Alan Day

From: Nelda Calhoun <nelcalhoun@gmail.com>
Sent: Wednesday, June 16, 2021 9:58 AM
To: Alan Day
Subject: Meeting June 8 2021

Follow Up Flag: Follow up
Flag Status: Flagged

To honorable board members and manager Allen Day, I would be writing a formal letter but due to technical difficulties this will have to do. My husband and I listen to your public meeting by zoom together and was questioning why was the counties of Burleson and Miliam so interested in our future ground water speculation? Have not those counties surrendered to the selling of water rights ? Like Blue water ships the water to San Antonio? For years massive pumping has left them dry and they envy us because we are sitting on the deepest water aquifer. Do not let the Post oak savanna water district bully us. Let's be the grand water stewards of the state. We have to be for our children's future.

From: Miriam Vaughn
To: clopez@brasosvalleygcd.org
Cc: Alan Day
Subject: Proposed DFCs
Date: Tuesday, May 25, 2021 10:57:05 AM

Dear Brazos Valley Groundwater Conservation District Board President,

Thank you for volunteering for this critical position as stewards of our ground water and river ecosystem health. It is so important to the health of the environment and economic viability of our communities. I appreciate you are in a very stressful position with threats of litigation, and companies wanting to market the valuable water resources. Your challenges continue but this is your opportunity.

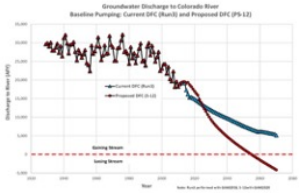
You must choose between what is good enough to get by and what is right to do. The proposed DFCs will ultimately deplete ground water and flowing streams. Please reject the proposed re-adopt the current DFC's until such time dependable sustainable solutions for aquifer management are agreed upon.

Please find the courage to adopt DFC's that will protect, long term, the environment and current landowners' water access and install monitoring wells to verify the effectiveness.

Sincerely,

mcv
Miriam Vaughn
200 Bishop St.
Smithville, TX 78957
512 237-1148

Proposed DFCs
Environmental Stewardship's Concerns and Requests



Presented to
Brazos Valley Groundwater Conservation District Board of Directors
June 10, 2021, Virtual

Environmental Stewardship
A Sustainable Ecosphere

Environmental-Stewardship.org

President Cast and board members,

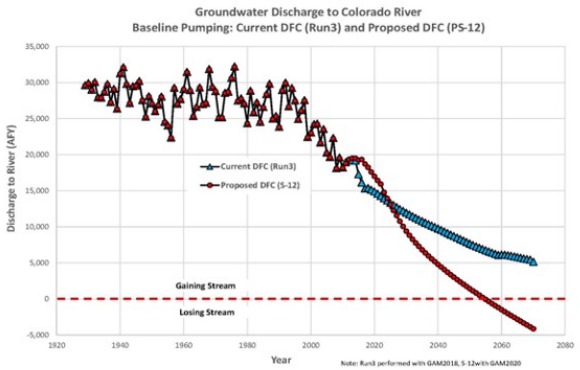
I want to thank you for allowing us the opportunity to share our concerns about the Proposed Desired Future Conditions with you today.

If it is agreeable with you, Environmental Stewardship will present its concerns first, answer your questions and then SAWDF will present its concerns and answer your question. We will be happy for board members to ask questions anytime during our presentation.

Our primary concerns relate to the predicted impacts of the new Proposed DFCs based on Run S-12 on surface waters as compared to the predicted impacts of the Currently Adopted DFCs on the Colorado River.

IMPACT OF PUMPING
ON OUTFLOWS TO MAIN STEM COLORADO RIVER

Adopted 2017 DFCs vs. Proposed DFCs:



Predicted reduction of discharge of groundwater into the mainstream Colorado River due to Current DFC Run 3 and Proposed DFCs S-12 (George Rice, New GAMs).

This graphic represents the impacts that are predicted by the new GAM. The graph shows the relationship between the pumping associated with each DFC and the impact on outflows to the Colorado River

Blue is the Currently Adopted 2017 DFCs as depicted by Run 3 using the NEW GAM.

Red is the Proposed DFCs based on Scenario S-12.

The Historical Calibration period is from 1930 to 1995

The Developmental Period is 1995-2070

Gaining Stream vs Losing Stream Redline

Comparing the two runs we see that the greater the amount of groundwater being pumped, the greater the reduction in discharge from the aquifers to the main stem of the Colorado River.

This trend toward reversing the groundwater-surface water relationship over the next 50 years is undisputed.

This is an example of how the model serves to demonstrate the difference between these two runs, in this case the two DFCs.

The key difference is that the Current DFCs **do not** cause the relationship between the river and the aquifer to reverse, whereas the S-12 Scenario **causes the river to change from a gaining to a losing stream** somewhere in the 2050-60 timeframe.

