NEIGHBORS FOR NEIGHBORS

Families working together to protect the lands, economy and quality of life of Bastrop and Lee Counties for future generations.

December 16, 2013

Delivered by Hand at the December 16, 2013, Forestar Rehearing.

Board of Directors
Lost Pines Groundwater Conservation District
908 Texas 230 Loop
Smithville, TX 78957

Re: Forestar (USA) Real Estate Group, Inc., Rehearing

Dear Board Members:

This letter is respectfully submitted for inclusion in the record for the Forestar permit proceedings, on behalf of Neighbors for Neighbors, a Central Texas nonprofit corporation and 501(c)(3) organization, whose members' grass roots efforts have centered around water, air and land use issues in our two counties for the last 13 years. Our organization has supported the concept of a strong and active groundwater conservation district from day one of the District's existence.

We would like to address the following procedural points. One, NFN fully endorses and adopts the evidence presented this evening by Environmental Stewardship, in particular the report of Mr. George Rice.[1] Mr. Rice has served on more than one occasion as an expert to Neighbors for Neighbors in administrative law matters involving water issues, and we commend his work to the District for its unbiased, "un-jaundiced," conflict-free professional viewpoint. In short, he is a breath of fresh air.

Further, NFN joins with Environmental Stewardship (ES) in stating that the current proceedings do not provide adequate opportunity for members of the public to properly present evidence and testimony to the Board. In particular, NFN adopts ES's argument under Section 4. of its December 16 submission to the Board concerning Forestar's attempts to elevate its materials to "evidence" but discredit public input to this Board.[2]

[1] Letter from Environmental Stewardship to District with attachments , December 16, 2013 (ES Letter); *Forestar's Proposal to Pump Groundwater from the Simsboro Aquifer*, George Rice, December 14, 2013 (George Rice Report)
[2] ES Letter, page 8.

Our purpose is the same as Forestar's, and we are limited to this forum, as the District's forum of choice, for providing comments for inclusion in the administrative record of the District's proceedings. We are responding to Forestar's arguments, and we urge that no credible reason exists to prevent your constituents and their comments, or "evidence", from being given the same face value credibility as any portion of Forestar's presentation, or "evidence". Forestar has had ample opportunity to publicly address the Board, at length. And, as we now know from Public Information Requests by ES, Forestar negotiated, in private, with at least the District's counsel and General Manager on the so-called phased-in permit alternative, *prior* to the date of original Board action on the permit.

Third, NFN further contends that Forestar's confidential efforts to sway the Board into "phased-in permits" as early as May 9, 2013, were not presented as "evidence" or included in any official record of public proceedings during the original hearing on its permit, although Forestar certainly had the opportunity to do so. We presume the Board had access to, and rejected, Forestar's written phase-in argument during its original deliberation on the permit, since that argument was presented to its General Manager and legal counsel prior to the Board's deliberation. To the extent Forestar attempts to characterize the phase-in alternative, and any supporting documentation, as "evidence" upon which the Board must formally act as a result of this re-hearing, we urge the Board to conclude that Forestar has already had its bite at that apple, and the Board should continue to reject the phased-in permits approach and/or reject its "resurrection" as new evidence in a re-hearing.

In the alternative, Forestar should be seen as attempting to *amend* its permit application, *ad hoc*, by introducing a request for phased-in permits that should have been dealt with as a proposed application amendment prior to action by the Board on the permit. Any action on an amended application in the context of a rehearing on the original application, which does not address the phased-in plan, is inappropriate, lacks due process and should be avoided. (To the extent the Board was *not* formally made aware of the phase-in negotiation by either its General Manager or its counsel, *prior* to its deliberation on the application, we express concern about the irregularity of that sort of internal District process.)

And fourth, we urge that the District's Rules, as currently promulgated, do not contemplate, and thus do not authorize, "phased-in permits" of the type Forestar requests that the District issue as an alternative to currently permitting the full 45,000 AFY request. The existing rules do not contemplate such a departure from the permitting regime currently contained in the Rules, which Rules are an extension of the District's Management Plan and which implement the Water Code pertaining to permitting. A request for the full 45,000 AFY is the only administratively complete application "on the table."

