinue any Phase I Conservation Measure regardless of whether the decision requires a Permit Amendment, (c) discontinue any Phase II Conservation

Measure regardless of whether the decision requires a Permit Amendment, (d) make any substantial alteration of the Long Term Biological Goals, Key Management Objectives, or Flow-Related Objectives), and (e) implement or decline to implement an Additional Conservation Measure proposed by the Service.

7.6.3 Strategic AMP Decisions. Strategic AMP Decisions are those decisions that relate to the selection of Phase II Conservation Measures to be undertaken by the Parties during Phase II.

Section 7.7. Implementing Committee. The Parties will establish and designate members of the Implementing Committee. The Implementing Committee will be comprised and operate as provided in this Section 7.7.

7.7.1. Membership on the Implementing Committee. The Implementing Committee will be comprised of one representative from each Party. The Implementing Committee will also include a nonvoting representative of each entity, or group of entities, other than a Party, which contributes to the HCP Program Account described in Section 5.3, under a written agreement with the EAA, an amount not less than \$400,000 for the each year of the Permit term, as that amount may be adjusted pursuant to the terms of the written agreement. Non-voting members of the Implementing Committee will not be considered as members of the Committee for purposes of determining quorum or voting.

7.7.2. Designation of Representative. Within 60 days of the Effective Date of the Permit, and from time to time thereafter as necessary, each Party will advise the Program Manager in writing of the name and contact information of its representative on the Implementing Committee. Within 60 days of the effective date of an agreement with the EAA, and from time to time thereafter as necessary, each other entity or group of entities entitled to nonvoting membership on the Implementing Committee will advise the Program Manager in writing of the name and contact information of its committee representative. Each member may appoint, by advising the Program Manager in writing, one or more alternates to act as its representative in the absence of its regular

representative. The Implementing Committee will elect officers and adopt procedures to govern its activities.

7.7.3 Duties of Implementing Committee. The Implementing Committee will have the following duties:

- a. consult with and advise the Program Manager on routine AMP Decisions proposed by the Program Manager, the Implementing Committee, or the Stakeholder Committee;
- b. consult with and advise the Program Manager on research and the development of models as necessary to support and inform AMP decision-making;
- c. ensure that the governing bodies of the Parties are kept informed and consulted with, through their respective representatives on the Committee, as appropriate, on Nonroutine AMP Decisions proposed by or to the Program Manager;
- d. ensure that the governing bodies of the Parties are kept informed and consulted with, through their respective representatives on the Committee, as appropriate, on Strategic AMP Decisions proposed by or to the Program Manager for Phase II of the Program; and
- e. make recommendations or decisions as required by the Program Documents.

7.7.4. Meetings of the Implementing Committee. The Implementing Committee will meet once each calendar quarter and at any other time upon the request of the Program Manager or any two Parties. Meetings will be conducted at the official offices of the EAA or at any other location agreed upon by the Implementing Committee. The Program Manager will provide reasonable advance notice of the meetings to the Parties and Stakeholder Committee, and will post notice of any meeting on the EAA website. Meetings will be generally open to the public, but, with good cause, may be closed to the public at the request of the Program Manager or any two Parties. Meetings of the Implementing Committee are not subject to the Texas Open Meetings Act, but the Committee and Program Manager will make all reasonable efforts to provide notice of its meetings and conduct them open to the public as though they were subject to the Texas

Open Meetings Act. Except as otherwise provided in this Article Seven for resolution of specific issues, decisions of the Implementing Committee will be made by unanimous vote of all of the voting members of the committee, and any vote less than unanimous will result in disapproval of the proposed decision.

Section 7.8. Stakeholder Committee. The Parties, through the Implementing Committee, will establish, and invite Stakeholders to designate members of, an Adaptive Management Stakeholder Committee (the Stakeholder Committee). The Stakeholder Committee will be comprised and operate as provided in this Section 7.8.

7.8.1. Stakeholder Committee Membership. The Stakeholder Committee will be comprised of one representative from each of the Parties and, to the extent possible, one representative from each of the following:

- a. Texas Commission on Environmental Quality;
- b. Texas Parks and Wildlife Department;
- c. Texas Department of Agriculture;
- d. Texas Water Development Board;
- e. Guadalupe-Blanco River Authority;
- f. San Antonio River Authority;
- g. South Central Texas Water Advisory Committee;
- h. Bexar County;
- b.** CPS Energy;
- c.** Bexar Metropolitan Water District or its successor, if that successor entity is not already represented on the Stakeholder Committee;
- d.** A holder of an initial regular permit issued to a retail public utility located west of Bexar County, to be appointed by the EAA;
- e.** A holder of an initial regular permit issued by the EAA for industrial purposes, to be appointed by the EAA;
- f.** A holder of an industrial surface water right in the Guadalupe River Basin, to be appointed by the Texas Commission on Environmental Quality;

- g.** A holder of a municipal surface water right in the Guadalupe River Basin, to be appointed by the Texas Commission on Environmental Quality;
- h.** A retail public utility in whose service area the Comal Springs or San Marcos Springs is located;
- i.** A holder of an initial regular permit issued by the EAA for irrigation, to be appointed by the commissioner of agriculture;
- j.** An agricultural producer from the Edwards Aquifer region, to be appointed by the commissioner of agriculture;
- k.** Environmental interests from the Texas Living Waters project, to be appointed by the governing body of that project, or if that project is discontinued, jointly by the National Wildlife Federation and the Lone Star Chapter of the Sierra Club;
- l.** Recreational interests in the Guadalupe River Basin, to be appointed by the Texas Parks and Wildlife Commission;
- m.** A holder of an EAA initial regular permit issued to a small municipality (population under 50,000) located east of San Antonio to be designated by the Stakeholder Committee;
- n.** Edwards Aquifer region municipal ratepayers/general public, to be designated by the Stakeholder Committee;
- o.** Guadalupe River Basin municipal ratepayers/general public, to be designated by the Stakeholder Committee;
- p.** A conservation organization, to be designated by the Stakeholder Committee; and
- q.** Nueces River Authority.

7.8.2. Representatives Serving on the Stakeholder Committee. The Service and the Parties recognize that, with the exception of the Parties, participation on the Stakeholder Committee is voluntary and cannot be compelled by the Service or the Parties. Any person or entity listed above that does not have a designated representative to the Stakeholder committee will not be considered as a member of the Committee for purposes of determining quorum, consensus, affirmative votes or unanimous votes.

