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OPINION COMMITTEE



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RQ-1220-GA

Edwards Aquifer Legislative Oversight Committee

September 3, 2014

VIA EMAIL opinion.committee@texasattorneygeneral.gov

The Honorable Greg Abbott
Attorney General of Texas
Attn: Opinion Committee
P.O. Box 12548
Austin, Texas 78711

RE: Request for opinion concerning whether a special district, or political subdivision of the state, may provide funding in the form of a grant to the federal government for the implementation of a program with public benefit under certain terms and conditions proposed by the federal government.

Dear Attorney General Abbott:

I respectfully request an Attorney General Opinion concerning the ability of the Edwards Aquifer Authority ("EAA") to provide funding to the U.S. Fish & Wildlife Service for the implementation of a refugia program under certain terms and conditions proposed by the Service. As you know, the Texas Constitution generally prohibits political subdivisions such as the EAA from providing grants of public funds to other entities, with certain exceptions. Upholding the requirements of the constitution is of course our first duty in all matters. The Edwards Aquifer Habitat Conservation Plan Program ("EAHCP"), including the refugia program, is a critical part of ensuring continued regional management of the Edwards Aquifer. I believe the EAA, other parties to the EAHCP and the public would benefit from clarification of the application of the Texas Constitution, statutes, and case law to the proposed refugia program to ensure that all legal requirements have been met.

The EAA is required to implement a refugia program under the EAHCP which was developed at the direction of the Texas Legislature in the Edwards Aquifer Authority Act. The EAHCP became effective in 2013 when the U.S. Fish and Wildlife Service ("Service") issued to the 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, and Texas State University, an Incidental Take Permit ("ITP") under the federal Endangered Species Act of 1973 ("ESA").¹

¹ As described more thoroughly in the attached brief, the refugia program is designed to temporarily house endangered species outside of their native habitats to protect their survival during times of stress, with the goal of reintroduction to the habitat at a later time.

This ITP provides users of the Southern Segment of the Edwards Aquifer (“Aquifer”), and the EAA in regulating the Aquifer, protection from Section 9(a) take liability under the ESA. The EAA is responsible for the general management and oversight of the EAHCP, including the establishment of a refugia program, subject to the duties and responsibilities held solely or jointly by the other permittees.

The EAA does not currently have refugia facilities nor is there the staff to implement a refugia, therefore, the EAHCP requires the EAA to contract with the Service to support, coordinate with, and provide funding to the Service for the implementation of the EAA’s refugia program. However, the Service also does not currently have refugia facilities or necessary staff.

It is estimated that implementation of the refugia program will cost approximately \$25,178,955 over the fifteen (15)-year term of the ITP. This amount includes costs to construct, equip, and staff the additional facilities necessary for the Service to have the capacity to be able to operate and maintain the refugia. The EAA will fund the refugia through its normal funding mechanism – aquifer management fees assessed against permitted users of the Aquifer.

In order for the Service to create a refugia program for the EAHCP, the Service has indicated that all refugia facilities must be located on its federally-owned land, that the improvements and equipment must be owned by the Service, and that additional staff necessary to operate the refugia must be Service employees.

Finally, and importantly, the Service is requiring that all of the costs for the additional construction, equipment, supplies, and staff necessary for the Service to operate the refugia must be funded solely by the EAA with no federal contributions. The Service advises that unless and until the EAA fully funds the refugia, and the facilities are constructed and staff hired, the Service is unable to provide any refugia services for the EAHCP.

These terms and conditions proposed by the Service appear to implicate the prohibition against the gratuitous grant of public credit and funds under Article III, Section 52(a), Texas Constitution, by political subdivisions, such as the EAA. Moreover, it is unclear whether the EAA has the statutory authority to enter into such an arrangement with the Service. Specifically, the following issues are presented:

1. May the EAA provide funding to the Service for new additional buildings and associated works and facilities, and equipment and supplies, necessary to implement the EAA’s refugia program if such buildings, works, facilities, and equipment must be owned solely by the Service and be physically located on real property owned by the Service?
2. If so, does the EAA have the statutory authority to enter into a non-joint refugia project contract with the Service and make advance payments to the Service for the costs of the refugia program?
3. Are the EAA-funded refugia facilities to be owned and operated by the Service to be considered “district facilities” for purposes of Chapter 49, Subchapter I, such

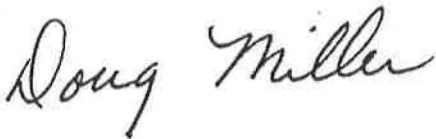
that the proposed refugia contract must meet the requirements of the subchapter, or may the EAA waive such requirements in the face of Service objections?

Under the authority to issue advisory opinions granted to the Attorney General pursuant to Article IV, Section 22 of the Texas Constitution, and Subchapter C of Chapter 402 of the Texas Government Code, please accept this letter as a request for a written opinion responding to the questions raised herein. Attached you will find a brief providing you with additional background facts, the questions presented, and a discussion of the law relative to the issues raised.

In light of the critical role that the refugia program plays in the implementation of the EAHCP and the resolution of the endangered species issues relative to the management of the Aquifer, the resolution of the legal issues raised herein is necessary and in the public's interest. Furthermore, although I am fully supportive of the protection of this region's natural resources and acknowledge the importance of this particular refugia program, I want to be certain that the state of Texas is equally protected in the continued appropriate use and oversight of these funds. It is a top priority for me to ensure that ratepayer dollars supporting this program are spent in compliance with the law and sufficiently safeguarded for the purpose for which they were intended, well into the future. Accordingly, your opinion on the foregoing issues is respectfully requested.

Your attention to this matter is greatly appreciated. If you have any questions regarding this request, please do not hesitate to contact me at (512) 463-0325 in my Capitol Office.

Sincerely,

A handwritten signature in cursive script that reads "Doug Miller".

Representative Doug Miller, Chair
Edwards Aquifer Legislative Oversight Committee

Cc: The Honorable Rick Perry, Governor
The Honorable David Dewhurst, Lieutenant Governor
The Honorable Joe Straus, Speaker of the House of Representatives
The Honorable Troy Fraser, Chairman of Senate Natural Resources
The Honorable Allan Ritter, House of Representatives

Attachment

RE: Request for opinion concerning whether the Edwards Aquifer Authority (“EAA”) may provide funding to the U.S. Fish & Wildlife Service (“Service”) for the implementation of a refugia program under certain terms and conditions proposed by the Service

1. QUESTIONS PRESENTED

1. May the EAA provide funding to the Service for new additional buildings and associated works and facilities, and equipment and supplies, necessary to implement the EAA’s refugia program if such buildings, works, facilities, and equipment must be owned solely by the Service and be physically located on real property owned by the Service?
2. If so, does the EAA have the statutory authority to enter into a non-joint refugia project contract with the Service and make advance payments to the Service for the costs of the refugia program?
3. Are the EAA-funded refugia facilities to be owned and operated by the Service to be considered “district facilities” for purposes of Chapter 49, Subchapter I, such that the proposed refugia contract must meet the requirements of the subchapter, or may the EAA waive such requirements in the face of Service objections?

2. BACKGROUND FACTS

2.1 Edwards Aquifer Recovery Implementation Program

From 2006 through 2011, the EAA, along with many other stakeholders, worked to cooperatively develop a “recovery implementation program” for the benefit of the federally-listed threatened and endangered species² associated with the Edwards Aquifer (“Aquifer”).³ This program came to be known as the “Edwards Aquifer Recovery Implementation Program” (“EARIP”).

