



June 20, 2012

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**RE: Item 29, June 21, 2012 Board Agenda: GMA-12 DFC Appeal**

Dear Board:

The following is my intended "Public Comments". Since I may not have time available to make these comments in full, I am providing them to you in advance and for the record.

Good Morning, I am Steve Box, Executive Director of Environmental Stewardship and Petitioner on the GMA-12 desired future conditions appeal. We recognize that your decisions need to be based on the factual information provided in the hearing and exhibits regarding our appeal. It is the Staff's lack of adherence to this basic precept that disappoints us the most.

Certainly we are disappointed in the Staff Report, but not so much that it favors the Districts, but that the Staff seems to have chosen to turn a blind eye to the facts that we have brought to your attention in this process, rather than facing these facts and dealing with them as required by the statutes and your own adopted administrative rules. Where we have met the burden of proof by providing compelling evidence, the staff has argued that the evidence was either "out of context," "outside the scope of these proceedings," or "conflicting and inconclusive" ... without bothering to substantiate the reasons for these conclusions. We consider this an abandonment of their duty to you ... the Board, to us ... the Petitioner, and to Texans on both sides of the issues.

Mr. Allmon has politely laid out our legal arguments for your consideration, now I'd like to tell you in straight forward terms why we, common citizens of the local community in the GMA-12 region, do not agree with the Staff recommendations, why we find them to be ***inconsiderate and unacceptable***, and why we recommend that you either find these DFCs unreasonable, or remand these recommendations back to the Staff to complete their work.

Coming from a region of Texas that has experienced not only the day-to-day impacts of drought over the last several years, but also the tragic consequences of the Bastrop wildfires that have devastated our community, we are even more sensitive to our reliance on water ... both the groundwater and the surface water of our region. We are also empathetic to those communities that faced, and are facing water shortages in the future as their populations grow and their communities develop. It is with great respect that we attempt to be law-abiding citizens of our Texas community.

But we find ourselves harboring great distrust and disrespect when we watch those who represent the governance of our State systematically disregard and manipulated the water laws of our State to enable the greedy of our community to trump those who follow the laws. Yes, I am implying that the recommendations of the Staff carefully dodged the basic precepts of our Water Code, Administrative Code, and the Conservation Amendments to the Texas Constitution, in order to enable the *development of water* to trump the duty of Groundwater Conservation Districts to also *preserve, protect and conserve* our water resources.

It is clear to me, and it is becoming clear to others, that the only mission of the Water Development Board is to assist the *development of water* while turning a blind eye to *conservation of water for Texas*.

As a Petitioner, we have brought legitimate concerns to the Board that are based on sound science and public policies of the State Legislature ... all clearly within the scope and context of the criteria established by the TWDB in their Administrative Rules. We have met

the burden of proof by citing technical and scientific studies and placing them within the context of the laws of the State of Texas and the adopted desired future conditions of GMA-12.

First, the Staff failed to provide the Board, and we, the Petitioner, with substantiation of their determination that our exhibits on the impact of groundwater pumping on property rights were “outside the scope of consideration in this proceeding”. As a Board, you should be MOST concerned about this error of omission by the Staff. This is where you, as a policy board, cannot afford to err, and need a rigorous analysis of the impacts of groundwater pumping on surface water property rights. Otherwise, you run the risk of leading groundwater conservation districts down a path of uncompensated takings claims as described in the recent Supreme Court opinion in the Edwards Aquifer Authority v. Day case.

Clearly criterion 5, “consider the impacts on private property rights,” was on the mind of the TWDB when it passed its administrative rules as a *legitimate consideration in this proceeding*. Somehow the Staff makes a giant leap from “considering the impacts on property rights,” to

- 1) not being obligated to provide groundwater discharge to the rivers, and
- 2) the requirement to consider the environmental impacts, including impacts on spring flow and other interactions between groundwater and surface water, *in future DFC proceedings*.

Neither of these are justifications for abandoning their responsibility to provide you and Texans with a substantiated reason for dismissing our evidence without analysis and discussion.

