

UW Brazos Valley Farm LLC

January 23, 2025

By Email and Hand Delivery

Brazos Valley Groundwater Conservation District
Board Members
General Manager Alan Day
112 West 3rd Street
Hearne, Texas 77859

Re: Stakeholder Comment for All-Board DFC Workshop and Stakeholder Meeting

Dear BVGCD Board Members Jayson Barfknecht, Stephen Cast, Mark Carraba, John Elliot, Jeff Kennedy, Gary Mechler, Lisa Rolke, and Chris Zeig, and General Manager Alan Day:

UW Brazos Valley Farm LLC (“UWBVF”) appreciates the opportunity to submit comments in advance of the District’s Desired Future Condition (“DFC”) Workshop and Stakeholder Meeting. The BVGCD Board is making critical policy decisions as it moves toward selecting DFCs for the next five-year planning cycle.

As the District considers the “aquifer uses or conditions” and “hydrological conditions” within its management area,¹ it is useful to reference the factual backdrop summarized in regional planning documents. Those materials explain the Carrizo-Wilcox Aquifer “stores enormous amounts of water” and has “significant potential for further development.”² GMA 12 has estimated that this aquifer has over a billion acre-feet of total estimated recoverable storage within the management area, with 178 million acre-feet attributed to Robertson and Brazos Counties.³ Further, the District must also consider the “interests and rights in private property” within its management area, which include private ownership, as real property, of “the groundwater below the surface of the landowner’s land.”⁴

In past DFC cycles, the District recognized permitted rights and used those rights to set a DFC that respected such production. This approach has been protective of issued permits and aligns with the availability of water resources in the District. We encourage the District not to depart dramatically from the District’s past methodology in this planning cycle.

The District, after consideration of the Water Code and its own Rules, authorized UWBVF to produce, and transport, up to 49,999 AFY from the Simsboro aquifer. UWBVF is relying upon these District authorizations to advance a key regional water supply project. Similarly, the District authorized other Robertson County landowners to produce, from their properties, approximately 57,720 AFY from the Simsboro aquifer. Those landowners have since partnered with UWBVF to

¹ Tex. Water Code § 36.108(d)(1), (d)(3).

² 2021 Brazos G Regional Water Plan.

³ Total Estimated Recoverable Storage for Aquifers in GMA 12 (May 16, 2014).


⁴ Tex. Water Code §§ 36.108(d)(7), 36.002.

add some of their groundwater to the UWBVF regional project while agreeing to cap the project's groundwater transport at 100,000 AFY. Each of these landowners' permitted production rights must be considered in setting the BVGCD DFCs for the Carrizo-Wilcox aquifer, as these permitting decisions are highly relevant "interests and rights in private property" that aid the District in estimating pumping and drawdown over the 50-year regional water planning time horizon.

Ultimately, BVGCD is tasked with setting a "reasonable" DFC.⁵ It would be wildly unreasonable to adopt a DFC without considering the 100,000 AFY of permitted production (for which 50,000 AFY of transport is complete and the remainder is progressing through a transport hearing) for a pending regional water supply project. A "best estimate" approach, as mentioned in past presentations, could incorporate into the DFC modeling a "ramp up" or stair-stepping of the authorized production and attendant export. UWBVF has shared with BVGCD its expected ramp up periods. Similarly, the District should enter the joint planning discussion at GMA 12 with an approach that recognizes and includes in DFC modeling the production permits the District granted throughout 2023. Far from best available science, disregarding the District's own permitting decisions in setting a DFC is unreasonable, would far underestimate planned production in the District, and is unsupported by sound "policy, scientific, and technical justifications."

UWBVF incorporates by reference, and attaches to this letter, comments presented to the Post Oak Savannah Groundwater District on December 12, 2024, which explain how a reasonable DFC must incorporate private property interests, and how those interests ultimately drive positive socioeconomic impacts. This letter, similar to the September 23, 2024 letter from Lost Pines GCD's President, emphasizes the importance of accounting for *permitted* production amounts when setting a reasonable DFC. In doing so, BVGCD can plan and account for the groundwater projects already in motion within its management area.

Mike Thornhill, P.G., will be available for questions and comments during the January 23, 2025 meeting.

Sincerely,

David Lynch, UWBVF

⁵ Tex. Water Code §§ 36.1083(b); 36.10835(a).

ATTACHMENT A

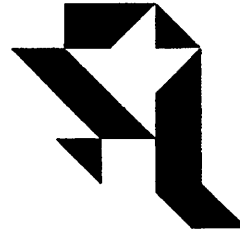
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**SANDOW
LAKES**

December 12, 2024

Gary Westbrook
Post Oak Savannah Groundwater Conservation District
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**Re: Comments on GMA 12's Desired Future Conditions for December 13, 2024
Joint Planning Meeting**

Dear Groundwater Management Area 12 Members:

SLR Property I, LP ("SLR") appreciates this opportunity to provide the members of Groundwater Management Area 12 ("GMA 12") with comments on the joint planning process for adopting desired future conditions ("DFCs"). SLR supports GMA 12's efforts to carefully consider each of the nine required statutory elements before proposing a DFC. DFCs are policy decisions. But the statutory framework requires that they be formed—and informed—by application of scientific fact, reason, and law.

