

GUADALUPE-BLANCO RIVER AUTHORITY

Minutes of the Board of Directors

The Board of Directors of the Guadalupe-Blanco River Authority met in a regular monthly meeting on March 21, 2012, at the GBRA River Annex Board Room, 905 Nolan, Seguin, Guadalupe County, Texas. Directors present were Grace G. Kunde, Oscar H. Fogle, James L. Powers, Frank J. Pagel, Dennis L. Patillo, Tommy Mathews, Myrna P. McLeroy, and Robert “Rusty” Brockman. Director Arlene N. Marshall was absent. Also present were W. E. West, Jr., General Manager; James Lee Murphy, Executive Manager of Water Resources and Utility Operations; Alvin Schuerg, Executive Manager of Finance and Administration; Todd Votteler, Executive Manager of Science, Intergovernmental Relations and Policy; Bruce Wasinger, General Counsel; David Welsch, Executive Manager of Business Development and Resource Management; Gary Asbury, Manager of Project Engineering; Barbara Gunn, Human Resources Manager; Tommy Hill, Chief Engineer; Debbie Magin, Director of Water Quality Services; Bryan Serold, Operations Manager-Lower Basin; John Smith, Operations Manager-Upper Basin; LaMarriol Smith, Manager of Communication and Education; Teresa Van Booven, Project and Community Representative; Cricket Dietert, Executive Assistant to the General Manager; Connie Rothe, Board Relations and Publication Specialist; Leigh Crettenden, Web Master; Tommy Schulte, Regional Representative; Sandra Terry, Accountant; Susan Hubbert, Accountant; Yolanda Pierce, Operations Assistant; Jaynellen Ladd, Natural Resource Specialist; Steve Jester, Executive Director representing the Guadalupe-Blanco River Trust; Tommie

Streeter-Rhoad, Executive Director representing the San Antonio Bay Foundation; Roger Nevola, legal counsel; Rose Marie Eash representing Dublin and Associates; Steve Holzhauser, consultant; David Engel representing Engel and Associates; Calvin Finch representing the San Antonio Water System; Thomas Spurgeon representing McCall, Parkhurst and Horton; Alan Thompson representing Klotz Associates; Alexa Knight representing Walton International Group; David Armbrust representing Armbrust and Brown; Kevin Frazier, John Findeisen, Jason Davis, Traecy Large, and David Terre representing Texas Parks and Wildlife Department; Sam Vaugh representing HDR Engineering; Greg Bowen representing the New Braunfels Herald-Zeitung; Mike Nichols representing Freese and Nichols; J. Harmon, Julius Grossenbacher, Gary Grossenbacher, Ray Kottler, and Raymond Bartram representing Preserve Lake Dunlap Association; Michael Calta, Tony Zeller, A. J. Sivek, Jane Sivek, Bob Arnold, Dan Laroe, Nanette Heye, Anthony Heye, Rick Wallace, A. W. Slaughtler, Doug Harrison, Connie Voges, Lori Keatts, Connie Turner, Tim Hennessee, Sharon Nerby, Kim Crowe, John Ivy, Rob Miller, and Marcus McKeon residents on Lake Dunlap; Tyson Broad representing the Sierra Club; Tim Cook representing Texas Bass Federation Nation; Bennett Cowan representing Canyon Bass Club of San Marcos; Humberto Ramos representing Canyon Regional Water Authority; Jeanne Schnuriger representing Springs Hill Water Supply Corporation; and Ashley Kegley representing 3 Point Partners.

Chair Kunde called the meeting to order at 10:00 a.m., and took note of the certifications presented that notice of the meeting had been properly posted in the office

of the Secretary of State, in the Guadalupe County Courthouse, and at the GBRA main office and river annex in Seguin, Texas, pursuant to Title 5, Chapter 551 of the Texas Government Code. A quorum being present, the following proceedings were had:

Director Brockman led the Pledge of Allegiance to the United States flag and Texas flag.

In the absence of Secretary-Treasurer Arlene Marshall, Chair Kunde appointed Director James L. Powers to serve as Secretary Pro-Tem.

The Chair called for comments from the public. There were no public comments at this time.

