

# Technical Memorandum

**To:** Nathan Pence, Executive Manager of Environmental Science  
(Guadalupe-Blanco River Authority)

**From:** Velma Danielson, Project Director (Blanton & Associates, Inc.)  
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**Date:** August 1, 2022

**Re:** Second Party Take: Options for Coverage and Next Steps for Initiating the Stakeholder Involvement Process

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## INTRODUCTION

Guadalupe-Blanco River Authority (GBRA) is preparing the Guadalupe River Habitat Conservation Plan (GRHCP) to apply for incidental take coverage under Section 10 of the Endangered Species Act (ESA). Currently, the GRHCP is expected to cover as many as 12 species<sup>1</sup> for a wide range of GBRA covered activities including water supply and diversions, wastewater treatment and discharges, operation and maintenance of dam facilities, in-stream infrastructure, water management, and parks and recreation facilities<sup>2</sup>. The permit duration for the GRHCP is proposed for 50 years.

GBRA is interested in extending the benefits of the GRHCP to their customers, partners, and other river users whose actions may have current or future effects to the species from activities covered by the plan. State and local agencies holding an incidental take permit (ITP) have the option to share the take coverage in their permit with other parties. This approach, whereby an ITP holder extends its permit to other parties, is sometimes called “second party take coverage.” GBRA customers and other river users have already expressed their interest in such an option.

GBRA has been exploring options for how to incorporate second party take coverage into the GRHCP. The GRHCP Project Team held a workshop in October 2021 to discuss the potential options for second party take coverage, and in February 2022 identified a framework for the second party take stakeholder involvement. To continue exploring how GBRA could provide second party take coverage and further the second party take stakeholder involvement process, this technical memorandum describes the following:

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<sup>1</sup> See January 17, 2022 Technical Memorandum Proposed Covered Species for the Guadalupe River Habitat Conservation Plan and Incidental Take Permit for details

<sup>2</sup> See June 10, 2022 Technical Memorandum Proposed Covered Activities for the Guadalupe River Habitat Conservation Plan and Incidental Take Permit for details.

- Background on how programmatic HCPs can convey take coverage to multiple entities;
- Options available for GBRA to provide second party take coverage to eligible stakeholders;
- Next steps to initiate the process to start gathering information from potential second party take stakeholders and understanding stakeholder take coverage needs, and to formulate a plan to develop the Second Party Take Stakeholder Work Group process.

## **BACKGROUND**

To receive take coverage under Section 10 of the ESA the person or agency holding the permit (called the “permittee”) must have the legal authority to execute a project or activities in the permit area, that is, the lands proposed for coverage under an HCP, and legal control over these lands to implement the HCP. Legal control may comprise ownership of property in fee simple, an easement, a lease agreement that grants authority for the proposed project or activity, or a similar type of legal authority to conduct the proposed activities, including a contractual arrangement.

In addition to having legal authority to carry out the proposed project or activity, the permittee must also have “direct control” over any other parties who will implement any portion of the proposed activity and the HCP (50 Code of Federal Regulations (CFR) 13.25(d)). Direct control includes the following:

- Person employed by the permittee,
- Person or entity under contract to permittee,
- Applicants under regulatory authority of the permittee,
- Person or entity receiving a permit or other authorization from the HCP permittee,
- Lease holder from permittee.

In all of these cases, the mechanism of control (i.e., a contract, permit, authorization, or lease) would be used to link the terms and conditions of the HCP to the participant. For example, an existing contract, lease, or other permit from the HCP permittee would be modified to impose the relevant conditions of the HCP on the holder of the contract, lease, or other permit.

For simple, single-applicant HCPs, take coverage is received by one permittee that has direct control over all activities covered under the HCP via direct ownership, employment, or contract. That is, the ITP will cover the single permittee’s employees and its contractors. In the case of more complex HCPs like the GRHCP, multiple entities may receive take coverage under one ITP.

