

IMPLEMENTING AGREEMENT

by and among

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

and

United States Fish and Wildlife Service

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

This Implementing Agreement ("Agreement"), made and entered into as of the ____ day of _____, 2012, by and among THE EDWARDS AQUIFER AUTHORITY (EAA), 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 (collectively the Permittees), TEXAS PARKS AND WILDLIFE DEPARTMENT (TPWD) and the UNITED STATES FISH AND WILDLIFE SERVICE (the Service), hereinafter collectively called the "Parties," defines the Parties' roles and responsibilities and provides a common understanding of action that will be undertaken to minimize and mitigate the effects on the subject listed and unlisted species and their habitats of the Comal and San Marcos springs.

1.0 RECITALS

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

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

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

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

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

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

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

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

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

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

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

2.0 DEFINITIONS

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

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

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

2.3 The term "Permittee" shall mean each Applicant.

2.4 The term "Conservation Plan" or "HCP" shall mean the Habitat Conservation Plan prepared for the Covered Activities.

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

2.6 The term "unforeseen circumstances" has the meaning as set forth at 50 CFR 17.3.

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

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

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

3.0 HABITAT CONSERVATION PLAN

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

4.0 INCORPORATION OF HCP

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

5.0 LEGAL REQUIREMENTS

In order to fulfill the requirements that will allow the Service to issue the Permit, the HCP sets forth measures that are intended to ensure that any take occurring within the Permit Area will be incidental; that the impacts of the take will, to the maximum extent practicable, be minimized and

mitigated; that procedures to deal with unforeseen circumstances will be provided; that adequate funding for the HCP will be provided; and that the take will not appreciably reduce the likelihood of the survival and recovery of the Covered Species in the wild. It also includes measures that have been suggested by the Service as being necessary or appropriate for purposes of the HCP.

6.0 COOPERATIVE EFFORT

Each of the Parties to this Agreement will perform certain specific tasks relating to the Conservation Measures and the Adaptive Management Process as more particularly provided in the Program Documents. The Program Documents thus describe a program for cooperation by federal, state and local agencies to minimize and mitigate the effects of the take of Covered Species which may be caused by the Covered Activities.

7.0 TERMS USED

Terms defined and utilized in the HCP and the ESA and in 50 CFR 17.3 shall have the same meaning when utilized in this Agreement, except as specifically noted.

8.0 PURPOSES

The purpose of this Agreement is to provide an understanding of the nature and effect of the program documents.

9.0 TERM

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

10.0 FUNDING

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

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

11.1 RESPONSIBILITIES OF THE PERMITTEES.

- a. The Permittees shall each undertake their respective activities as set forth in the HCP in order to meet the terms of the HCP and comply with the Permit, including the adaptive management process described in subparagraph (b) below, if applicable.
- b. The conservation measures proposed to be funded and implemented by the Permittees meet the incidental take permit issuance criteria of the ESA and applicable regulations. The Parties recognize, however, that because of the number of Covered Species, the quantity and quality of the data and information regarding some of the Covered Species, and the dynamic nature of the habitats of both the Covered Species and the pursuit of the Covered Activities, an essential component of the HCP is science-based management that adapts to changing information about the Covered Species. The Permittees have, thus,

developed and incorporated into this Agreement the description of the Adaptive Management Plan in Section 6 of the HCP and as amplified in Article Seven of the FMA. This iterative AMP process requires the Permittees to rely on the best available scientific and commercial information and knowledge for monitoring, research, and management practices to minimize and mitigate, to the maximum extent practicable, the impacts of the authorized taking of the Covered Species. Each Party will, to the maximum extent practicable, fully cooperate in implementing the AMP. The Permittees will comply with the AMP to evaluate the effectiveness of the Conservation Measures and to make appropriate adjustments if warranted.

- c. The Permittees shall submit an annual report describing their respective activities and an analysis of whether the terms of the HCP were met for the reporting period. The report shall provide all reasonably available data regarding the incidental take, and where requested by the Service, changes to the overall population of Covered Species that occurred in the Permit Area during the reporting period.

11.2 RESPONSIBILITIES OF THE SERVICE.

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

11.3 RESPONSIBILITIES OF THE TEXAS PARKS AND WILDLIFE DEPARTMENT.

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

12.0 REMEDIES AND ENFORCEMENT

12.1 REMEDIES IN GENERAL

The Parties will work together in good faith to attempt to resolve disagreements in a mutually satisfactory manner. Such attempts will include, where feasible, reasonable notice of any default and an opportunity to cure. Notwithstanding the above, and except as set forth below, each Party shall have all remedies otherwise available to enforce the terms of this Agreement, the Permit, and the HCP, and to seek remedies for any breach hereof, subject to the following:

- a. **NO MONETARY DAMAGES**

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

(1) Retain Liability

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

(2) Land Owner Liability

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

(3) Responsibility of the United States

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

b. INJUNCTIVE AND TEMPORARY RELIEF

The Parties acknowledge that injunctive and temporary relief may be appropriate to ensure compliance with the terms of this Agreement.

12.2 THE PERMIT

a. SEVERABILITY

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

b. PERMIT SUSPENSION OR REVOCATION

The Permit shall be suspended or revoked only in conformance with the provisions of 50 CFR 13.27 through 13.29 (2011) and 50 CFR Part 17, as those regulations exist as of the date hereof. In the event that the Permit is revoked with respect to any Permittee, this Agreement shall immediately terminate as to that Permittee and will be of no further force and effect as to that Permittee.

