

**SIMSBORO AQUIFER WATER  
DEFENSE FUND  
(SAWDF)  
P.O. Box 931  
Elgin, Texas 78621-0931  
[www.simsborowaterdefensefund.org](http://www.simsborowaterdefensefund.org)**

*Michele G. Gangnes, Esq.*  
Director  
[mggangnes@aol.com](mailto:mggangnes@aol.com)  
512-461-3179 (V/T)

June 7, 2021

Leo Wick, Sr., President  
Members of Board of Directors  
Fayette County Groundwater Water Conservation District

Re: Simsboro Aquifer Water Defense Fund (SAWDF) Preliminary Comments on Proposed 2022  
Desired Future Conditions (DFC)

President Wick and Board Members:

SAWDF is an Elgin-based, Texas non-profit corporation and a qualified 501c3 organization, dedicated to the protection of aquifers and private property rights in groundwater. I am authorized by the Board of Directors of SAWDF to present these comments and accompanying slides to you. I will also present the slides and an edited version of these same comments at today's board meeting, with the hope that we might have a dialogue about the issues we raise. Follow-up questions after the June 7 meeting also are most welcome.

We appreciate the opportunity to present our concerns about the proposed DFC, and we look forward to resolving issues through mutually beneficial dialogue whenever possible.

In addition to being a founding board member of SAWDF, I am a Lee County landowner and a semi-retired attorney on Emeritus status with the State Bar of Texas --- that just means I am old but still licensed to practice. However, I am not a water lawyer, and I have not been engaged as legal counsel either for SAWDF or any other person interested in these comments. The opinions expressed here or at today's meeting are those of SAWDF. However, I have been a volunteer advocate for aquifer protection and landowner rights protection for the last 22 years in Lee County.

SAWDF also reserves the right to submit additional comments to you during the 90-day public comment period associated with the proposed Desired Future Conditions (DFC), but please also consider this letter as public comment, delivered during the official comment period.

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The purpose of this letter is two-fold. One, we hope to inform you more fully of conditions on the ground in Lee County that we don't want to see worsen or be replicated elsewhere, and to present the landowner perspective on the future if the GMA-12 proposed DFCs stand.<sup>1</sup>

By now you have received Mr. Eric Allmon's letter of June 3 as counsel to Environmental Stewardship. We refer you to Mr. Allmon's reference to the *Stratta v. Roe* case in the Brazos Valley Groundwater Conservation District for an important discussion, *inter alia*, of the rights of *all* landowners, whether they have wells or not. We are also aware of a November 2020 letter from legal counsel to the Vista Ridge project, addressed to Post Oak Savannah Groundwater Conservation District and copied to all member districts in GMA-12.

Our second purpose, respectfully, is to *broaden* your awareness of the potential legal peril if the proposed DFCs are adopted by individual districts.

Again, Mr. Allmon's discussion of your ability to survive a "takings or statutory" challenge, based on your DFC, by a non-exempt permittee like Vista Ridge, is instructive. It should be noted that we are not offering legal advice to either the district or our landowner constituents, but we do not necessarily agree with all of his conclusions as they might pertain to *exempt* (rather than non-exempt) *well owners who have already incurred damage* under the *current* DFC, or to landowners generally.

There are landowners, including exempt well owners in Lee and Burleson counties, whose ability to produce water, and whose property values (due to the loss of a capital asset, their groundwater) and their agri-businesses, have already been damaged by another district's official permitting action. These impacts on exempt well owners are current, measurable, and continuing, not hypothetical. Their loss of water can be extrapolated more broadly to landowners in the same area, whether they have a well or not, because the water levels beneath them all have been diminished.<sup>2</sup> The proposed DFCs will not only further damage the wells that have already been impacted, but will also imperil numerous additional wells in at least two counties. This is information you cannot ignore.

We urge that the Fayette County district and the other member districts not exacerbate this situation through the DFC process, but rather try to be part of the solution. The member districts in GMA-12

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<sup>1</sup> My remarks to the board tonight will be abbreviated, so please read this letter in its entirety.

