ADDITIONAL EVIDENCE AND COMMENTS OFFERED TO TEXAS WATER DEVELOPMENT BOARD RELATED TO ENVIRONMENTAL STEWARDSHIP PETITION CHALLENGING DESIRED FUTURE CONDITIONS SET BY GROUNDWATER MANAGEMENT AREA 12

Submitted on behalf of Neighbors for Neighbors
by Michele G. Gangnes, Vice President

Delivered Electronically and by Certified Mail, Return Receipt Requested

INTRODUCTION

I live and work in the community of Blue, in Lee County. I have been a Lee County landowner since 1998, a water activist since 1999 and a practicing attorney since 1975. These remarks are offered on behalf of myself, as a citizen who is affected by the actions of GMA 12 in setting desired future conditions for the Carrizo-Wilcox aquifers, and on behalf of Neighbors for Neighbors, a Texas non-profit corporation and 501(c)(3) organization, whose grass-roots efforts are aimed at environmental and quality of life issues for its Central Texas constituency. NFN's membership is comprised primarily of citizens of Lee and Bastrop counties who are also affected by the DFCs. I am the Vice-President of NFN and am authorized to comment on its behalf.

NFN believes that, as an overarching principle, if the GMA 12 DFCs are implemented, and modeled available groundwater is based on those DFCs, pumping will far exceed recharge, unacceptable drawdowns will result, (further) mining of the Carrizo-Wilcox Aquifer will occur, private property values will be devastated, and irreparable damage will occur to surface water resources and surface water rights. For purposes of these comments, however, we have addressed only those issues raised by Environmental Stewardship's petition.

The additional evidence and comments offered here by Neighbors for Neighbors are intended to amplify comments submitted on its behalf by the undersigned on March 14, 2012, in connection with End Op, L.P.'s petition challenging GMA 12's desired future conditions, a copy of which is attached. Please consider both sets of comments with respect to Environmental Stewardship's petition.

Attached to these comments as Exhibit A for inclusion in the record is a letter from Environmental Stewardship, with attached exhibits and sworn affidavit of its Executive Director, to you (the Texas Water Development Board), dated March 20, 2012. The letter was delivered to me and Neighbors for Neighbors, because the letter is responsive to numerous questions I submitted to ES's Executive Director after the hearing, seeking a more clear understanding of the evidence on both sides. Speaking for myself and based on similar comments I heard from other NFN members and citizens present at the hearing, we were concerned that certain discrepancies created in the record of the hearing improperly discredited and distorted ES's petition, evidence and presentation at the hearing. In

order to maintain precision in the presentation of the matters addressed in his letter, and to avoid the kind of misleading paraphrasing and mischaracterization that I believe GMA 12 allowed in framing ES's case, I respectfully submit the entirety of Mr. Box's letter and exhibits for your consideration as a part of NFN's additional evidence, together with Mr. Box's sworn affidavit concerning the letter. That is, NFN adopts Environmental Stewardship's March 21 letter as a document presented to TWDB for its consideration as additional evidence, as such "evidence" is defined in 36 TAC §356.42(3).[1]

We would also urge that TWDB carefully consider the comments submitted by Dr. Curtis Chubb on March 12, 2012, in connection with the ES petition. In our view, Dr. Chubb has captured the essence of why GMA 12's DFCs are not reasonable and should be revised, based on the actual facts of what transpired *in GMA 12* during the DFC process; the undeniable interaction of groundwater and surface water; the availability *today* of tools to monitor that interaction; GMA counsel's virtual admission the DFCs were reverse-engineered; and the GMA's clear failure to pass the legal tests for reasonableness of their DFCs.

In short, GMA 12, like the emperor, has no clothes as far as the Environmental Stewardship petition is concerned.