To grant Forestar's request for phased-in permits in the context of a re-hearing for a permit application for a full 45,000 AFY, without first properly amending the District's Rules with public notice and a meaningful opportunity to participate in rulemaking,

would be an arbitrary and capricious act by the District, subject to challenge. Additionally, such a departure would not be in accord with the District's Management Plan. We believe that both the Rules and the Management Plan contemplate review and analysis of permit applications based on a *contemporaneous* review and analysis of the factors required under the Water Code, which factors are much broader than simply "revisiting" permits already committed, with a limited review of ambiguous factors such as "impacts (if any)" and "any mitigation concerns", as Forestar urges.[3]

DISCUSSION OF DISTRICT'S INITIAL DELIBERATIONS AS A BLUEPRINT FOR FINAL ACTION ON RE-HEARING

It should be noted that the following discussion is intended to be only a brief review of important factors in the District's consideration upon re-hearing of Forestar's permit application. NFN urges the District to consider the more comprehensive ES Letter, as well as the ES letter of April 13, 2013 and the George Rice Report. The April 13 letter, on which NFN collaborated with ES, provides the sound reasoning for, and sets out the "blueprint" for the way the District conducted its permit review process on the original application. Nothing has changed to render that reasoning or that blueprint inoperative, indefensible or any less convincing. (Rejection of the phased-in permit approach could likewise be defended, to the extent the possibility of phased-in permits is considered by the Board. Rejection of that approach is further bolstered by the findings of Mr. Rice, ES's expert, that either a full permit or a phased-in permit have near identical effects on the aquifer after 2040, and diverge only slightly in the meantime.[4])

The District properly balanced its constitutional and legislative duty and authority to "conserve, preserve and protect" the aquifers within its jurisdiction against new legislative directives to address "statutory goals and mandates" when it reduced Forestar's application for 45,000 acre-feet/year and left Forestar with the option of re-applying for additional water in future, on a level playing field with other applicants (rather than on a "pre-ordained" basis).

The District's own Management Plan, which has been approved by the Texas Water Development Board and which derives from the Texas Water Code, requires the Board to *balance* the "highest practicable level of groundwater production against conservation, preservation, protection, recharging and prevention of waste of groundwater."[5] The Board's action in denying Forestar's application for 45,000 acre-feet/year and granting it a permit for 12,000 acre-feet/year embodies the required application of that mandate --- *in the course of permitting,* the Board balanced the two goals, rather than engaging in piecemeal balancing by permitting all comers and then waiting for damage, and potential irreparable harm to its aquifers, before striving to achieve aquifer sustainability for future generations.[6]

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[3] Forestar PowerPoint Presentation, Slide p. 8. See also, ES Letter discussion of phased-in permitting

[4] Rice report, page 5.

[5] Lost Pines Groundwater Conservation District Management Plan, Appendix A

[6] See also, Environmental Stewardship, December 16 letter, pages 1-2 for amplification of the application of the District's Management Plan.

Forestar argues that, in essence, the District has three alternatives: grant its permit, today, for a full 45,000 AFY; or confirm its permit for 12,000 AFY, today, with a further, presumably legally enforceable commitment to phase in permits totaling 45,000 AFY over a period of 25 years; or litigate. Their argument, essentially, is: the water is now "available", and will be "available" in future according to Forestar's consultants' projections; there are only two bases on which Forestar will accept permit(s); and any other meddling by the District is unacceptable.

The District must continue to resist the arbitrary dictates of individual permittees and continue issuing permits in accordance with its Management Plan and Rules, which in turn assures compliance with the Texas Water Code. Otherwise, it will either succumb to the Post Oak Savannah Groundwater Conservation District style of "management" --- which requires turning a blind eye to managing groundwater as a natural resource by permitting all comers,[7] no questions asked----or it will engage in inconsistent permitting decisions, subject to whatever pressures individual permittees are able to impose on the District's desire to prudently manage its aquifers for future generations.

Presumably, Forestar would argue that the District must permit, in full, every other applicant who has a compliant consultant and who is otherwise able to achieve "administrative completeness" in the permitting process.[8] Forestar's only acknowledgement of the District's authority to regulate production is apparently a token recognition that the District, at an unspecified point in the future, may require "withdrawals to be legally curtailed, if required."[9] In other words, the District has no *active* authority to "manage" the aquifers; instead, in Forestar's view, it must wait for the prospect of, in the words of Forestar, "impacts, if any" to invoke its authority to conserve, preserve and protect the aquifer.[10]

It should be noted that experiencing "*irreparable* harm" is not an unrealistic potential, given that the DFCs first must be *exceeded* in Forestar's analysis --- that is, the "desired

[7] POSGCD has permitted 190,200 acre-feet/yr in all aquifers as of July, 2013, with almost 104,000 acre-feet/year in the Simsboro alone, per Open Records Request to which NFN had access.