IMPACT OF PUMPING
ON OUTFLOWS TO MAIN STEM COLORADO RIVER

Discharge to Colorado River - AFY (1)				
Year	Pre-Development	Early Pumping	Current DFC	Proposed S-12
1930	29,600			
1995	27,500			
2011		18,700		
2070			5,150	-4,100
Change from 1930	-2,100	-8,800	-22,350	-31,600
	-7%	-37%	-83%	-114%

(1) Data From Rice Current vs Proposed DFC Graph

This table gives a quantitative view of the predictions from an historic perspective.

It is very clear that the early pumping -- from around 1995 to 2011 -- caused considerable impact on the river; about a **37% decline in discharge** to the Colorado River compared to 1930.

Following that early unregulated pumping time period is the Current DFC time period. This is the regulated joint-planning phase where desired future conditions are being established.

In the currently adopted DFCs column the predicted decrease in discharges to the Colorado River is whopping **83% less discharge** than the historical outflows.

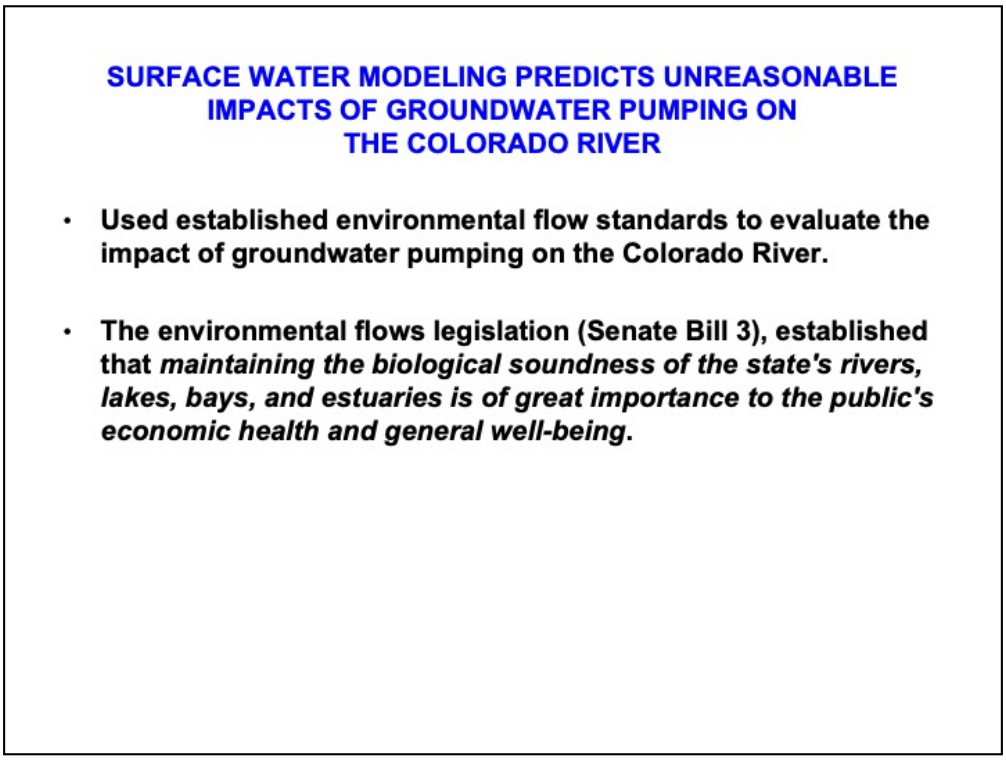
In the Proposed DFCs column, the predicted decrease in discharge is an additional 31% more that the Current DFCs. This results in a **devastating 114% less discharge than historic flows and reverses the relationship between the river and the aquifers**.

- Whereas the quantity of pumping in the 2017 adopted DFCs is predicted to cause a significant decrease in outflows to the river; *an impact that may be unreasonable in-and-of-itself,*

- The **Proposed DFCs are predicted to decrease outflow to the point that the Colorado River LOSES water to the aquifers.**
  - **This is an impact that Environmental Stewardship sees as a bright line between what is reasonable and what is *unreasonable***.

Hydrologically, this is a complete reversal in the flow of groundwater and surface water relationship. At this point the river starts contributing water to the aquifer on an *on-going basis*. **This sets up hydrological conditions for the RIVER could go dry during drought periods. But more certainly, it sets up condition where the river will lose its biological and ecological resilience that enables it to bounce back to being an ecologically sound environment after a serious drought**.

- **The Proposed DFCs based on Scenario Run S-12 cross the bright line and are unreasonable.** As such, it is our view that the only reasonable option is to REJECT the Proposed DFCs and REMAND the process back to the GMA Representatives to develop DFCs using the Currently Adopted DFCs as the basis for setting DFCs that are not predicted to cross this hydrologically and ecologically unreasonable line of impact.



