

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
INTEROFFICE MEMORANDUM

TO: Commissioners

DATE: December 12, 2008

THRU: Todd Chenoweth, Director
Water Supply Division

FROM: Kellye Rila, Section Manager
Water Rights Permitting & Availability Section

Robin Smith, Attorney
Environmental Law Division

SUBJECT: Kevin Petermann and Martha Petermann
Docket # 2008-1912-WR
Application No. 5528A to Amend Water Use Permit No. 5528
Guadalupe River, Guadalupe River Basin
Kendall County

CHIEF CLERKS OFFICE

2008 DEC 16 AM 9:14

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

On June 9, 2006, the Texas Supreme Court issued an opinion in the case of *Marshall v Uncertain*.¹ The Supreme Court in that opinion considered the Commission's practices regarding notice and hearing for applications to amend a water right under Texas Water Code §11.122(b). The Court held that it could not determine under the record in that case whether notice and a hearing would be required. The Court remanded the case to the Commission.

The court in *Marshall* held that when reviewing the type of notice required for an amendment to a water right, the Commission must determine whether there could be an adverse impact from the application on other water rights or the environment beyond or irrespective of the full use assumption, explained below. The court also held that the Commission must determine if the application could have an adverse impact on the public interest criteria: beneficial use, public welfare, groundwater effects, consistency with the state and regional water plan, compliance with administrative requirements, and conservation.

The types of amendments that come within the *Marshall* decision are those amendments that do not already have a specific notice requirement in a rule for that type of amendment, and that do not change the amount of water to be taken or the diversion rate. These amendments are changes in use, changes in place of use, or changes in substantive conditions in a water right.

¹ City of Marshall et. al. v. City of Uncertain et. al., No. 03-1111 (Tx. June 9, 2006).

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The purpose of this memo is to discuss the public notice that should be given in the above referenced application by Kevin and Martha Petermann in light of agency rules and the *Marshall* decision.

Current Permit and Application for Amendment

Kevin and Martha Petermann originally owned all of Water Use Permit No. 5528 which authorizes the diversion of not to exceed 98 acre-feet of water per year from within a diversion segment on the Guadalupe River, Guadalupe River Basin at a maximum combined diversion rate of 0.56 cfs (250 gpm) for agricultural (irrigation) purposes to irrigate 50 acres of land out of a 57.7-acre tract in Kendall County with a priority date of May 19, 1995. This authorization is based on an Upstream Diversion Contract with the Guadalupe-Blanco River Authority. The Petermanns sold the 57.7-acre tract of land and conveyed a 49-acre-foot portion of the water right to Steves Brothers. Ownership of the permit was changed to reflect that the Petermanns and Steves Brothers each own a 49-acre-foot portion of the permit.

The Petermanns seek to amend their portion of Water Use Permit No. 5528 to add a diversion point, approximately 1.5 mile downstream of the authorized diversion segment, on the Guadalupe River, Guadalupe River Basin and to add a new place of use, being a 94.069 acre tract, in Kendall County for their 49-acre-foot right. This will establish a new place of use for the Petermanns portion of the permit because they no longer own the original 57.7 acre tract.

Rules Related to Notice

Addition of the Diversion Point

The Commission has rules concerning what notice is required for applications to amend a water right in 30 TAC §295.158. New diversion points are governed by a specific rule. Subsection 295.158(c)(2)(E) requires mailed notice to interjacent water rights holders when amending a permit to add a diversion point when the existing rate of diversion will not be increased. This rule will be applied to the request to add the new diversion point, therefore mailed notice will be provided to the interjacent water right holders between the original and the proposed diversion point. Because there is a specific rule requiring notice governing this amendment, it will not be discussed further in this memo.

Addition of the Place of Use

Changes in place of use are not covered by a rule requiring specific notice. Under subsection (c), no notice is required to change a place of use if no additional consumptive use is contemplated, no increase in diversion rate or period will be granted, and in the judgment of the Commission there is no potential for harming another water right. Also, §295.158(c)(2)(C) provides that no notice will be required to change the place of use when there will be no increased use of state

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water and the change will not operate to the injury of any other lawful user of state water. If a water right is owned by more than one party, all other parties will be notified of the proposed changes by certified mail and given two weeks to protest. If no protest is received, further notice will not be required. This notice will be given to the Steves Brothers, co-owners of the permit.