To aid GMA 12 in its considerations, SLR offers the following comments on two of the statutory elements: Element 7 (interests and rights in private property) and Element 6 (socioeconomic impacts). SLR welcomes the chance to engage with GMA 12 on these important topics.

A. Element 7: Impact on the Interests and Rights in Private Property

Texas law recognizes that private property rights in groundwater include both a landowner's ownership of groundwater in place, Tex. Water Code § 36.002(a), *and* the landowner's ability to "produce th[at] groundwater." Tex. Water Code § 36.002(b)(1). Proper evaluation of the seventh DFC-setting consideration—"the impact on the interests and rights in private property"—must therefore encompass both of these facets. Tex. Water Code § 36.108(d)(7).

In discussing Element 7, we first lay out Texas's legal framework of groundwater ownership. Then, we offer a simple, but important, change that GMA 12 can make in setting the DFCs that will respect private property rights in groundwater.

i. ***A DFC must respect the private ownership of water in aquifers.***

Unlike surface water and the beds and banks of state watercourses, groundwater is private property. Neither GMA 12 nor the five groundwater conservation districts (“GCDs”) that comprise it hold title to the groundwater within the GMA boundaries. Individual landowners do. And these individual landowners have different ideas for how to exercise their groundwater rights. Some landowners may want to produce this water to support their house and ranch; others, like SLR, may want to produce it to support the economic development of their property and the vitality of their community. In accordance with the law, any DFCs selected by GMA 12 should encourage the exercise of these private property rights. To do that, GMA 12 must strike a balance that accords with the law, as set by the Texas Legislature and interpreted by the Texas courts.

The Texas Legislature directs GMAs to select DFCs that provide “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.” Tex. Water Code § 36.108(d-2) (emphasis added). On the face of the statute, the Legislature indicated a hierarchy of interests: it decided that “groundwater production” should receive the “highest” practicable weight, balanced against other considerations that have no similar emphasis. While the highest practicable level of groundwater production must be considered in the context of other enumerated interests—such as prevention of waste and conservation—the law favors production.

Regarding prevention of waste, the Legislature mandates that groundwater be “put to beneficial [i.e., non-wasteful] use at all times,” and only water so used may be pumped from the ground. Tex. Water Code § 36.1131(b)(5). By authorizing the production of groundwater only when it can be beneficially used—not wasted—the Legislature provides a backstop. This backstop allows GMAs (and GCDs) to encourage production of privately owned groundwater to the “highest practicable level,” secure in the knowledge that such production will not result in waste.

Regarding conservation, GMAs must examine the unique characteristics of the aquifers within their boundaries before defaulting to non-production (or lower production) in the name of conservation. Some aquifers readily recharge; others do not. Guarding production from the Ogallala Aquifer, with its nearly nonexistent recharge, may be reasonable; but applying a similarly protectionist approach to the Carrizo-Wilcox Aquifer, which recharges at a more substantial rate, is not. Moreover, individuals pumping the Carrizo-Wilcox utilize only a small fraction of the entire storage of the aquifer. Therefore, a DFC for the Carrizo-Wilcox Aquifer that accommodates significant groundwater production would still harmonize with the GMA’s “conservation” obligations.

Like the Legislature, Texas state courts have repeatedly emphasized Texas’s respect for private property rights in groundwater. We know from case law that groundwater in Texas is the “exclusive property” of the overlying landowner,¹ who owns this property in place (i.e., before capture).² The Legislature struck a balance between groundwater production and conservation—

¹ *Texas Co. v. Burkett*, 296 S.W. 273, 278 (Tex. 1927).

² *Edwards Aquifer Auth. v. Day*, 369 S.W. 814, 832 (Tex. 2012).

just as GMAs are directed to do via DFCs—by tempering the rule of capture with a prohibition on waste.³ But, fundamentally, landowners who wish to produce their groundwater for a (beneficial) purpose may do so, so long as they conserve the resource by not wasting it. Like the Texas Legislature, Texas courts have repeatedly confirmed that the groundwater property right most protected by law is the right to *produce* one’s groundwater.

Texas law sets forth, for each GMA, how to consider “impact on the interests and rights in private property,” when setting DFCs. Whatever the numerical value of a DFC—and how that value changes over time—the GMA must adhere to Texas’s statutory and common law in choosing the DFC, and in doing so protect the highest practicable level of groundwater production, along with landowners’ attendant rights to produce their groundwater.

ii. DFCs should not assume non-production of groundwater.

When setting DFCs based on modeled groundwater production, a GMA should be careful not to assume that permitted groundwater will not be produced to its full authorized amount. Assuming non-production of permitted groundwater artificially depresses the baseline of groundwater production and creates a false presumption: the *non-exercise* of private property rights. Absent curtailments, GMAs and GCDs do not get to decide if, when, or how an individual groundwater owner will exercise its permitted production rights for its privately owned groundwater.