Second, we brought forward the EXACT GAM analyses that GMA-12 and the Staff used to justify the adopted desired future conditions. The MODFLOW analyses that we presented to the Staff and Districts were drawn directly from *their* GAM files. These were not *OUR* analyses, but the results of their analyses as presented to them by Environmental Stewardship since they would not recognize these trends either on their own, or with

encouragement from Environmental Stewardship and others like Texas Parks and Wildlife Department.

The Staff Technical Analysis failed to examine the trends that these analyses exposed, even though in their own words, “a GAM provides a first-order approach to coupling surface water to groundwater, which is adequate for the regional scale modeling”. However, rather than use the first-order trends as indicators of potential regional concerns that need to be further investigated, they weaseled a dismissal by complaining that “the model does not provide a RIGOROUS solution to surface water modeling in the region,” and the Legislature “did not define ‘reasonable’.”

On the other hand, the Staff carefully reviewed the CALIBRATION of the model to 20 years of data, and then the VALIDATION of the model. What they DID NOT DO was to USE THE MODEL to its fullest power and intent ... to investigate potential harmful trends. The Staff needs to go back and examine this information IN THE CONTEXT of these adopted DFCs now that empirical data from the scientific investigations of the LCRA are available, data that was not available at the time of the original calibration, validations, and use of the model by those who developed the GAM (which is what the staff reviewed).

While on this topic I want to point out that the Staff wholly, and without analysis, accepted the conclusions of others that there was a 50,000 acre-feet per year decline in outflows to surface waters during the calibration period. Even with an eyeball analysis, the decline is not 50,000 acre-feet per year. The decline, applying statistical analysis to provide a straight line fit of the data, is 3,984 acre-feet per year; which, by the way, is an analysis of TWDB data that WE had to perform since the staff failed to recognize and correct this error<sup>1</sup>. Furthermore, this declining trend is one that should have signaled a need for further analysis of the adopted DFCs. The MODFLOWS Environmental Stewardship presented as evidence from the DFC GAM show a much steeper predicted decline.

Furthermore, the Staff statement that “testimony on the impacts of the DFCs on surface waters was conflicting and inconclusive,” is both unfounded and unsubstantiated. The Staff merely cites the hearing transcript and does not provide examples where the testimony is

either conflicting or inconclusive. Such statements, without substantiation, are merely methods of dodging their duty and responsibility.

Finally, on item 5, “consider the state’s policy and legislative directives,” the staff points out that the directives of Senate Bill 3 are addressed to TCEQ, TWDB and Texas Parks and Wildlife Department, not to the Districts”. That is exactly our point. *As directed by statute, the Texas Water Development Board and its Staff have a responsibility to ensure that, in carrying out mandates under other Texas statutes, they guide other state entities, such as groundwater conservation districts, in such a way as to avoid conflict with these statutes.* The TWDB has abandoned this duty and needs to take responsibility for its negligence, not pass the buck to the Districts or Environmental Stewardship. As has been often pointed out, it is the adopted DFCs, not the DFC process, which is under consideration. So it matters not if it was the District’s or the TWDB’s responsibility to avoid conflict with other policies and directives, it is the fact that they are in conflict that is of concern.

Taken as a whole, we find the Staff report to be to be ***inconsiderate and unacceptable***. Based on the reasons cited, we recommend that you either find these DFCs unreasonable, or remand these recommendations back to the Staff to complete their work.

Respectfully submitted,



Steve Box  
Executive Director  
Environmental Stewardship

Cc: Senator Kirk Watson c/o Susan Nold, Counsel and District Director  
Senator Glenn Hegar c/o Lisa Craven, Chief of Staff  
Eric Allmon, Lowerre, Frederick, Perales, Allmon & Rockwell  
Joe Reynolds, TWDB counsel

Environmental Stewardship is a charitable nonprofit organization whose purposes are to meet current and future needs of the environment and its inhabitants by protecting and enhancing the earth’s natural resources; to restore and sustain ecological services using scientific information; and to encourage public stewardship through environmental education and outreach. We are a Texas nonprofit 501(c) (3) charitable organization headquartered in Bastrop, Texas. For more information visit our website at <http://www.environmentstewardship.org/>.

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<sup>i</sup> George Rice. June 20, 2012. Statistical analysis of Hutchison’s MODFLOW estimates of net groundwater flow to streams (1980-1999). Equation  $y = -3945x + 192.07$   $R^2 = 0.49$