I am not an expert in water law, nor am I a scientist. However, I do believe my credentials which I have summarized at the end of these comments and my frequent participation in water related conferences, water planning group meetings, GCD meetings and water related community meetings since 1999 at least establish my credibility (1) as a professional who is trained to evaluate complex issues and competing arguments of the type raised at these two hearings and make reasonable judgments as to credibility, and (2) as a private citizen and community volunteer who has been frequently and substantively involved in local, regional and state water issues, and who cares very much that my community gets a fair shake when it comes to "balancing all of the competing interests" in water.

I have included that latter point to highlight what is most frustrating to many members of the public when they try to express their concerns about local impacts and local concerns, not only to regional and state bodies, but increasingly, to local governments as well --- we often feel marginalized and dismissed, as if the "balancing" that is supposed to go on does not involve having any weight on our side of the scale, resulting inevitably in an *unfair imbalance*. Once cloaked in the term "the greater good," however, the imbalance is transformed back into a perfectly acceptable balance. GMA 12 emphasized how hard they worked and how committed they are to achieving "balance" in their DFCs. However, at the end of the hearing on March 7, one thing is clear, and I believe GMA 12 would have to honestly admit, there was really no effort made to include the potential effects of groundwater

[1] Defining "evidence" as "information, consisting of testimony, written materials, material objects, or in any other form, that is relevant to the reasonableness of the desired future conditions." Chapter 356 TAC §42(3).

pumping on surface water and surface water property rights[2] in the DFCs "balancing of interests" during the DFC process.

We are not naïve; we understand the give and take that goes into what we at least hope is ultimately a stakeholder process. Although my thinking, and that of Neighbors for Neighbors' constituents, were once proclaimed in public to be similar to the thinking that resisted the invention of the flushing toilet, I continue to believe we have some very valuable input to offer as true "stakeholders" in the water planning process. I hope you will listen when we say, "Groundwater is of utmost importance to our economy and our (including our children and grandchildren's) ability to compete and survive. The value we, along with the State, place on our rivers, springs and streams is unquestionable. Because the existence of groundwater-surface water interaction seems beyond question at this point in the scientific community's understanding of the hydrologic cycle, assuming that groundwater has to be a focus of the preservation of *both* systems seems a foregone conclusion.

So if we common folk understand *today* how important the interaction between surface water and groundwater is to our state and that we should not wait five or ten years, until our groundwater districts are 100% sure they have figured out a surface water/groundwater "metric" for their DFCs and in the meantime , doing nothing (including the monitoring for which tools exist), how could TWDB's conclusion be any different? We want adaptive management *now* in GMA 12 for the unique riparian and ecological systems that exist there, and we want monitoring of surface water/groundwater interaction *now,* while there is still time to avoid irreparable damage to the hydrologic cycle. It is not enough to say *trust us, we care, we're going to employ adaptive management any day now.* Tomorrow may be too late --- to quote Steve Box, Environmental Stewardship:

> *During the next five years, based on the MAG that comes out of this DFC, permits will be granted, wells will be drilled, tested and put into operation, all sorts of supply, service, construction and operation contracts will be written and signed, pipelines will be built and, ultimately, municipalities, industries, and agriculture will come to rely on the water that is granted by these DFCs. The damage will be done and will be extremely difficult, if not impossible, to unwind and repair.*

Mr. Box's statement is strangely reminiscent of a slide, a copy of which is attached as Exhibit B, that was shown to the Brazos G Regional Water Planning Group, to the best of my recollection, in 2006 by Dr. Robert Kier, then hydrologist for the Lost Pines Groundwater Conservation District. In assisting LPGCD's effort to resist Region G's disregard of Lee County's recharge (7,174 AFY per the current GAM) in favor of setting Lee County's availability at 46,458 AFY, he recommended a conservative approach --- fixable by future generations---rather than the "false promise" that overstatement of groundwater