SLR’s situation provides a clear example. SLR currently holds production permits within GMA 12 that authorize the production of 40,000 af/yr. The current GMA 12 DFCs were based, in part, on the 2017 assumption that Alcoa, the prior owner of SLR’s property, would not produce all the groundwater for which it was permitted. While SLR, who purchased the property in 2021, intends to make full use of its permitted production, the GMA’s modeling assumptions have never changed. The failure to right-size the modeling used to set the DFC (incorrectly) allows a GMA to set—or perpetuate—DFCs that will not be satisfied if landowners fully utilize their existing permitted production. There is no factual or hydrological problem with this. But, unless a DFC is changed to address this disconnect, a DFC risks impinging upon a landowner’s exercise of a fully-permitted, existing private property right.

Fortunately, DFCs are adaptable. GMA 12 can, and should, set its DFCs based on assumptions that consider total *permitted* production. Modeling and setting DFCs based on permitted, rather than actual, production better aligns with Chapter 36’s charge to GCDs, to issue permits “up to the point that the total volume of exempt *and permitted* groundwater production will achieve an applicable [DFC].” Tex. Water Code § 36.1132(a) (emphasis added). Because GCDs must consider *permitted* production in relation to the DFCs when issuing new permits, GMAs should also look at permitted production when *setting* the DFCs. Under such an approach, the GMA could (appropriately) achieve its DFC while supporting landowners’ exercise of both their permitted production authorizations and their underlying private property rights.

³ Tex. Water Code § 36.002(b)(1); see *City of Corpus Christi v. City of Pleasanton*, 276 S.W.2d 798, 801-02 (Tex. 1955); *Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75, 76 (Tex. 1999); *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 832 (Tex. 2012).

B. Element 6: Socioeconomic Impacts Reasonably Expected to Occur

A GMA must also consider the “socioeconomic impacts reasonably expected to occur” when setting its DFCs. Tex. Water Code § 36.108(d)(6). A DFC should reflect what the Legislature repeatedly emphasizes—the positive socioeconomic impacts associated with groundwater production—embodied, for instance, by the directive that GCDs “shall issue [production] permits up to the point that the total volume of exempt and permitted groundwater production will achieve an applicable [DFC].” Tex. Water Code § 36.1132(a). Put another way, GCDs must authorize the maximum amount of production possible while achieving a DFC that is, itself, set to allow “the highest practicable level of groundwater production.” Tex. Water Code § 36.108(d-2).

Setting DFCs that accommodate, and even encourage, groundwater production, invites investment in development and the accompanying, positive, socioeconomic impacts. Attracting new development—whether that be residential housing, commercial, industrial, or otherwise—requires a secure water supply. In groundwater, like in surface water, a water supply must exist before development can follow. Water is a limiting resource for development in Texas. When individuals are looking to relocate to an area, they look for things that provide quality of life—such as schools, secure housing, transportation, reliable power, and available amenities—each of which requires a water supply. More specifically, whether it is chip manufacturing in Taylor or new subdivisions in Milam County, all require water before companies will make the serious commitment to invest, or people will make the thoughtful decision to move. With an established water supply, companies invest and people move, creating an economic engine.

The Texas Legislature understood that water supply precedes development: water supply planning in this state operates on a 50-year planning horizon. And GMA 12 has, historically, recognized the valuable, positive, indirect socioeconomic impacts of a DFC that accommodates groundwater production during this 50-year window. However, the positive impacts are also direct and immediate: a DFC that allows landowners to produce their privately-owned groundwater provides such individuals access to a tangible resource, bolstering their own socioeconomic position,⁴ independent of, and in addition to, the broader, indirect, positive impacts of groundwater production for the area and community.

Of course, the DFC-enabled socioeconomic impacts are not all positive. Large-volume production to support new development may draw down water levels in nearby smaller wells, with attendant impacts on that smaller well’s productivity. While this negative impact cannot be overlooked, it must be contextualized. Even with production permits in hand, Texas law simply does not allow groundwater production without a beneficial use for that water. Tex. Water Code § 36.1131(b)(5). The ramping up of production over time, and in stages, allows landowners, GCDs, and the GMA to plan for and respond to the negative socioeconomic impacts, such as on individuals’ wells, as a consequence of the production that drives new investment, new development, and the associated positive socioeconomic impacts.

⁴ See, e.g., *Edwards Aquifer Auth. v. Bragg*, 421 S.W.3d 118, 152-53 (Tex. App.—San Antonio, 2013) (discussing the difference in value of two orchards with and without access to groundwater).

When considering socioeconomic impacts, GMA 12 should acknowledge that a DFC that accommodates new production will spur more positive than negative socioeconomic impacts. On the other hand, DFCs that are too restrictive risk deterring investment and funneling economic growth elsewhere.

* * *

SLR appreciates the opportunity to provide these comments and looks forward to continuing to work with GMA 12 in its DFC-setting process.

Respectfully,



Alan Gardenhire
Vice President of
Operations
SLR Property I, LP