

SECTION 1.26A(c) IMPLEMENTING AGREEMENT FOR THE EDWARDS AQUIFER RECOVERY IMPLEMENTATION PROGRAM

This Implementing Agreement (the “Agreement”) for the Edwards Aquifer Recovery Implementation Program (the “EARIP” or “RIP”) sets out the agreement of the Edwards Aquifer Authority (“EAA”), United States Fish and Wildlife Service (the “Service”), other appropriate federal agencies, Texas Commission on Environmental Quality (“TCEQ”), Texas Parks and Wildlife Department (“TPWD”), Texas Water Development Board (“TWDB”), Texas Department of Agriculture (“TDA”), and other stakeholders (collectively the “Parties”) regarding the development of a program document.

1. Purpose

This Agreement is developed to satisfy the requirements of Subsection 1.26A(c) of Article 12 of Senate Bill 3¹ and to set out the broad parameters of the decision-making process through which the program document² referenced in that Subsection will be developed. The program document must be approved and executed by the EAA, TCEQ, TPWD, TDA, TWDB, and the Service³ not later than September 1, 2012, will be created pursuant to a facilitated decision-making process governed by the Memorandum of Agreement for the EARIP (“MOA”)⁴

¹ Article 12 of S.B. 3 is codified in the Edwards Aquifer Authority Act at Act of May 28, 2007, 80th Leg., R.S., ch. 1430, §§ 12.01–12.12, 2007 Tex. Gen. Laws 5848, 5901. This Agreement is required by Subsection 1.26A(c) of S B. 3. Although, the Service is not required to enter into this agreement, the EAA and the referenced state agencies are required to enter into this agreement. In other places, S.B. 3 refers to the “implementing agreement” in Subsection 1.26A(c) of the EAA Act as a “cooperative agreement.” See, Subsection 1.26A(d)(2)(noting that the program document must “include provisions to pursue cooperative and grant funding to the extent available from all state, federal, and other sources for eligible programs included in the cooperative agreement under Subsection (c) of this section, including funding for a program director”) and (e) (requiring the creation of a steering committee to “oversee and assist in the development of the cooperative agreement under Subsection (c) of this section.”); see also Subsection 1.26A(m) (requiring the Steering Committee “[a]fter the development of the cooperative agreement” to make certain recommendations to EAA). The Parties consider this Agreement to be the cooperative agreement referenced elsewhere in Sections 1.26A(d)(2), (c), (e), and (m) of Senate Bill 3.

² Pursuant to Senate Bill 3 in Subsection 1.26A(d) of the EAA Act, the program document may be in the form of a habitat conservation plan.

³ As noted above in note 1, the Service cannot be required by State law to enter into this agreement.

⁴ The list of MOA Participants is attached hereto as Attachment 1.

and the Program Operational Rules for RIP Steering Committee Members and RIP Participants (“POR”), current copies of which are posted on the Internet at <http://earip.tamu.edu/ProgramDocs.cfm> .

Various aspects of the decision-making process are spelled out in the MOA for the EARIP and the POR. Nothing in this Agreement is intended to supersede any provision of those documents and in the event of any inconsistency between this Agreement and the MOA or the POR, the provisions of the MOA and POR shall control.

2. Decision-making Process⁵

The EARIP is a consensus-based process, designed to be as open and transparent as possible consistent with achieving its goals with reasonable efficiency. The decision-making process shall encompass those issues necessary to prepare the program document.

As part of the decision-making process, the Parties shall consider the recommendations of the Expert Science Subcommittee regarding the information required by Subsections 1.26A(k) and (j) of Article 12 of Senate Bill 3, the results of the initial study prepared by a team of scientists led by Dr. Thomas Hardy, as well as the peer review report(s) regarding these recommendations and studies, and the recommendations of the Recharge Facility Feasibility, Ecosystem Restoration Subcommittees, and any duly constituted subcommittee that may be subsequently created.

As discussed further below, the Parties anticipate an entity designated by the EARIP Steering Committee, acting on behalf of the EARIP, will retain an expert facilitator or facilitation team and a Program Document Contractor to assist in the development of the program document. Once that expertise has been retained, a specific process governing interactions between the Parties and the facilitation team will be developed.