The EAA, the Service, the Texas Commission on Environmental Quality, the Texas Parks and Wildlife Department, the Texas Department of Agriculture, the Texas Water Development Board and other stakeholders were required to prepare a “program document,” which could be in the form of a “habitat conservation plan” (“HCP”)⁴ to support the issuance of

² These species are known as the “Covered Species.” For a list of the eleven Covered Species associated with the Aquifer, *see* Edwards Aquifer Habitat Conservation Plan at 1-10, Table 1-3 (Nov. 2012). This list also includes three “petitioned” species which have not yet been officially declared to be either threatened or endangered. A copy of the EAHCP is available from the EAHCP’s website at <http://www.eahcp.org/files/uploads/Final%20HCP%20November%202012.pdf>.

³ *See* Act of May 28, 2007, 80th Leg., R.S., ch. 1430, § 12.06, 2007 Tex. Gen. Laws 5848, 5904-5908 (“S.B. 3”) (amending the Edwards Aquifer Authority Act, Act of May 30, 1993, 73rd Leg., R.S., ch. 626, 1993 Tex. Gen. Laws 2350, as amended, to add new Section 1.26A requiring the EAA to develop a “recovery implementation program”).

⁴ The federal Endangered Species Act of 1973 (“ESA”) is codified at 16 U.S.C.A. §§ 1531-1544 (West 2014). An HCP is a document supporting an application for an Incidental Take Permit under Section 10(a)(1)(B) of the ESA (16 U.S.C.A. § 1539(a)(1)(B)) that, among other things, contains measures that the applicant will take to minimize and mitigate to the maximum extent practicable the impacts of an otherwise lawful activity on the threatened and

an “incidental take permit” (“ITP”)⁵ by the Service to the EAA and other permittees.⁶ As finally developed by the EARIP participants, the program document included several other documents. Among these documents was an interlocal contract under Chapter 791, Texas Government Code, referred to as the “funding and management agreement” (“FMA”).⁷ The purpose of the FMA is to provide the terms and conditions for the management and funding of the implementation of the EAHCP.⁸ Another document included was an “implementing agreement” (“IA”).⁹ The purpose of the IA is to define the roles and responsibilities of those parties interested in the EAHCP to ensure a common understanding of actions to be undertaken by ITP permittees to minimize and mitigate the effects of the use and regulation of the Aquifer on the threatened and endangered species associated with the Aquifer.¹⁰

In January 2012, the EAA, in conjunction with 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, and Texas State University (the “Other Permittees”), filed a joint application for an ITP with the Service. The application included the HCP, the FMA and the IA. After the ITP application was filed, the work of the EARIP participants was essentially complete and the EARIP began to wind down its activities and was replaced by the EAHCP administered by the EAA.

endangered species that may be affected by the activity. *Id.* § 1539(a)(2)(A)(ii), (B)(ii)); *see also* 50 C.F.R. §§ 17.22(b)(1)(iii)(B), (b)(2)(i)(B); 17.32(b)(1)(iii)(C)(2), (b)(2)(i)(B) (2013).

⁵ An ITP issued under Section 10(a)(1)(B) of the ESA (16 U.S.C.A. § 1539(a)(1)(B)) acts as an exception to “take” liability under Section 9(a)(1)(B) of the ESA (16 U.S.C.A. § 1538(a)(1)(B)) by authorizing activities that may result in the “take” of protected species if the “taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.” *Id.* § 1539(a)(1)(B). For example, the withdrawal of groundwater from the Aquifer by well owners, and the regulation of such withdrawals by the EAA, are lawful activities under Texas law. *See generally* Edwards Aquifer Authority Act, Act of May 30, 1993, 73rd Leg., R.S., ch. 626, 1993 Tex. Gen. Laws 2350, as amended (“EAA Act”), §§ 1.08; 1.14-1.20. The EAA Act is uncodified. The EAA Act, with all amendments incorporated therein, is available from the EAA’s website at <http://edwardsaquifer.org/legislation-and-rules/the-aaa-act>.

⁶ *Id.* § 1.26A(b), (c), and (d).

⁷ *See* 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, and Texas State University – San Marcos to fund and manage the Habitat Conservation Plan for the Edwards Aquifer Recovery Implementation Program (eff. Jan. 1, 2012). A copy of the FMA is available from the EAHCP’s website at [http://www.eahcp.org/files/uploads/Funding_and_Management_Agreement_\(Appendix_R\).pdf](http://www.eahcp.org/files/uploads/Funding_and_Management_Agreement_(Appendix_R).pdf).

⁸ *Id.*, Recital B at 2.

⁹ *See* 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 (eff. Mar. 4, 2013). A copy of the IA is available from the EAHCP’s website at http://www.eahcp.org/files/admin-records/NEPA-and-HCP/Imp_Agr_Doc_with_TCEQ_sig.pdf.

¹⁰ *Id.* at 1.

2.2 Edwards Aquifer Habitat Conservation Plan Program

In February 2013, the Service approved the application and issued ITP TE63663A-O to the EAA and the Other Permittees to be effective March 2013.¹¹ By issuing the ITP, the Service also approved the HCP, the FMA, and the IA, and the approved HCP has come to be known as the Edwards Aquifer Habitat Conservation Plan Program (“EAHCP”).¹² Since issuance, the EAA and the Other Permittees have been implementing the EAHCP, however, the EAA is responsible for the general management and oversight of the EAHCP, including the establishment of the refugia program, subject to the duties and responsibilities held solely or jointly by the Other Permittees.¹³

The approved EAHCP includes “minimization and mitigation measures” (known as “Conservation Measures”)¹⁴ that “are designed to ensure that incidental take resulting from the Covered Activities will be minimized and mitigated to the maximum extent practicable and will not appreciably reduce the likelihood of the survival and recovery of covered species associated with the Aquifer and Comal and San Marcos Springs and Rivers ecosystems.”¹⁵

2.3 The EAA’s Refugia Program

Among the Conservation Measures to be implemented by the EAA, and most relevant to this request, is a refugia program.¹⁶ Paragraph K of the ITP provides as follows:

The EAA will support and coordinate with the USFWS (Service) on the work relating to the San Marcos Aquatic Resource Center’s operation and maintenance of a series of off-site refugia at the Service’s San Marcos, Uvalde, and Inks Dam facilities. (Section 6.4 of the HCP). The support of the refugia will augment the existing financial and physical resources of these facilities, and provide supplementary resources for appropriate research activities, as necessary, to house and protect adequate populations of Covered Species and expanded knowledge of their biology, life histories, and effective reintroduction techniques. The use of this support will be limited to the Covered Species in the EARIP HCP.

The above language is nearly identical to that set out in Section 5.1.1 of the EAHCP.

¹¹ A copy of ITP TE63663A-O is available from the EAHCP’s website at [http://www.eahcp.org/files/admin-records/NEPA-and-HCP/USFWS Permit 03-18-2013 rcvd 1030 a.m. Final.pdf](http://www.eahcp.org/files/admin-records/NEPA-and-HCP/USFWS%20Permit%2003-18-2013%20rcvd%201030%20a.m.%20Final.pdf).

¹² See *supra* note 1 for the EAHCP.

¹³ FMA § 2.2.

¹⁴ See EAHCP, ch. 5 for the complete catalog of the Conservation Measures.