Back in December, 2020 we provided the GMA Representatives with the results of an analysis of the impacts of Current and Proposed pumping on the Colorado River from the perspective a surface water scientist - Joe Trungale – using surface water modeling techniques.

He used the environmental flow standards as a means of evaluating the impact of reduce groundwater discharges to the Colorado River.

This evaluation also predicted unreasonable impact of groundwater pumping on the Colorado River.

Senate Bill 3, the basis for the environmental flow standards, established that maintaining the biological soundness of the state's surface waters is of great importance to the economic health and general well-being of Texans.

Here is what Joe had to say about his findings.

Click Here for Video

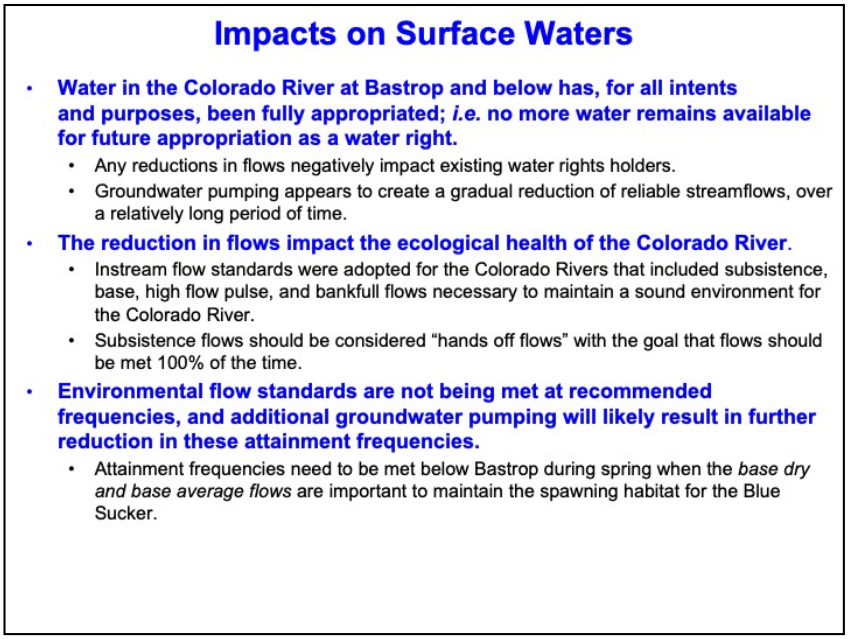
Joe Trungale

Ecological impacts of reduced surface water flows due to groundwater pumping

Joe Trungale
Trungale Engineering
Presentation to GMA-12
April 20, 2021

Click Here for Video

4:41 minutes



Since the audio link will not likely be loud enough for you to hear his comments I will summarize them quickly for you.

First: The Colorado River at Bastrop and below is fully appropriated to surface water right holders. As such, any decrease in flow due to reduced groundwater discharge will negatively impact these permit holders.

Second: such reductions in flow also impact the ecological health of the river and its ability to recover from drought conditions. As you might recall, the lower Colorado basin was intensively studied during the LCRA/SAWS project by many different scientists and engineers. These were major studies making this basin one of the most studied basins in the State. Based on these studies instream flow standards were set at several gages on the river – including Bastrop. The intent is that these standards be maintained at recommended frequencies year-round.

Finally: These standards are not being met at recommended frequencies, and any reduction in flow due to groundwater pumping will likely result in future reductions in these frequencies, damaging the ecology of the river.

Such damage to the ecology of the river is a trend in the wrong direction, and we consider this to be an unreasonable impact.