The notice recommendation for the applicants' request to add a new place of use for the authorized water will be discussed below.

Texas Water Code

This application for an amendment to an existing water right is governed by Texas Water Code §11.122. Subsection (a) requires a water right holder, except as discussed above, to obtain a water right amendment if the holder is going to change the purpose of use or "otherwise alter a water right."

Subsection (b) of §11.122 sets out the scope of the Commission's authority in reviewing applications to amend a water right. Staff notes that in their application, Kevin and Martha Petermann are not asking for either an increase in the amount of water authorized for diversion, or an increase in the rate of diversion. With that understanding of the application, it then becomes a duty of the Commission to approve the application "*if the requested change will not cause adverse impact on other water right holders or the environment on the stream of greater magnitude than under circumstances in which the permit . . . that is sought to be amended was fully exercised according to its terms and conditions as they existed before the requested amendment,*" and the application must meet, "*all other applicable requirements,*" of Chapter 11 of the Water Code. The clause that requires the Commission to compare the requested amendment to the existing permit as if the existing permit was fully exercised is often referred to as the "full use assumption."

Adverse Impact on Water Right Holders or the Environment

Under the *City of Marshall* opinion, the Commission must evaluate whether an amendment can adversely impair other water rights or the environment beyond the full use assumption. Under the full use assumption, the addition of the new place of use can have no greater impact on other water right holders or the environment than the impacts to those interests under the existing certificate because the amount of water to be diverted is the same. Both before and after the amendment, the applicants will only be able to take 49.0 acre-feet of water per year from the Guadalupe River. The applicants, under the existing permit and the proposed amended permit, could take all of that water in the first part of the year, or take all of that water in later parts of the year, subject to a maximum diversion rate of 0.56 cfs (250 gpm). In other words, there are no special conditions in the permit that restrict the water right holder to a particular pattern of use,

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or that spreads out the diversion of 49.0 acre-feet to specific amounts over the course of the year. Because there is no specific pattern of use in the permit, the full use assumption requires the Commission to consider the existing permit and the proposed amended permit as potentially exercised under all lawful patterns of use.

It makes no difference to other water right holders or the environment, whether the water right holder is using their 49.0 acre-feet to irrigate the currently authorized tract of land or on the proposed tract of land. The effect on streamflow, and therefore water available for downstream water right holders or the downstream aquatic environment will be the same: there will be 49.0 acre-feet per year less after the diversion. Therefore with the full use assumption, the proposed amendment will not cause adverse impact to other water right holders or the environment.

Specifically regarding impacts on the environment, the Texas Parks and Wildlife Department (TPWD), in a letter from Chad Norris dated October 4, 2007, has commented that "because the requested action will essentially result in some volume of water remaining in the Guadalupe River for an additional 1.5 miles, TPWD staff has no environmental concerns...".

Concerning whether there are impacts to water rights or the environment beyond the full use assumption, the Executive Director believes that there are none for the change in place of use. Adding a place of use does not change a non-consumptive use to a consumptive use. Also, there is no specific pattern of use required in the existing permit that will be changed. As stated above, notice will be given to interjacent water right holders for the addition of the diversion point.

Some persons may argue that an applicant should not be allowed to change the place of use for water that is not being used, since such a change may result in an applicant using all of the authorized water and leaving less available for the environment. The Executive Director does not believe that this is a proper factor to use because it would discourage conservation and future water planning.

Other Applicable Requirements

Under §11.122(b) the proposed amendment must also satisfy all other applicable requirements of Water Code Chapter 11. The Supreme Court in the *Marshall* case itemized those other requirements, which are discussed below.

Administrative Requirements

Staff has reviewed the application and has found that it meets all administrative requirements of the Water Code. Staff therefore declared the application administratively complete and accepted it for filing with the Chief Clerk on November 16, 2007. The applicant has paid notice fees for

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the interjacent water right holders. In the event that the Commission recommends that additional notice is required, additional notice fees will be requested at that time.