## **OPTIONS FOR COVERAGE**

Options for multiple entities to receive take coverage through a single incidental take permit include: (1) a co-permittee permit structure, where multiple entities are permittees on the same ITP and are jointly responsible for implementing the HCP; (2) a master permittee with direct control over entities implementing

the HCP; and (3) entities receiving take coverage from a master permittee through enrollment via agreement or contract. An important distinction between the co-permittee option and the options where take is conveyed through a master permittee, is that co-permittees must be identified prior to permit issuance (i.e., all co-permittees are named on the incidental take permit) or the permit must be amended to add co-permittees. When take is conveyed via a master permittee to second parties, this occurs when the second party enrolls in the HCP after issuance of the incidental take permit to the master permittee without any need for a permit amendment, so long as the HCP provides for a mechanism to convey take to second parties whose activities align with the covered activities included in the HCP. The options for take coverage are further discussed in the following sections.

Below, mitigation and conservation banks are also described and contrasted to second party take. Mitigation banks do not provide second parties with take coverage, but they do provide mitigation that other entities can use to offset impacts to species listed under the ESA.

### **Co-Permittees**

One way to receive take coverage under the GRHCP permit is to engage with GBRA as a co-permittee. Under a co-permittee ITP structure, multiple permittees are named on the ITP and one permit is issued to them all jointly. The HCP and ITP explain the responsibilities of each agency to implement in the HCP, including funding. Usually one permittee functions as the “lead” permittee in HCP development and implementation, or a governance structure is developed amongst the co-permittees to define roles, responsibilities, and decision-making processes and authorities. Typically, all of the permittees invest in HCP development and/or implementation. A jointly held permit can be designed to be either non-severable or severable. The non-severable co-permittee approach, in which co-permittees are jointly responsible for the success of the HCP, is most common among public agencies preparing programmatic HCPs. In this model, all co-permittees are required to implement the HCP together. If one entity withdraws from a non-severable ITP, the permit must be amended to account for the withdrawing entity. In a severable co-permittee approach, the HCP and permit are still jointly held (i.e., co-permittees holding the ITP), but the plan and permit are designed to allow one or more parties to withdraw from the program without jeopardizing the permit for the remaining entities. Severable permits have advantages in implementation, but they are more difficult to design, especially in the case of many participating entities.

In both cases (non-severable and severable permits), public agencies can pool resources, streamline regulatory compliance under the ESA, and benefit from economies of scale under a programmatic HCP with co-permittees. However, the co-permittee structure will increase the complexity of the HCP to prepare and implement with each additional co-permittee, and the co-permittees must be determined prior to permit issuance, or a permit amendment would be required to add a co-permittee. This approach therefore requires careful consideration of responsibilities between the co-permittees during HCP development.

An example of the co-permittee approach is the Edwards Aquifer Habitat Conservation Plan. Under this plan, there is one ITP that names each of the six co-permittees: Edwards Aquifer Authority, City of New Braunfels, City of San Marcos, Texas State University, and City of San Antonio/San Antonio Water

System. The Edwards Aquifer Authority is the primary implementing agency for the HCP, but each permittee has implementation responsibilities, and all are jointly responsible for the success of the HCP.

### **Existing Authorities**

Given the scope of the GRHCP and the number of potentially interested parties, it is not practical for GBRA to engage with all possible stakeholders as co-permittees. As such, GBRA may be more interested in serving as the master permittee and conveying its take coverage to second parties that are currently under its direct control through existing authorities. In this situation, USFWS allows a master permittee to extend take authorization to entities under the jurisdiction of the master permittee, and the master permit provides that those people may carry out the authorized activity.

Thus, GBRA through its jurisdiction would need to demonstrate direct control over the covered activities of second parties receiving take coverage. That is, second parties would have take coverage conveyed to them by GBRA because they are under direct control of GBRA when conducting covered activities. Typically, a local agency that administers laws governing activities covered by the HCP conveys take coverage. For example, a county government (master permit holder) enforces building codes by issuing building permits or other similar permits or authorizations. As the master permittee, GBRA would still be responsible for all aspects of GRHCP implementation, including the failure of any entity implementing the HCP under its direct control to comply with the terms of the GRHCP and permit.