- a.** Within 60 days of the Effective Date of the Permit, and from time to time thereafter as necessary, each of the above-listed persons or entities who choose to participate in the Stakeholder Committee will advise the Program Manager in writing of the name and contact information of its representative.
- b.** Any person or entity listed above may, at any time after the 60 day period, choose to become a member of the Stakeholder Committee by giving written notice to the Program Manager of their intent to become a member and by providing the name and contact information of its representative.
- c.** Each designated representative will be authorized to vote on the behalf of the person or entity making the designation and such designated representative will become a member of the Stakeholder Committee on the date that the Program Manager receives the written notification from the designating person or entity of the designation and the designee's acceptance of the designation. If an entity listed above was represented on the EARIP Steering Committee created under Section 1.26A of the EAA Act, that entity's representative will be presumed to continue as the voting representative of that entity on the Stakeholder Committee in the absence of a contrary designation or a written resignation.
- d.** Each member may designate one or more alternates to act as its representative in the absence of its regular representative.

7.8.3. Role of the Stakeholder Committee. The role of the Stakeholder Committee is to:

- a.** at the request of the Program Manager or an individual Party, consult with, advise, and make recommendations to the Program Manager, or the individual Party, on Routine Adaptive Management Decisions;
- b.** consult with, advise, and make recommendations to the Implementing Committee on proposed Nonroutine Adaptive Management Decisions;
- c.** consult with, advise, and make recommendations to the Implementing Committee on proposed Strategic Adaptive Management Decisions;

- d. consult with, advise, and make recommendations to the Program Manager or the Implementing Committee on the design of studies related to the Long Term Biological Goals, the Key Management Objectives, or the Flow-Related Objectives;
- e. consult with, advise, and make recommendations to the Program Manager or the Implementing Committee on any other matter at the request of the Program manager or Implementing Committee; and
- f. make appointments of members to the Science Committee as provided in Section 7.9.

7.8.4. Meetings of the Stakeholder Committee. The Stakeholder Committee will meet twice each calendar year and at any other time upon the request of the Program Manager or of any two Parties, or upon petition to the Program Manager by four members of the Stakeholder Committee. Meetings will be conducted at the official offices of the EAA or at another location agreed upon by the Stakeholder Committee. The Program Manager will provide reasonable advance notice of the meetings via email to each member of the Stakeholder Committee and will also post notice of any meeting on the EAA website. Meetings will generally be open to the public, but, with good cause, may be closed to the public at the request of the Program Manager or any two members of the Stakeholder Committee. Meetings of the Stakeholder Committee are not subject to the Texas Open Meetings Act, but the Committee and Program Manager will make all reasonable efforts to provide notice of its meetings and conduct them open to the public as though they were subject to the Texas Open Meetings Act.

7.8.5. Stakeholder Committee Voting. Each member of the Stakeholder Committee will have one vote until participation is resigned, or forfeited by absence, without an authorized alternate, from three consecutive meetings.

7.8.6. Procedures of the Stakeholder Committee. A quorum for any meeting of the Stakeholder Committee will be three-fourths of the total number of members for whom the Program Manager has received the notification described in Subsection 7.8.2.a. The Stakeholder Committee will operate on a consensus basis, to the maximum extent

achievable. In the absence of consensus, an affirmative vote of at least 3/4 of the entire membership will be required to approve any recommendation to the Program Manager or the Implementing Committee. The Stakeholder Committee will elect a chair person, along with any other officers, and adopt procedures to govern its activities.

Section 7.9. Science Committee. The Parties, through the Implementing Committee, will establish and, in conjunction with the Stakeholder Committee as provided in this Section 7.9, appoint an Adaptive Management Science Committee (the Science Committee). To the extent possible, the Science Committee will be comprised of an odd number of not fewer than 7 or more than 11 members, as determined by the Implementing Committee, who have technical expertise in one or more of the following areas: (a) the Edwards Aquifer or its management; (b) the Comal Springs and River as defined by Section 1.3 of the HCP; (c) the San Marcos Springs and River as defined by Section 1.3 of the HCP; or (d) the Covered Species.

7.9.1. Membership on the Science Committee. The Implementing Committee and the Stakeholder Committee will each select an equal number of members of the Science Committee and will coordinate with one another in making selections in order to ensure balance and proper coverage of areas of expertise. The Implementing Committee and the Stakeholder Committee will jointly select one additional member of the Science Committee. In the case of a vacancy on the Science Committee, the committee, or committees, that made the initial appointment for that position will appoint a replacement member.

a. The Parties recognize that participation on the Science Committee is voluntary and cannot be compelled by the Service or the Parties. Any person to which the Implementing Committee or the Stakeholder Committee extends an invitation to be a member of the Science Committee will be requested to respond, within 30 days of the date of the invitation advise the Program Manager in writing of the acceptance of the invitation and provide the invitee's contact information. If an invitee does not timely respond with acceptance, that invitation will be considered declined and

another qualified person will be invited to become a member of the Science Committee in the same manner as for the invitation that was declined.

b. Each member appointed to the Science Committee will be authorized to vote and such appointed member will become a member of the Committee on the date that the Program Manager receives the written acceptance of the appointment.

c. No member of the Science Committee may designate an alternate to act for that member in the member's absence.

7.9.2. Role of the Science Committee.

a. The role of the Science Committee is to consult with, advise and make recommendations to the Program Manager, the Implementing Committee and the Stakeholder Committee on any AMP Decision upon request as provided in this Article Seven.

b. The members of the Science Committee are expected to provide independent and unbiased advice based on their best scientific judgment so that all AMP Decisions will be made consistent with the best scientific and commercial data available.

c. The Science Committee will participate in the meetings of the Science Review Panel and provide to the Panel such information as requested by that Panel or the Implementing Committee.

7.9.3. Operation of the Science Committee.

a. The Science Committee will meet at any time upon the request of the Program Manager, the Implementing Committee, or the Stakeholder Committee. Meetings will be conducted at the official offices of the EAA or at any other location agreed upon by the Science Committee. The Program Manager will provide reasonable advance notice of the meetings via email to each member of the Science Committee and will post notice of any meeting on the EAA website. Meetings will generally be open to the public, but, with good cause, may be closed to the public at the request of the Program Manager or any two members of the Science Committee. Meetings of the

Science Committee are not subject to the Texas Open Meetings Act, but the Committee and Program Manager will make all reasonable efforts to provide notice of its meetings and conduct them open to the public as though they were subject to the Texas Open Meetings Act.

b. The Science Committee may be organized into subcommittees as jointly determined by the Program Manager and Implementing Committee.