¹⁵ EAHCP § 1.1.1. “Covered Activities” means those activities described in Chapter 2 of the EAHCP for which incidental take authorization of Covered Species is authorized pursuant to the ITP. Examples of Covered Activities include the withdrawal of groundwater from the Aquifer, the regulation of the Aquifer by the EAA, the management of public recreation on the Comal and San Marcos Rivers by New Braunfels and San Marcos, respectively, diving classes at Texas State University, the operation by SAWS of its Aquifer Storage and Recovery facility, and the development of a “state scientific area” by the Texas Parks and Wildlife Department.

¹⁶ EAHCP § 5.1.1.

As used in the EAHCP, a refugium means an off-site facility designed and dedicated to the care, housing, and maintenance of individuals or populations of Covered Species in an artificial habitat to protect them from and to avoid the negative effects of drought disturbance, disease outbreaks, and water quality impairment in the Comal and San Marcos Springs and Rivers ecosystems.

The primary purpose of the EAHCP refugia program is to provide a location where viable source populations of Covered Species can survive these disturbances, and be reintroduced and repopulate in the Comal and San Marcos Springs and Rivers ecosystems following a disturbance in non-refugia areas.

To accomplish this, three categories of population stocks of Covered Species will be collected and managed at the refugia: (1) “standing stocks” will always be in the refugia as backup in the event an emergency occurs in the Comal and/or San Marcos Springs and Rivers ecosystems; (2) “refugium stocks” will be collected when conditions in the wild for breeding are poor and held in the refugia for breeding and possible later reintroduction of offspring back into the wild; and (3) “salvage stocks” will be collected to prevent death when conditions in the wild have deteriorated and they will be held in the refugia for possible later reintroduction when conditions in the wild improve.

In addition, it is planned that research will be conducted at the refugia that would be directed at husbandry, propagation, and reintroduction of Covered Species maintained at the refugia.

The proposed locations for the three refugia facilities under the EAHCP are the San Marcos Aquatic Resource Center (“SMARC”) near San Marcos, Texas, the Inks Dam National Fish Hatchery (“Inks Dam”) near Burnet, Texas, and the Uvalde National Fish Hatchery (“Uvalde”) near Uvalde, Texas. These three facilities are owned and operated by the Service.

2.4 Terms and Conditions Proposed by the Service for the Refugia Contract

Neither the EAA nor the Service currently has the facilities or staff to implement the ITP- and EAHCP-mandated refugia program. Nonetheless, Paragraph K of the ITP and Section 5.1.1 of the EAHCP require the EAA to support, coordinate with, and provide funding to the Service for the refugia program. This will necessarily be accomplished under a contract between the EAA and the Service.

The cost to construct, operate, maintain, and staff refugia at the SMARC, Inks Dam, and Uvalde facilities is estimated to be \$25,178,955 over the fifteen (15)-year term of the ITP.¹⁷ The approximate cost to construct new buildings and associated works, facilities, equipment, and

¹⁷ EAHCP Table 7.1. The ITP became effective on March 18, 2013, and expires on March 21, 2028. ITP at 1. Since the ITP is in year two (2) of its term, and the refugia program is not yet under implementation, the estimated total implementation costs for the refugia would need to be downwardly adjusted by the amounts in Table 7.1 for each calendar year during the ITP that the refugia program has not been implemented.

utilities is estimated to be \$10,854,000. The estimate for staff support and services is \$14,324,955.

Conceptually, the Service proposes a management contract that would contain the terms and conditions under which it would be willing to contract with the EAA to implement the refugia program.¹⁸ This contract would encompass the construction of the additional buildings and associated works and facilities by the Service, the acquisition of necessary equipment and supplies, and staffing as necessary to provide the Service with sufficient capacity to perform the refugia services. The Service has indicated that deviations from the proposed terms and conditions will not be accepted. Because the Service does not currently have the necessary capacity to provide refugia services to the EAA, the Service has indicated that its offer is conditioned upon the EAA providing full funding in advance of the Service performing any refugia-related activities. Additionally, the Service advises that until the necessary capacity is in place, the Service is unable to and will not provide any refugia services to the EAA, including even reduced level refugia activities pending the construction of the necessary facilities.

Relative to the additional buildings, works, facilities, equipment, and supplies, the Service has indicated that they must be owned by the Service and located on federally-owned land, with no ownership, title or interest of any kind in the EAA. Nor does the Service propose any reversionary interest in the EAA after the expiration of the ITP term in March 2028. Thus, the Service would continue to own all of the improvements funded by the EAA even though the improvements on federal land may continue to have a useful life that will not accrue to the benefit of the EAA. Control over the design, construction and equipment plans and specifications, cost schedules, procurement, construction, and construction management and oversight, and operation and maintenance would be vested exclusively in the Service.

Relative to the additional staff, they would be employees of the Service. Control over these employees would be with the Service.

Regarding providing refugia-related professional services (as opposed to construction activities), the Service proposes a contract in the form of a "reimbursable agreement" in which the Service would provide staffing and services and other products. The agreement would provide for: (1) a scope of work; (2) the cost of the work; (3) a transfer of funds from the EAA to the Service in advance of the Service performing any work; (4) annual work plans to include the specific work to be done in a particular calendar year and the cost of such services; and (5) after performance of the services, the Service would bill against the advanced funds provided by the EAA with a detailed documented accounting of the funds spent, billed, and balances, all through a federal accounting system.

In short, the Service proposes for the EAA to engage and fund the Service to perform all refugia-related construction and services as long as the EAA provides full funding in advance. The Service has indicated that as long as the EAA provides the agreed-to funding, it will

¹⁸ See Letter from L. Stewart Jacks, Assistant Regional Director, Fish and Aquatic Conservation, Service to Roland Ruiz, General Manager, EAA (July 16, 2014) (on file with the EAA).

consider the EAA to be in full compliance with Paragraph K of the ITP, and the EAA will have met its legal duty to implement a refugia program under Section 5.1.1 of the EAHCP.¹⁹

2.5 Funding of the EAHCP

The ITP was issued subject to “full and complete compliance with, and implementation of, the EARIP HCP and all specific conditions contained herein.”²⁰ The IA provides that: “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.”²¹ The EAHCP provides that:

To issue the ITP, USFWS must find that the Applicants ‘will ensure that adequate funding for the [HCP] will be provided.’ (16 U.S.C. § 1539(a)(2)(B)(iii)). To satisfy this requirement, the costs of implementing the HCP are set out below [in chapter 7 of the EAHCP] along with the assurance that funding will be available to implement the HCP. Specifics regarding the funding arrangements for the HCP are found in Articles Three and Five of the FMA, (Appendix R) and that are generally described briefly in Sections 7.1.1 and 9.1.1 below.²²

Under the FMA, the EAA, beginning January 1, 2013, has the obligation to fully fund the implementation costs of the EAHCP.²³ The FMA provides that the implementation costs for the EAHCP will be funded primarily through “program aquifer management fees” (“PAMFs”) assessed by the EAA against holders of EAA-issued groundwater withdrawal permits.²⁴ The EAA is authorized to assess its regular aquifer management fees (“AMFs”) to finance the administrative expenses and programs of the EAA authorized under the EAA Act.²⁵ A PAMF is a category of AMF collected by the EAA under Section 1.29 of the EAA Act to fund the costs of the implementation of the EAHCP.²⁶ The EAHCP is one of the expenses and programs under the EAA Act and, therefore, the EAA may assess AMFs to fund this program.²⁷ The EAA must

¹⁹ Letter from Adam Zerrenner, Field Office Supervisor, Austin Ecological Services Field Office, Service, to Nathan Pence, Program Manager, EAA (Nov. 14, 2013) (on file with the EAA). Essentially, this acknowledgment shifts the burden of actual day-to-day compliance for the operation of the refugia from the EAA to the Service in exchange for the EAA’s commitment to fund the refugia program.