<sup>2</sup> We also emphasize that well owners and landowners who have already been impacted by a certain district's regulatory action are not, through this letter or by reason of any viewpoint of SAWDF, prejudiced by anything SAWDF says, nor have they waived or otherwise had their legal rights addressed or affected.

should all come to the conclusion that their work on the DFCs is not done, because they have not fulfilled their statutory duties in setting DFCs for the next five years.

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SAWDF was founded by veterans of several organized efforts over the last two decades to protect the central portion of the Carrizo-Wilcox Aquifer. We have shown our ability, and our supporters' ability, to marshal considerable resources to support and assist legal and other actions to ensure the public right and our government's duty to conserve and protect our aquifers in perpetuity, and to preserve landowners' property rights and access to their own groundwater.

Whether or not they support SAWDF, we expect there are many exempt well owners in Fayette County who look to you to protect their investments that depend on access to water, and to share their priorities of passing on healthy and protected natural resources to our future generations. The accessible aquifers under Fayette County may not be the Carrizo and Wilcox Group, now being pumped by Vista Ridge and targeted by other marketers, but we suspect your constituents will identify with our issues, and the peril of their neighbors, if the proposed DFCs are not rejected.

We look to Environmental Stewardship to present you with the science behind the peril to which the Colorado River is exposed by the proposed DFCs, but we emphasize how important it is for you to have a healthy Colorado River, as well as healthy aquifers.

In SAWDF's opinion, Fayette County landowners, if they were polled, would say their considerable investments in a certain way of life, individually and collectively, should be valued with as much care and deference as is shown to the speculative investment expectations of non-resident water marketers, in profit-based export enterprises that, in the scheme of things, return relatively little of value to the local community.<sup>3</sup>

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Our concerns with the process the five member districts of GMA-12 employed in setting proposed DFCs, are largely summarized by Mr. Allmon's letter, with the caveat that we intend to restrict our comments in this letter to landowner and well owner concerns only, although SAWDF is also very concerned about surface water issues as well. Most importantly, Mr. Allmon lists for you the nine factors you are required by law to consider. Currently, no GMA-12 district, through its general manager, has made a record that it has considered more than just one of those factors in setting proposed DFCs. It's up to the individual district boards of directors to conduct their own evaluation of

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<sup>3</sup> While that statement may seem to ignore the fees paid by water marketers to the groundwater district, landowners are justified in inquiring into how that money benefits them, especially when they realize the relative value of the water they stand to lose from under their property ---and from their property values! Bottom line, the comparison we have drawn here is a perfect example of the balancing of interests required in the DFC process.

the nine factors, and weigh them with the stated objective of achieving a balance between conservation and protection, and development of our water resources.

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We concur with Mr. Allmon's statement that ES's concerns with spring flow and aquifer discharge, and SAWDF's concerns with impacts on private property, are "competing interests" as far as the nine factors are concerned, and that the furtherance of one will often come at the expense of the other. Balancing these interests is a value judgment, purposefully delegated to districts primarily responsible to their local electorates, in the case of Fayette County, or to the elected officials who appointed them, in other cases. We accept that regime, but apparently GMA-12 arbitrarily, if not capriciously, has so far not accepted the statutory regime of balanced interests in setting the proposed DFC.

In this particular instance, the interests of the constituents of ES and SAWDF are more alike than different or competing, because the two natural resources we all seek to protect -----surface water and aquifers ----are at risk, but have not been adequately considered.

With all due respect, however, it doesn't take a lawyer, or even a hydrologist, to figure out the GMA 12 districts are painting themselves into a corner for future, with their current proposed DFC.

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You as a board, as well as individually, must be able to defend your decisions and your reasons for making them --- and then you have to live with the consequences to your future ability to adapt to changing conditions and manage our aquifers accordingly.

It is one thing to claim that you have the ability to cut back pumping when necessary, and quite another to plan for maximum pumping by reverse-engineering your DFC so that you hopefully never have to actually exercise your authority to regulate pumping, no matter the collateral damage to exempt wells and other landowners.