7.9.4. Requests for Science Committee Evaluations or Recommendations.

a. Requests by the Program Manager, the Implementing Committee, or the Stakeholder Committee for an evaluation or recommendation on a proposed Routine Adaptive Management Decision may be made to the entire Science Committee or the appropriate subgroup of the Science Committee. However, for any proposed Routine Adaptive Management Decision that has significant potential to affect the overall well-being of a Covered Species, the Program Manager will, if time allows, consult the Science Committee for input prior to making a decision or, if that is not possible, as soon as possible after making the decision and will adjust the decision as appropriate.

b. For any proposed Nonroutine or Strategic Adaptive Management Decision, the Implementing Committee will seek a recommendation from the entire Science Committee prior to taking action on the proposed decision.

c. The Program Manager will regularly inform the Science Committee of plans related to the applied research activities described in the HCP, including, but not limited to, Subsections 6.3.4 (applied research facility), 6.3.5 (Texas wild-rice enhancement) and 6.3.6 (non-native snail removal and gill parasite monitoring), and, unless exigent conditions require otherwise, seek comments and recommendations from the Science Committee with regard to the research plans before the plans are implemented. The Program Manager will also inform the Science Committee and the Science Review Panel of the findings and results of the research activities.

7.9.5. Procedures. The Science Committee and its subcommittees will operate to the maximum extent achievable by a collaborative process designed to achieve consensus. In the absence of full consensus on any evaluation or recommendation, the Science Committee will provide a written summary of competing positions to the Program Manager or the Implementing or Stakeholder Committees, as may be appropriate. Each member of the Science Committee will have one vote towards consensus until participation is resigned, or forfeited by absence from three consecutive meetings. A quorum for any meeting of the Science Committee will be three-fourths of the total number of members for whom the Program Manager has received the notification described in subsection 7.9.1.a. The Science Committee will elect a chair person and a vice chair and adopt procedures to govern its activities.

7.9.6. EAA Funding. The EAA, after consulting with the Implementing Committee, may enter into contracts with members of the Science Committee as, in the judgment of the EAA, are necessary and reasonable to secure the members' services.

Section 7.10. Creation of the Science Review Panel. Not later than December 31, 2013, the EAA will enter into a contract with the National Academies of the National Academy of Science to establish an independent Science Review Panel (SRP), select its members, and undertake the ongoing role of overseeing the SRP activities. If the National Academies declines to enter into a contract that is reasonable in the judgment of the Implementing Committee, the Program Manager will consult with the Implementing Committee and the Stakeholder Committee in order to develop a consensus recommendation on another comparable organization to select, and contract with that organization to fulfill that role. The Implementing Committee, in its discretion and after receiving the recommendation of the Stakeholder Committee, may contract with one organization for selection of SRP members, and contract with another organization for the ongoing role of overseeing SRP activities.

7.10.1. Membership of the Science Review Panel. The SRP will have five members, chosen on the basis of their expertise in the scientific areas most relevant to resolution of issues expected to arise in the AMP. The members need not have specific knowledge

about the Covered Species or the Edwards Aquifer and must not have pre-conceived positions on the appropriate resolution of the issues expected to be presented to the SRP.

7.10.2. Meetings of the Science Review Panel. From the time that the SRP is established until determinations have been made under Subsection 7.13.7, the SRP will meet quarterly at various locations within the jurisdiction of the EAA. After determinations under Subsection 7.13.7 have been made, the Program Manager will request the SRP to meet on an as-needed basis for the remainder of the Permit term. To the maximum extent practicable, such meetings shall be open to the public and shall be recorded, with the recordings included in the administrative record. As part of its meetings, the SRP is expected to tour various sites and facilities in order to obtain first-hand knowledge and insights about key issues and challenges to be addressed through the AMP. Such tours need not be recorded or open to the public.

7.10.3. Role of the Science Review Panel. The SRP will serve as a formal review body as requested by the Program Manager to provide scientific advice to the Program Manager, Implementing Committee, Science Committee and Stakeholder Committee on issues related to the AMP. The SRP will provide ongoing comments on the modeling, studies, and data collection and analyses performed pursuant to the HCP. The SRP will provide resolution of major scientific issues involved in the HCP and the AMP (including without limitation changes to a Long-Term Biological Goal, Key Management Objective, or Flow-Related Objective), and, upon request by the Project Manager, will definitively determine if the Scientific Record establishes each of the conclusions required in Subsection 7.13.7 and explain its determinations.

Section 7.11. Procedures for Routine AMP Decisions. Routine AMP Decisions will be made in accordance with the procedures stated in this Section 7.10.

7.11.1. Program Manager Approval Authority. Routine AMP Decisions that do not involve an adjustment to the Program Budget in excess of \$50,000.00, and that do not primarily affect an individual Party, will be made by the Program Manager.

7.11.2. Decisions Involving Substantial Budget Adjustments. If a Routine AMP Decision involves an adjustment to the Program Budget in excess of \$50,000, the decision will be subject to approval by the Implementing Committee.

7.11.3. Decisions Affecting an Individual Party. If a Routine AMP Decision will primarily affect an individual Party, the Program Manager will consult with that Party. Such a decision will not require the approval of the Implementing Committee unless it involves an adjustment to the Program Budget in excess of \$50,000, or an increase in the Program Budget. If the Party and the Program Manager agree on such a decision, they will report it to the Implementing Committee. If the affected Party and the Program Manager cannot reach agreement on such a decision that does not involve an adjustment to the Program Budget in excess of \$50,000, the decision will be made by a majority vote of the voting members of the Implementing Committee.

7.11.4. Decisions Involving Increase in Budget. Routine AMP Decisions involving an increase in the Program Budget will require approval by the Implementing Committee and the EAA Board of Directors. Routine AMP Decisions that require amendments, transfers, or adjustments to the Program Budget will be subject to applicable EAA disbursement and budget policies and procedures.

7.11.5. Use of Science in Decisions. The Program Manager, individual Parties, and, if applicable, the Implementing Committee, will: (a) make Routine AMP Decisions on the basis of the best scientific and commercial data available; (b) consult with the Science Committee on any such decision that has significant potential to affect the overall well-being of a Covered Species for input prior to making a Routine AMP Decision or, if prior consultation is not possible, as soon as possible after making the decision; and (c) make appropriate adjustments in the decisions if the Science Committee input so advises. The Service will also be consulted on such decisions as a part of the AMP, as appropriate.

7.11.6. Voting on Decisions. The Implementing Committee members may vote on a Routine AMP Decision by email or other electronic communication.

Section 7.12. Procedures for Nonroutine AMP Decisions. Nonroutine AMP Decisions will be made on the basis of the best scientific and commercial data available, and in accordance with the procedures stated in this Section.

7.12.1. Submission of Proposals. A draft proposal for a Nonroutine AMP Decision may be brought forward by the Program Manager, any Party, the Implementing Committee, or any three members of the Stakeholder Committee. A draft proposal for a Nonroutine AMP Decision will be forwarded in writing to the Program Manager. The Program Manager will promptly forward the draft proposal to the Implementing Committee and the Stakeholder Committee, as appropriate, and to the Science Committee.