Impacts on Surface Waters

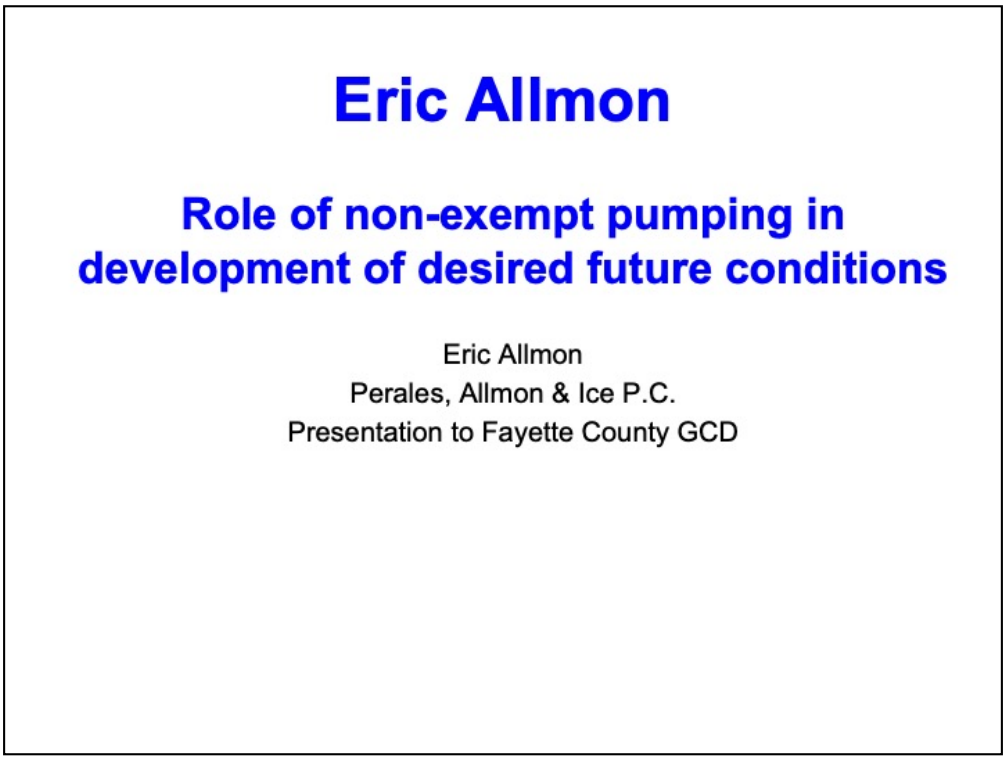
In Summary:

- The effect of the Proposed S-12 DFCs on the Colorado River is *unreasonable* because:
  - It causes the relationship between the river and the aquifers to reverse, and
  - it increases the shortfalls in meeting environmental flow targets.
- Since the flows in the river are already often below levels needed to maintain the ecological health of the river, any additional pumping that causes further reduction in stream flows is *unreasonable*.

In summary, we have demonstrated that the best science available – both from a groundwater availability perspective and a surface water availability perspective WILL LIKELY RESULT IN UNREASONABLE IMPACTS to the Colorado River.

Certainly, the Proposed S-12 DFCs cross the line into unreasonable territory and **SHOULD BE REJECTED**.

If not outright rejected, the potential of unreasonable harm **MUST BE RECOGNIZED AND DEALT WITH.**

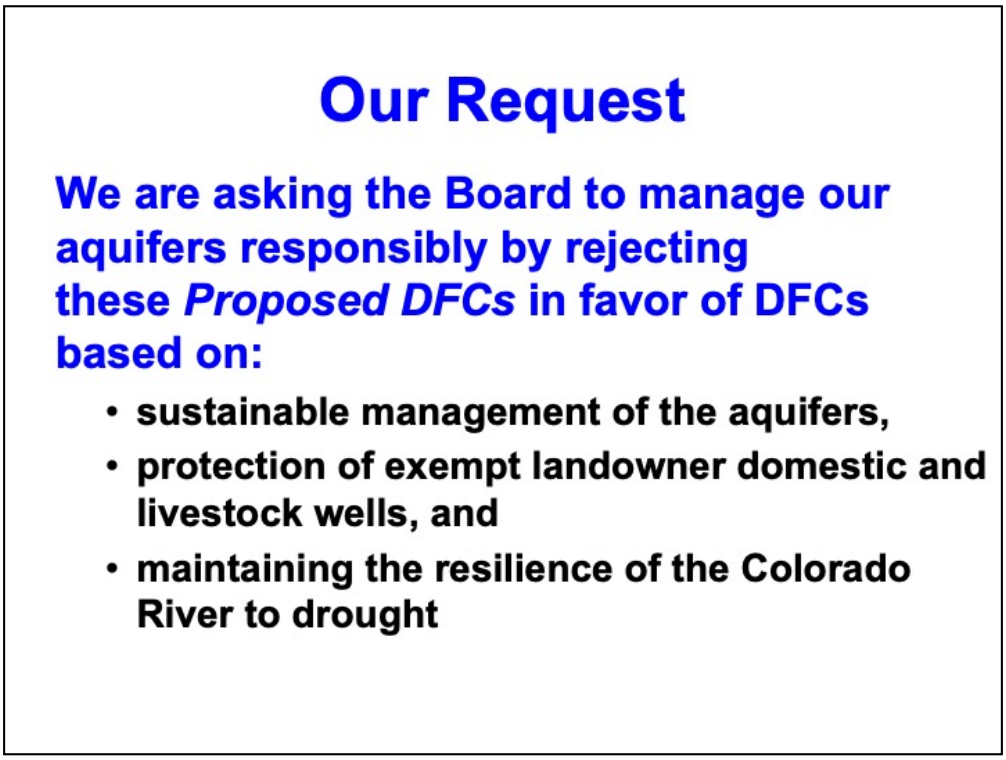


Eric Allmon, Environmental Stewardship's attorney, provided the Board with a letter that addresses the role of non-exempt pumping in development of desired future conditions.