And we hope you are not just going through the motions when you hear from our two organizations, because we intend to defend *our* proposal for revising your proposed DFC. And at the same time, we challenge *you* to defend your decision to almost double the allowable drawdowns that are the currently expressed DFC, an action that

- *is not warranted under the Texas Water Code;*
  - *may not be warranted by demonstrable conditions on the ground in this district;<sup>4</sup>*
  - *will unreasonably impact natural resources, including aquifers and surface waters;*
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<sup>4</sup> SAWDF does not profess to know conditions on the ground in Fayette County; however, we are confident that conditions on the ground in at least two other groundwater districts do not warrant adoption of the proposed GMA-12 DFCs.

- *will unreasonably affect private property rights;*
- *will have unreasonable socio-economic impacts on our local communities;*
- *will set precedent that will prevent the planning process from being the adaptive exercise it is meant to be, to allow effective management of groundwater;*
- *has nothing to do with an application of the best available science; and*
- *can only be explained as an apparent capitulation to threats of litigation by non-exempt pumpers, resulting in 100% protection for their projected drawdowns, and virtually zero (0%) protection for exempt well owners and other environmental, social and economic interests*

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The unreasonable socio-economic impacts and the unreasonable impacts on our aquifers are exposed by *data in two of the five GMA-12 districts that were not contemplated, and accordingly not considered in the prior DFC review.*<sup>5</sup>

In February 2021, SAWDF formally asked the GMA-12 districts to consider the impacts being suffered by wells in northeastern Lee County and in Burleson County, within six months of Vista Ridge's commencement of 60-years of water supply commitments to San Antonio, from a cluster of Carrizo and Simsboro wells in Burleson County. The numbers of affected wells has grown since then, according to at least one well driller who works in both counties.<sup>6</sup>

SAWDF recently renewed that request in a presentation to the board of the Lost Pines District on May 19. At a specially called meeting to allow the district to hear from well owners in Lee County, Lost Pines unveiled a potential district-funded mitigation fund, and a potential rule-making to create a special management zone in Lee County to address the stress on the Carrizo Aquifer there.

SAWDF also joined in Environmental Stewardship's request for formal consideration of unreasonable surface water impacts of that same pumping at GMA-12. Both organizations are of course also highly

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<sup>5</sup> During the February GMA-12 meeting, my colleague and SAWDF board member Andy Wier had a dialogue with one of the general managers on GMA-12, who wanted to know if SAWDF's position is that no well should be allowed to be damaged. In the course of that discussion, Andy simply asked GM Day of the Brazos Valley GCD whether his district's non-exempt projects supply water locally or for export, simply because Andy knew it was the former in BVGCD, and that in Lost Pines it is the latter. Mr. Day interjected that it doesn't matter because districts cannot "discriminate" against export projects. We accept that premise in the permitting process, but it is not discrimination to fully flesh out the Sec. 36.108 factors for the DFC process. BVGCD's locally-destined water projects presumably tremendously benefit the socio-economic situation in Brazos and even Robertson counties, while the export projects that are permitted in the Post Oak GCD and the Lost Pines GCD are virtually 100% export projects. That means the water permanently leaves the aquifer, with the attendant managed depletion risks, and then permanently leaves the donor region, never to return in quantity or economic/social benefit.

<sup>6</sup> Currently, SAWDF knows of 27 impaired wells in Lee County requiring remediation. In addition to the obvious impairment of wells, there must be consideration of the diminished water levels generally, in the two formations in the near-term, and in other formations longer term.

concerned about future impacts of at least three mega-groundwater projects planned for the Lost Pines district<sup>7</sup>, and likely to be concentrated in Lee County. SAWS' and Alcoa's assertion of similar mega-water rights in Milam, Lee and Bastrop counties must also be considered.

Cumulatively, this is the situation that caused my reference to "painting yourselves into a corner" for the future.