7.12.2. Science Committee Review. Upon receipt of a draft proposal for a Nonroutine AMP Decision, the Program Manager will convene a meeting of the Science Committee as soon as practicable to discuss the draft proposal and to develop a schedule and identify any resources or studies that will be necessary for the Science Committee to evaluate the proposal and make any recommendations, if necessary.

7.12.3. Stakeholder Committee Review. Within 14 days of receipt of a draft proposal for a Nonroutine AMP Decision, the Program Manager will convene a meeting of the Stakeholder Committee. With the consensus agreement of the Stakeholder Committee, obtained through polling of the members, the Program Manager may delay the meeting by up to an additional 14 days. The Program Manager will provide each member of the Stakeholder Committee a copy of the proposal and the written recommendation of the Science Committee, along with any other available supporting information, in advance of the meeting. If the Science Committee has not had sufficient time to complete its evaluation and recommendation of the draft proposal, the Program Manager will convene another meeting of the Stakeholder Committee within 14 days of receipt of the Science

Committee's evaluation report. The Stakeholder Committee will take action on the proposal as provided in this subsection.

- a.** At the meeting to consider the draft proposal, the Stakeholder Committee will seek to achieve consensus on a recommendation to the Program Manager regarding the proposal.
- b.** The Stakeholder Committee will have 60 days from the date of its initial meeting on the draft proposal to develop, approve, and submit a report with its recommendation on the proposal to the Program Manager. The Stakeholder Committee may, for good cause, request more time to submit its report, and such request will not be unreasonably denied by the Program Manager. Any recommendation of the Stakeholder Committee for a Nonroutine AMP Decision will require at least a 3/4 majority of the entire Stakeholder Committee membership to be adopted. In the absence of consensus, the report of the Stakeholder Committee will include a succinct summary of the competing positions. The Stakeholder Committee will deliver its report on the proposal in writing to the Program Manager.
- c.** The Program Manager will deliver the Stakeholder Committee report to the Implementing Committee and the Service.

7.12.4. Implementing Committee Decision. The Program Manager will call a meeting of the Implementing Committee within 14 days of receipt of the Stakeholder Committee's report on a proposal for a Nonroutine AMP Decision. The Implementing Committee will take action on the proposal as provided in this subsection.

- a.** If the report includes a recommendation for a change to a Long Term Biological Goal, or to a Key Management Objective or a Flow-Related Objective contained in Chapter 4 of the HCP, the Implementing Committee may either (1) approve the recommendation of the Stakeholder Committee and direct the Program Manager to commence discussion with the Service on the proposal, or (2) disapprove (by any vote other than unanimous approval) the Stakeholder Committee recommendation and direct the Program Manager to provide a written explanation of the disapproval to the Stakeholder Committee and to the Service. Any substantial alteration to a Long

Term Biological Goal, Key Management Objective, or Flow-Related Objective will be based only upon new science developed during Phase I of the HCP. The Parties acknowledge that such an alteration will require a Permit Amendment.

b. A unanimous vote by the voting members of the Implementing Committee will be required to move forward with any proposed Nonroutine AMP Decision.

Comment [s4]: MH believes this language is redundant and proposes to strike. PSK prefers to retain the language even if it is redundant.

c. After consideration of the Stakeholder Committee report on a proposed change to a Conservation Measure, the Implementing Committee, through the Program Manager, or, in the case of a change, other than a change requiring a Permit Amendment, that would primarily affect an individual Party, the Party that would be primarily affected, after notice to the Program Manager, may commence discussion with the Service on the proposed change, and implement the change if approved by the Service so long as the change is not substantially less likely to achieve the Long Term Biological Goals, Key Management Objectives and Flow-Related Objectives than the Conservation Measure described in the HCP, as it may have been modified through the AMP.

d. A Nonroutine AMP Decision involving an increase in the Program Budget will require approval by the Implementing Committee and the EAA Board of Directors. A Nonroutine AMP Decision that requires an amendment, transfer, or adjustment to the Program Budget will be subject to applicable EAA disbursement and budget policies and procedures.

e. If a Nonroutine AMP Decision involves an Additional Conservation Measure, the written approval of all of the Parties will be required, in addition to approval by the Implementing Committee, to implement the Additional Conservation Measure.

f. Notwithstanding the unanimous vote requirement in Subsection 7.7.4, a Phase I Conservation Measure may be discontinued during the Permit Term by an affirmative vote of at least three voting members of the Implementing Committee if the measure is not needed to achieve any Long Term Biological Goal, Key Management Objective, or Flow-Related Objective.

g. The right of any member of the Stakeholder Committee to protest any Permit Amendment under consideration by the Service is recognized.

Section 7.13. Scientific Record

7.13.1. Supplementation of the Scientific Record. During Phase I, the Implementing Committee will ensure that the Program Manager continues to supplement the Scientific Record in accordance with Section 6.3 of the HCP to include the best scientific and commercial data available as necessary to evaluate, for each Covered Species, whether:

- a. the Key Management Objectives and Flow-Related Objectives, as set out in Section 4.2 of the HCP, are necessary and adequate to meet the Long-Term Biological Goals; and
- b. the Conservation Measures are necessary and adequate to meet the Key Management Objectives and Flow-Related Objectives, as set out in Section 4.2 of the HCP.

7.13.2. Identification of Research and Modeling. The research and modeling to be performed in connection with the AMP include the following:

a. **Ecological Modeling.** The EAA will develop an ecological model to better understand biological and ecological relationships, processes, interactions, and responses over time of the systems being studied, and to predict ecological responses to changes in environmental conditions. The ecological model will address as many of the objectives and criteria listed in Subsection 6.3.3 of the HCP as possible. The EAA, through the Program Manager, will seek input from the Science Committee on the design and use of the model, and will seek input from the Implementing Committee on significant issues which arise in development of the model. The EAA, through the Program Manager, will also inform the SRP of planning and development related to the ecological model. The EAA will, as it determines to be appropriate, seek comment and evaluation from the SRP in order to help ensure that the SRP is able to rely on the model results in making its determinations pursuant to Subsection 7.13.7.