[2] Despite vigorous argument to the contrary by counsel for GMA 12, we believe that surface water permit holders do indeed have a "property right" protected under Texas law. That may be an argument for a later day, but in any event, there needs to be *acknowledgement* by the GMA that an issue exists about which they differ with ES. Instead, counsel characterized the matter as settled law that disposes of ES's argument that surface water permit holders have legally enforceable property rights, possibly rights that are protected under the "takings" clause of the Texas Constitution.

availability imposes and that may spell disaster for future generations. I have personal knowledge of how sincere LPGCD's efforts have been to influence conservative groundwater planning, and I regret they are in a position today to argue, with GMA 12, that they did everything they "reasonably" could to set DFCs.[3]

I would state Mr. Box's and Dr. Kier's concerns another way. If you, TWDB, buy the GMA's argument that because Steve Box and his experts cannot give you 100% assurance that all of ES's calculations, using the same GAM that GMA 12 used, are 100% reliable; that it's okay for GMA 12 to just say it was "too complex"[4] to develop a metric related to stream and spring flow for inclusion in the DFCs and "too lacking in data"[5] to at least take a stab at it, and that there is no hurry to implement adaptive management today rather than five or ten years down the road, you will do nothing to set aside the DFCs and will not ask GMA 12 to do better.

If you instead recognize how absurd it is to claim too much "uncertainty" in ES's case and then turn around and elevate "average drawdown" to a perfect science; if you recognize that the DFC petition process has to have some meaning and should not be a rubber stamp just because your staff, in effect, tells you those seven criteria for "reasonable" DFCs in your Rules and your statutory authorization to recommend revisions in DFCs are virtually meaningless because the determination of whether DFCs are reasonable is ultimately controlled by the GMA;[6] and if you recognize that espousing adaptive management would at least compel you to say the GMA should put monitoring in place *today*, rather than try to manage irreparable harm down the road, you will decide that Environmental Stewardship has carried its burden of proving GMA 12 *failed* to meet mandatory requirements of Chapter 36, specifically, Section 36.108(d), rendering their DFCs *per se* defective, and that GMA 12's DFCs *fail* scrutiny under the relevant criteria for TWDB's review of DFCs in TWDB's rules, 36 TAC §356.45.

I was present for the entirety of both hearings, and I have reviewed the ES petition and the exhibits ES introduced into evidence prior to the hearing. I have also read the 36-page "Response" of counsel for the GMA, except for the attached affidavits of experts which were not available to me. Despite my earlier attempt to convince you I have special skills to discriminate between the arguments and evidence offered by Environmental Stewardship, and the corresponding offerings of GMA 12, it did not take a rocket scientist to figure out that GMA 12 had no game to bring to this table. I believe GMA 12 simply realized they had failed to comply with Section 36.108(d) and would fail scrutiny under the relevant criteria for TWDB's review of DFCs in TWDB's rules, and decided to rely almost solely on obfuscation, mischaracterization of ES's case and tautologies to make their "case", such as it was. As

[3] Per Mr. Box's March 20 letter, I believe LPGCD was unfortunately too reliant on its hydrologist Mr. Kier as far as his apparent advice to them that they could essentially put off thinking about surface water and environmental considerations that flow from the interaction of groundwater and surface water.
[4] Lein oral argument, End Op hearing
[5] *Id*.
[6] TWDB Staff Briefing on GMA 9 petition proceedings, January 25, 2012

often as possible, they hid behind lifelines thrown to them by TWDB and TWDB staff in the GMA 9 petition Staff memo.

