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Gary Westbrook
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via e-mail gwestbrook@posgcd.org

Re: Environmental Stewardship Supplemental Comments on GMA 12 Proposed Desired Future Conditions

Dear Mr. Westbrook:

As previously noted, Environmental Stewardship appreciates the opportunity to work with GMA 12 to move towards desired future conditions that fully consider environmental impacts, including interactions between surface water and groundwater, as the GMA is charged to consider under Texas Water Code § 36.108(d)(4) while balancing other factors. In light of issues and questions raised at the December 10 meeting of GMA 12, Environmental Stewardship submits these supplemental comments.

Approach of other Groundwater Management Areas

A question was raised at one point regarding the approach of downstream groundwater management areas (GMAs) to the Colorado River. Downstream of GMA 12, the Colorado River borders GMA 14 and GMA 15. In these areas, the Colorado River crosses the outcrop of the Gulf Coast Aquifer, and, thus, neither of these GMAs is presented with a need to address the hydrologic connection of the Wilcox Aquifer and the Colorado River. Neither downstream GMA has established a DFC directly relating to surface water criteria.

Notably, both GMAs directly upstream of GMA 12 have already established DFCs that contain surface water components that would be indirectly protective of the Colorado River or Brazos River watersheds. For example, GMA 8 has established DFCs requiring the maintenance of specific drought flows in Salado Creek in Bell County, as well as aggregated stream/spring flow in Travis County, and aggregated stream/spring flow in Williamson County.

The preservation of stream flow into Salado Creek, and aggregated stream/spring flow in Williamson County protect flows into the Brazos River, while the preservation of stream/spring flow in Travis County protects flows into the Colorado River under the jurisdiction of GMA 8 immediately adjacent to GMA 12.

Similarly, GMA 10 has established the following DFCs for the Edwards Aquifer within its jurisdiction preserving specific springflows at Barton Springs, which provides some protection for the Colorado River.

In light of these upstream surface water DFC components, the adoption of a surface water DFC relating to inflows into the Colorado River by GMA 12 would be consistent with the protection of surface water inflows within the Colorado and Brazos River watersheds immediately upstream of GMA 12.

Notably, several other GMAs have been able to adopt DFC components directly linked to surface water impacts, including GMA 7, GMA 8, and GMA 10.

<u>The "beginning" of the conversation of surface water DFCs in GMA 12 has passed, and action is now warranted in the form of the adoption of surface-water DFCs.</u>

Environmental Stewardship understands how some would say that that GMA 12 is "beginning" a conversation regarding the adoption of a DFC component directly-linked to surface water. In a certain sense this is true, since GMA 12 has yet to take action by adopting a surface water DFC component. But this is not genuinely the beginning of the conversation. As detailed in Environmental Stewardship's initial comments, this is the third DFC round in which Environmental Stewardship has proposed that the GMA 12 DFCs should contain a component specifically protective of surface waters. Consequently, this conversation has now been ongoing for *more than a decade*. Within GMA 12, each time the topic is raised, the ultimate resolution has been to delay adoption of a specific surface water DFC.

The Legislature has called upon groundwater districts to act based upon the "best available science," rather than perfect information. GMA 12 has adopted numerous DFC components based upon the best estimates of the direct future groundwater aquifer dynamics. Environmental Stewardship has faith that GMA 12 is now fully capable of similarly adopting DFCs with a surface water component. In the last round of DFC adoption, GMA 8 and GMA 10 were both able to accomplish this by adopting DFC components protective of surface water flows within the same watersheds as are at issue in GMA 12.

In Environmental Stewardship's initial comments, Environmental Stewardship proposed specific DFC components directly linked to surface water dynamics. Environmental Stewardship makes no claim that these are perfect, but they are well-grounded in the best available science. As districts continue to consider permit applications, the adoption of DFC components linked to surface water dynamics would help to inform the Districts in applying a uniform framework for the consideration of the impacts that such permits will have upon surface water resources. Further delay in the adoption of a surface-water component in the GMA 12 DFCs would further delay the ability of such a uniform framework to meaningfully inform the consideration of permit applications within the District, and irreparably delay the protection of surface water resources within the GMA.

Accordingly, Environmental Stewardship respectfully asks that GMA 12 take action now to adopt a surface water component within the GMA 12 DFC, rather than allowing delay to further undermine protection of the surface water resources within GMA 12.

Role of SB3 flows and Jurisdiction to Protect Surface Waters

Considering the extensive discussion of the process that has been undertaken to establish surface water flows within the SB 3 context, the question was reasonably raised as to the entities with responsibility to protect such flows. The TCEQ has direct responsibility to consider and protect these particular flow levels. But, groundwater districts also play an important role. In developing a management plan, each district is required by Texas Water Code § 36.1071(a)(4) to work "*in coordination with surface water management entities* on a regional basis" to develop a management plan, "addressing conjunctive surface water management issues."[1] Likewise, in the permitting process, each district is required to determine whether the permit is consistent with that management plan, and is required to consider whether the proposed use of water unreasonably affects surface water resources.[2] As GMA 12 is well aware, the Legislature has specifically charged groundwater districts with considering surface water impacts in establishing DFCs. Thus, the protection of surface water is a consistent required thread as groundwater districts engage in planning and permitting.

