

Report of the EARIP Implementing Agreement Drafting Workgroup

To: EARIP Steering Committee and Stakeholders

From: EARIP Implementing Agreement Drafting Workgroup

Date: March 16, 2011

Subject: First Report

1. Meeting of February 11, 2011. The EARIP Implementing Agreement Drafting Workgroup convened its initial meeting at 1:00 p.m. on February 11, 2011, at the IRNR office in San Antonio. The workgroup consists of Mark Taylor, Darcy Frownfelter, Kirk Patterson, Alan Wayland, Myron Hess, Mary Kelly and Steve Kosub. All members were present. Also in attendance were Con Mims, Raymond Meyer, Nathan Pence, and Dr. Robert Gulley. After initial remarks by Dr. Gulley, Steve Kosub was elected chairman of the workgroup.

The workgroup discussed the complex nature of the documentation that will be required to translate the work of the EARIP into mutual contractual relationships with the United States Fish and Wildlife Service and among various EARIP participants. Subjects of discussion included the issues to be resolved, the potential relationships of the parties, timelines, the role of the state agencies, the role of the EAA, the nature of the HCP administrative structure, enforceability, and the challenges associated with unresolved funding.

The workgroup agreed to an ambitious drafting schedule with a goal of having a complete set of documents ready for consideration by the EARIP Steering Committee by July 1, 2011. The Workgroup recognized that adherence to this schedule will require resolution by the Steering Committee of funding and governance issues in the near future, and availability of in-depth component activity and operational descriptions (relating, for example, to the use of ASR) from other workgroups by April 1, 2011.

2. Meeting of February 22, 2011. The workgroup met again at 9:00 a.m. on February 22, 2011, in the City Council Chambers of the City of New Braunfels. Members in attendance were Kirk Patterson, Mary Kelly, Myron Hess, Alan Wayland, Mark Taylor and Steve Kosub. Also in attendance were Dr. Robert Gulley, Nathan Pence, Cheryl Gilpin, and Greg Bowen of the New Braunfels Herald-Zeitung. The meeting lasted two and one-half hours.

The first half of the meeting was devoted to identification of issues that must be resolved by the EARIP stakeholders in order for drafting of documents to move beyond a conceptual level. The second half of the meeting consisted of a conceptual discussion of the various possible contractual relationships that might be created to implement the EARIP. Mr. Kosub agreed to prepare and circulate among the workgroup members a comprehensive, prioritized draft list of

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the issues requiring resolution to be presented to the stakeholders on March 10. The workgroup agreed to respond to the draft with comments and suggestions, and to meet again in New Braunfels on March 9, 2011.

3. Identification of issues. The workgroup has identified the following initial issues for consideration and resolution by the Steering Committee in order to complete drafting of documents on a schedule consistent with the requirements of S.B. 3:

3.1. Program funding mechanisms,

Comment: The workgroup anticipates drafting documents on the assumption that revenue to fund the program will be from sources other than sales tax, with alternative provisions triggered by voter approval of the tax.

- a. Source or sources of the revenue.
- b. Steps required to ensure commitment of funds to EARIP program.
- c. Steps to be taken if any funding mechanism fails.

3.2. Designation of the applicants for the Incidental Take Permit.

Comment: The workgroup's interim assumption is that the EAA, City of New Braunfels, City of San Marcos and SAWS will be the joint applicants.

3.3. Determination of the continuing role of EARIP stakeholders who are not applicants for the ITP.

Comment: Senate Bill 3 neither directed nor prohibited a continuing role for the EARIP stakeholders after December 31, 2012. The Steering Committee must now decide if a continuing role for the stakeholders will be incorporated in the program documents, and if so, whether that role will be advisory or directive in nature.

The workgroup currently assumes that there will be a continuing role for all the stakeholders, but believes that it may be unrealistic to assume functioning cohesiveness by such a large, diverse group over the term of the HCP. The workgroup therefore suggests that the stakeholders consider options for the ongoing discharge of their current role. These options might include continuing utilization of the larger Steering Committee, or transition to a smaller but still inclusive Advisory Committee, Adaptive Management Committee, or Adaptive Decision-making Committee. Any such committee might include Incidental Take Permit applicants, current Steering Committee members and/or other stakeholder representatives.