Occasionally during oral argument and later when I read their Response, I envisioned that GMA counsel and experts were playing a game of "Whack-a-mole" with a revolving menu of glib responses in an attempt to minimize and dispose of, one by one, Petitioner's substantive and serious contentions (at least to people who read the Water Code to have recognized that not only does the groundwater/surface water connection exist, but that it is also *important).* I am almost too old to remember my early mandatory litigation training as a first-year associate in a large law firm. It might not have been an acknowledged basic tenet, but nevertheless, just like ordinary people who don't have much of a leg to stand on, lawyers are not above throwing everything against the wall in the hope something will stick --- there was definitely some of that going on in GMA 12's case. And I could not help noticing that Environmental Stewardship and its experts consistently remained earnest, honest and sincere in a presentation that they obviously had worked very hard on --- maybe that's not enough to win, but if you realize that neither counsel nor experts nor affiants for GMA 12 were actually able to refute ES's arguments, nor were they convincing that they actually *considered* in a reasonable manner all of the stakeholder input they congratulated themselves for *receiving,* or complied with §36.108(d) or could pass your tests in 36 TAC §351.45, ES proved their case (or at least I believe they "carried their burden of proof" even though nothing in the petition proceedings seems to have defined just what that burden could possibly be, if, ultimately, as the TWDB staff says, the determination of DFCs is always in the control of the GMA.[7])

I do not profess to be able to articulate ES's arguments any better than they did, but I was able to follow their arguments and found them convincing. I believe their arguments are well-presented and capable of being evaluated if the slides they submitted to TWDB in advance of the hearing are considered along with their Petition and other written materials (e.g. the George Rice Affidavit), as well as the presentations of Myron Hess, Environmental Defense Fund, and Cindy Loeffler of Texas Parks and Wildlife.

Not so, I believe, with GMA 12's case. I cannot hope to specifically address them all, but as one example only of the deficiencies in GMA's defense, GMA 12's counsel and experts refuted ES's claim that the DFCs "are not protective of surface waters, including impacted springs and rivers" by saying, "…the evidence shows the Districts reasonably considered groundwater-surface water interaction and that the resulting DFCs are reasonable**. "** [8] In case there was any lingering doubt after that statement that everything the GMA districts did was inherently reasonable and therefore so are their DFCs, counsel goes on for another four pages to argue in effect that groundwater-surface water interaction was just too difficult and inexact to be tackled by the DFC deadline (as if anything related to the average drawdown method is exact, perfect and 100% reliable). That decision was argued to show just how reasonable they were in "considering" the substance of criterion 3 in Chapter 356 §45, but just in case their argument didn't seem particularly responsive to criterion 3, they used their "TWDB lifeline" to claim, "bottom line," that Texas Parks and Wildlife's claims, which were incorporated into ES's case,

[7] TWDB Staff Briefing on GMA 9 petition proceedings, January 25, 2012
[8] GMA Response, p. 7

were basically a criticism of the GAM which is not a proper subject for the appeal of DFCs.[9] We believe the record is replete with similar examples of the weakness of GMA's arguments.

Neighbors for Neighbors respectfully requests that TWDB determine that GMA 12's DFCs are not reasonable and recommend revisions in accordance with Environmental Stewardship's petition. In the alternative, if actual revisions in the DFCs are not allowed by GMA 12, we urge TWDB to also take steps to cause GMA 12 to work with stakeholders to implement monitoring tools for groundwater/surface water interaction *during the current planning cycle*, rather than waiting until the next cycle or even later.

Thank you for the opportunity to attend the hearing and offer comment.

Respectfully submitted,

NEIGHBORS FOR NEIGHBORS
Submitted by: Michele G. Gangnes, Vice President

Michele G. Gangnes, Principal
Law Office of Michele G. Gangnes (1995-present)
Rice University, B.A.
The University of Texas Law School, J.D.
Former Partner, Karr Tuttle Koch, Seattle WA
Former Partner, Riddell, Williams, Bullitt & Walkinshaw, Seattle WA
"AV Pre-eminent" Rating, Martindale-Hubbell, since 1987
Continuously listed in the Red Book, Public Finance, since 1987
Landowner, Lee County since 1998
Board Member (since 1999) and Vice President, Neighbors for Neighbors
1290 CR B
Lexington, TX 78947
512-461-3179

[9] TWDB Staff Briefing on GMA 9 petition proceedings, January 25, 2012