3. Role of Supporting Personnel

The Parties acknowledge the importance of independent scientific input into the development of the program document and the importance of having other advisors who can approach the issues without a particular interest and help the Parties to achieve consensus recommendations. Accordingly, the Parties anticipate receiving input and guidance from at least the following Supporting Personnel:

⁵ For information purposes only, a rough timeline for the decision-making process is attached hereto as Attachment 2.

a. Facilitator(s)

The facilitator retained to assist the EARIP shall ensure throughout the process that the process is open, transparent, and collaborative. Unless otherwise directed by the Steering Committee, the facilitator will conduct all decision-making sessions with respect to the development of the program document. The facilitator will provide the Program Manager minutes of each decision-making session that summarize the discussions and any decisions made at the session.

b. Science Advisors

The Steering Committee and facilitator(s) may utilize Science Advisors to advise them during the decision-making process. The Science Advisors shall include but not be limited to: (1) Dr. Thomas Hardy, (2) the Program Document Contractor, described below, and (3) such other persons who are subsequently designated by the Steering Committee/EARIP.⁶

The Steering Committee may seek the advice or forward an issue that is scientific in nature to be considered by one or more of the Science Advisors. The Science Advisors will not participate in the decision-making sessions except to the extent specifically requested by the Steering Committee.

Science Advisors, individually or collectively, may be requested to assist and advise the facilitator. The facilitator may consult with the Science Advisors on technical issues as needed or as requested by the Steering Committee. The facilitator may, in coordination with the Program Manager, request specific tasks to be conducted by one or more Science Advisors (*e.g.*, biological model development) to inform the facilitator, Steering Committee, and stakeholders in the decision-making process.

c. The Program Document Contractor

The Program Document Contractor, retained to assist the EARIP, will provide support and information in the decision-making process as set out above in paragraph 3.b. Such support and information requests will be made by the Steering Committee and coordinated by the Program Manager.

d. Expert Science Subcommittee

⁶ The use of Dr. Thomas Hardy shall depend and be contingent upon the availability of funds and the ability of an entity designated by the EARIP Steering Committee to act on its behalf, to negotiate acceptable contractual arrangements.

The Expert Science Subcommittee will provide support and information requested by the Steering Committee and coordinated by the Program Manager.

e. Recharge Facility Subcommittee

The Recharge Facility Subcommittee will provide support and information requested by the Steering Committee and coordinated by the Program Manager.

f. Ecosystem Restoration Subcommittee

The Ecosystem Restoration Subcommittee will provide support and information requested by the Steering Committee and coordinated by the Program Manager.

g. Public Outreach Subcommittee

The Public Outreach Subcommittee will provide support requested by the Steering Committee and coordinated by the Program Manager.

h. Program Manager

The Program Manager will participate in the decision-making meetings as specifically requested by the Steering Committee. However, the Program Manager will be expected to bring to the attention of the Steering Committee questions and information relating to applicable legal and procedural requirements. Consistent with the requirements of the POR, the Program Manager will manage the contracts of the facilitator(s) and other Supporting Personnel. The Program Manager shall handle the logistical arrangements for the facilitator, coordinate the activities of the EARIP during the decision-making process, and serve as a liaison between the EARIP and the Supporting Personnel.

4. Role of the United States Fish and Wildlife Service

The Service is not required by State law to enter into this Agreement. The Service can attend and participate in all decision-making meetings. The Steering Committee may, from time-to-time, request input from the Service regarding the application of the Endangered Species Act, National Environmental Policy Act, and their implementing regulations and guidance on issues in the decision-making process. The Service will endeavor to provide such input as soon as reasonably possible. Such requests will be made by the Program Manager to the Service's Austin Ecological Service's Field Supervisor.

5. Funding

Part or all of the funding for development of the program document will be from a Section 6 Habitat Conservation Planning Assistance grant for \$1,063,250 from the Service and a 2010-2011 appropriation for support of the EARIP for up to \$1,692,500 from the 2009 Texas Legislature through the TWDB.

The appropriation funding will be obtained from the TWDB through a water research grant application process. The EARIP Steering Committee shall designate an eligible entity to serve as the grant applicant and approve the application for the appropriation funds from the TWDB and will enter into the grant fund contract with the TWDB on behalf of the EARIP.