The Chair called for **Consent Item 1 - Consideration of and possible action approving the February 15, 2012, Board meeting minutes; Consent Item 2 - Consideration of and possible action approving the monthly financial report for February 2012; Consent Item 3 - Consideration of and possible action approving the monthly operations report for February 2012; and Consent Item 4 - Consideration of and possible action approving Directors' expense vouchers.** Upon motion by Director Powers, seconded by Director Patillo, the Board unanimously approved Consent Items 1, 2, 3, and 4.

Next, the Chair called for **General Manager Item 5 - Discussion of the Executive Reports addressing matters relating to safety, utility operations, water resource operations, engineering, coordination with the U.S. Army Corps of Engineers regarding Canyon Reservoir operations, Nueces Recharge Study, the seasonal deviation study for Canyon Reservoir and Cibolo Watershed Study,**

construction management including the Luling Water Treatment Plant Expansion and ASR Facilities, River Bend pump station replacement matters including easement acquisition and geotechnical investigation, Clean Rivers Program activities, Plum Creek Project, operations, Geronimo Creek Watershed Protection Plan, Environmental Flows Project, River Network Project, water quality general, San Antonio Bay Foundation, Economic and Community Development activities, events and projects, Water and Wastewater Services activities including Bulverde area regional wastewater activities, Rural Utilities - Dunlap wastewater service area activities, Mid-Basin water supply, Gonzales County groundwater project activities; Tri-Community Water Supply Corporation water supply matters, Resource Protection activities including lake management and water safety, implementation of water conservation measures, Gorge Preservation Society matters, Gonzales area flood warning matters, information technology, human resources, budget activities, accounting and finance. No discussion was had on General Manager Item 5.

The Chair then called for **Action Item 6 - Consideration of and possible action authorizing the General Manager to engage the audit firm of Thompson, Williams, Biediger, Kastor, and Young for the Fiscal Year 2012 financial audit.** An annual audit is required by Section 7 of GBRA's Enabling Act, Section 49.191 of the Texas Water Code, GBRA Board Policy 410-Audits, and the provisions of numerous bond resolutions. GBRA Board Policy 410.202 states that the initial term of the engagement of an independent auditor shall be three years subject to annual evaluation and

reappointment for the second and third years. Subsequent reappointments may be approved but the engagement cannot exceed five consecutive years. The firm of Thompson, Williams, Biediger, Kastor and Young (TWBKY) completed their fourth year serving as GBRA's auditor with the Fiscal Year 2011 audit. In March, 2012, TWBKY submitted their proposal for auditing services for the Fiscal Year 2012 financial audit to the Auditing Committee. The proposal for services states that the fees for the firm's services will be their quoted hourly rates, not to exceed the fees charged for the Fiscal Year 2011 audit. Upon motion by Director Powers, seconded by Director Patillo, the Board unanimously authorized the General Manager to engage the audit firm of Thompson, Williams, Biediger, Kastor, and Young for the Fiscal Year 2012 financial audit.

The Chair called for **Action Item 7 - Consideration of and possible action approving a Second Amendment to the Guadalupe-Blanco River Authority Defined Contribution Retirement Plan and Trust.** One of three basic retirement programs for employees of GBRA is a Defined Contribution Retirement Plan and Trust. It is funded by GBRA and no employee contributions are contributed. The Plan is maintained for the benefit of all employees hired after 2010 who have never participated in the Defined Benefit Plan. GBRA's retirement plan legal counsel recommended an amendment to the GBRA Defined Contribution Retirement Plan and Trust to restate the involuntary cash-out level of the Plan from \$5,000 to \$1,000 to terminated Participants in lieu of providing for automatic rollovers. If the value of a terminated Participant vested benefit **does not exceed** \$1,000, the Committee shall direct the Trustee to

cause the entire vested benefit to be distributed to such terminated Participant in a single lump sum in full and release all further rights of the Participant and his or her Beneficiaries to receive any benefits under the Plan, and the non-vested portion, if any, shall be treated as a Forfeiture. If the present value of a terminated Participant vested benefit **exceeds** \$1,000, his or her portion shall not be paid without his or her written consent. This recommended amendment was required by the U. S. Treasury when GBRA sought a determination letter for the GBRA Defined Contribution Retirement Plan and Trust. Upon motion by Director Mathews, seconded by Director Patillo, the Board unanimously approved a Second Amendment to the Guadalupe-Blanco River Authority Defined Contribution Retirement Plan and Trust. A copy of the Second Amendment is attached and made a part of these minutes.