12.3 LIMITATIONS AND EXTENT OF ENFORCEABILITY

a. NO SURPRISES RULE

The Service confirms and agrees that the Permit includes full protections under the No Surprises Rule for all Covered Species and to the greatest extent allowed under 50 CFR Part 17.

b. PRIVATE PROPERTY RIGHTS AND LEGAL AUTHORITIES UNAFFECTED

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

13.0 AMENDMENTS

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

14.0 MISCELLANEOUS PROVISIONS

14.1 NO PARTNERSHIP

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

14.2 SUCCESSORS AND ASSIGNS

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

14.3 NOTICE

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

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

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

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

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

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

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

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

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

14.4 ENTIRE AGREEMENT

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

14.5 ELECTED OFFICIALS NOT TO BENEFIT

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

14.6 AVAILABILITY OF FUNDS

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

14.7 DUPLICATE ORIGINALS

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

14.8 THIRD PARTY BENEFICIARIES

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

14.9 RELATIONSHIP TO THE ESA AND OTHER AUTHORITIES

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

14.10 REFERENCES TO REGULATIONS

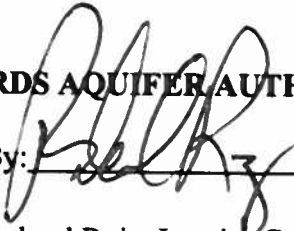
Except as specifically provided herein to the contrary, any reference in this Agreement, the HCP, or the Permit to any regulation or rule of the Service shall be deemed to be a reference to such regulation or rule in existence at the time an action is taken.

14.11 APPLICABLE LAWS

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

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

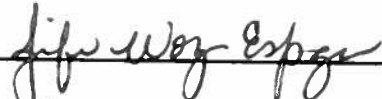
EDWARDS AQUIFER AUTHORITY

By: 

Roland Ruiz, Interim General Manager

Date: 8-22-12

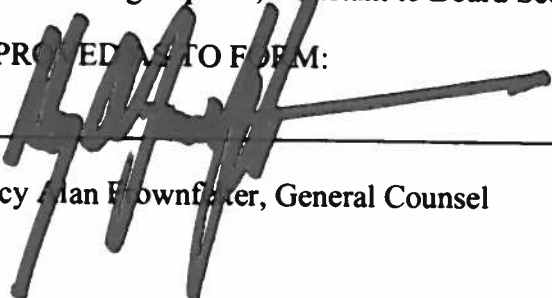
ATTEST:

By: 

Jennifer Wong-Esparza, Assistant to Board Secretary

Date: 8-22-12


APPROVED AS TO FORM:

By: 

Darcy Alan Brownfelter, General Counsel

Date: 08/22/12

CITY OF NEW BRAUNFELS

By:  Date: 8/16/2012

Michael Morrison, City Manager

ATTEST:
By:  Date: 8/16/12

Patrick Aten, City Secretary

APPROVED AS TO FORM:
By:  Date: 8/16/12

Valeria Acevedo, City Attorney

CITY OF SAN MARCOS

By: 

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

Date: 8/16/12

ATTEST:

By: 

Jamie Lee Pettijohn, City Clerk

Date: 8/16/12

APPROVED AS TO FORM:

By: 

Michael Cosentino, City Attorney

Date: 8-16-12

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

By: *RRP*

Date: 08-23-12

Robert R. Puente, President/CEO

ATTEST:

By: *Becky Gonzalez*

Date: 8-23-12

Becky Gonzalez, Executive Administrative Assistant

APPROVED AS TO FORM:

By: *PSK*

Date: 8-24-12

Phil Steven Kosub, Senior Water Resources Counsel

TEXAS STATE UNIVERSITY – SAN MARCOS

By: Denise M. Trauth

Denise M. Trauth, President

Date: 8/24/12

ATTEST:

By: William Nance

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

Date: 8/24/12

APPROVED AS TO FORM:

By: Diane Corley

Diane Corley, Associate General Counsel, Texas State University System

Date: August 23, 2012

TEXAS PARKS AND WILDLIFE DEPARTMENT

By: 
Carter Smith, Executive Director

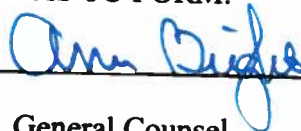
Date: 28 August 2012

ATTEST:

By: 
Michelle Klaus, Executive Assistant

Date: 8-28-12

APPROVED AS TO FORM:

By: 
Ann Bright, General Counsel

Date: 8-28-2012

STATE AGENCY SIGNATURES

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

TEXAS WATER DEVELOPMENT BOARD

By: Melanie Callahan

Date: 9/11/12

Melanie Callahan, Executive Administrator

By: Kenneth Petersen

Date: 09/06/12

Kenneth L. Petersen, General Counsel

STATE AGENCY SIGNATURES

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

TEXAS DEPARTMENT OF AGRICULTURE

ATTEST:

By:  _____

Drew DeBerry, Deputy Commissioner

Date: 9-7-12

APPROVED AS TO FORM:

By:  _____

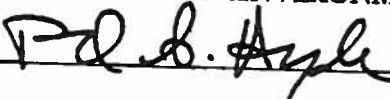
Dolores Alvarado Hibbs, General Counsel

Date: 9/06/12

STATE AGENCY SIGNATURES

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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

By: 

Date: 10/12/12

Richard A. Hyde, P.E., Deputy Executive Director

ATTEST:

By: 

Date: 10/12/12

Lori Wilson, Executive Assistant to the

Deputy Executive Director

APPROVED AS TO FORM:

By: 

Date: 10/9/12

Les Trobman, General Counsel

UNITED STATES FISH AND WILDLIFE SERVICE

By: _____

Date: _____

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

ATTEST:

By: _____

Date: _____

Donna Shoemaker, Executive Assistant

APPROVED AS TO FORM:

By: _____

Date: _____

Justin Tade, US Department of the Interior,

Office of the Solicitor, Attorney Advisor