b. **Applied Research Facility and Other Studies.** The EAA will support and coordinate the construction of an applied research facility as described in Subsection 6.3.4 of the HCP. The primary goal of this facility will be to provide data and information important for informing AMP decisions during Phase I and Phase II of the Program. Key studies to be performed are more completely described in Subsection 6.3.4 of the HCP. As authorized in Annual Party Work Plans, other studies

will be performed on Texas Wild Rice enhancement as described in Subsection 6.3.5 of the HCP and on non-native snails and gill parasites as described in Subsection 6.3.6 of the HCP, and studies and data collection efforts recommended by the EARIP Expert Science Subcommittee (2008 and 2009) and Dr. Thomas Hardy (2011) may be undertaken. The Party responsible for a study, through the Program Manager, will seek input from the Science Committee on the design of the study, and will seek input from the Implementing Committee on significant issues which arise in the course of the study. The EAA, through the Program Manager, will also inform the SRP of activities related to the Applied Research Facility and associated studies. The EAA will, as it determines to be appropriate, seek comment and evaluation from the SRP in order to help ensure that the SRP is able to rely on the study results in making its determinations pursuant to Subsection 7.13.7.

c. Edwards Aquifer Groundwater Modeling Improvements. The EAA will make improvements to its MODFLOW model, and will create a new groundwater model, as described in Section 6.3.2 of the HCP. The goals of these improvements are to:

- (1) improve the simulated transient water level residuals output;
- (2) incorporate additional aquifer characterization data and information as may be appropriate and available;
- (3) incorporate reconceptualizations of boundary conditions, geologic structures and stratigraphy, hydraulic architecture, recharge, and water budget; and
- (4) improve calibration with respect to Comal Springs elevation, discharge, and observed instrumental record well level measurements throughout the aquifer region.

The EAA, through the Program Manager, will keep the Implementing Committee informed on the progress of the model improvements and creation of the new model. The Implementing Committee may, through the Program Manager, provide comments to the EAA on the model improvements and the creation of the new model.

7.13.3. Other Studies. The Implementing Committee will also ensure the performance of other studies, research and experimentation determined to be necessary during the AMP.

Comment [s5]: MH has proposed to add language here similar to language in the foregoing sections requiring that the Program manager inform the SRP of activities related to this model development. The EAA believes that the language is inappropriate in this context because of the unique nature of the model and the fact that the work is already on-going.

7.13.4. Deadlines for Research and Modeling. The Program Manager will compile all relevant completed research, modeling and other data not later than December 31, 2017.

7.13.5. Science Committee Review. Not later than January 15, 2018, the results of the research and modeling, along with the data compiled by the Program Manager, will be submitted to the Science Committee for review and comment. All information submitted to the Science Committee will at the same time also be made available to the Science Review Panel, the Implementing Committee and the Stakeholder Committee. All Science Committee review and comment will be completed and incorporated into a report to the Program Manager not later than May 15, 2018. The Program Manager will submit the report from the Science Committee summarizing its review pursuant to this Section to the Science Review Panel, the Implementing Committee, and the Stakeholder Committee as soon as possible after its completion.

7.13.6. Science Review Panel Research Review. Not later than June 1, 2018, the Program Manager will deliver the results of the research and modeling, along with the data compiled by the Program Manager, and the report of the Science Committee, to the Science Review Panel and request the determinations required by Subsection 7.13.7 in the form of a written report to be provided not later than September 30, 2018. On or before October 15, 2018, the Program Manager will distribute the report of the Science Review Panel to the Implementing Committee, the Stakeholder Committee, and the Science Committee.

7.13.7. Action on Scientific Conclusions.

- a. If the Science Review Panel determines for any Covered Species that the Scientific Record establishes that the full complement of Key Management Objectives and Flow-Related Objectives is not necessary to meet the Long Term Biological Goals, then the Implementing Committee will propose changes to the Key Management Objectives and Flow-Related Objectives applicable to that Covered Species based

solely on, and in accordance with, the Scientific Record utilizing the procedures for a Nonroutine Adaptive management Decision set forth in Section 7.11.

b. If the Science Review Panel determines, for any Covered Species, that the Scientific Record establishes that the Key Management Objectives and Flow-Related Objectives are not adequate to achieve the Long Term Biological Goals, then the Implementing Committee will propose changes to the Key Management Objectives and Flow-Related Objectives applicable to that Covered Species based solely on, and in accordance with, the Scientific Record utilizing the procedures for a Nonroutine Adaptive management Decision set forth in Section 7.11.

c. If the Science Review Panel determines that the scientific record establishes that any Phase I Conservation Measure is not needed to achieve the Key Management Objectives and Flow-Related Objectives, then the Implementing Committee will propose discontinuation of that Phase I Conservation Measure utilizing the procedures for a Nonroutine Adaptive Management Decision set forth in Section 7.11.

d. If the Science Review Panel determines that the scientific record establishes the Phase I Conservation Measures are achieving the Key Management Objectives and the Flow-Related Objectives, then neither the Presumptive Phase II Conservation Measure nor any other Phase II Conservation Measure will be pursued.

e. If the Science Review Panel determines that the scientific record establishes the Phase I Conservation Measures are not sufficient to achieve the Key Management Objectives and Flow-Related Objectives, then the Implementing Committee will consider changes to the Phase I Conservation Measures based solely on and in accordance with the scientific record utilizing the procedures for a Nonroutine Adaptive Management Decision set forth in Section 7.11. However, if the Implementing Committee does not recommend changes to the Phase I Conservation Measures sufficient to achieve the Key Management Objectives and Flow-Related Objectives, based on direction from the Science Review Panel about the degree to which those Objectives are not being achieved, the Implementing Committee will direct the Program Manager to initiate, not later than January 31, 2019, the procedures for Strategic AMP Decisions set forth in Section 7.14.

f. If, contrary to its duties as set out in Subsection 7.10.3, the Science Review Panel fails to make a determination or determines that the scientific record is inconclusive about whether the Phase I Conservation Measures are achieving the Key Management Objectives and Flow-Related Objectives, the Implementing Committee will coordinate with the Service as part of the AMP, and attempt to reach a conclusion that the Presumptive Phase II Conservation Measure or another Phase II Conservation Measure either is or is not necessary to achieve the Key Management Objectives and Flow-Related Objectives. If the Implementing Committee concludes that the Presumptive Phase II Conservation Measure or other Phase II Conservation Measures are necessary, the Implementing Committee will direct the Program Manager to initiate the procedures for Strategic AMP Decisions set forth in Section 7.14. If the Implementing Committee concludes that neither the Presumptive Phase II Conservation Measure nor another Phase II Conservation Measure is necessary, the Implementing Committee will inform the Service and seek the Service's concurrence, as part of the AMP, that the Scientific Record supports the conclusion to not pursue these measures. If the Service does not concur, the Implementing Committee will direct the Program Manager to initiate, not later than January 31, 2019, the procedure for Strategic AMP Decisions. If the Implementing Committee after coordination with the Service, is unable to reach a conclusion that Additional Conservation Measures or the Presumptive Phase II Conservation Measure either are or are not necessary, the Implementing Committee will direct the Program Manager to initiate, not later than January 31, 2019, the procedure for Strategic AMP Decisions.