The written comments submitted by SAWDF to GMA-12 are available [here](#). Those comments were centered around these concepts:

We urge [instead] a new mindset that could start with GMA-12 --- that we are not going to allow managed depletion (mining) of our aquifers, and that we will determine not only how much we want to pump but also how much we are determined to conserve. We must at least have two reference points at opposite ends of the spectrum if we are to find the "balance" between development and conservation that the Conservation Amendment to the Texas Constitution mandates... What we and our supporters want most, is for our state policymakers, legislators, and regulators to decide that ultimate sustainability requires that our natural resources remain resilient along the way --- that our aquifers can still spring back while they are being stressed by massive pumping. We understand that development will occur, but maintaining resiliency of natural resources assures that we are achieving sustainable development of natural resources.

The video of the February 2021 GMA-12 meeting, that includes SAWDF Director Andy Wier's commentary on his slides, may be found [here](#), along with his April 2021 updates to his slides [here](#), in response to the surprising vote by GMA-12 in March 2021 to almost double the drawdowns that are the expression of GMA-wide and district-specific Desired Future Conditions through the year 2070.

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For any groundwater district board to conclude, as I at least inferred from statements made at GMA-12 and other indications, that each district has "no choice" but to adopt these particular DFCs is troubling enough. But if you also believe you cannot now review them for possible revisions, you would be patently wrong.

If that were the case, there would be no need for the planning process and most definitely no room for public participation --- and yet, Tex. Water Code Section 36.108 sets out multiple factors you must *document* that you have "considered" when you set the DFC every five years. Mr. Allmon sets out

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<sup>7</sup> The Gatehouse permit (formerly Forestar) is for a maximum 28,500 acre-feet/year from Lee County; Recharge Water LP (formerly End Op LP) is permitted for 46,000 acre-feet/year, potentially primarily from Lee County; and the LCRA permit for 25,000 acre-feet/year in Bastrop County is pending.

those factors, and I could not improve on his discussion of what you are statutorily required to do with those factors!

In short, the Water Code does not specify one single factor that overrides all others, thus giving you no choice but to consider *only* that factor as your “marching orders”. But that is exactly what you have done.

Interestingly, you and the other members of GMA-12, *except the district where the 800-pound gorilla pumps for San Antonio*, seem all too eager to cave in to the gorilla’s threats.

Only you can decide if you are carrying out your duties or whether, instead, you are making decisions for reasons that are not set out in the Water Code, thus, for the *wrong* reasons. For example, fear of litigation is not even a factor you may consider, much less make the basis for your decision.

Further, using the groundwater availability model (GAM) to actually *calculate* the Desired Future Conditions rather than as a tool to inform and evaluate your deliberations on balanced DFC, is not warranted. *Your job and your duty do not end with a simple computer run. You haven’t finished your work, but you have time to do so.*

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In the meantime, there is hard data related to factors of equal weight with those Vista Ridge is hanging over your head. We believe you have inappropriately considered them, or possibly totally ignored them.

At the end of today’s meeting, we intend for you to:

- be convinced that you are not using the best available science and are ignoring hard data in your planning work;
- be concerned you may be setting up *your* local well owners and the Colorado River system for unreasonable impacts as a *direct result of your decisions*; and
- be concerned you are setting up a situation that will result in further imminent threats to, and confiscation of, private property within GMA-12, without compensation.

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We hope you realize that you should not just go through the motions today or for the remainder of the public process. Please consider Texas Water Code Section 36.108(d-2) when you hear our suggestions and recommendations. Section 36.108(d-2) reads in pertinent part:

After the close of the public comment period, the district shall compile for consideration at the next joint planning meeting a summary of relevant comments received, any suggested revisions to the proposed desired future conditions, and the basis for the revisions.