There are many HCPs in Texas where a master permittee (or permittees) conveys take coverage to other entities via existing authorities, including the Balcones Canyonlands Conservation Plan (BCCP). The City of Austin and Travis County are the co-permittees under the BCCP. They convey take coverage through their existing land use authorities for a wide range of projects in unincorporated Travis County and the City of Austin, including development projects for private landowners and public infrastructure projects for the County and City. Private landowners enroll in the BCCP voluntarily through a “Participation Certificate” with the City of Austin while public utilities receive take coverage through existing authorities and issuance of permits for projects from the City of Austin. Other similar HCPs in Texas include the Comal County HCP, Hays County HCP, Williamson County HCP, Southern Edwards Plateau HCP (Bexar County), and Lost Pines HCP (Bastrop County). Because water agencies do not typically have the direct authority over third parties like cities or counties do for land use, GBRA’s authorities will need to be explored to determine if and how second-parties may be conveyed take coverage. Where GBRA does not have existing jurisdiction or authority over a second party, this option would not be feasible, and a contractual arrangement for second party enrollment would need to be used to convey take coverage.

### **Second Party Enrollment**

If a second party entity is not already under the direct control of the HCP permittee or the HCP permittee does not wish to employ solely its existing authority as a means of conveying take coverage, some form of legal mechanism (e.g., agreement or contract, certification of inclusion) defining direct control would need to be created for the second party to receive take coverage under the HCP. Such legal mechanism must ensure the second party entity’s compliance with the relevant terms and conditions of the HCP and enable the HCP permittee to enforce those terms in the event of the second party participant’s non-compliance.

Second parties seeking take coverage could enroll in the GRHCP through a participation agreement with GBRA that is created as part of the HCP process. A participation agreement can establish direct control and convey take coverage from a master permittee to a second party seeking take coverage. Participation agreements can take many forms, including a Certificate of Inclusion, Certificate of Participation, Landowner Agreement, or Cooperative Agreement.

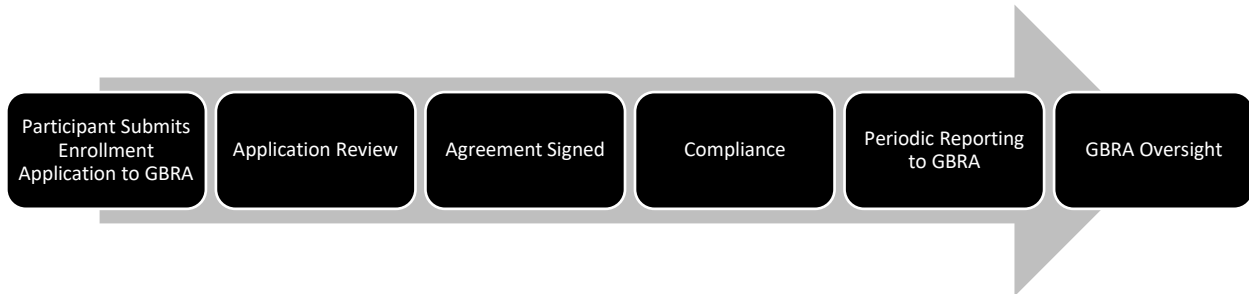
In order to enroll in the HCP, an entity's activities proposed for coverage must be 1) occurring within the permit area of the HCP, 2) consistent in substance and scope with the covered activities described in the HCP, and 3) within the take limits established by the HCP as a whole. That is, enrollment of the entity cannot cause the HCP to exceed the take coverage of the ITP or otherwise be out of compliance with the HCP or ITP.

The enrollment or participation agreement is used to establish a master permittee's direct control over second parties seeking take coverage. This process creates an enforceable contract to ensure that avoidance, minimization, mitigation, monitoring, and other essential components of HCP compliance are carried out. The general process for how second party enrollment in the GRHCP via such an agreement could work is outlined below.