The main point of the letter is to address the issue of the threats of litigation that seem to be driving the position by some that the DFCs must include 100% of all permitted pumping in order to avoid litigation.

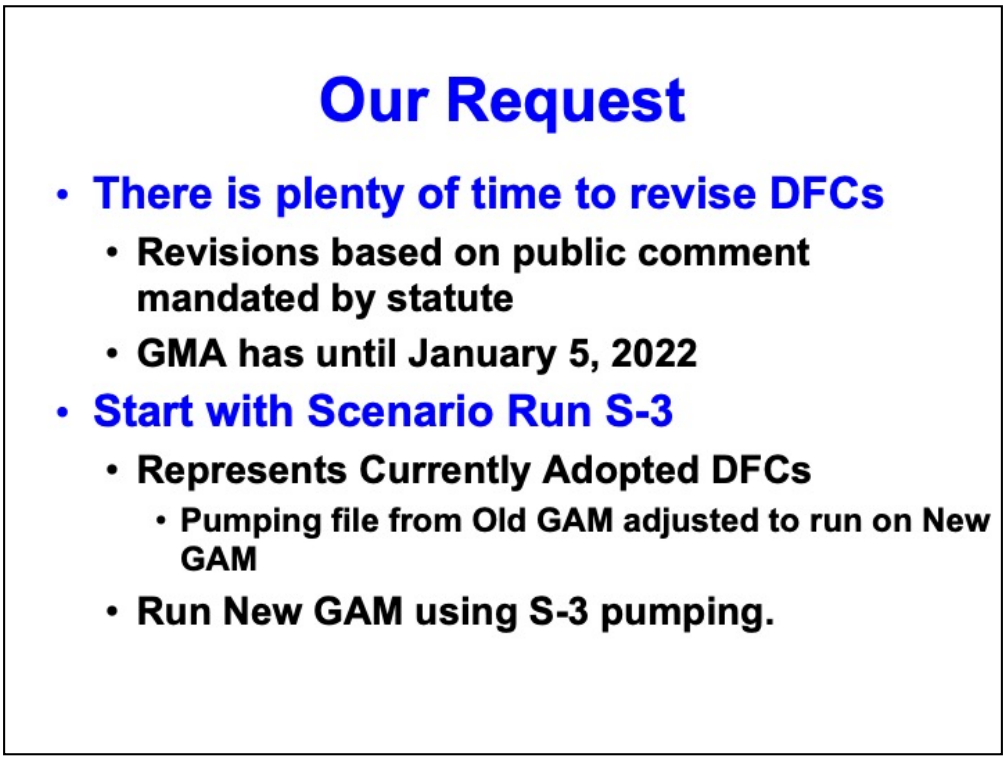
Mr. Allmon lays out the legal framework and court findings that support the position that the DFCs must BALANCE conservation and protection of the aquifers and the 9 factors required to be considered against development in order to sustain the DFCs against litigation by water marketers and others.

We encourage you to read Mr. Allmon's letter and take it to heart as you deliberate on the adoption of DFCs.



So our request is that you, the Board, direct that our aquifers be responsibly managed by rejecting these proposed DFCs in favor of DFCs based on three criteria:

1. Sustainable management of the aquifers,
2. Protection of exempt landowner domestic and livestock wells – which SAWDF will discuss, and
3. Maintaining the resilience of the Colorado River to drought conditions.