Beneficial Use

Proposed appropriations of state water must be for a beneficial use. Beneficial use is defined in in Tex. Water Code § 11.002(4) as “the use of the amount of water which is economically necessary for a purpose authorized by this chapter, when reasonable intelligence and reasonable diligence are used in applying the water to that purpose and shall include conserved water.” The authorized use in the permit is agricultural (irrigation) which is recognized as a beneficial use by Water Code §11.023(a)(2) and was already found to be a beneficial use when the Commission issued the permit. The applicants have not asked to change the authorized use in this application. We will consider whether the use is non-wasteful below.

According to the applicants, the specific use of the water will be to supplement rainfall to more properly sustain hay production, currently Klein grass and Coastal varieties. They plan to rotate pastures to maximize production and decrease possibilities for erosion. In the water conservation plan submitted with the application, the applicants indicate that they will use all of the 49 acre feet of water on the new land. The pattern of use should be similar. Even if the pattern of use changes, the Executive Director does not believe that this factor should be considered unless the pattern of use is specified in the permit because patterns of use change due to the weather, time of use, and needs of the applicant. The Executive Director believes that the use for agriculture (irrigation) continues to be a beneficial use on the added land.

Protection of Public Welfare

A proposed appropriation of state water must not be detrimental to the public welfare. No definition of “detriment to public welfare” is provided in the law. Therefore, the Commission has wide discretion in determining benefits or detriments to the public welfare. The application seeks to add a new place of use for the authorized water. The purpose of the proposed amendment is to irrigate the new tract of land for hay production for cattle on the tract. According to the applicants, irrigation of the new tract will increase vegetative ground cover helping to reduce erosion. The applicants also note that the Guadalupe Blanco River Authority has consented to the amendment, and has agreed to a new Upstream Diversion Contract, which they believe supports the fact that public welfare has been considered. There are no legal or public policy factors that would make this application contrary to the public welfare, and hay production is a common purpose for irrigation. The Executive Director’s opinion is that there is no detriment to the public welfare by granting this application.

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Some persons may argue that an applicant should not be allowed to change the place of use for water that is not being used, since such a change may result in an applicant using all of the authorized water and leaving less available for the environment. The Executive Director does not believe that this is a proper factor to use for the reasons stated above.

Groundwater Effects

A proposed appropriation of state water must consider effects of the proposed permit on groundwater or groundwater recharge. The Commission's Water Availability Model (WAM) is used to evaluate the availability of unappropriated water for new appropriations and takes into account both contribution to river flow caused by groundwater coming to the surface in the river (springs) and decreases in river flow caused by the river flowing over recharge features and losing surface water to groundwater recharge. The WAM contains channel loss factors that account for the gain or loss of river flow. These channel loss factors were developed by expert engineering contractors hired by the Commission to develop the WAMs.

The Guadalupe-San Antonio WAM includes the segment of Guadalupe River at which the diversion under this permit occurs. The Guadalupe-San Antonio WAM includes channel loss factors associated with the Guadalupe River at the requested diversion point. The Water Availability Report for the Guadalupe-San Antonio River Basin indicates that the losses in the reach of the Guadalupe River where the diversion point is located are 0.24% per mile.² These channel losses represent long-term average losses and the report does not indicate whether they are the results of evapotranspiration, evaporation or groundwater recharge

The amount of water diverted by the owner will be the same (49 acre-feet per year) whether that water is drawn from the Guadalupe River at the existing or proposed place of use. Thus, the diversion of the full authorized volume of water for agriculture use will have no greater effect on groundwater resources or groundwater recharge than the diversion of water for the existing agriculture use. Therefore, the Executive Director concludes that there is no potential groundwater issue involved with this application.

Some persons have suggested that the Executive Director examine the Texas Water Development Board Groundwater Availability Models (GAMs) and information from the University of Texas Bureau of Economic Geology to assess groundwater impact. Predictive simulations using the GAMs do not account for streamflow changes associated with permitted surface water withdrawals or return flows. GAMs were not originally designed to address groundwater-surface water interactions and there are issues with using these models for that

² Water Availability in the Guadalupe-San Antonio River Basin. Prepared by HDR Engineering, Inc. and others for the Texas Natural Resource Conservation Commission. December 1999.