- GBRA engages with potential HCP enrollees during the HCP development process to 1) understand their potential second party take coverage needs to scope the HCP appropriately and 2) gain feedback about the enrollment process the GRHCP can establish;
- The GRHCP identifies the specific process by which second parties may enroll in the HCP. For example, a participation agreement template is included as an appendix to the HCP;
- The GBRA reviews each entity's proposed covered activities for consistency with the HCP and ITP prior to or as part of establishing the participation agreement. The issuance of the participation agreement by GBRA is discretionary. That is, GBRA can choose to grant or deny a request for a participation agreement. The GRHCP would establish criteria by which GBRA would judge the merits of enrollment applications;
- The enrolled entity (i.e., entity receiving second party take coverage) provides a fee (or other resources or in-kind contribution as defined in the participation agreement) in support of mitigation for the proposed activities' impacts as described in the HCP;
- The entity, in conducting its covered activity, complies with all requirements of the HCP and ITP as specified in the participation agreement (e.g., properly implement avoidance and minimization measures as applicable);
- The enrolled entity implements its mitigation and/or monitoring measures if it has agreed to do that in lieu of participation fees;
- The GRHCP establishes reporting requirements for enrolled entities;

- GBRA is responsible for ensuring all enrolled entities are in compliance with the GRHCP and ITP. USFWS has oversight over GBRA as the master permittee, not the enrolled entities.

### General Process for Second Party Enrollment



As GBRA develops the GRHCP with a process – as illustrated in the figure above – to allow second parties to enroll for take coverage, it will be important to consider how much take coverage to allocate to second party take applications so that the GRHCP can meet the take coverage needs of stakeholders. Determining a process to estimate the need for second party take will be a primary purpose of the second party take stakeholder involvement process, described further below.

#### *Opt-In Versus Opt-Out Mechanisms*

Second party enrollment in an HCP can occur via “opt-in” or “opt-out” mechanisms. Opt-in mechanisms are most common, where parties choose voluntarily to enroll in the HCP through a participation agreement after the ITP is issued. Opt-out mechanisms work conversely. They provide blanket coverage for many parties upon ITP issuance and assume some of them will opt out of the plan. A single HCP can use both approaches; they are not mutually exclusive. **Table 1** compares these approaches and identifies some of the benefits and drawbacks of each.

**Table 1. Comparing Opt-In and Opt-Out Mechanisms for Second Party Enrollment**

Opt-In Approach	Opt-Out Approach
<b>Summary</b>	
<ul style="list-style-type: none"> <li>• Voluntary participation during implementation</li> <li>• Interested parties apply to permittee to receive second party take authorization</li> <li>• Permittee reviews and approves participation</li> <li>• USFWS typically not involved in approvals</li> <li>• If approved, participant signs agreement committing them to relevant terms of HCP</li> </ul>	<ul style="list-style-type: none"> <li>• “Blanket” coverage provided in HCP to class of participants at permit issuance</li> <li>• Those not wishing to participate can opt-out</li> </ul>
<b>Benefits</b>	
<ul style="list-style-type: none"> <li>• Clear legal connection established between permittee and participants</li> <li>• Familiar to USFWS</li> </ul>	<ul style="list-style-type: none"> <li>• Good when well-defined participants want to use HCP</li> <li>• Works well if participation is mandatory by those under clear authority of permittee</li> <li>• Can clearly define level of participation</li> </ul>
<b>Drawbacks</b>	
<ul style="list-style-type: none"> <li>• Can be difficult to predict level of participation</li> </ul>	<ul style="list-style-type: none"> <li>• Difficult to show direct control if permittee lacks clear permitting authority</li> <li>• Will not work if number of participants is unknown</li> </ul>

The opt-out approach only works if a majority of eligible parties are committed to the plan already and their participation is certain (but they do not want to be a co-permittee). In situations where it is difficult to predict who may enroll, opt-in approaches work best; these approaches are also most familiar to the Service and DOI solicitors.