Next, the Chair called for **Action Item 8 - Consideration of and possible action authorizing the General Manager to continue pursuit toward final renderings for an Environmental Learning Center Master Plan with Jackson-McElhaney Architects of Austin, Texas as required to pursue external funding of the Project.** In 2010, GBRA staff acquired a tract of land adjacent to the Canyon Lake Gorge in Comal County with the intent of establishing an Environmental Learning Center for the GBRA's Upper Basin region. In 2011, GBRA staff posted a Request for Qualifications to develop an Environmental Learning Center Master Plan. Jackson-McElhaney Architects of Austin was selected for plan development. Working with members of the Comal County community and internal staff, the architects have drafted and submitted several renderings. While the renderings are not in final form, the

architects and GBRA staff have moved significantly closer to concepts that fit the needs of the stakeholders. This project is envisioned to be one that requires substantial funding from external sources. To pursue those resources, the GBRA staff must be able to present architectural renderings along with narrative descriptions of the proposed project, its intended usage, and evidence of support from GBRA's Board of Directors. During the February 2012 GBRA Board of Directors meeting, contracted architects Robert Jackson and Michael McElhaney of Jackson-McElhaney Architects of Austin presented concepts for the proposed GBRA Environmental Learning Center for Comal County. In that presentation, the architects indicated approximate costs for the project, as designed and depending upon final material selections, to be \$4 million to \$6 million. In order for fundraising efforts to begin, prospective donors must have a visualized concept and supporting documentation for which to commit funding. The project managers, LaMarriol Smith and Cinde Thomas-Jimenez, received no feedback from Board members indicating significant concerns with the renderings and/or information the architects presented at the February meeting. The GBRA staff requested approval to continue pursuit toward final renderings for the Master Plan with Jackson-McElhaney Architects so that external fundraising efforts may begin immediately thereafter. Upon motion by Director Fogle, seconded by Director Patillo, the Board unanimously authorized the General Manager to continue pursuit toward final renderings for an Environmental Learning Center Master Plan with Jackson-McElhaney Architects of Austin, Texas as required to pursue external funding of the Project.

The Chair then called for **Action Item 9 - Consideration of and possible action ratifying the terms of a loan from Regions Bank to fund improvements to GBRA's Dunlap Wastewater System and approving Regions Bank as a GBRA depository bank pursuant to GBRA Board Policy 413.** During the early 1970's, GBRA constructed four small wastewater treatment systems in Guadalupe and Comal Counties. These systems were constructed to provide environmentally sensitive wastewater treatment services to subdivisions beyond the reach of the nearest municipal system. One of these four systems was the Dunlap Wastewater Treatment System located west of Lake Dunlap and just south of the City of New Braunfels. Due to expected growth in the area (primarily the Legends Pond Subdivision), GBRA expanded the Dunlap Wastewater Treatment Plant in 2004-2005 to a capacity of 950,000 gallons per day. The cost of that expansion totaled \$4.4 million and was funded by a loan from Wells Fargo Bank. GBRA completed a Preliminary Engineering Report/Master Plan for the Dunlap Wastewater Treatment System which was reviewed with the Board in April 2011. The results of the Preliminary Engineering Report were (1) the Treatment Plant was in good operational condition and had plenty of capacity for growth, (2) the original River Bend Lift Station needed to be replaced and relocated, (3) a new Regional Lift Station was needed to alleviate operational issues related to the south end of the sewer shed and to prepare for additional growth in the area, and (4) several new or replacement sewer mains were needed for operational efficiencies and to prepare for additional growth. The GBRA Board of Directors authorized the General Manager to approve construction bids approximating \$2.6 million during their November

2011 meeting and subsequently authorized during the February 2012 meeting, the General Manager and Executive Manager of Finance to approve the final terms of a loan which included \$2.6 million of new money and refunding of the existing 2004 debt of \$3,588,000. The loan was awarded to Regions Bank with the following terms (1) \$2,600,000 bank qualified, tax-exempt loan rate of 3.34 percent for the first fifteen years adjusting to sixty percent of LIBOR, plus five percent for years sixteen through twenty, with a maturity of September 2032 and (2) \$3,588,000 taxable loan rate of 2.34 percent with a maturity of September 2015. Upon motion by Director Patillo, seconded by Director Mathews, the Board unanimously ratified the terms of a loan from Regions Bank to fund improvements to GBRA's Dunlap Wastewater System and approved Regions Bank as a GBRA depository bank pursuant to GBRA Board Policy 413.