²⁰ ITP ¶ E.

²¹ IA § 10.0.

²² EAHCP § 7.0. *See also* 50 C.F.R §§ 17.22(b)(1)(iii)(B), (b)(2)(i)(C); 17.32(b)(1)(iii)(C)(2), (b)(2)(i)(C) (2013).

²³ FMA §§ 3.2, 5.2.1; and EAHCP § 7.1.2.

²⁴ FMA §§ 5.1, 5.2.2; and EAHCP § 7.1.2. Contributions are also anticipated from other governmental, corporate, and associational entities. FMA §§ 5.1, 5.3, 5.5.2; and EAHCP § 7.1.2.

²⁵ *See* EAA Act § 1.29(b).

²⁶ *See* FMA § 1.1.41; and *see also* EDWARDS AQUIFER AUTHORITY RULES § 709.18(a)(2) (2013). A copy of the EAA’s rules are available from the EAA’s website at <http://edwardsaquifer.org/legislation-and-rules/rules-and-regulations>.

²⁷ *See* EAA Act §§ 1.11(d)(9), 1.14(h), and 1.26A.

annually assess PAMFs at levels sufficient to fully fund the implementation of the EAHCP.²⁸ The amount of funding that is required to meet the full funding obligations is provided for in Section 5.2.1 of the FMA and Table 7.1 of the EAHCP, and includes a line item for the refugia program.²⁹

3. DISCUSSION

In order to evaluate the issues raised in this request, it is important to evaluate the legal nature of the EAA and its legal authority generally and specifically, with respect to threatened and endangered species protection, the expenditure of its funds and contracting.

3.1 Legal Nature of the EAA

The EAA is a conservation and reclamation district created by the EAA Act pursuant to Article XVI, Section 59 of the Texas Constitution.³⁰ The Legislature characterizes the EAA as a “special regional management district”³¹ The EAA is also a groundwater conservation district (“GCD”) under Chapter 36 of the Texas Water Code.³² As such, the EAA is a political subdivision of the state and stands on the same footing as counties and other political subdivisions.³³

3.2 Legal Authority of the EAA in General

The legal authority of the EAA is initially found in its organic act – the EAA Act. Section 1.08(a) of the Act also provides that the EAA may look to Chapters 36,³⁴ 49,³⁵ and 51 of the

²⁸ FMA §§ 5.2.1, 5.2.2.

²⁹ FMA § 5.2.1; EAHCP § 7.1.2, and Table 7.1. The actual level of estimated funding initially required by the EAA for calendar year 2013 was \$20,416,847. *See* FMA §§ 3.2; 5.2.1; and EAHCP §§ 7.1.1, 7.1.2, and Table 7.1. Beginning in 2014, the EAA’s funding obligation may be adjusted up or down based on actual experience. FMA § 5.2.1. However, the EAA’s funding obligation for any year may never be increased beyond the level of the funding obligation for 2013, adjusted for a 2% increase, compounded annually for the years that have elapsed since 2013. *See id.* §§ 3.2, 5.2.1; and EAHCP § 7.1.2.

³⁰ EAA Act §§ 1.02(a); 1.06(b).

³¹ *Id.* § 1.01.

³² *See Edwards Aquifer Auth. v. Chem. Lime, Ltd.*, 291 S.W.3d 392, 399 at n. 37 (Tex. 2009) (finding that the EAA is a “district” as defined in Section 36.001(1), Texas Water Code); *see also In re Edwards Aquifer Auth.*, 217 S.W.3d 581, 587 (Tex. App.—San Antonio 2006, orig. proceeding).

³³ *See* TEX. CONST. art. XVI, § 59(b); *Bennett v. Brown Cnty. Water Improvement Dist. No. 1*, 272 S.W.2d 498, 500 (Tex. 1954), *accord Willacy Cnty. Water Control and Improvement Dist. No. 1 v. Abendroth*, 177 S.W.2d 936, 937 (Tex. 1944).

³⁴ Section 1.08(a) of the Act does not specifically reference Chapter 36, Texas Water Code, but, instead, refers to Chapter 52, Texas Water Code: “The authority has all of the rights, powers, privileges, authority, functions, and duties provided by the general law of this state, including Chapters 50, 51, and 52, Water Code . . .” In 1995, Chapter 52 was repealed and recodified at Chapter 36. *See* Act of May 29, 1995, 74th Leg., R.S., ch. 933, §§ 2, 6, 1995 Tex. Gen. Laws 4673, 4679, 4701. Texas courts have held that due to this recodification, Chapter 36 applies to the EAA. *See e.g., In re Edwards Aquifer Auth.*, 217 S.W. 3d at 588 (“[b]ased on the plain language of the statute, we hold that Chapter 36 of the Water Code applies to the Authority”); *see also Edwards Aquifer Auth. v. Chem. Lime, Ltd.*, 291 S.W.3d 392; and *Edwards Aquifer Auth. v. Horton*, No. 04-09-00375-CV, 2010 WL 374551 (Tex.

Texas Water Code, for additional legal authority, as well as other general laws applicable to authorities created under Article XVI, Section 59, of the Texas Constitution.³⁶

The Texas Constitution specifically provides that special districts created under Article XVI, Section 59, have only such powers and authorities as “may be conferred by law.”³⁷ Therefore, unlike home rule cities, a groundwater conservation district, such as the EAA, has only those powers expressly granted to it by the Legislature,³⁸ and those powers that are necessarily implied in order to carry out its express powers.³⁹ If a statute does not grant a power expressly, or by reasonable implication, then a GCD has no legal authority to act.⁴⁰ If a GCD exceeds its powers, such conduct is *ultra vires* and is void.⁴¹

App.—San Antonio 2010, pet. denied) (mem. op., not designated for publication) (applying certain sections of Chapter 36 to the EAA); and *see also* Tex. Att’y Gen. LO-97-012 (1997).

³⁵ Section 1.08(a) of the Act does not specifically reference Chapter 49 of the Water Code, but, instead, refers to Chapter 50 of the Water Code. Chapter 50 was repealed and recodified at Chapter 49. *See* Act of May 25, 1995, 74th Leg., R.S., ch. 715, §§ 2, 39, ch. 49, 1995 Tex. Gen. Laws 3755, 3802. Based on the same logic as discussed above, Chapter 49 also applies to the EAA. *See e.g.* Tex. Att’y Gen. Op. No. JC-0006, 2 (1999).

³⁶ EAA Act § 1.08(a).

³⁷ TEX. CONST. art. XVI, § 59(b).

³⁸ *See, e.g., Mobil Oil Corp. v. Matagorda Cnty. Drainage Dist. No. 3*, 597 S.W.2d 910, 913 (Tex. 1980) (“The distinction between the broad powers of such municipalities and the limited powers of special districts such as drainage districts has been previously recognized by this court.”); *Franklin Cnty. Water Dist. v. Majors*, 476 S.W.2d 371, 373 (Tex. Civ. App.—Texarkana 1972, writ ref’d n.r.e.) (“A water district . . . can only do that which is authorized by the statute creating it.”); and *Tri-City Fresh Water Supply Dist. No. 2 of Harris Cnty. v. Mann*, 142 S.W.2d 945, 948 (Tex. 1940) (“The powers of such districts are measured by the terms of the statutes which authorized their creation, and they can exercise no authority that has not been clearly granted by the legislature.”)