The Parties agree to implement measures to ensure accountability in all expenditures and acknowledge the importance of pursuing eligible cooperative and grant funding to the extent available from all state, federal, and other sources, making efficient use of those funds.

6. General Provisions

- a. This Agreement shall remain in effect until the earlier of September 1, 2012, or the execution of a superceding implementing agreement to implement the program document in compliance with the requirements of Senate Bill 3. Any Party who withdraws from the EARIP as provided in the MOA is no longer bound by this Agreement.
- b. This Agreement does not create an exclusive arrangement between the Service or the Department of the Interior and the Parties or commit the Service, the Department of the Interior, or the Parties to enter into any contract or other binding obligation.
- c. By entering into this Agreement, no Party is obligated to enter into, approve, or execute any contract or other binding obligation including, without limitation, the program document or any other document included in or incorporated in the program document.
- d. This Agreement is subject to and is intended to be consistent with all applicable federal, state, and local laws.

e. All Parties recognize that various Parties have statutory responsibilities that cannot be delegated. Nothing in this Agreement shall be construed to abrogate any of the statutory responsibilities of any Party, including:

(1) Responsibilities that relate to implementing specific strategies included in the program document;

(2) Authority to decide whether to approve any document, or amendment thereto, specifically required to be entered into by the Parties under Senate Bill 3; or

(3) The Service's statutory authority under the Endangered Species Act and other federal law. 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 or other applicable law.

f. This Agreement is not a Federal contract, rule, or regulation. This Agreement shall not be construed as or interpreted to be final Federal agency action.

g. Though the Parties agree that no action at law or in equity may be brought to enforce or interpret the provisions of this Agreement, if any action at law or in equity, including any action for declaratory relief, is brought to enforce or interpret the provisions of this Agreement, then each Party shall pay its own attorney's fees and costs. No Party shall be liable in monetary damages to any other Party or other person for any breach of this Agreement, any performance or failure to perform a mandatory or discretionary obligation imposed by this Agreement or any other cause of action arising from this Agreement. The Parties shall retain whatever liability they would possess for their present and future acts or failure to act without the existence of this Agreement.

h. Nothing in this Agreement may be construed to obligate the Service, the United States, or any other Party to any current or future expenditure of resources in advance of the availability of appropriations from Congress, the Texas Legislature, or the governing bodies of the respective state agencies or the Authority, as may be applicable. Nor does this Agreement obligate the Service, the United States, the TWDB, or any other Party to spend funds on any particular project or purpose, even if funds are available.

i. The Public Outreach Committee shall coordinate with the Service regarding for the publication of an EARIP press release announcing the execution

of the Agreement.

j. 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.

l. The provisions of any statutes and/or regulations cited in this Agreement contain legally binding requirements. The Agreement itself does not alter, expand, or substitute for those provisions or regulations, nor is it a regulation itself. Thus, it does not impose legally-binding requirements on the Parties, nor does it create a legal right of action for the Parties or third-parties.

m. Nothing in this agreement may be interpreted to imply that any Party endorses any position or policy of the other Parties. The Parties to this Agreement will not take any action or make any statement that suggests or implies such an endorsement.

7. Amendment

This Agreement may be amended at any time with the written consent of all Parties. This Agreement will only be amended upon agreement of all Parties.

8. Termination

The Service may choose to terminate its involvement with this Agreement upon providing thirty (30) days written notice to the other Parties. All other Parties are required by Section 1.26A(c) of S.B. 3 to have entered into this Agreement and may not terminate their involvement except as provided in Section 6(a) above.

9. Entire Agreement

Except as provided above in Section 1, this Agreement constitutes the entire agreement among the Parties. Except as provided above in Section 1, the Agreement 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.

10. Effective Date

This Agreement is effective on that date on which it has been executed by duly authorized representatives of (1) the EAA, Service, TCEQ, TPWD, TDA, TWDB, and (2) of other members of the Steering Committee such that, collectively, at least 75 percent of the members of the Steering Committee have signed the document. This Agreement may be signed by additional stakeholders, including other appropriate federal agencies, following the Effective Date of this Agreement.

11. Execution

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.

IN WITNESS WHEREOF, THE PARTIES HERETO have executed this Implementing Agreement:

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