[8] However, Forestar apparently intends to further "meddle" with the District by picking and choosing which future permit applications it will challenge. On the basis of its assertion that the District would never grant another permit if it persists in reducing Forestar's permit, it has now formally challenged a relatively small "new water" permit for local use by one local industry. On the other hand, Alcoa Inc.'s request for, essentially, a "new water" permit by transferring wells from RRC to District jurisdiction in order to use the water for a "new" use, and at a higher pumping limit than the other applicant, went unchallenged by Forestar. Such inconsistency may be explained by Forestar's likely search for additional water partners for its grand water marketing plan, but does not help its arguments in this rehearing.

[9] See, for example, *Water for Texans-Forestar's Commitment to Bastrop and Lee Counties,* cover letter from Jim Decosmo, President and Chief Executive of Forestar Real Estate (USA) Group, Inc., page 1 of Forestar presentation to LPGCD, November 20, 2013 (Decosmo Letter): "Forestar recognizes the important role the Lost Pines Groundwater Conservation District plays in managing the region's water resources. We also respect the District's authority to manage the aquifers, including requiring withdrawals to be legally curtailed, if required. We believe this regulatory process protects everyone."

[10] Forestar Power Point Presentation.

future conditions" that the District is legally mandated to set for a 50-year horizon, for each aquifer in the county, are the drawdowns that will be considered "acceptable" or "desired", when pumping is allowed in the maximum amount that will "achieve," but not exceed, those drawdowns. Currently, the DFCs are expressed as acceptable county-wide average drawdowns, by 2060, in the Simsboro Aquifer in Lee and Bastrop counties. However, the District's General Manager and George Rice, respectively, each cited proected drawdowns at the epicenter of the Forestar well field in Lee County of over 600 feet. Theoretically, the DFC can be revised up or down every five years in the regional planning process; however, significantly increased drawdowns (and DFCs) in neighboring counties with aggressive permitting that results in massive pumping, will likely force the District to focus on resisting pressure to *increase the District's DFCs* during future planning periods. If the specter of irreparable harm becomes the only control on permitting at the front end, at what point in a failing aquifer will we be able to decide *irreparable* harm is imminent, but not inevitable?

We urge that sacrificing one prong of the balancing test for the other until it may be too late to *achieve* balance, i.e. sustainability, is not the intended result of current state water law --- the statutory regime of "requiring the highest practicable level of production" does not exist in a vacuum and is not mutually exclusive of the mandate to conserve, preserve and protect.

Rather than ignoring, or violating State water law, in fact the Board's permitting process properly mirrors, and continues, the process under which a groundwater conservation district is required to set the district's "desired future conditions" (DFCs) to achieve balance between production and sustainability.

Despite the inference otherwise by Forestar, State water law does not mandate that potentially irreparable harm must be allowed to occur before development of groundwater is regulated by groundwater conservation districts. Recent Texas Supreme Court decisions on the actions of groundwater conservation districts to regulate groundwater production do not change this regime. Forestar, instead, seems to urge this is the only regulatory process that protects "everyone", and thus the regime that must prevail.[11] In essence, Forestar's arguments give lip service to sustainability and protection of the public interest, but in truth represent the relentless pursuit of maximum benefit to Forestar and its partners. (One has to wonder, for example, why the reservation of the full 45,000 AFY by Hays County was so critical, if the water is truly destined for Williamson, Travis, Lee and Bastrop counties as well as Hays? Is it because Forestar and its partner, Hays County, will benefit more if Hays County is the "broker" and Forestar receives a percentage of their "action" over and above selling all the water to Hays County (taxpayers) in the first place?)

The Board's approach to evaluating the Forestar permit, a permit application which far exceeds the quantity of water previously permitted by the Board under a single application, reflects adherence to the "desired future conditions" process which is intended to guide any district's permitting decisions. The Texas Water Code sets the

[11] Decosmo Letter, page 1

process by which the DFCs are determined. Not surprisingly, the process calls for the same "balancing" between conservation, preservation and protection and the highest practicable level of production. Contrary to the trend of Forestar's reasoning, nothing in the Texas Water Code obliges a groundwater district to abandon the conservation side of the equation until some arbitrary, but unknown, future date. In short, it is possible for the District to *manage its aquifers on a sustainable basis* without violating any *statutory or regulatory requirements.* The process by which the District determined to issue a permit of 12,000 acre-feet/year to Forestar was not flawed, is backed by substantial evidence and does not need to be unwound.