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purpose.³ The GAMs are regional in nature and are not able to simulate groundwater-surface water interaction in detail.⁴ Both the WAMs and the GAMs have issues related to quantifying groundwater-surface water interaction; however, the WAMs were developed as a tool for surface water permitting.

The Bureau of Economic Geology provides information about aquifer recharge rates.⁵ In general, these rates, where quantified, are applicable to aquifers or portions of aquifers. As such they do not provide sufficient detail to determine interaction between surface and groundwater at discrete points. The Cow Creek Groundwater Conservation District notes that natural recharge in Kendall County is likely the result of percolation of rainfall. The District is currently unaware of any significant recharge features in Kendall County, although some local sites should be investigated further.⁶ The Regional Water Plan for Region L did not contain additional information related to effects on groundwater or groundwater recharge.

The amount of water diverted by the owner will be the same (49 acre-feet per year) whether that water is drawn from the Guadalupe River at the existing or proposed place of use. Thus, the diversion of the full authorized volume of water at the proposed place of use will have no greater impact on groundwater resources or groundwater recharge than the diversion of water at the existing place of use. Therefore, the Executive Director concludes that there is no potential groundwater issue involved with this application.

Consistency with Regional and State Plan

Water right applications are only granted if the application addresses a water supply need in a manner that is consistent with the state water plan and the relevant regional water plan, unless the Commission determines that conditions warrant a waiver of this requirement. The purpose of the state and regional water plans is to assess the likely future use of water and to develop strategies for meeting water supply shortfalls. The state and regional water plans simply do not address every possible change in individual water rights. Further, the state and regional plans do not assess or plan for changes in places of use for small-scale individual agricultural (irrigation) water rights. Because the Region L plan was not approved by the Texas Water Development Board, there is no approved regional water plan to analyze for consistency with the application. We can, however, grant a waiver for this requirement because no plan was approved and because the Region L plan is discussed in the state water plan. Therefore, a waiver for the regional water

³ Bureau of Economic Geology. 2005. Groundwater-Surface Water Interactions in Texas. August 2005.

⁴ Mace, R., Austin, B. Angle, E. and R. Batchelder. 2007. Surface Water and GroundWater Together Again. Paper presented at State Bar of Texas 8th Annual Changing Face of Water Rights in Texas. San Antonio, Texas.

⁵ Scanlon, B., Dutton, A. and M. Sophocleous. 2002. Groundwater Recharge in Texas. Water Research Fund Grant Contract No. 2000-483-340.

⁶ Cow Creek Groundwater Conservation District. 2004. Groundwater Management Plan. Adopted September 7, 2004.

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plan consistency requirement is granted. The application is consistent with the approved 2007 state water plan because the state plan does not address this amendment, and because there is nothing in the state water plan that conflicts with issuing this amendment.

Avoidance of Waste and Achievement of Water Conservation

The Commission has adopted rules to specify the type of water conservation plans that will be required for amendments to existing water rights in 30 TAC §295.9(a)(4). The applicants are not increasing the amount of the appropriation. The applicants are adding a new place of use for the authorized water, as a result of their purchase of a new tract of land. The applicants have submitted a water conservation plan, which has been reviewed for administrative sufficiency for agricultural (irrigation) use. Additionally, the applicants indicate that since there are two families living on the acreage to be irrigated, there will be constant observation of the water delivery systems to protect against leaks and wasteful watering during the heat of the day or on excessively windy days. Staff finds that the applicants will achieve water conservation and avoid waste.