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The stakeholders must decide how the composition of this group will be determined; whether it will operate by consensus, as has the Steering Committee; and what role the group will play in the decision process.

If the Steering Committee determines that some continuing role is appropriate, the workgroup suggests four categories of decisions in which a role might be considered. These categories are as follows:

3.3.1. Ministerial administrative decisions made in the course of contract execution and management.

Comment: Examples of such decisions would include selection of contractors, approval of invoices, approval of weather-related delays, and other routine contract performance issues. While we recognize that this is an issue to be resolved by the Steering Committee, the workgroup respectfully suggests that the stakeholders should have no continuing role in this category of decisions.

3.3.2. Routine adaptive management decisions on a day-to-day basis.

Comment: Examples of such decisions would include an adjustment to the location of wild-rice planting, or possible alternatives to gill-parasite control if it proves ineffective.

3.3.3. Non-routine adaptive management decisions.

Comment: Examples would include any substantive change to the Phase One plan or cost of the plan, such as an unanticipated lack of response to the VISPO program.

3.3.4. Adaptive strategic decision-making.

Comment: This category is essentially the determination of required action in Phase Two. The determination would itself have two subcategories, as follows:

- a. Determination of long-term biological goals.
- b. Implementation of long-term biological goals.

3.4 Enforcement of HCP responsibilities and whether cross-enforcement is advisable.

Comment: This relates to the issue of what happens if one of the permit applicants fails to implement its responsibilities under the HCP. The workgroup discussed the following pros and cons regarding enforcement:

Pros: Cross-enforcement authority increases the stakes for any applicant considering default of its obligations to USFWS and the other applicants, and it

may enhance USFWS's view of the enforceability of the obligations of the permit holders. If any applicant fails to implement its responsibilities, the incidental take protection for all applicants and other parties such as pumpers who are protected by the ITP could be at risk unless that failure is rectified.

Cons: Cross-enforcement provisions will complicate documentation, may increase the reluctance of applicants to make long-term commitments, and may have little practical value in terms of ensuring compliance.

3.5. Determination of stakeholder expectations for “no surprises” protection with regard to the activities covered by the permit, including the security of pumping permits in time of drought, and river recreation management.

Comment: The workgroup anticipates that there may be an expectation on the part of ITP applicants for the maximum “no surprises” protection available from the Service for activities covered by the permit. The Steering Committee should determine if these expectations are consistent with those of the other stakeholders.

3.6. Determination of stakeholder expectations for assurance that future costs of the program do not exceed the future ability of participants to pay.

Comment: The workgroup recognizes that the multi-phase nature of the action plan poses unique challenges and opportunities for the Service, the ITP applicants, and other stakeholders. The Service and stakeholders expect reasonable assurances that action will be completed in accordance with the HCP. However, the ITP applicants and possibly other funding parties are public entities with limitations on their ability to commit to future funding of this action in unknown amounts. In order for the workgroup to draft the implementing agreement, we need to understand the stakeholders' expectations for future financial commitments.

3.7. Administration of Phase One and Phase Two activities, funds and contracts.

Comment: This relates to the issue of which entity will be primarily responsible for day-to-day implementation of the listed activities, subject to the adaptive-management decisions discussed above.

Phase One

- a. ASR
- b. CPM Stage V implementation
- c. CPM Stage V mitigation
- d. Municipal conservation

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- e. VISPO
- f. FWS hatchery activities
- g. ERPA construction and oversight (at Comal Springs or elsewhere)
- h. Comal Springs water quality and riparian management
- i. Comal Springs gill-parasite control
- j. Comal Springs exotic species control
- k. San Marcos River recreation management
- l. San Marcos River exotic aquatic plant control and planting of wild rice
- m. San Marcos water quality and riparian corridor management
- n. General biological monitoring/research for springs systems
- o. Biological adaptive management process
- p. Model refinement
- q. Studies related to Phase Two evaluation and project design
- r. EARIP staff

Phase Two

- a. All continuing aspects from Phase One
- b. Construction, if any, of new projects
- c. Continuing management of any new projects

Phase Three

- a. All continuing aspects from Phase Two
- b. Other

3.8. Participation by state agencies.

Comment: SB 3 requires that state agencies approve and execute the program document. The EARIP Steering Committee has determined that the program document will, at a minimum, include a Habitat Conservation Plan (HCP). The HCP will accompany an

application for an incidental take permit. These documents will be accompanied by an implementing agreement.