³⁹ *See* Tex. Att’y Gen. Op. No. JC-11 (1999) (citing *Tex. Roofing Co. v. Whiteside*, 385 S.W.2d 699, 701 (Tex. Civ. App.—Amarillo 1964, writ ref’d n.r.e) as standing for the proposition that political subdivisions have “only those powers expressly conferred on them by the constitution or by statute or those necessarily implied from the powers conferred”) and *Benavides Ind. Sch. Dist. v. Guerra*, 681 S.W.2d 246, 249 (Tex. App.—San Antonio 1984, writ ref’d n.r.e) (indicating that a political subdivision cannot act in a manner contrary to express or implied statutory authority or else its action is void).

⁴⁰ *See Franklin Cnty. Water Dist*, 476 S.W.2d at 373; *Benavides*, 681 S.W.2d at 249 (explaining that a political subdivision’s action is void if it is executed in a manner contrary to express or implied statutory authority). Relatively recent examples of the need for GCDs to demonstrate their express authority to support their actions include *Guitar Holding Company, L.P. v. Hudspeth County Underground Water Conservation District No. 1*, 263 S.W.3d 910, 917 (Tex. 2008) (GCD’s actions to link transfer permits to existing permits exceeded its statutory authority under Chapter 36, Texas Water Code); *South Plains Lamesa R.R., Ltd. v. High Plains Underground Water Conservation Dist. No. 1*, 52 S.W.3d 770, 779-80 (Tex. App.—Amarillo 2001, no pet.) (GCD not authorized to limit groundwater withdrawals based on tract size because Chapter 36, Texas Code, did not “clearly authorize” the regulation of groundwater withdrawals by that method); and Tex. Att’y Gen. Op. No. GA-498, 11 (2007) (EAA not authorized to issue permits comprised of “senior” and “junior” withdrawal rights, with junior rights being interrupted when the Aquifer was below a certain level, as to do so exceeded its authority under EAA Act).

⁴¹ *Houston Natural Gas Corp. v. Nueces Cnty. Water Improvement Dist. No. 1*, 157 S.W.2d 170, 171 (Tex. Civ. App.—San Antonio 1941) (holding the distribution of natural gas to be *ultra vires*).

3.3 Legal Authority of the EAA Relative to Species Protection

The EAA was created to manage and regulate withdrawals from the Aquifer.⁴² Section 1.08(a) of the EAA Act provides that the EAA has “all of the powers, rights, and privileges necessary to manage, conserve, preserve, and protect the aquifer and to increase the recharge of, and prevent the waste or pollution of water in, the aquifer.”⁴³ The EAA, however, has the additional important function of developing and implementing a program to protect the federally-listed threatened or endangered species associated with the Aquifer. In this regard, the EAA was created in 1993 in response to, and to provide a mechanism to prevent, a federal takeover of the Aquifer under the ESA.⁴⁴ Section 1.01 of the EAA Act acknowledges that a legislative policy in creating the EAA was to, among other things, “effective[ly] control . . . the [Aquifer] . . . to protect terrestrial and aquatic life . . .”⁴⁵

To provide for the EAA’s implementation of its species protection program, the Legislature provided the EAA with the following express authority:

1. The EAA may hold permits under federal law pertaining to the ESA.⁴⁶
2. The EAA is required to manage withdrawals from the Aquifer to protect aquatic and wildlife habitat, and protect species that are designated as threatened or endangered under the ESA.⁴⁷
3. The EAA is required to implement and enforce water management practices,

⁴² The portion of the Aquifer over which the EAA exercises its jurisdiction is the segment of the Aquifer within the boundaries of the EAA lying between Brackettville, Texas, in Kinney County and Kyle, Texas, in Hays County. EAA Act §§ 1.03(1); 1.08(a), (b). This segment is referred to as the Southern Segment of the Aquifer (as opposed to the Barton Springs or Northern Segments of the Aquifer, over which the EAA has no jurisdiction). The Southern Segment is also sometimes referred to as the “San Antonio Segment.”

⁴³ *Id.* § 1.08(a).

⁴⁴ See *Sierra Club v. Lujan*, No. MO-91-CA-069, 1993 WL 151353 (W.D. Tex. 1993) (opinion issued); *Sierra Club v. Babbitt*, 995 F.2d 571 (5th Cir. 1993); *Sierra Club v. City of San Antonio*, 112 F.3d 789 (5th Cir. 1997), *cert. denied*, 522 U.S. 1089 (1998). In creating the EAA, a *Burford* abstention defense became available to the State to successfully defend the Aquifer from management by the federal courts under the ESA. *Id.* Indeed, the 5th Circuit in *City of San Antonio* stated its views on the passage of the EAA Act as follows:

[T]he Edwards Aquifer Act can fairly be characterized as a comprehensive regulatory scheme. It represents a sweeping effort by the Texas Legislature to regulate the aquifer, with due regard for all competing demands for the aquifer’s water. The Act vests the . . . Authority with ‘all the powers and privileges necessary to manage, conserve, preserve, and protect the aquifer . . .’ The Authority controls withdrawals from the aquifer through a permit system. . . . The Act also specifically addresses the preservation of endangered species. Under § 1.14 of the Act the Authority must ‘protect aquatic and wildlife habitat’ and ‘protect species that are designated as threatened or endangered under applicable federal or state law.’

Id. at 794.

⁴⁵ EAA Act § 1.01.

⁴⁶ *Id.* § 1.11(d)(9). This subsection also authorizes the EAA to hold permits under state law.

⁴⁷ *Id.* § 1.14(a) (6), and (7).

procedures, and methods to ensure that, not later than December 31, 2012, the continuous minimum springflows at Comal Springs and San Marcos Springs are maintained to protect endangered and threatened species to the extent required by federal law.⁴⁸

4. In 2007, the Legislature required the EAA to cooperatively develop a “recovery implementation program” for the benefit of the federally-listed threatened and endangered species associated with the Aquifer.⁴⁹
5. The EAA is also required to adopt a final “critical period plan” in light of the recovery implementation program.⁵⁰

3.4 Extension of Public Credit or Public Funds by Political Subdivisions

As discussed above in Section 2.4, the EAHCP requires the EAA to support, coordinate with, and provide funding to the Service for the implementation of the refugia program under Section 5.1.1 of the EAHCP. This will necessitate the EAA entering into a contract with the Service for this purpose. The terms and conditions proposed by the Service are set out in Section 2.4 above and appear to implicate the prohibition against gratuitous grants of public credit and funds under Article III, Section 52(a), Texas Constitution, by political subdivisions, such as the EAA.

Article III, Section 52(a) of Article III provides as follows:

[T]he Legislature shall have no power to authorize any county, city, town, or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company. . . .

This section prohibits the state from authorizing political subdivisions to gratuitously lend their public credit or public moneys to any individual, association, or corporation. Similar prohibitions for state agencies are found at Article III, Sections 50 and 51, Texas Constitution.

As discussed above in Section 2.4, the Service is requiring that the EAA expend its public funds to construct permanent improvements to be owned by the Service on Service-owned land. The Attorney General has had multiple occasions to consider whether a state agency or a political subdivision may expend public funds to construct permanent improvements on land not owned by the state agency or political subdivision in light of the prohibition against gratuitous grants of public credit or funds. The general rule appears to be that, if certain criteria are met,

⁴⁸ *Id.* § 1.14(h). The “federal law” referred to in Section 1.14(h) is undoubtedly the ESA. *See id.* § 1.11(d)(9) (authorizing the EAA to seek permits under the ESA).