### ***Minimum Requirements by USFWS***

Whichever mechanism GBRA selects to provide take authorization to second parties, the USFWS will use a common set of requirements to ensure that these second parties are truly under the direct control of GBRA as the master permittee or co-permittee. The mechanism for direct control typically must allow GBRA to<sup>3</sup>:

- Impose relevant conditions of the HCP on every second party,
- Request information from the participant on their compliance,
- Monitor the second party's compliance with those conditions,
- Allow GBRA to inspect the covered activities enrolled in the HCP, if requested,
- Allow USFWS to monitor compliance, if requested,
- Notify participants that they are not in compliance,
- Enforce and remedy non-compliance by a second party,
- If not remedied, terminate the second party take authorization for that participant, and
- Transfer second party take authorization in the event of transfer of ownership.

Some of these criteria may be negotiable with USFWS depending on the staff and Solicitor involved. The flexibility of the program will typically depend on factors such as:

- the status of the covered species and severity of threats to the species from second party activities,
- the proportion of take authorization allocated to second party activities (as compared to the permittee's own activities), and
- the perceived risk of non-compliance by second parties and the permittee's ability to enforce or correct instances of non-compliance.

### **Mitigation and Conservation Banks**

Mitigation banks are used to offset impacts to jurisdictional waters or wetlands in order to comply with the Clean Water Act, regulated by the U.S. Army Corps of Engineers. They are typically established by for-

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<sup>3</sup> 50 CFR 13.25 (d).

profit companies or investors that create wetlands to generate credits, and then sell those credits to developers in need. There are over 4,000 mitigation banks in the United States, including 67 in Texas (see [RIBITS](#)).

Conservation banks are used to offset impacts to protected species under the federal Endangered Species Act or state endangered species acts in certain states (e.g., California, Hawaii). Species offset credits are reviewed and approved by the USFWS or the National Marine Fisheries Service (NMFS).<sup>4</sup> As for mitigation banks, most conservation banks are privately owned by for-profit companies, but there are also conservation banks created by public agencies. These are typically used to create advanced mitigation credits for the agency's own use but may also be used by other public agencies or private entities. The approval process for conservation banks through USFWS or NMFS is stringent and can be lengthy (two to several years).

The important difference between second party take enrollment options and a conservation bank is that second party enrollment conveys take coverage through the ITP held by the master permittee, while a conservation bank does not. In other words, conservation banks do not permit take and cannot be used in isolation to comply with the Endangered Species Act. Conservation banks can only provide mitigation credits for other parties' separately authorized take, they do not provide the take coverage itself. That is, project proponents using a conservation bank must obtain their own take coverage, either through federal consultation (ESA Section 7) or by preparing their own HCP and obtaining their own ITP (ESA Section 10). Second parties enrolling in a programmatic HCP would receive take coverage for all enrolled activities and mitigation for the take resulting from those activities, all facilitated by the HCP.