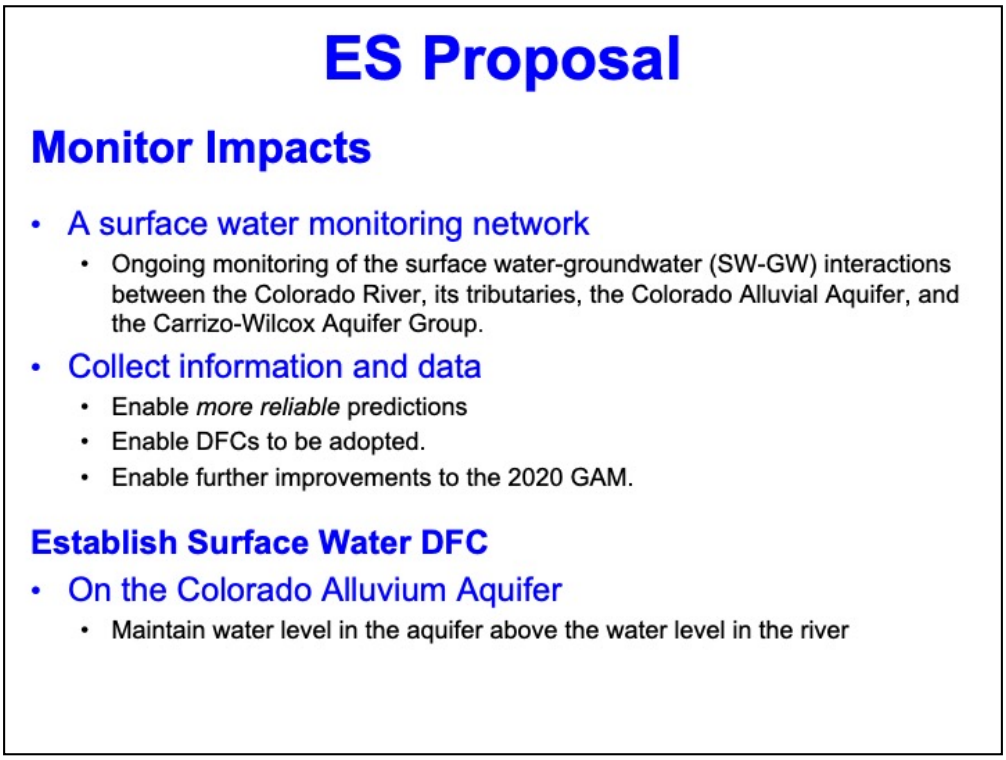


It is important that you recognize that there is plenty of time to revise the DFCs.

In fact, the statutes mandate revisions based on public comments.

The GMA has until January 5, 2022, to make and submit revisions.

We are requesting that the revisions be based on Scenario Run S-3 which represents the currently adopted DFCs. In this scenario, the pumping file from the OLD GAM was modified slightly to be able to be run on the NEW GAM.



To deal with these predicted impacts on surface waters we have propose that the GMA Districts:

- monitor the impacts of groundwater pumping on the Colorado River and its tributaries,
- Gather the information and data needed to enable more reliable predictions
- Establish surface water DFCs on the Colorado River Alluvium Aquifer, and
- Maintain the water level in the alluvium above the water level in the river.

These are areas where we could also use your help and cooperation to get the monitoring needed and set DFCs for the Colorado River Alluvium.

Environmental-Stewardship.org
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Of Counsel:
David Frederick
Richard Lowerre
Brad Rockwell

June 3, 2021

Sidney Youngblood, President
Post Oak Savannah Groundwater Conservation District Board of Directors

Via e-mail: admin@posgcd.org

RE: Role of non-exempt pumping in development of desired future conditions.

Dear Mr. President and Board Members:

In the development of the currently-proposed desired future conditions ("DFC"), claims have been made by water marketers such as Blue Water Vista Ridge LLC and others that the DFC *must* be set at a level that enables pumping of the maximum amounts identified within all issued non-exempt permits with no allowance for the governing districts to employ an adaptive management strategy in the future and no effective balancing of other statutorily-mandated factors. Environmental Stewardship offers these comments to aid Post Oak Savannah Groundwater Conservation District (the "District") in a more balanced consideration of the DFCs. Accepting water marketers' approach, embodied in the currently-proposed DFCs, would not merely be unwise – it would be unlawful.[1]

The District must give consideration to all relevant statutory factors in developing a DFC.

The Texas Water Code sets forth a number of factors which a district is required to consider when adopting a desired future condition, including:

- Aquifer uses or conditions within the management area;
- The water supply needs and water management strategies included in the state water plan;
- Hydrologic conditions for each aquifer in the management area, including recharge, inflows, discharge and total recoverable storage;

[1] By this submission, Environmental Stewardship does not waive its right to submit further comments as the process moves forward.

- Other environmental impacts, including impacts on spring flow and other interactions between groundwater and surface water;
- The impact on subsidence;
- Socioeconomic impacts reasonably expected to occur;
- The impact on the interests and rights in private property, including ownership and the rights of management area landowners and their lessees and assigns in groundwater.
- The feasibility of achieving the desired future condition; and,
- Any other information relevant to the specified desired future conditions.[2]

Ultimately, in adopting a DFC, the districts are statutorily charged with, "provid[ing] a *balance* between the highest practicable level of groundwater production and the conservation, preservation, protection, recharging, and prevention of waste of groundwater and control of subsidence in the management area."[3]

This statutory structure establishes a complex process by which a wide range of occasionally conflicting factors are weighed by the Districts prior to the adoption of a DFC. Achieving *balance* is the key goal of the DFC process. It would be impossible to simultaneously and completely protect every consideration identified by the Legislature. Just as the district must "consider" impacts on private property, the district is equally charged with considering spring flow and aquifer discharge. These are competing interests, and the furtherance of one will often come at the expense of the other. Balancing these interests is a value judgment, purposefully delegated to districts primarily responsible to their local electorates.