⁴⁹ *Id.* § 1.26A.

⁵⁰ *Id.* § 1.26(a).

public funds may be expended without contravening Article III, Sections 50, 51, and 52(a) if the improvements are made on land in which the funding agency holds a sufficiently long-term leasehold interest.⁵¹ The criteria that need to be satisfied to authorize such an arrangement are that: (1) the expenditure of funds is supported by statutory authority;⁵² (2) a valid public purpose will be served; (3) adequate consideration will be received by the funding agency; (4) adequate controls by the funding agency are maintained to ensure that the public purpose will be achieved; and (5) the benefit to the land owner is merely incidental to and not the primary purpose of the expenditure.⁵³

The Attorney General recognized the appropriateness of public expenditures in several circumstances not involving a lease. First, the Attorney General found that state funds may be expended to construct university-owned improvements on property owned by a trust dedicated to the support and benefit of the university.⁵⁴ Second, the Attorney General has approved the expenditure of public funds to construct permanent improvements on land owned by a university, notwithstanding the existence of reversionary interests held by the grantor.⁵⁵ Finally, county expenditures to help construct a school swimming pool on school-owned property were found to be permissible if the county has the statutory authority to do so and retains a sufficient level of joint responsibility and continued participation in the project.⁵⁶

The Service's proposed terms and conditions discussed in Section 2.4 in essence provide for a political subdivision (i.e., the EAA) to serve as a funding agency to a federal agency (i.e., the Service) to construct federally-owned buildings on federally-owned land so that the federal agency will have the capacity to perform an activity (i.e., implement a refugia program) that the political subdivision desires to have the federal agency perform on its behalf. This scenario does not appear to have been previously considered by the Attorney General.⁵⁷

⁵¹ See e.g., Tex. Att'y Gen. Op. No. LO-97-078 (1997) (state expenditures to construct airport on land leased to the state); Tex. Att'y Gen. Op. No. MW-290 (1981) (county expenditures to improve hospital leased from another district); Tex. Att'y Gen. Op. No. H-416 (1974) (state expenditures to assist in the construction of a city airport on school-owned property leased to a city); Tex. Att'y Gen. Op. No. H-403 (1974) (state expenditures to construct state livestock export station on privately-owned property leased to the state); and Tex. Att'y Gen. Op. No. H-257 (1974) (state expenditures to construct state recreational facilities on federally-owned property leased to the state). Similarly, public expenditures to acquire and rehabilitate a privately-owned building with the intent to lease the building back to the previous owner have been found not to violate the constitutional limitation on gratuitous grants of public funds. Tex. Att'y Gen. Op. No. H-445 (1974).

⁵² See e.g. Tex. Att'y Gen. Op. No. JM-65 (1983) (noting that "a primary issue is whether the county has authority to perform the specific service [for which it is seeking to contract]. Without that authority, an expenditure by the county constitutes a donation of county's funds in violation of the constitution."); Tex. Att'y Gen. Op. No. MW-532 (1982) (state expenditures to private landowners to reforest their privately-owned lands without statutory authority violates Article III, Section 51); and Tex. Att'y Gen. Op. No. MW-329 (1981) (county expenditures to non-profit corporation to construct building for job skill training without statutory authority violates Article III, Section 52).

⁵³ See *supra* notes 50 and 51.

⁵⁴ Tex. Att'y Gen. Op. JM-551 (1986).

⁵⁵ Tex. Att'y Gen. Op. MW-514 (1982); and Tex. Att'y Gen. Op. No. H-655 (1975).

⁵⁶ Tex. Att'y Gen. Op. No. H-413 (1974).

⁵⁷ See *supra* notes 50 and 51 and the authorities discussed therein.

As discussed below in Section 3.5, the EAA has the statutory authority to implement a refugia program and to engage the Service to assist in this program and such an expenditure would have the valid public purpose of protecting the Covered Species associated with the Aquifer. However, it is not clear, based on prior Attorney General opinions, especially because the title to the buildings, works, facilities, and equipment necessary to implement the EAA's refugia program would be solely in the Service, and these improvements and equipment would be required to be physically located on Service-owned land, whether the EAA would receive adequate consideration, whether the EAA would be able to maintain adequate control to ensure that the public purpose was being achieved, or whether the benefit to the federal government would be merely incidental. Accordingly, guidance is sought from the Attorney General on whether the EAA may provide funding to the Service under the terms and conditions proposed by the Service, or whether such funding would contravene the gratuitous grant prohibition of Article III, Section 52(a).

Additional guidance is sought on whether certain contractual provisions would be legally adequate for the EAA to ensure that: (1) adequate consideration will be received by the EAA for the funding of improvements and equipment to be owned by the Service on Service-owned land; (2) adequate control will be maintained by the EAA to ensure that the EAA's public purpose will be achieved; and (3) any benefit to the federal government will be only "incidental." Specifically, guidance is sought from the Attorney General on whether a contractual requirement that the Service use the EAA-funded improvements and equipment solely to implement the EAA's refugia program for the benefit of the Covered Species and/or the shifting of operational compliance to the Service⁵⁸ would be sufficient to satisfy the adequate consideration requirement, notwithstanding the fact that the EAA has no ownership, leasehold, or reversionary interest of any kind in such improvements and equipment. As for the control requirement, the Attorney General's guidance is sought on whether the right to inspect, monitor, and audit the refugia facilities and activities would be a sufficient control to ensure that the public purpose of the EAA's funding was being achieved. This issue is of particular importance in light of the fact that the EAA will have no ownership, leasehold, or reversionary interest of any kind in the improvements and equipment, and the staffing of the facilities will be solely by federal employees not subject to EAA control. Finally, in light of the federal ownership of all land, improvements, and equipment, and the federal staffing of the refugia, coupled with the duty of the EAA to solely and fully fund the refugia program, the Attorney General's guidance is sought on whether a contractual requirement that the Service use the EAA-funded improvements and equipment solely to implement the EAA's refugia program for the benefit of the Covered Species would be sufficient to ensure that the EAA's funding under these circumstances will result in only an "incidental" benefit to the Service, and avoid a result that the primary purpose of the funding is to benefit the Service.⁵⁹

⁵⁸ See *supra* note 18.

⁵⁹ It would also seem that in order for the EAA to protect its investment in the refugia facilities, the provision to use the improvements funded by the EAA solely for the purpose of the EAAHCP's refugia program would need to be accompanied by appropriate default provisions in the event the Service does not or is not able to use the facilities solely for this purpose, including, for example, a reversionary interest in the EAA, with other remedies such as a right of access and the ability to assume control of the facility. It should be noted that the term of the refugia contract would be for the unexpired term of the ITP. Such term may be less than the useful life of any improvements and equipment funded by the EAA. Moreover, there is always a possibility that the federal government could defund or otherwise close the SMARC, Inks Dam, and/or Uvalde facilities. It is not understood by the EAA that the Service

3.5 Statutory Authority Relative to Advance Payments and Non-Joint Projects

As discussed above in Section 2.4, the Service is requiring that the EAA provide refugia funding to the Service before the Service constructs any improvements, acquires any equipment or supplies, or performs any refugia-related services. Guidance is sought on whether any constitutional or statutory provisions prohibit such advance payments and whether the EAA has the statutory authority to enter into a non-joint refugia project with the Service.