The SB3 flows identified potentially serve as an important tool for both GMA 12 and the Groundwater Districts within GMA 12 in fulfilling this responsibility to protect surface water. The use of these flows enhances the ability of groundwater districts to coordinate their work with surface water management entities as required by the Texas Water Code by aligning the specific objectives of both regulatory entities. These flow quantities have been presented as relevant science for use in evaluating the protectiveness of surface water flows within the Colorado River. Consideration of these flow regimes enables the joint consideration of environmental impacts and surface water impacts in a scientifically-sound parameter, as well as moving towards a consistent framework for the conjunctive protection of surface water and ground water.

Additionally, appropriate consideration of the state water plan would include the adoption of a DFC that preserves instream environmental flows. The current state water plan sets aside water needed for SB3 environmental flows as unavailable for water projects permitted after adoption of the environmental flow standards.[3] Accomplishing this goal requires protection of such flows from both surface water withdrawals *and* groundwater impacts. In considering the water management strategies set forth in the State Water Plan, including strategies such as the use of water by Blue Water Vista Ridge, the GMA should also consider this limitation imposed by the State Water Plan.

Balancing of Surface Water Flows and Property Rights

Environmental Stewardship fully realizes that a consideration of the protection of surface water flows must be balanced in context with other factors, including the protection of private property rights. In fact, Environmental Stewardship and the members of Environmental Stewardship own

[1] Tex. Water Code §36.1071(a)(4).
[2] Tex. Water Code §36.113(d)(2).
[3] 2017 State Water Plan, Texas Water Development Board, at p. 63 – 64.

groundwater within GMA 12. Unfortunately, all-too-often the protection of "private property rights" is forwarded in the DFC process as a reason to prioritize the rights of persons who have obtained permits for non-exempt pumping above all other factors by claiming that no DFC may be adopted that could result in the curtailment of such pumping. Within the current DFC process in GMA 12, an assumption that any DFC must accommodate all permitted pumping under model run S-7 reflects such an approach, since model run S-7 incorporates all permitted non-exempt pumping. This logic is flawed based not only on the need to balance such interests with surface water protection, but also based upon on a comprehensive consideration of private property rights.

All landowners within the GMA possess ownership rights in the groundwater beneath their property, and the rights of *all* landowners warrant balanced consideration. In fact, the groundwater districts equally bear a responsibility to protect the ability of each property owner to produce their fair share of groundwater. [4] This right encompasses a right which includes the right to conserve a landowner's share of groundwater, as GMA 8 previously noted in adopting its DFC:[5]

> 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.

Several members of Environmental Stewardship have chosen *not* to pump the groundwater beneath their property, or who have chosen to self-limit the pumping of groundwater beneath their property. The acreage within GMA 12 owned and leased as a basis of the non-exempt permitting reflected in pumping file S-7 total only a small fraction of the total area encompassed within GMA 12. Focusing on the protection of groundwater rights held beneath this fraction of property within the GMA compromises the protection of the rights of persons owning the remainder of real property within GMA 12.

The permits for non-exempt pumping reflected in pumping file S-7 have each been granted subject to curtailment as necessary to protect groundwater within the District, and during the permitting process it was consistently asserted that protection of the DFCs would be accomplished through such an adaptive management approach. For example, the current permit held by Vista Ridge, LLC, explicitly provides that the POSGCD rules are incorporated into the permit, including the Rules providing for reducing permitted production. This would include Rule 16.4 of the POSGCD rules providing for curtailment of groundwater production in order to achieve the DFC. In that case, Vista Ridge has been fully apprised that it's allowed groundwater production may be adjusted in the future to meet the DFC. Recent comments by Vista Ridge seem to express a reverse expectation that the DFC will be adjusted to accommodate the maximum production allowed under its permit. Such an expectation is simply unreasonable.

These considerations reflect the manner by which DFCs that properly seek to conserve and protect water within the GMA not only benefit the surface water environment that is dependent upon groundwater within the GMA, but also provides balanced protection of the private property interests within the District.

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[4] *Edwards Aquifer Authority v. Day*, 369 S.W.3d 814, 829 (Tex. 2012).

[5] *see Elliff v. Texon Drilling Co., 210 S.W.2d 558 (Tex.1948).*

Conclusion

For these reasons, Environmental Stewardship maintains its request that the GMA fully incorporate the protection of surface water resources in the development of a DFC, followed by continuous evaluation and refinement of that DFC in future rounds.

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Respectfully submitted,
/s/ Eric Allmon
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