Section 7.14. Procedures for Strategic AMP Decisions. Strategic AMP Decisions regarding Phase II of the Program will be made on the basis of the best scientific and commercial data available, and in accordance with this Section.

7.14.1. Submission of Proposals. If directed by the Implementing Committee pursuant to Section 7.13 to initiate the procedures for Strategic AMP Decisions, a draft proposal for a Strategic AMP Decision may be brought forward by the Program Manager, the

Implementing Committee or any member of the Stakeholder Committee. Any such draft proposal will be forwarded in writing to the Program Manager. The Program Manager will promptly forward the draft proposal to the Implementing Committee and the Stakeholder Committee, as appropriate, and to the Science Committee.

7.14.2. Science Committee Review. The Program Manager will convene a meeting of the Science Committee as soon as practicable to discuss the draft proposal and to develop a schedule and identify any resources or studies that will be necessary for the Science Committee to evaluate the proposal and make any recommendations, if necessary.

7.14.3. Stakeholder Committee Review.

- a. If a draft Strategic AMP Decision proposal is received prior to January 31, 2019, the Program Manager will present it for initial consideration by the Stakeholder Committee on a convenient time schedule designed to ensure completion of review in a timely and efficient manner with reasonable access to scientific review and input.
- b. If a draft Strategic AMP Decision proposal is received later than January 31, 2019, the Program Manager will convene, within 14 days of receipt of the draft proposal, a meeting of the Stakeholder Committee. With the consensus agreement of the Stakeholder Committee, obtained through polling of the members, the Program Manager may delay the meeting by up to an additional 14 days. The Program Manager will provide each member of the Stakeholder Committee a copy of the draft Strategic AMP Decision proposal and the written recommendation of the Science Committee, along with any other available supporting information, in advance of the meeting. If the Science Committee has not had sufficient time to complete its evaluation and recommendation of the draft proposal, the Program Manager will convene another meeting of the Stakeholder Committee within 14 days of receipt of the Science Committee's evaluation report. The Program Manager may include multiple and alternative draft Strategic AMP Decision proposals for consideration by the Stakeholder Committee at a single meeting.

c. At the meeting to consider the draft Strategic AMP Decision proposal(s), the Stakeholder Committee will seek to achieve consensus on a recommendation regarding the proposal(s).

d. The Stakeholder Committee will have 180 days from the date of its initial meeting on the proposal to develop, approve and submit its report on the draft Strategic AMP Decision proposal(s) to the Program Manager. The Stakeholder Committee may, for good cause, request additional time to develop a report. Approval of the request for additional time will be granted at the sole discretion of the Implementing Committee, but will not be unreasonably withheld.

e. The Stakeholder Committee will not be required to make a recommendation on a draft Strategic AMP Decision proposal without the opportunity to consider formal input from the Science Committee on the draft proposal.

f. Any recommendation of the Stakeholder Committee on a draft Strategic AMP Decision proposal will require at least a 3/4 majority of the entire Stakeholder Committee membership to be adopted. In the absence of consensus, the report of the Stakeholder Committee report will include a succinct summary of the competing positions.

g. The Stakeholder Committee will deliver a report with its recommendation on the proposal(s) in writing to the Program Manager. The Program Manager will deliver the report of the Stakeholder Committee to the Implementing Committee and to the Service.

7.14.5. Implementing Committee Decisions. The Program Manager will call a meeting of the Implementing Committee within 14 days of receipt of the report from the Stakeholder Committee to consider the report. The Implementing Committee will not consider approval of a draft proposal for a Strategic AMP Decision without first reviewing the Stakeholder Committee report on the proposal in accordance with this Section 7.14.

- a.** After review and discussion of a draft proposal, the Implementing Committee will vote on the proposal. Any decision by the Implementing Committee to proceed with a draft proposal will be made by unanimous vote.
- b.** If the Implementing Committee accepts the recommendation of the Stakeholder Committee on a draft proposal, the Program Manager will inform the Stakeholder Committee and the Service of the decision. If the recommendation that was accepted calls for implementing one or more Phase II Conservation Measures other than as described in Chapter 5 of the HCP, the Implementing Committee will direct the Program Manager to initiate discussions with the Service about amending the Permit to implement the recommended change. If the recommendation that was accepted calls for implementing the Presumptive Phase II Conservation Measure, then the Implementing Committee will commence action to implement the Presumptive Phase II Conservation Measure and ensure that it is fully implemented by December 31, 2020.
- c.** If the Implementing Committee rejects a recommendation of the Stakeholder Committee, the Implementing Committee will direct the Program Manager to provide a written explanation of the rejection to the Stakeholder Committee and to the Service. If the recommendation that was rejected calls for implementing Phase II Conservation Measures other than those described in Chapter 5 of the HCP, the Implementing Committee will either commence steps to implement the Phase II Conservation Measures described in Chapter 5 of the HCP, or present alternate proposed Phase II Conservation Measures for expedited consideration by the Stakeholder Committee. However, if the Implementing Committee chooses to pursue an alternate Phase II Conservation Measure that was previously presented for formal consideration by the Stakeholder Committee and not favorably recommended, the Implementing Committee may direct the Program Manager to provide a written explanation for the decision to the Service and to initiate discussions with the Service to implement the alternative Phase II Conservation Measure. If the recommendation that was rejected calls for proceeding with the Presumptive Phase II Conservation Measure, the Implementing Committee may initiate steps to pursue an alternative

Phase II Conservation Measure only if the alternative Phase II Conservation Measure was previously presented to the Stakeholder Committee for formal consideration.

d. If the Program Manager initiates the Strategic AMP Decision process under Section 7.14 and the Implementing Committee fails to reach a resolution on the Strategic AMP Decision and to take action to commence discussion with the Service on or before December 31, 2019 on the Strategic AMP Decision, the Parties will undertake the Presumptive Phase II Conservation Measure and ensure that it is fully implemented by December 31, 2020.

e. No Party may be compelled to take any Conservation Measure, including any Strategic AMP action not included in Chapter 5 of the HCP or approved through the AMP.

f. The Parties may not pursue a Phase II Conservation Measure other than those described in Chapter 5 of the HCP without first presenting the proposed measure to the Stakeholder Committee for formal consideration pursuant to this Section 7.14.

Article Eight – General Provisions

Section 8.1. Term. This Agreement will be effective January 1, 2012, the Effective Date, and will continue in effect for a period of sixteen years from the Effective Date. In the event that the term of the Permit is extended, this Agreement will continue in effect for the extended term of the Permit.