The Attorney General has had occasion to consider whether a state agency or political subdivision may make such “advance payments,” in light of the prohibition against gratuitous grants of public credit or money. As discussed below, the general rule appears to be that, if certain criteria are met, advance payments of public funds may be made by a political subdivision without violating Article III, Section 52(a).

The Texas Attorney General has opined that the constitutional prohibitions against gratuitous grants are not intended to prevent the direct accomplishment of a legitimate public purpose by the mere fact that a private entity may be otherwise benefited.⁶⁰ Indeed, the Attorney General has indicated that he “has issued a number of opinions approving the advance payment of public funds to private parties for the achievement of a public purpose.”⁶¹

Similar to the discussion above in Section 3.4 relative to the construction of improvements, the Attorney General has stated that the fundamental principles relative to Sections 50, 51, and 52, of Article III regarding gratuitous grants are that “the constitutional provisions are not violated when public funds are expended for the achievement of a public purpose, when the public receives adequate consideration in return, and when the governmental body retains control over the use of the funds to ensure that the public purpose is achieved.”⁶² The Attorney General has also opined that whether a particular expenditure of public funds meets constitutional muster “is left, in the first instance, within the sound discretion of the governing body that proposes to pay public funds to a private entity.”⁶³

As for arrangements between two governmental entities, the First Court of Appeals in *State ex rel. Grimes County Taxpayers Association v. Texas Municipal Power Agency* has stated as follows:

Many cases could be cited which involve an arrangement between two governmental entities in which one rendered agreed services to the other in exchange for money paid at a different time than when

will agree to any reversionary interest or other appropriate default remedies in the EAA after the expiration or termination of the ITP, or in the event of closure or defunding of the refugia sites. Although the ITP is renewable (see ITP Block 4), the nature of such renewal cannot be entirely known at this time. See 50 C.F.R. § 13.22 (2013).

⁶⁰ See e.g. Tex. Att’y Gen. Op. No. JM-1030 (1989).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

services were rendered . . . Two requirements must be met in such a transaction. (1) The purpose for which the obligation or payment or transfer was made must be within the power of the entity incurring the obligation or making the payment or transfer of funds [citations omitted]. (2) The political entity that receives the funds has to be obligated (by statute or contract) to use the funds for the public purpose.⁶⁴

In *Grimes*, the court held that early payments by four cities to the Texas Municipal Power Agency were neither lacking in consideration, nor were they grants, donations, or gratuities, but instead “were payments made for services rendered and *to be rendered*.”⁶⁵ As a result, these payments, despite being prepayments, were not in violation of Section 52 of Article III of the Texas Constitution. The Attorney General, relying on *Grimes*, has stated that Section 50 or Article III “does not prohibit advance payment by one governmental entity for services which another governmental entity is obligated to render in the future.”⁶⁶

While the Attorney General has appeared to generally approve of advance payments if certain criteria are met, guidance from the Attorney General is sought as to whether the EAA may legally provide advance funding to the Service for both construction, equipment and supplies, and services under the terms and conditions proposed by the Service without contravening the gratuitous grant prohibition of Article III, Section 52(a).

Assuming that advance payments are permissible under Article III, Section 52(a), Texas Constitution as discussed above, it is necessary to determine whether the EAA has statutory authority to enter into the contract proposed by the Service.

Section 1.11(d)(2) of the EAA Act⁶⁷ generally authorizes the EAA to enter into contracts. This section does not prescribe any limitations or qualifiers. This would seem to indicate that the EAA has broad authority to enter into contracts necessary to implement its responsibilities under the Act, including to contract for services, research, construction, ownership, operation, and maintenance of the refugia program.

Sections 49.213(b) and Section 49.213(c)(5) and (7), Texas Water Code, similarly appear to provide broad contracting authority to the EAA respectively as follows:

A district may enter into contracts with any person or any public or private entity in the performance of any purpose or function permitted by a district.⁶⁸

⁶⁴ *State ex rel. Grimes Cnty. Taxpayers Ass'n v. Texas Muni. Power Agency*, 565 S.W.2d 258, 265 (Tex. App. — Houston [1st Dist.] 1978, no writ) (internal citations omitted).

⁶⁵ *Id* at 265 (emphasis added).

⁶⁶ See Tex. Atty. Gen. Op. No. MW-55 (1979).

⁶⁷ EAA Act § 1.11(d)(2). The Act also specifically authorizes the EAA to contract for services to conduct research. *Id.* § 1.27(d).

⁶⁸ TEX. WATER CODE ANN. § 49.213(b) (West 2008).

A district may enter into contracts . . . with persons[,] or any public or private entities[,] on the terms and conditions the board may consider desirable, fair, and advantageous for: . . .

(5) the maintenance and operation of any works, improvements, facilities, plants, equipment, and appliances of the district or of another person or public or private entity;⁶⁹ . . .

(7) the exercise of any other rights, powers, and duties granted to a district.⁷⁰

As discussed in Sections 1.1, 1.2, 1.3 and 3.3, the refugia program is necessary to accomplish a purpose for which the EAA was created – the protection of the Covered Species associated with the Aquifer, and would be for a purpose or function permitted by the EAA, as well as the exercise of a right, power, and duty granted to the EAA. Similar to Section 1.11(d)(2) of the EAA Act, these sections do not prescribe any limitations or qualifiers on the contracting authority of a district. Indeed, Section 49.213(c) provides that districts may contract on the terms and conditions the district’s board may consider desirable, fair, and advantageous. Therefore, Sections 49.213(b) and Section 49.213(c)(7) would appear to support the proposition that the EAA may broadly contract with the Service for services, research, construction, ownership, and operation, and maintenance of the refugia program on the terms and conditions the EAA’s Board of Directors (“Board”) may consider desirable, fair, and advantageous, including non-joint projects and the making of advance payments.

Supporting this broad contracting authority is Section 49.211(b), Texas Water Code, which gives districts broad authority to own, construct, operate, and maintain facilities necessary to accomplish its purposes as follows:

A district is authorized to purchase, construct, acquire, own, operate, maintain, repair, improve, or extend inside and outside its boundaries any and all land, works, improvements, facilities, plants, equipment, and appliances necessary to accomplish the purposes of its creation or the purposes authorized by this code or any other law.⁷¹

Relative to services contract, Section 49.067(b), Texas Water Code, likewise appears to provide districts broad authority to set the terms and conditions for services contracts, including the terms for payment, as follows:

⁶⁹ Note that Section 49.213(c)(5) authorizes a district to enter into a contract for the maintenance and operation of works and improvements owned by another person or entity, whether public or private. Although this subsection does not so expressly provide, it can be observed here that for facilities owned by another entity, the operation and maintenance would have to benefit the district by relating to a right, power, duty, function, or purpose that the district is authorized by law to perform.

⁷⁰ *Id.* § 49.213(c)(5), (7) (West 2008).

⁷¹ *Id.* § 49.211(b) (West 2008).