Specifically, the Board properly considered "Modeled Available Groundwater" or "MAG", in its permitting process for Forestar, as mandated by the Texas Water Code and as determined by TWDB through computer modeling.

Modeled Available Groundwater is defined in state law and in District Rules as the amount of groundwater that may be produced on an average annual basis to achieve a DFC. MAG, in essence, dictates the *regulatory availability* of the aquifer, to insure that something less than the amount which is *physically available* (possibly, the last drop)[12] will be withdrawn from an aquifer. It is the "regulatory yardstick" that was correctly used by the District to evaluate the Forestar application (and presumably other recent permits, such as the LCRA permit which was also proportionately reduced by the District). It is true that MAG is expressed in terms of amounts produced, rather than amounts permitted, and it is also true that some permits do not pump to the permit limits. However, nothing dictates when or if such production limits are expected to be met, and post-permit, the District usually has no authority over permittee decisions to increase pumping to any level at or below maximum permit limits. [13]

The District's Management Plan makes no mention of arbitrary assumptions in the permitting process about how much of the permitted production will actually be realized at any given time --- statements along those lines are irrelevant and misleading if granting a permit for X acre-feet grants authority to actually produce, and install wells and pipelines big enough to support the production of, X acre-feet during the permit term. In fact, nothing less than X acre-feet should be used to assess how achievement of the DFC will be accomplished. Arbitrary reduction of X acre-feet to something less also distorts the usefulness of MAG as a tool in permitting. It might be useful to note that the same permittees that argue they must have long-term certainty in their projects to assure the participation of sophisticated investors in their financing, are not likely to reduce their pumping down the road or mitigate their damage without a fight, or in lieu of a fight, without helpful legislation on the books.

[12] Draining an aquifer to the last drop, and doing irreparable harm short of draining the aquifer, is not an impossibility. Rather, it is constrained only by the hydraulics of the aquifer and the available technology. The advent of "fracking" as an advanced recovery technology in the oil and gas industry is a perfect illustration of the latter point.

[13] Nothing herein should be construed to argue against the reserved right of the District, in its Rules and in its permits, from curtailing production if the circumstances warranting such curtailment exist. We simply argue this is an uncertain right in an uncertain world of future groundwater regulation.

The Legislature has so far not guaranteed Districts will be able to cut producers/pipelines back when it is determined they are preventing achievable DFCs. *In fact, legislation was introduced in the last legislative session that would severely limit any groundwater district's authority to impose such cutbacks on the recipients of the water transfer.* There is no reason to believe the same or similar legislation will not be re-introduced in the next or future sessions. The future resolution of many issues related to groundwater supply and demand is murky; in the meantime, it is reasonable to conclude that the Legislature intended that the District should apply the MAG on the front end of permitting, in part to diminish the necessity of production cutbacks but more importantly, to avoid potentially irreparable damage to the water supply and unreasonable adverse impacts on the citizens (your constituents) who depend on the aquifer below them and on the District's mandate to protect that aquifer.

MAG has been set at 37,249 acre-feet in 2060. If you add the Forestar permit request of 45,000 acre-feet/year to existing use and other pending permits that Forestar would presumably support, MAG becomes totally irrelevant if you permit 100% of what applicants are asking. Why have MAG at all? This is not what the Legislature intended in SB 660, the law which introduced the concept and application of "modeled available groundwater" and which established the balance between "highest practicable level of groundwater production versus the conservation, preservation, protection, recharging and prevention of waste of groundwater" as a yardstick to be used to avoid unachievable DFCs. The District should, indeed is *required,* to factor MAG into the evaluation of every permit, to avoid the necessity of future cutbacks and future harm, as much as possible.