Section 8.2. Remedies. The Parties recognize that failure in the performance of any Party's obligations hereunder cannot be measured in money damages. Each Party therefore agrees in the event of any default on its part that each Party will have available to it only the equitable remedy of mandamus and/or specific performance, but not termination as long as the Permit is outstanding. It is the intent of the Parties to this Agreement that any default will be subject to the remedy of specific performance and/or mandamus to the extent that specific performance and/or mandamus is possible under the existing circumstances. It is the further intent of the Parties that money damages will not be available to any Party under any circumstances. If any Party will fail to appropriate funds necessary to discharge that Party's obligations under this Agreement and a

court of competent jurisdiction will fail to enforce that obligation, then this Agreement will terminate with regard to that Party, and the other Parties will have the right to petition the Service to terminate the Permit with regard to the defaulting Party.

Section 8.3. Default – Notice and Opportunity to Cure. If any Party fails to perform any obligation or make any payment in the required amount when due under this Agreement, any other Party may, without prejudice to any other right or remedy it may have under this Agreement, provide written notice of default to the nonperforming Party. If written notice of default is provided to a nonperforming Party, a copy of said notice will also be provided to every other Party. The nonperforming Party has 60 days from receipt of the notice within which to remedy the default.

Section 8.4. Payments from Current Revenue. The Parties acknowledge that pursuant to the requirements of Texas Government Code Section 791.011, a Party to this Agreement that pays for the performance of services must make those payments from current revenues available to that Party. A Party to this Agreement will never have the right to demand payment by another Party of any obligations assumed by or imposed upon that Party under or by virtue of this Agreement from any funds raised or to be raised by taxation (other than revenues from a regional sales tax as an alternative funding source under Section 6.4), and a Party's obligation under this Agreement will never be construed to be a debt of the Party of such kind as to require it under the Constitution and laws of the State to levy and collect an ad valorem tax to discharge such obligation. The Parties agree that the cost of all Conservation Measures and other Program-related activities will be paid solely from Program Funding defined in this Agreement, and that the Parties will not be obligated to provide funding beyond the sources identified in Article V.

Section 8.5. Rights Regarding Books and Records. Each Party will permit any other Party upon reasonable notice to examine and copy all the books and records kept by the Party regarding this Agreement. In addition, upon reasonable prior written notice to the Party, any other Party may conduct a complete audit of the books and records kept by the Party regarding this Agreement as well as upon the information and documentation used to prepare the books and records. Any such audit will be at the requesting Party's sole expense and will be prepared

by a certified public accounting firm. If the audit report discloses actual errors in the books and records such that the charges assessed to another Party are in error then such error will be corrected for the period up to four years after the erroneous charge was paid and all payments reconciled over the subsequent twelve month period beginning with the audited Party's fiscal year. If the error identified in the audit is greater than the cost of the audit, the audited Party will reimburse the requesting Party the cost of the audit.

Section 8.6. Mediation. In the event any controversy arising under this Agreement is not resolved by informal negotiations between the Parties within 30 days after any Party requests negotiations, then, upon the request of any Party, the controversy will be referred to the voluntary settlement procedure known as mediation, which process will be governed by the Texas Civil Practice and Remedies Code, Section 154.002, et seq., or its successor statute. The Parties will attempt to select a mutually acceptable mediator. Failing identification of a mutually acceptable mediator, the mediation will be conducted by the University of Texas School of Law Center for Public Policy Dispute Resolution. The mediation process will continue until the controversy is resolved, the mediator makes a finding that there is no possibility of settlement through mediation, or either Party chooses not to continue further. All costs and expenses of the mediation (including the mediator's fees) will be shared equally by the Parties involved in the mediation; provided however, that costs incurred by each Party will be costs solely of such Party.

Section 8.7. Interpretation. The caption headings of this Agreement are for reference purposes only and will not affect its interpretation in any respect. Unless the context otherwise requires, words of the masculine gender will be construed to include correlative words of the feminine and neuter genders and vice versa. This Agreement and all the terms and provisions will be liberally construed to effectuate the purpose set forth herein and to sustain the validity of this Agreement.

Section 8.8. Participation by the Parties. Each Party to this Agreement represents to the others that it is empowered by law to execute this Agreement and other agreements and documents and to give such approvals, in writing or otherwise, as are or may hereafter be

required to accomplish the same; and that its execution of this Agreement has been duly authorized by action of its governing body.

Section 8.9. Force Majeure. If by reason of Force Majeure any Party hereto will be rendered unable wholly or in part to carry out its obligations under this Agreement, then if such Party will give notice and full particulars of such Force Majeure in writing to the other Parties within a reasonable time after the occurrence of the event or cause relied on, the obligation of the Party giving such notice, so far as its performance is prevented by such Force Majeure, will be suspended during the continuance of the inability then claimed, but for no longer period, and any such Party will endeavor to remove or overcome such inability with all reasonable dispatch. The term "Force Majeure" as employed herein will mean acts of God, strikes, lockouts or other industrial disturbances, acts of public enemy, orders of any kind of the Government of the United States or the State of Texas, regulatory restrictions by a groundwater district (other than those of the EAA as described in the Program Documents), any civil or military authority, insurrection, riots, epidemics, landslides, lightning, earthquake, fires, hurricanes, tornados, blue northers, storms, floods, washouts, any drought defined as an Unforeseen Circumstance in the HCP, restraint of government and people, civil disturbances, explosions, extraordinary breakage or accidents to machinery, pipelines or canals, partial or entire failure of water supply, or on account of any other causes to the extent not reasonably within the control of the party claiming such inability. The Parties acknowledge that nothing in this provision affects the authority of the Service to suspend or revoke the Permit, either partially or in its entirety, as to the Party experiencing the inability or as to all Parties.

Section 8.10. Indemnification. To the fullest extent allowed by law, each Party agrees on behalf of itself and its successors and assigns to defend, save and hold harmless the other Parties and their officers, directors, and employees from and against any and all claims, losses, expenses, costs, demands, judgments, causes of action, suits, and liability for personal injury or property damage (including but not limited to all costs of defense, such as fees and charges of attorneys, expert witnesses, and other professionals and all court or other dispute resolution costs) resulting from the negligence or other wrongful acts or omissions of the party or an officer, director or employee of the Party.

Section 8.11. Modification. This Agreement may be amended only by written agreement of all of the Parties. No change, amendment, or modification of this Agreement will be made or be effective that will (a) cause this Agreement to diverge from or create an inconsistency with any Program Document; or (b) affect adversely the prompt payment when due of all money required to be paid by a Party under the terms of this Agreement.