Notwithstanding any other law, a contract for technical, scientific, legal, fiscal, or other professional services must be approved by the board unless specifically delegated by board action. The terms and conditions of such a contract, including the terms for payment, are subject to the decision of the board unless specifically delegated by board action. The board through such action cannot abrogate its fiscal responsibility.⁷²

Therefore, based on the sections of the EAA Act and Chapter 49 discussed above, the EAA would appear to have broad authority to contract with the Service to construct, own, operate, and maintain all land, facilities, and equipment, as well as for services and research necessary to implement the refugia program, and the determination of the terms of payments under the proposed refugia contract would rest generally with the EAA's Board, and that the project may be non-joint and the payments under the refugia contract may be made in advance of the Service performing the services. However, these sections, because of their breadth, offer no guidance on those terms and conditions that would be necessary for the contract to contain in order to satisfy the requirements of Article III, Section 52(b) of the Texas Constitution. Additionally, clarification is needed with respect to these broad grants of contracting authority in light of other sections in Chapter 49 which appear to provide for a more limited contracting authority under certain circumstances that are relevant to the Services's proposed terms and conditions for the refugia contract.

Several provisions of Chapter 49 of the Texas Water Code specifically authorize districts, including the EAA, to contract for *joint* projects. Section 49.213(a) addresses joint contracting projects as follows:

A district may contract with a person or any public or private entity for the joint (constructing, financing, ownership, and operation of any works, improvements, facilities, plants, equipment, and appliances necessary to accomplish any purpose or function permitted by a district, or a district may purchase an interest in any project used for any purpose or function permitted by a district.⁷³

Section 49.227, Texas Water Code, further provides:

A district or water supply corporation may act jointly with any other person or entity, private or public, whether within the State of Texas or the United States, in the performance of any of the powers and duties permitted by this code or any other laws.⁷⁴

As discussed above, the refugia program is necessary for the EAA to protect the Covered Species associated with the Aquifer. Therefore, under Sections 49.213(a) and 49.227, the EAA may

⁷² *Id.* § 49.067(b) (West 2008).

⁷³ *Id.* § 49.213(a) (West 2008).

⁷⁴ *Id.* § 49.227 (West 2008).

contract with the Service for the *joint* construction, financing, ownership, and operation of the refugia program. However, these sections, standing alone, are silent as to whether the EAA is authorized to contract with the Service for the refugia project unless and only if the project is, in fact, *jointly* constructed, financed, owned, and operated. The Services's proposed terms and conditions proposed do not appear to meet these criteria because the financing for the refugia is solely by the EAA, and the EAA has no ownership interest, nor any other role in the refugia construction or operation.

Accordingly, the Attorney General's guidance is sought as to whether the EAA has the statutory authority to enter into a refugia contract with the Service in which the construction, financing, ownership, and operations will not be joint in that the EAA will be providing all of the funding to the Service, the EAA will have no ownership interest in the improvements funded by the EAA, and the EAA will have no participation in the construction or operations of the refugia, although the refugia will be for a permissible purpose and function of the EAA.

Furthermore, guidance is also sought from the Attorney General as to whether Section 49.276 applies to the EAA and prohibits the EAA from making advance payments to the Service for the construction of the additional improvements necessary for the Service to perform the refugia services, and, if not, whether the EAA otherwise has the statutory authority to make advance payments. Section 49.276(a) provides that "district[s] shall pay the contract price of construction contracts *only* as provided in [Section 49.276]."⁷⁵ Subsection (b) requires that districts "make progress payments under construction contracts monthly as the work proceeds, or at more frequent intervals as determined by the board or its designee, on estimates approved by the board or its designee."⁷⁶ Subsection (d) provides for retainages and that districts are not obligated to pay interest on amounts retained except as so provided.⁷⁷ In light of Section 49.213(c)'s apparent broad grant of discretion to district boards in structuring their contracts "on the terms and conditions the board may consider desirable, fair, and advantageous," may the EAA deem advance payment to the Service to be "desirable, fair, and advantageous" and, therefore, within the authority of the EAA to make advance payments?

Finally, based on the above discussion, while the EAA may have general authority to contract with the Service for services related to the refugia program, the issue remains whether the EAA may make advance payments for such *services* (as opposed to construction) as required by the Service. None of the sections discussed above authorizing the EAA to contract with the Service relative to the EAA's refugia program specifically authorize the EAA to make advance payments for services.

Section 49.067(b), Texas Water Code, notes that the terms and conditions of service contracts, including the terms of payment, are generally subject to the discretion of a district.⁷⁸ However, this section seems to be nothing more than a restatement of the basic principle that the

⁷⁵ *Id.* § 49.276(a) (West 2008).

⁷⁶ *Id.* § 49.276(b).

⁷⁷ *Id.* § 49.276(d).

⁷⁸ *Id.* § 49.067(b).

governing body of a district has primary jurisdiction over contracting, and that such authority may be delegated within limits. Therefore, this section does not seem to amount to an authorization for the EAA Board to approve advance payment contracts for services.

Section 49.213(c), Texas Water Code, authorizes a board to enter into service contracts with persons or other entities “on the terms and conditions the board may consider *desirable, fair, and advantageous.*” Thus, it appears that as long as a contractual term or condition is considered by the EAA Board to be “desirable, fair, or advantageous,” then it would be in the discretion of the Board to approve its inclusion as a term or condition of a contract. Accordingly, guidance is sought from the Attorney General on whether the EAA has statutory authority under Section 49.213(c) to find that the advance payment to the Service for refugia-related services is permissible as being “desirable, fair, and advantageous” and may be incorporated into the refugia contract.

3.6 Applicability of Chapter 49, Subchapter I

Another issue relative to the construction of the refugia facilities for which the Attorney General’s guidance is sought is whether Subchapter I of Chapter 49, Texas Water Code,⁷⁹ applies to the proposed refugia contract and thus, would require that the refugia contract comply with the procurement requirements in that subchapter. Section 49.271(a) provides that “[a]ny contract made by the board for *construction work* shall conform to the provisions of [chapter 49].”⁸⁰ This section appears to place no qualifiers on the nature of the construction contract to which Subchapter I might apply. Similarly, Section 49.276(a) provides that the “district shall pay the contract price of construction contracts only as provided in this section.”⁸¹ On the other hand, Section 49.273(a) provides that “board[s] shall contract for construction . . . of *district facilities* and for the purchase of equipment, materials, machinery, and all things that constitute or will constitute the plant, works, facilities, or improvements *of the district* in accordance with [Section 49.273, Texas Water Code.]”⁸² It is not clear whether Subchapter I of Chapter 49 applies to the construction contemplated by the refugia contract: (1) as the EAA will not own any of the improvements for which the EAA is proposed to provide all of the funding; (2) the Service is proposed to be solely responsible for the design, construction and equipment plans and specifications, cost schedules, procurement, construction, and construction management and oversight, and operation and maintenance; and (3) the contract will not be a traditional construction contract in which the EAA will be contracting to construct facilities that it will own, but instead will be funding the construction of facilities to be owned exclusively by the federal government, notwithstanding the fact that the contract may contain a provision requiring the Service to use the facilities solely for the benefit of the EAA’s refugia program. Guidance is sought as to whether the EAA-funded refugia facilities to be owned and operated by the Service are to be considered “district facilities” for purposes of Chapter 49, Subchapter I, such that the proposed refugia contract must meet the requirements of the subchapter, or whether the EAA may waive such requirements in the face of Service objections.

⁷⁹ *Id.* §§ 49.271- .279 (West 2008 & Supp. 2014).

⁸⁰ *Id.* § 49.271(a) (West 2008), (West Supp. 2014).

⁸¹ *Id.* § 49.276(a) (West 2008).

⁸² *Id.* § 49.273(a) (West Supp. 2014).

4. CONCLUSION

An Attorney General opinion on the legal issues raised herein concerning whether the EAA may provide funding to the Service for the implementation of a refugia program under certain terms and conditions proposed by the Service is necessary and in the public's interest and is respectfully requested.