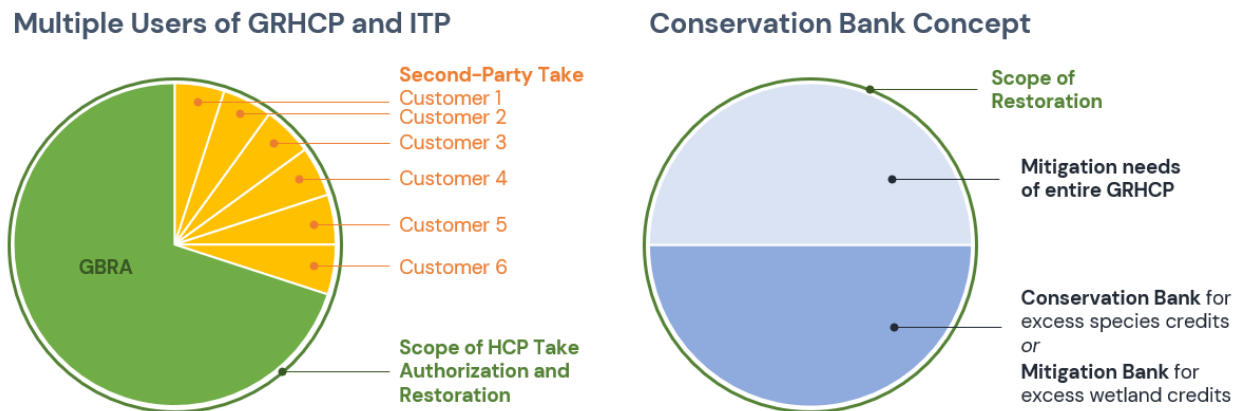
GBRA could create a conservation or mitigation bank if restoration of wetlands or covered species habitat exceeds the needs of the GRHCP and sell excess credits to outside parties. However, the conservation credits would not convey any take coverage; they could only be used for mitigation for entities obtaining their own take coverage. The figure below illustrates a comparison between the GRHCP providing second party take to multiple users and the GRHCP providing mitigation to outside parties.

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<sup>4</sup> Under the Endangered Species Act, the U.S. Fish and Wildlife Service regulates terrestrial and freshwater aquatic species, and the National Marine Fisheries Services regulates marine species and anadromous fish species.



## GRHCP Only Compared to GRHCP with Conservation Bank



### RECOMMENDED PROCESS TO INITIATE SECOND PARTY TAKE STAKEHOLDER INVOLVEMENT

The GRHCP Project Team provided a technical memorandum, *Stakeholder Identification and Framework for Stakeholder Involvement for the Guadalupe River Habitat Conservation Plan*, on January 17, 2022 that addressed the approach for identifying and engaging a Second Party Take Stakeholders Work Group so that it could assist the GRHCP Project Team in designing a second party take program that will be beneficial for GBRA, second party take customers, the GRHCP, and the covered species. The following sections build upon that approach and recommend near-term next steps to initiate the process of engaging second party take stakeholders.

#### Continue to Outreach to Second Party Take Stakeholders

**Who:** GBRA and GRHCP Project Team

**What:** Potential second party take “customers” were identified during the October 19, 2021 Second Party Take Workshop. GBRA and the GRHCP Project Team will continue outreach, especially to potential second party take stakeholders that have potential covered activities that could be dissimilar to GBRA. Additionally, the first public stakeholder meeting in Summer 2022 was an opportunity for GBRA to announce its second party take initiative.

Additional information would be provided to interested entities to learn more about their covered activities (see next step below). GBRA can also ask these interested entities if they are aware of any other potential second party take stakeholders that GBRA should contact. This may result in additions to the list of ‘likely yes’ or ‘maybe’ interested entities. The GRHCP Project Team can assist with this outreach if requested by GBRA.

**When:** Now – December 2022

## **Request Information to Screen Second Party Take Candidates**

**Who:** GBRA and GRHCP Project Team

**What:** The GRHCP Project Team, in coordination with GBRA, will develop an information request for second party take candidates to initiate screening their activities for coverage under the GRHCP. The information request will focus on characterizing potential activities needing take coverage under the GRHCP. The GRHCP Project Team will provide the information request to those entities that have confirmed their interest in second party take coverage during initial outreach (previous step). The GRHCP Project Team will then analyze the information received from potential second party take stakeholders using the covered activities screening criteria, listed below, similar to what is being used to evaluate GBRA's own covered activities.

- Does the candidate have activities occurring within the plan area?
- Does the candidate foresee activities that could result in take of proposed covered species?
- How do these activities align with the scope and type of GBRA's covered activities? Are they very similar or very different?
- Will the activities impact federally listed species not proposed for coverage?
- Will the activities present new impact mechanisms not resulting from GBRA's activities that would require additional analysis or different mitigation?