CONCLUSION AND FURTHER PERSPECTIVE

Conclusion of Discussion

Good science, as demonstrated here today by the ES Letter and the George Rice Report, supports the District's prior application of good science and good law that resulted in a decision to reduce Forestar's permit to 12,000 acre-feet/year. Nothing in the reduced permit prevents Forestar from coming back to the District, on whatever schedule it chooses, to make its case for more water. Clearly, Forestar is being driven by the chicken and egg problem of obtaining financing, as part of the *big permit* needed to get the *big water supply contract* to get the *big financing.* We have said it to you before, and we will say it again, nothing in state water law requires the District to capitulate to the capital markets' risk aversion by making that conundrum part of the balancing act between production and sustainability --- in essence, to shift the risk to the aquifers, who are at least as important as corporate profits. The District has acted wisely, and should not be criticized either for giving Forestar a portion of its request, or for doing so in keeping with the urging of its constituents. The Bastrop County Commissioners Court, followed immediately by the Lee County Commissioners Court, spoke for those constituents in passing resolutions last spring that urged the District to "adhere to and comply with" the MAG to assure achievability, to the extent we can along the way, of DFCs.

Public Perspective

We believe NFN represents, and has delivered to the District, the credible viewpoint of a large percentage of the population of both of our counties who believe the District's reduction of the Forestar permit to 12,000 acre-feet/year was warranted, reasonable and defensible. Their viewpoint should be judged as valuable to the District's processes. The District's record at this point *should* include numerous public comments previously delivered during the original public hearing. As well, both County Commissioners Courts have passed resolutions in support of the District, which should be part of the record.

I also believe the approximate 1% of the population ---the almost 100 Lee County landowners and one State Representative---who have sold their water to Forestar, are unable to refute the District's analysis and even its logic in reducing, but still granting significant pumping limits under, the Forestar permit, though they disagree with the amount permitted.

What does it mean that they disagree with the amount permitted? It means that the nearly *4 billion gallons* per year they *now* have the collective right to send beyond our borders under Forestar's 12,000 acre-feet/year permit, is just not enough to give them the profits they seek. It does *not* mean that their land has lost its economic value, or that they or Forestar are denied an economic benefit. But in their collective minds, they are only permitted to sell enough water to fill the Lexington water tower every 28 minutes, or serve 35,000 households, possibly in perpetuity, and that just isn't what they were promised --- either under state law that says they own the water under their land and, with a big enough straw, the water under their neighbors as well, or by the Forestar-Hays County partnership, which stands ready to sue to get the rest of their neighbors' water as well.

But do those ordinary folks, our neighbors, in their hearts agree with Forestar that, by God, they were literally promised *and are entitled*, *without interference from the District on the front end*, to suck almost *15 billion* gallons a year from under their neighbors, forever, or at least as long as the aquifer lasts--- or, to be fair to Forestar's reasoning, at least until the damage done to our aquifers by *all* pumping in the District is *so great* that the District *might* be legally empowered to step in and reduce *everyone's* pumping? The latter is the only real authority "to manage the region's water resources" that Forestar concedes belongs to the District. By "damage so great" I mean pumping that will cause the average drawdowns in the Simsboro portion of the Carrizo-Wilcox Aquifer across Lee and Bastrop counties to *exceed* the established desired future conditions, before we reach the year 2060, whether or not the permit is phased or granted all at once. And remember *those drawdowns may very likely be steadily increased every 5 years by a political process that ensures the Forestars of the world will not be allowed to fail to get their ever-increasing share of the pie.*

We frankly don't want to believe our neighbors would have signed on to deliberately damage the future water supply, if they had not received the disingenuous Forestar

promise that "[o]bjective science shows that the water Forestar would remove from the Simsboro aquifer can be replenished by recharge." If you enjoy math, try figuring out just how many hundreds of feet of rain per year it would take to recharge one year of pumping over 150,000 acre-feet/year (almost 49 billion gallons), taking into account the District's current permits, at maximum pumpage, Forestar at 45,000 acre-feet/year, and other permit applications currently on the table. Rational minds can differ about science, but profit motives and conflicts of interest have been known to influence hired-gun consultants, and the computer modeling they perform, in irrational ways.

Forestar has not successfully challenged the District's formal Findings and Conclusions. No evidence that was not available to the District prior to the May 15 permit decision has been presented, and no information presented by Forestar as a result of this re-hearing dictates a different result, or successfully refutes the *substantial evidence* on which the District based its decision. Under the facts of this particular permitting process, in which the District fairly exercised its constitutional mandate, as the agent of the State, to conserve, preserve and protect aquifers within its jurisdiction, the District has not excessively regulated anyone's land so as to require money damages as compensation.

The District has done its work, and has done its work well.

Thank you for the opportunity to address you in a public forum.

Sincerely and respectfully,

NEIGHBORS FOR NEIGHBORS
By Michele G. Gangnes, Vice President
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