**We are offering our accumulated “relevant comments” and arguments in favor of them, to induce you to reject the proposed DFC. We hope you will work hard to develop and submit credible proposed revisions to the proposed DFC back to GMA-12 at the end of the public comment period. In the meantime, we challenge you to consider our suggestions in the attached slides when you provide information *to the public during the comment period*.**

**If you have the discipline and diligence to get this done, you have ample time to accomplish it before your January 2022 deadline.**

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Many of my close, as well as distant neighbors have wells, and several have reached out to me for answers. Seventy-five well owners attended Lost Pines GCD’s special meeting in Lexington on May 26 to show their concern, and some of them told their stories to the board. If 75 owners turned out with only the Friday before Wednesday notice Lost Pines gave of the meeting, I view that audience as the tip of the iceberg of community concern.

Some well owners apparently feel GMA-12 member districts don’t appreciate the level of concern in their communities, or the magnitude of damages to exempt wells from the owners’ perspectives.

You must keep in mind these well owners had no way of knowing that a well that had functioned just fine for years would suddenly be out of water. It is understandable they would want answers, when something as fundamental as water supply for valuable land, improvements, and livestock, acquired with their life savings, suddenly becomes insecure.

Some well owners with problems have worked with well drillers who are familiar with the situation in Burleson County, where the Post Oak Groundwater Conservation District’s well assistance program leaders have called for lowering pumps as much as 100 feet deeper than current drawdowns would otherwise require to get back in water.

The rule of thumb with the driller we have consulted is to maintain 100 feet of head above the pump. POSGCD policy thus could result in dropping pumps as much as 200 feet --- this time. No one has been assured further drawdowns will not occur; in fact, more drawdowns in this decade seem assured.

Not surprisingly, the level of anxiety rises with the level of uncertainty about how much additional drawdown will occur and how soon. Of course, landowners are savvy enough to know what water means to the biggest investments of their lives.

Now, because of their recent experience, they have become savvy enough to understand that the “average drawdowns” across the county to express the DFC are very misleading, depending on an exempt well’s relative proximity to a mega-project like Vista Ridge. (More on that subject appears in our slides.)



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The GMA-12 proposed DFC will one hundred percent protect non-exempt permits and offer no protection to many exempt domestic and livestock wells (and to local landowners' groundwater levels generally).

What these proposed DFC may do, and in some cases *will* do, to the ability of some landowners to continue on their land as planned, and to pursue livelihoods that are connected to land and dependent on groundwater, will be of great concern to an ever-growing number of landowners.

Lee County is developing but currently does not provide mitigation or "well assistance", and there is no guarantee what they are considering at this time will be enough. For example, the other Vista Ridge shoe has yet to drop on the Simsboro formation, which is the target of the other mega-projects in the Lost Pines District I mentioned earlier..

Fayette County may not have non-exempt permits of the magnitude your neighbors are facing, but you have the ability and the duty, as do all of the other four GMA-12 districts, to work to avoid this disproportionate impact on exempt wells, and on our aquifers and rivers.

**We are asking all five districts to explain yourselves to a public that has a right to know your interpretations of how you are protecting our local water supply, and what we should expect will happen to them next.** The fact of the matter is, Vista Ridge's pumping of 50,000 acre-feet a year for 60 years will have serious and far-reaching consequences all by itself. The Post Oak district permits all comers, and the Lost Pines District has at least 111,000 more acre-feet permitted or pending for unprecedented export projects.

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**The bottom line on mitigation as the fix is that isn't the fix. The comments we hear, and Lost Pines just heard, from landowners are almost always tempered with concern for the future of our local aquifers, despite the perceived infringement of their property rights and the financial burden some residents are experiencing.**

**Those are the dualities of interest that SAWDF as an organization shares with them --- the protection of both aquifers and private property rights --- because more often than not, those interests coincide.**

**And I also daresay there is not one landowner who wants to trade the health and future sustainability of an aquifer for money, i.e. mitigation.**

At the Lost Pines May 26<sup>th</sup> meeting with landowners, one local well driller went on record that he has serviced 26 wells in Lee County in 2020-2021 so far . Neither SAWDF nor, we believe, Lost Pines knows

the number of affected wells that are serviced by other companies, but the District revealed it expects to see up to 150 Carrizo wells affected by Vista Ridge in Lee County.