Does GBRA have an existing mechanism with the interested party, such as existing jurisdiction or permit issuing authority by which take coverage could be conveyed to the participant (i.e., other than enrollment)?

**When:** July – December 2022: Distribute and receive information requests.

## **Identify and Inform Second Party Take Stakeholders via Initial Workshop**

**Who:** GBRA and GRHCP Project Team

**What:** The GRHCP Project Team will hold an initial training with interested second party take stakeholders, based on initial outreach, to continue to inform them about the GRHCP and the concepts of second party take. Stakeholders will also have the opportunity to ask questions to help them better understand the information needed to analyze their take coverage needs in the GRHCP.

**When:** Fall 2022

## **Analyze Initial Information and Plan for Second Party Take Stakeholder Engagement Process**

**Who:** GRHCP Project Team

**What:** Using the information gained via the information requests and the initial workshop, the GRHCP Project Team will complete a plan for the Second Party Take Stakeholder Work Group process. This plan will identify the Work Group members and other potential second party take stakeholders, lay out a detailed strategy to engage second party take stakeholders to gather information, and outline an approach for how this information will be considered in the effects analysis, conservation strategy and in determining mechanisms for providing second party take coverage in the GRHCP. The plan will align with the GRHCP development schedule, and it will identify additional information requests, individual second party take stakeholder outreach, and up to five (5) additional workshops at key steps in the process. The plan will be subject to change as the second party take engagement process and GRHCP development proceeds, but its purpose is to ensure the following key inputs to the GRHCP through the second party take stakeholder involvement:

- Define activities and potential take from second party covered activities
  - What are the particular characteristics of the project needed to evaluate potential take (e.g., location, footprint, discharge amount)?
  - What are the take mechanisms of the activity?
  - Given answers to the preceding two bullets, can the activity be included in the GRHCP without substantially increasing the scope and cost of plan development or implementation (e.g., adding new covered species, adding significant complexity to the analysis, or adding significant new controversy)?
- Align GRHCP effects analysis with second party take coverage needs
  - GRHCP covered activities must encompass the substance and scope of the activities that GBRA wants to include for second party take authorization
  - Impacts must be analyzed, including types of impacts (i.e., mechanisms) resulting from all covered activities, those of GBRA and all expected second party take users
  - Covered activities must inform the take estimates
- Determine the mechanisms by which second party take authorization would be conveyed
  - Assess jurisdictional and/or contractual relationship between GBRA and second parties for possible take conveyance mechanism or facilitation of in-kind contributions or need for other contractual agreement to establish minimum requirements of direct control
  - Identify the types of entities to which take would be conveyed and the conveyance mechanisms (e.g., permit, or contract(s) to second parties)
  - Describe the process(es) by which second parties receive take authorization under the GRHCP.

The outcome of this process will be a technical memorandum that identifies second party take covered activities and details the approach for including second party take coverage in the GRHCP. This memorandum will be provided to GBRA and USFWS for review.

**When:** Complete plan and hold training/first Work Group meeting in November 2022 to March 2023

## **CONCLUSION**

GBRA is poised to initiate the second party take stakeholder process for determining the approach to second party take coverage in the GRHCP. GBRA reviewed an annotated outline on a technical memorandum describing the framework for determining second party take coverage in the GRHCP in September and October 2021. Then in October 2021, the GRHCP Project Team held a workshop to discuss the potential options for second party take coverage and to brainstorm potential second party take customers.

The *Stakeholder Identification and Framework for Stakeholder Involvement for the Guadalupe River Habitat Conservation Plan* technical memorandum further described the framework by which the Second Party Take Stakeholder Work Group would proceed as part of the stakeholder involvement process. This memorandum documents the second party take coverage options discussed in the October 2021 workshop, and then it identifies clear next steps for initiating the process to determine the second party coverage approach in the GRHCP. Initiating this process according to the timeline presented above will ensure that the process for determining second party take coverage aligns with key milestones in the GRHCP development schedule.