The Texas Supreme Court has noted that by employing groundwater districts as the primary means of groundwater regulation, "the Legislature has chosen a process that permits the people most affected by groundwater regulation in particular areas to participate in *democratic* solutions to their groundwater issues."[4] A *democratic* groundwater management strategy requires weighing *all* of the factors set forth in statute.

Some water marketers would have the District delegate the decision on a DFC to a modeling program based upon a mere "reverse engineering" of the drawdown resulting from permitted wells. Disregarding the statutory structure in this manner would be unlawful, as it would

[2] Tex. Water Code § 36.108(d).
[3] Tex. Water Code § 36.108(d)(2) (emphasis added).
[4] *Sipriano v. Great Spring Waters of America*, 1 S.W.3d 75, 80 (Tex. 1999)(emphasis added).

effectively preclude consideration of factors that the districts are required to incorporate in their DFC decisions.

In fact, maximizing drawdown in order to accommodate all non-exempt permitted pumping would render the District's DFC decision arbitrary. An agency acts in an arbitrary manner if it fails to consider a factor the legislature directs it to consider, considers an irrelevant factor, or weighs only relevant factors and reaches a completely unreasonable result.[5] If non-exempt pumping controls the DFC to the disregard of other considerations, such as environmental impacts and the interaction of surface water and groundwater, then the districts will have failed to adequately consider factors that the Legislature has directed the districts to consider.

Surface water impacts require more limited DFCs than the DFCs proposed.

Other comments discuss the technical details of surface water interaction modeling, but the trend towards reversal of groundwater recharge into the Colorado River within the next 50 years is undisputed. Claiming that nothing should be done to address this due to a lack of certainty is akin to arguing that Texas should not prepare for an anticipated direct hit from a hurricane because it is difficult to determine whether it would be Category 4 or Category 5 in intensity. The fact that a groundwater impact is difficult to evaluate does not justify ignoring it, as the Texas Supreme Court noted in the *Day* decision.[6]

As noted above, the districts are statutorily required to consider environmental impacts in setting a DFC, including interactions between surface water and groundwater. Conservation of surface water is further consistent with the Texas Constitution's Conservation Amendment pursuant to which groundwater districts exist. A balanced DFC that does not fully incorporate all permitted non-exempt pumping is well-justified by the statutory goal of conserving surface water by mitigating the impact of a DFC upon groundwater interactions with surface water.

Consideration of *all* property rights justifies more limited DFCs than those proposed.

All landowners possess property rights in the groundwater beneath their property subject to groundwater district regulation, and *all* landowners possess an equal right to produce their fair share of that water. This was confirmed in 2020 by the Federal Fifth Circuit Court of Appeals in the case of *Stratta v. Roe,* wherein the Court held that an adjacent landowner to a permitted non-exempt well could pursue a federal takings action against the Brazos Valley Groundwater

[5] *City of El Paso v. Public Utility Commission of Texas,* 883 S.W.2d 179, 184 (Tex. 1994).
[6] *Edwards Aquifer Authority v. Day*, 369 S. W. 3d 814 (Tex. 2012) ("*Day*"), at 832.

Conservation District based upon the drainage of groundwater from beneath the adjacent property owner's land by the permitted pumping.[7] The validity of that action depended in no way whatsoever upon whether the adjacent landowner possessed a water well, or a pumping permit. Rather, the Court held that the Texas Water Code has created a regulatory structure "which affords landowners their fair share of the groundwater beneath their property."[8] This governs both the extent and the limit of the District's obligation to consider private property rights. Setting a DFC at a level that accommodates the maximum amount permitted to non-exempt permittees creates an increased risk that groundwater levels will be lowered below the level at which pumps owned by exempt well landowners can efficiently operate, makes it more difficult for persons without current wells to access their groundwater, and potentially results in greater drainage of groundwater from beneath the property of landowners who would elect to exercise their right to keep their groundwater in the ground rather than produce it.[9] That is not a *balanced* approach to the consideration and protection of private property rights within the District. As GMA-8 previously noted in adopting its prior DFC:

> GCDs must consider all private property rights when considering management plans, rules, and permit decisions. GCDs must balance the interests of historic groundwater users, landowners who desire to preserve the aquifer levels beneath their property, and property owners who may be damaged by either groundwater-level declines, reduction of water in storage, and reduced spring flow.

Achieving *balance* is the most important goal in setting a DFC.

A balanced DFC would survive a takings or statutory challenge.

The District's decision to require a balanced DFC that was not reverse-engineered to include all permitted non-exempt pumping would be defensible against a constitutional takings claim, statutory takings claim, or a suit for judicial review.