SAWDF is aware of at least one more well going dry just a few days ago. Another probable Carrizo well's water level has dropped 70 feet since 2013. The latter well is up to 200 feet deeper than the deepest Carrizo wells that have been impacted so far in Lee County, and is probably at the bottom of the Carrizo at that location. The well reportedly has been remediated only once since it was drilled in 1977, when the pump was dropped 20 feet during the drought of 2011.

The local groundwater districts, as the state's preferred regulators of groundwater, have put landowners in the position of needing mitigation by allowing drawdowns that will otherwise consume their wells and deplete water levels for the foreseeable future, if not permanently. It is not difficult to interpret this as an admission by the districts that the aquifer is being "managed to depletion" (i.e. mined) rather than sustained.

The districts in GMA-12 are not figuring out where that breaking point between depletion and sustainability is, and are currently making no attempt to find the constitutionally-mandated balance between conservation and protection of resources, versus their development.

Ultimately, if not reversed, your actions rightly will be seen as taken for the wrong reasons; as instrumental in sacrificing resiliency and sustainability of a precious natural resource; and as promoting what should be an impermissible confiscation of their private property.

Bottom line, they don't want to hear you say you have no choice but to protect mega-projects at the expense of the domestic and livestock wells upon which they depend. Deepening the allowable drawdown to accommodate full realization of mega-permits at the expense of local communities will simply be unacceptable.

We hope you will carefully consider the slides that accompany this letter. My colleague Andy Wier put together a different set of slides from those SAWDF previously provided to GMA-12. He has put a lot of thought into what you might do to test your resolve – and, frankly, for you to test your constituents' *informed* reaction to your proposed DFC that accommodate no aquifer and no person, other than non-exempt permittees.

Hopefully, this letter and our slides will convince you to not only address landowners' questions, but also to honestly re-focus on the proposed DFC and ask yourselves, and ask your staff and consultants, why you proposed them in the first place.

We recommend that your starting point be the realization that the GAM is not the appropriate tool to *calculate* Desired Future Conditions. The GAM does not make value judgments, nor is it capable of the discrete weighing of the §36.108 factors.

You must do that, it's your job to strive for the constitutionally mandated balance between conservation and development. It is one thing to be assisted by the GAM and the pumping files in *evaluating* the relative impacts, but using it to simply calculate one set of drawdowns based on only one factor is a ludicrous distortion of the requirements of the Water Code. In our opinion, misuse of a tool as important as the GAM is clearly not an application of the best available science.

We further suggest that the district apply our methodology of calculating the numbers of exempt wells that will be impacted by different GAM runs, because the numbers *will vary from run to run*. (For example, the wells impacted under GAM Run S-3 will be fewer than under S-12.) This work is feasible and useful!

If you refine your methodology, you can develop data on many of the nine considerations. Then you as board members can more effectively balance the damage to exempt wells, groundwater property rights, rural economies, and surface water resources, against permitted pumping.

The lop-sided "see saw" in our slideshow illustrates the total absence of balance that results when the other eight factors are ignored, in favor of only considering permitted production.

Please explain to the public why our proposal is not a logical and compelling adaptation of the planning process to assure GMA-12 is using newly developed data, applying the best available science, and deliberately and carefully seeking the required balance.

While there is more than one forum in which landowners may seek answers and hold someone accountable, SAWDF will always first seek a collaborative result in the best interests of all, if possible.

The imperative now is for the districts of GMA-12, one by one, to reject the GMA-12 proposed Desired Future Conditions, due to the unreasonable impacts that will otherwise result from a process that does not incorporate a balanced consideration of all factors you are legally required to consider. We urge you to replace them with Desired Future Conditions that provide for:

- sustainable management of our aquifers,
- protection of exempt domestic and livestock wells, and
- maintaining the resilience of the Colorado River in times of drought.

Thank you for the opportunity to participate in today's meeting.

Respectfully submitted,



Michele G. Gangnes