The Chair called for **Action Item 10 - Consideration of and possible action approving a Resolution amending the Resolution adopted on January 18, 2012, relating to the issuance of Guadalupe-Blanco River Authority General Improvement Revenue Bonds, Series 2012, for the purpose of amending the name of the financial institution approved to serve as the initial Escrow Agent and Paying Agent/Registrar in connection with such Series 2012 Bonds and incorporating certain conditions and requirements of the Texas Water Development Board.** For several years, GBRA has been planning the Mid Basin Treated Water Supply Project. In order to facilitate the continuation and in fact acceleration of that planning effort, GBRA intends to issue bonds to provide additional funding for the project. During the December 2011 Board of Directors meeting, the

Board ratified the submission of a \$4.4 million application to the Texas Water Development Board's Water Infrastructure Fund. The Texas Water Development Board subsequently approved that application with the requirement that GBRA issue the related debt prior to April 7, 2012. On January 18, 2012, the Board approved a resolution authorizing the issuance of up to \$4,400,000 in principal amount of Guadalupe-Blanco River Authority General Improvement Revenue Bonds, Series 2012, to be purchased by the Texas Water Development Board with general terms to include a par value of \$4.4 million, tax-exempt bonds, an interest rate not to exceed five percent (5%), and a repayment term of 20 years. Subsequent to that authorization, the Resolution needs to be amended to change the Escrow Agent and Paying Agent/Registrar and incorporating requirements of the Texas Water Development Board. Upon motion by Director Mathews, seconded by Director Brockman, the Board unanimously approved a Resolution amending the Resolution adopted on January 18, 2012, relating to the issuance of Guadalupe-Blanco River Authority General Improvement Revenue Bonds, Series 2012, for the purpose of amending the name of the financial institution approved to serve as the initial Escrow Agent and Paying Agent/Registrar in connection with such Series 2012 Bonds and incorporating certain conditions and requirements of the Texas Water Development Board. A copy of the Resolution is attached and made a part of these minutes.

Next, the Chair called for **Action Item 11 - Consideration of and possible action approving amended engineering and environmental consulting contracts related to the \$4.4 million Texas Water Development Board debt issuance.** GBRA

staff has reviewed previous, executed Consulting Engineering contracts that now qualify for a Texas Water Development Board loan. Original contracts were issued as stand-alone components that can now be construed as a part of the Mid Basin Treated Water Supply Project. In order to minimize duplication and inefficiencies, GBRA staff recommended renegotiating the scope of work, assigning various tasks to the Consultant best suited to execute them. Upon motion by Director Fogle, seconded by Director Patillo, the Board unanimously authorized the General Manager to amend engineering and environmental consulting contracts related to the \$4.4 Million Texas Water Development Board debt issuance.

The Chair then called for **Action Item 12 - Consideration of and possible action approving a Letter of Intent between the Guadalupe-Blanco River Authority and Walton International Group (USA), Inc. and its assigns.** GBRA is engaged in the planning and development of a long-term regional wholesale water treatment and distribution project capable of providing treated water and treated water related services to supply the demands of Central Texas within Hays, Caldwell, Guadalupe, Comal, and Gonzales Counties. Walton owns, manages, and is planning for the development of several thousand acres of land in multiple communities through these five (5) Counties. GBRA and Walton desire to combine their resources in a collaborative public/private water partnership to facilitate the economic development of this area. The parties agree to set forth their intent to work together to accomplish their mutual goals in a more efficient and expeditious manner to achieve mutual objectives including acquiring regulatory permits and approvals, initiation of the design, construction and financing of

projects, working with existing retail water supply providers and identifying public and private financing options for the projects. The parties intend to negotiate in good faith a definitive binding agreement within ninety (90) days of the date of the Letter of Intent. Alexa Knight gave the Board an overview on the Walton International Group and the proposed area of development. Upon motion by Director Powers, seconded by Director Mathews, the Board unanimously approved the Letter of Intent between the Guadalupe-Blanco River Authority and Walton International Group (USA), Inc. and its assigns. A copy of the Letter of Intent is attached and made a part of these minutes.