A challenge to a DFC as a constitutional taking would not be proper at this time. In order for a constitutional takings claim regarding the DFC to be proper, an *injury* as a result of the DFC decision would need to be "imminent, direct, and immediate, and not merely remote, conjectural, or hypothetical."[10] Mere adoption of the DFC will not reduce the value of the water marketers'

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[7] *Stratta v. Roe,* 961 F.3d 340, 357 (5th Cir. 2020) ("*Stratta*"), at 364.
[8] *Stratta,* quoting approvingly *Day* at 830.
[9] *See Brown v. Humble Oil and Refining,* 83 S.W.2d 935, 940 (Tex. 1935).
[10] *City of Houston v. Mack*, 312 S.W.3d 855, 862 (Tex. App. – Houston [1st Dist.], 2009).

property in any significant manner (if at all), nor will it deprive them of the use and enjoyment of their property. While the districts will have the authority to curtail pumping in the future in *consideration* of the DFCs, that potential already exists, and the process for such curtailment is discretionary, non-mandatory, and dependent upon a complicated process that includes the consideration of numerous factors.[11] Accordingly, the adoption of a DFC does not give rise to a valid takings claim.

Furthermore, the action in setting the DFCs is well-justified even if proper at this time (which it is not) and if *some impact* on property rights would occur (which has not been shown). The adoption of balanced DFCs furthers the statutory purposes of groundwater conservation districts to ensure the conservation and protection of groundwater. As the Texas Supreme Court has held, government serves multiple functions, and "[t]o satisfy its responsibilities, government often imposes restrictions on the use of private property, " since, " [a]lthough these restrictions sometimes result in inconvenience to owners, government is not generally required to compensate an owner for associated loss."[12] A regulatory taking, as water marketers claim would exist as the result of a more limited DFC, would need to be, "a condition of use so onerous that its effect is tantamount to a direct appropriation [of property] or ouster [from property]."[13] The permitting decision involved in the *Day* case met this high threshold, as it directly and imminently placed a severe constraint upon the landowner's use of groundwater. The adoption of balanced DFCs does not in any way result in a direct appropriate of property nor an ouster from property. Accordingly, the adoption of balanced DFCs that do not allow for all non-exempt permitted pumping would not constitute a "taking."

Likewise, the setting of balanced DFCs would survive a challenge alleging that the action is a statutory takings under the Texas Private Real Property Rights Act found at Texas Government Code Chapter 2007. Beyond a Constitutional taking (addressed above) that Act only applies to a government action that: (1) affects an owner's private real property that is the subject of the governmental action in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; *and* (2) results in a reduction of at least 25% in the market value of the affected private property.[14] The adoption of a DFC does neither of

[11] *See, e.g.,* POSGCD Rules Section 16.
[12] *City of Houston v. Carlson*, 451 S.W.3d 828, 831 (Tex. 2014).
[13] *Id.*
[14] Tex. Gov't Code § 2007.002(5).

these things. Thus, a suit regarding the adoption of a balanced DFC under the Private Real Property Rights Preservation Act also would not be proper.

Furthermore, a balanced DFC would be defensible against a statutory suit for judicial review. Such an appeal would be evaluated under the "substantial evidence" standard of review set forth in Texas Government Code § 2001.174.[15] Under this standard of review, a reviewing court gives significant deference to the agency for decisions within the agency's field of expertise, and an agency's interpretation of the statute it administers is entitled to serious consideration so long as it is reasonable and does not conflict with the statute's language.[16] In this case, a balancing of the various considerations set forth in statute, including meaningful consideration of surface water impacts and all property rights impacts, would further the purposes of the statutory scheme at issue, and be fully consistent with the governing statutes. Accordingly, such a decision would be defensible against a statutory challenge. On the other hand, a decision to prioritize non-exempt pumping to the disregard of other factors *would* be problematic.

Conclusion.

For these reasons, Environmental Stewardship asks that the districts reject the DFCs currently proposed for adoption by GMA-12, and, instead, move forward with a process to develop DFCs that incorporate a balanced consideration of *all* factors that the districts are statutorily required to consider, including environmental impacts and interactions between surface water and ground water.

Respectfully submitted,

Eric Allmon
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512-482-9346 (f)

[15] Tex. Water Code § 36.10835.
[16] *Office of Public Utility Counsel v. Texas-New Mexico Power Co.*, 344 S.W.3d 446, 450 (Tex. App. – Austin, 2011).

COUNSEL FOR
ENVIRONMENTAL
STEWARDSHIP

cc: Gary Westbrook, General Manager

cc: Lost Pines Groundwater Conservation District
Mike Talbot, President
James Totten, General Manager

cc: Brazos Valley Groundwater Conservation District
Stephen Cast, President
Alan Day, General Manager

cc: Mid-East Texas Groundwater Conservation District
George Holleman, Vice President
David Bailey, General Manager

cc: Fayette County Groundwater Conservation District
Leo Wick Sr., President
David Van Dresar, General Manager