The workgroup assumes, at least as a starting point for discussion, that it might be possible for the agencies to approve and execute a program document in the form of an incidental take permit application or related implementing agreement if it includes a provision to the effect that the agencies participated in the process and are signing solely to indicate they do not object to the assurances, programs, and other activities provided by the other signers of the program document. TPWD may also have specific performance responsibilities related to the habitat conservation plan.

The workgroup suggests that the Program Manager convene a meeting of the workgroup with state agency counsel to further explore this issue.

3.9. Confirming that the EARIP does not have obligations imposed by Texas Parks and Wildlife Code Chapter 83 (establishing specific procedures for involvement by science and citizen advisory committees in a “regional HCP”).

Comment: The EAA had previously determined that the chapter was applicable to the Authority’s efforts in 2004 to secure an HCP. However, subsequent changes to the Authority’s enabling act in SB 3 formalizing the EARIP process changed aspects of the analysis. The workgroup believes that the issue needs to be resolved.

3.10. Development of process for determining biology-related adaptive management measures in Phase One and beyond.

Comment: Section 3.3, above, deals with the role of stakeholders in this decision, but, regardless of the nature of stakeholder involvement, a detailed decision process will need to be specified.

3.11 Development of process for determining adaptive management alternatives to Phase One activities.

Comment: Section 3.3, above, deals with the role of stakeholders in this decision, but, regardless of the nature of stakeholder involvement, a detailed decision process will need to be specified.

3.12. Development of process for refining long-term biological goals and developing specific plans for Phase Two.

Comment: Section 3.3, above, deals with the role of stakeholders in this decision, but, regardless of the nature of stakeholder involvement, a detailed decision process will need to be specified.

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3.13. Permit duration.

- a. Phase One duration.
- b. Phase Two duration.

3.14. Possibility of a Phase Three.

4. Meeting of March 9, 2011. The workgroup met at 11:30 a.m. on March 9, 2011, in the City Hall offices of the City of New Braunfels. Members present were Kirk Patterson, Myron Hess, Darcy Frownfelter, Mark Taylor, Alan Wayland and Steve Kosub. Also present were Dr. Robert Gulley, Nathan Pence, Dr. Todd Votteler, and Mike Gershon. Mr. Gershon was introduced by Mr. Wayland as counsel to New Braunfels. The meeting lasted three hours.

Virtually the entire meeting was devoted to further identification and refinement of issues that must be resolved by the Steering Committee in order for meaningful drafting of documents to proceed. Much of the discussion focused on the single issue of determining the continuing role of the EARIP stakeholders after December 31, 2012. The workgroup recognized the importance of this issue to the future of the program, and the related importance of a well-organized presentation of the issue to the Steering Committee for decision.

Members suggested a number of changes to the draft report in this regard. Mr. Kosub agreed to revise and re-circulate the draft report of the workgroup for final comments prior to distribution to the stakeholders. The meeting concluded with a brief discussion of the implementing agreement and related documentation. Mr. Kosub distributed a rough-form draft of an implementing agreement based on the U.S. Fish and Wildlife Service's template. Mr. Kosub also distributed a copy of the Texas statute governing intergovernmental agreements.

5. Additional meetings. The workgroup plans to meet as often as necessary to complete draft documents by July 1, 2011. For the time-being, we will focus our attention on the conceptual relationships among the permit applicants and among the EARIP participants. However, the nature and substance of the implementing documents will for the most part be determined by the resolution of the issues identified in Section 3 above and by further direction from the Steering Committee.

Timely completion of the implementing documents will also require completion in the near future of detailed activity/operational descriptions for the various components of the action plan. These descriptions will be incorporated in one form or another into the implementation documents and will be critical to the long-term success and enforceability of the Habitat Conservation Plan that will be our core program document. We therefore urge the stakeholders and other workgroups to resolve these remaining issues and provide direction to the Implementing Agreement Drafting Workgroup within the next thirty days.