The Chair called for **Action Item 13 - Consideration of and possible action authorizing the General Manager to negotiate and execute a Purchase and Sale Agreement between the Guadalupe-Blanco River Authority and SJW Corporation.**

No discussion or action was had on Action Item 13.

Next, the Chair called for **Discussion Item 14 - Discussion regarding proposed Power-Water Nexus Project.** General Manager West briefed the Board on the Texas Seawater Desalination Initiative. The Project has a regional approach for collocating water supply and power generation facilities along the Gulf Coast to address the needs of the South Central Texas Region through 2060. This effort was initiated in response to the severe drought the State went through last year and which is expected to continue through 2012 severely impacting our water supplies. Regional approaches to current and future water and electricity supply challenges will result in the most sustainable and cost-effective solutions. The Board was briefed on project components, budget and schedule.

The Chair then called for **Discussion Item 15 - Discussion regarding water safety and associated actions on Lake Dunlap in Comal and Guadalupe Counties.**

Chair Kunde called for public comments on Discussion Item 15 and informed each speaker that they are limited to 2 minutes each in accordance with GBRA Board Policy 103-Public Access and Public Input. J. Harmon addressed the Board and stated he has been a resident on Lake Dunlap for 30 years and the stumps have been a nuisance to boaters. Mr. Harman informed the Board that the Preserve Lake Dunlap Association will provide all funding for a lake/marine habitat study and cutting the remaining stumps and replacing with natural stumps to improve the habitat. Julius Grossenbacher informed the Board he has lived on the lake since he was nine (9) years old and will be eighty (80) years old. Mr. Grossenbacher said he has broken numerous boat motor props and wants the stumps removed to make it safe to swim and boat. He continued that an artificial reef can be put in Lake Dunlap for fish and other habitat. Gary Grossenbacher informed the Board that homeowners have been cutting stumps as a public service to remove the danger, the exiting channel in the Lake is becoming too small, and one homeowner is being selfish wanting to keep the Lake to himself. Mr. Grossenbacher continued that the “no wake zone” is now creating overcrowding on the remainder of the Lake and the area is the safest part of the lake. Michael Calta informed the Board he lives in the Oasis Subdivision on Lake Dunlap and has lost three boat motor props in the stump area. He and his family enjoy water skiing on the Lake, but because of the “no wake zone” they will be unable to use lake and would like the remainder of the stumps removed. Tim Cook representing Texas Bass Federation

Nation supports the actions of GBRA regarding the establishment of a “no wake zone” after the unauthorized cutting of stumps. Mr. Cook continued that GBRA, homeowners, anglers, and Texas Parks and Wildlife had worked together, had an agreeable plan for Lake Dunlap to mark areas for the stumps to be cut and then the stumps were cut by unauthorized homeowners. Mr. Cook stated that good stakeholders can agree on a compromise and the “no wake zone” does not reduce the use of the Lake, but creates opportunities for additional recreational uses. Bennett Cowan is concerned about the fish habitat in Lake Dunlap because of the stump removal. Mr. Cowan frequently fishes at Lake Dunlap and the majority of fish have been caught by stumps. He continued that the stumps have been there since 1929 when Dunlap Dam was built, the majority of stumps have been marked, that there is plenty of area for skiing and wakeboarding with the “no wake zone”, and this gives an opportunity for fishing and additional recreational uses. Rob Miller informed the Board that he has lived on Lake Dunlap for sixteen (16) years and is very impacted by the “no wake zone”. It has increased his travel time to various areas of lake, requested the “no wake zone” be eliminated and go back to the way the stumps were marked. Mr. Miller stated that the Lake is now safer since the stumps were removed, the remaining area should be marked, and the Lake opened up. Dan Laroe stated that everyone should be working toward a reasonable solution to the situation, a new habitat study should be conducted, cutting the remaining stumps is not the solution, and supports the “no wake zone” currently in place on Lake Dunlap. Doug Harrison thanked the Board for opportunity to speak and respectfully request a compromise to remove the “no wake zone”. Mr. Harrison stated that less underwater

hazards will make this unique Lake safer and requested the Board to do the right thing. Connie Voges informed the Board she has seen stumps on Lake Dunlap being cut and not marked, has seen people removing/cutting the markers from the marked stumps, and asked “how is GBRA going to police what stumps or markers are cut”. Ms. Voges feels the solution is to cut all the stumps and again asked “how is GBRA going to police the Lake”. General Manager West thanked everyone for their comments. General Manager West then made the following statement:

“GBRA is an entity with the responsibility to conserve, protect and develop the water resources of the Guadalupe River Basin. We take this responsibility seriously. We have been asked to consider modifications or removal of the “no wake” area recently established on a small segment of Lake Dunlap.

This action initially was taken after the recent unauthorized cutting of habitat tree stumps in favor of boating interests creating an even more unsafe environment in the stump field. The “no wake” area was put in place to enhance boater safety, while maintaining a reasonable balance for boating, fisheries and other lake uses.

Prior to that on two different occasions, GBRA met with lake residents, professional fishery personnel and enforcement personnel, and discussed and developed several options. Consideration for balance of use was important in this determination.

Some lake residents favored the action and others did not, including some Preserve Lake Dunlap Association Board members. Some of these individuals have played up the controversy. But GBRA must consider the interests of the broader constituency of the area lake dwellers and users, not just a few.

Therefore, GBRA will expand the selection of individuals to form a broader workgroup and who will represent all interests in a cordial and professional manner. In coordination with such a workgroup, GBRA will evaluate the safety of the “no wake zone”, fishery habitat issues, and recreation to reach a final resolution on this issue with a goal of achieving water safety and recreation balance. Then, we will bring the recommendation of this workgroup back to the Board for consideration. In the meantime, the current “no-wake zone” will remain in place.”

The Chair recessed the meeting at 11:00 a.m. The meeting reconvened in open session at 11:14 a.m.

The Chair called for **Discussion Item 16 - Discussion regarding the Supreme Court of Texas Opinion on Case No. 08-0964, the Edwards Aquifer Authority and the State of Texas, Petitioners, verses Burrell Day and Joel McDaniel, Respondents.** Bruce Wasinger briefed the Board regarding the Supreme Court Case facts that Burrell Day and Joel McDaniel own about 382 acres of land where they grow oats, peanuts, and graze cattle and have had an irrigation well from 1956 to 1970's. Some of the water was used for irrigation, with the remainder flowing into a 50 acre lake

on the property and water used for some irrigation and recreation. Mr. Day and Mr. McDaniel applied for a permit with the Edwards Aquifer Authority (EAA) for 700 acre feet per year. Their application was denied by EAA on grounds that use of water from well during historical period (June 1972 – May 1993) was not put to beneficial use. An Administrative Law Judge found beneficial use for irrigation of seven (7) acres and, therefore, Mr. Day and Mr. McDaniel are entitled to 14 acre feet per year. The water flowing into lake was no longer considered groundwater, but now surface water subject to State's surface water authority not EAA's. Mr. Day and Mr. McDaniel appealed EAA's decision to the State District Court and also alleged a taking of their property right under the State Constitution. The State District Court (Trial Court) ruled in favor of Mr. Day and Mr. McDaniel on the permit issue saying water flowing into the lake was groundwater not surface water. EAA took the position that landowner's property interest in groundwater does not vest until after the groundwater is brought to the surface. The court ruled in favor of EAA on the takings claim (no taking). The Court of Appeals ruled in favor of EAA on permit issue finding that the groundwater became surface water when it flowed into the lake. The Court of Appeals also ruled in favor of Mr. Day and Mr. McDaniel that they had some ownership rights in groundwater beneath their property and were entitled to constitutional protection and their takings claim should have not been dismissed by trial court. There were three (3) issues before the Texas Supreme Court:

1. Whether the EAA erred in limiting the landowner's permit to 14 acre-feet under the EAA regulations (i.e. whether the EAA correctly

applied its regulations to the specific facts in the landowner's case). Held: No.

2. Whether the landowner has a constitutionally protected interest in the groundwater beneath his property (i.e. whether the landowner owns the groundwater in place under his land, and whether this ownership is a vested right that will be constitutionally protected from a taking by a governmental entity without just compensation). Held: Yes.