Section 8.12. Addresses and Notice. Unless otherwise provided herein, any notice, communication, request, reply, or advice (herein severally and collectively, for convenience, called "Notice") provided or permitted in this Agreement to be given, made, or accepted by any Party to the other Parties will be in writing and may be given or be served by depositing the same in the United States mail postpaid and registered or certified and addressed to the Party to be notified, with return receipt requested, or by delivering the same to an officer of such Party, or by prepaid telegram when appropriate, addressed to the Party to be notified. Notice deposited in the mail in the manner hereinabove described will be conclusively deemed to be effective, unless otherwise stated herein, from and after the expiration of three days after it is so deposited. Notice given by electronic communication or in any other manner will be effective only if and when receipt is acknowledged by the Party to be notified. For the purposes of notice, the addresses of the Parties will, until changed as provided in the last sentence of this Section 8.12, be as follows:

If to the EAA:

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

If to New Braunfels:

City Manager
(with copy to Watershed Manager)
City of New Braunfels
424 South Castell Avenue

New Braunfels, Texas 78130

If to San Marcos:

City Manager
City of San Marcos
630 E. Hopkins
San Marcos, Texas 78666

If to the University:

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

If to San Antonio:

President/Chief Executive Officer
San Antonio Water System
P.O. Box 2449/2800 U.S. Hwy. 281 North
San Antonio, Texas 78298

Any Party which changes its address or contact person for notice under this Agreement will provide at least five days' written notice to the other Parties.

Section 8.13. State or Federal Laws, Rules, Orders, or Regulations. This Agreement is subject to all applicable federal and State laws and any applicable permits, ordinances, rules, orders, and regulations of any local, state, or federal governmental authority having or asserting jurisdiction but nothing contained herein will be construed as a waiver of any right to question or contest any such law, ordinance, order, rule, or regulation in any forum having jurisdiction. Each Party represents that, to the best of its knowledge, no provisions of any applicable federal or State law, nor any permit, ordinance, rule, order, or regulation of any Party will limit or restrict the ability of such Party to carry out its respective obligations under or contemplated by this Agreement.

Section 8.14. Severability. The Parties hereto specifically agree that in case any one or more of the sections, subsections, provisions, clauses, or words of this Agreement or the application of such sections, subsections, provisions, clauses, or words to any situation or circumstance should be, or should be held to be, for any reason, invalid or unconstitutional, under the laws or constitutions of the State or the United States of America, or in contravention of any such laws or constitutions, such invalidity, unconstitutionality, or contravention will not affect any other sections, subsections, provisions, clauses, or words of this Agreement or the application of such actions, subsections, provisions, clauses, or words to any other situation or circumstance, and it is intended that this Agreement will be severable and will be construed and applied as if any such invalid or unconstitutional section, subsection, provision, clause, or word had not been included herein, and the rights and obligations of the Parties hereto will be construed and remain in force accordingly.

Section 8.15. Waiver. Notwithstanding anything to the contrary contained in this Agreement, any right or remedy or any default under this Agreement, except the right of a Party to receive the payments from another Party, which will never be determined to be waived, will be deemed to be conclusively waived unless asserted by a proper proceeding at law or in equity within four (4) years after the occurrence of such default. No waiver or waivers of any breach or default (or any breaches or defaults) by any Party hereto or of the performance by any other Party of any duty or obligation hereunder will be deemed a waiver thereof in the future, nor will any such waiver or waivers be deemed or construed to be a waiver of subsequent breaches or defaults of any kind, character or description, under any circumstances.

Section 8.16. Venue. It is specifically agreed among the Parties to this Agreement that in the event that any legal proceeding is brought to enforce this Agreement or any provision hereof, the same will be brought in the County in which the principal administrative offices of the Defendant or any one Defendant are located.

Section 8.17. Succession and Assignment. This Agreement is binding on and inures to the benefit of the Parties hereto and their respective successors, representatives, and assigns. This

Agreement may not be assigned by any Party hereto without prior written notice to and approval by the other Parties, which consent may be withheld without cause.

Section 8.18. Entire Agreement. This Agreement, along with the other Program Documents, constitutes the entire agreement among the Parties with respect to the matters described herein.

Section 8.19. Applicable Law. This Agreement will be governed by and construed in accordance with the laws of the State, and the obligations, rights, and remedies of the Parties hereunder will be determined in accordance with such laws without reference to the laws of any other state or jurisdiction, except for applicable federal laws, rules, and regulations.

Section 8.19. Counterparts. This Agreement may be executed in counterparts, each of which will be an original and all of which together will constitute but one and the same instrument.

Section 8.20. Officers and Agents. No officer or agent of the Parties is authorized to waive or modify any provision of the Agreement. No modifications to or rescission of this Agreement may be made except by a written documents signed by the Parties' authorized representatives.

Section 8.21. Recitals. The Parties agree that the recitals in this Agreement are true and correct and are incorporated into the terms of this Agreement.

Section 8.22. Approval by Parties. Each Party affirms that it has taken all necessary official action to approve this Agreement.

Section 8.23. Condition Precedent. The Parties' obligations under this Agreement are contingent upon approval of the Implementing Agreement and issuance of the Permit by the Service.

Section 8.24. Goods and Services. The Parties agree that the mutual commitments stated in this Agreement to provide operational, regulatory and implementation services in execution of the HCP and mutual discharge of the Implementing Agreement constitute an agreement by each

Draft of October 11 clean

Party for providing goods and services to the other Parties, that payments due from the EAA and the mutual provision of goods and services are amounts due and owing under the Agreement, and that this Agreement is subject to Chapter 271, Subchapter I, of the Texas Local Government Code.

Section 8.25. No Third Party Beneficiary; No Partnership. This Agreement is not intended to confer any rights, privileges or causes of action upon any third Party other than the Parties to this Agreement. The relationship of the Parties under this Agreement is not and will not be construed or interpreted to be a partnership, joint venture or agency. The relationship of the Parties will be an independent contractor relationship. No Party will have the authority to make any statements, representations or commitments of any kind, or to take any action, which will be binding on another Party.

IN WITNESS WHEREOF, the Parties hereto acting under authority of their respective governing bodies have caused this Agreement to be duly executed as of the Effective Date.

EDWARDS AQUIFER AUTHORITY

By: _____

Karl Dreher
General Manager

ATTEST:

By: _____

Enrique P. Valdivia
Secretary, Board of Directors

APPROVED AS TO FORM:

By: _____

Darcy Alan Frownfelter
General Counsel

CITY OF NEW BRAUNFELS

By: _____

Gale Pospisil
Mayor

By: _____

Michael Morrison
City Manager

ATTEST:

By: _____

Patrick Aten
City Secretary

CITY OF SAN MARCOS

By: _____

Jim Nuse
City Manager

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

By: _____
Robert R. Puente
President/CEO

TEXAS STATE UNIVERSITY – SAN MARCOS

By: _____
Denise M. Trauth
President

DRAFT