3. Whether the EAA's denial of a permit to the landowner for the amount of water requested by the landowner constituted a taking. Held: Remanded to trial court for further proceedings.

The findings included groundwater "in place" beneath real property is owned by the landowner and EAA's restrictions on it based on historical use can constitute a takings claim against the State; EAA's permitting based on historical use is a policy departure from the Texas Water Code's permitting factors without justification; landowner cannot be deprived of all beneficial use of the groundwater below his property merely because he did not use it during a historical period and supply is limited; groundwater regulation need not result in takings liability; the Texas Legislature can discharge its responsibility under the Conservation Amendment without triggering the Takings Clause; the Takings Clause ensures that the problems of a limited public resource – the water supply – are shared by the public; not placed onto a few; the burden of the Takings Clause on government is no reason to excuse its applicability; groundwater in place is owned by the landowner on the basis of oil and gas law; and no basis in the differences between

groundwater and oil and gas leads to the conclusion that common law allows ownership of oil and gas in place, but not groundwater. The Court noted that in its prior rulings, including the East Case when the Court adopted the rule of capture, neither recognized nor precluded ownership in place. The Court noted that in oil and gas cases, the Court has recognized both ownership in place and the rule of capture. Although the Court had found that the landowner's right to the oil and gas beneath his land "is an exclusive and private property right ... of which he may not be deprived without a taking of private property" it had also held that oil and gas beneath the surface are subject to the rule of capture and administrative regulation. The Court found no basis for treating groundwater in place differently. The Court also found that groundwater rights "are property rights subject to constitutional protection, whatever difficulties may lie in determining adequate compensation for a taking". The Court affirmed the authority of EAA and groundwater conservation districts to regulate groundwater production, but recognize that regulations that impose too severe a burden on private property rights could constitute a taking. Potential implications from the Court ruling is the stage set for allegations of "regulatory takings" claims if groundwater production permits are denied outright or unreasonably restricted as evaluated by a judge in a "fact-sensitive test of reasonableness". The existing groundwater permit holders authorized production values cannot be viewed as untouchable. How does groundwater conservation district fairly allocate production so that each landowner has an opportunity to capture a fair share of the groundwater, which may result in a larger reliance on well spacing and acreage considerations rather than merely historical use? How do groundwater

conservation districts allocate the limited production from each aquifer given the Desired Future Conditions process (EAA aquifer production caps)? The potential efforts to reallocate water from those who already hold production permits, which will create uncertainty in the value of existing permits. More litigation as landowners whose groundwater rights are restricted seek compensation for a taking.

Next, the Chair called for **Discussion Item 17 - Discussion regarding pending draft Texas Commission on Environmental Quality rules: a. Emergency Drought Rules and b. environmental flows for San Antonio and Guadalupe Basin.** General Manager West briefed the Board on the Texas Commission on Environmental Quality draft Emergency Drought Rules including use of junior and senior water rights, municipal use of water in drought conditions, and revisions being made to the draft Rules. James Murphy briefed the Board on the Environmental Flow Standards Proposal including Senate Bill 3 environmental flows rule-making, data collected on sixteen flow gauges with nine gauges in the Guadalupe Basin, recommendations of BBEST and BBASC, GBRA's flow recommendation, Texas Commission on Environmental Quality draft standards, and the Guadalupe estuary.

The Chair then called for **Discussion Item 18 - Discussion regarding Base Flow Report, Water Quality Index, and condition of the Guadalupe Basin.** The reports were discussed with the Board. Tommy Hill briefed the Board on the Comal Springs level, elevation of Canyon Reservoir, rainfall events, and the U. S. Drought Monitor Seasonal Outlook.

The Chair called for **Discussion Item 19 - Discussion regarding local, State and national water planning and water resource issues.** General Manager West briefed the Board on the Victoria Energy Summit held February 29, 2012, the Texas Water Conservation Association Annual Conference in Dallas, and the upcoming Texas House Natural Resources Committee hearing.

The Chair recessed the open meeting at 12:03 p.m. The Chair closed the open meeting and convened the meeting in executive session at 12:25 p.m. The open meeting reconvened in open session at 1:22 p.m.

There being no further business to be brought before the Board, the meeting was adjourned at 1:23 p.m. subject to call by the Chair.

Chair

Secretary Pro-Tem