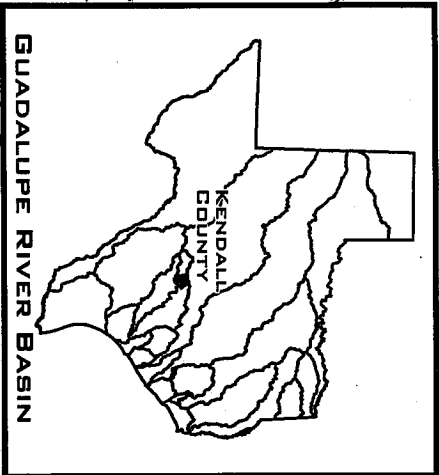
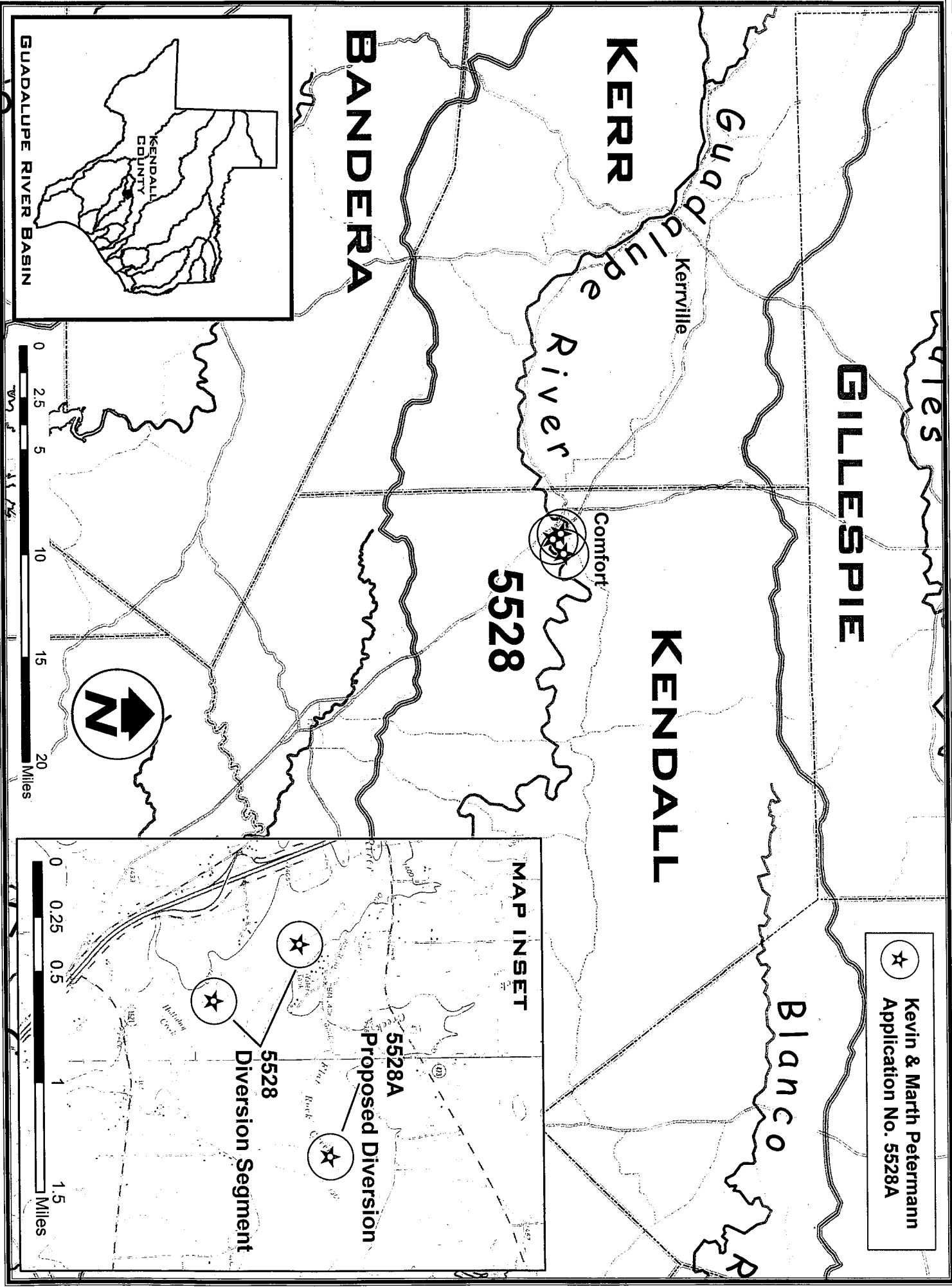
Conclusion

The request in this application to add a diversion point approximately 1.5 mile downstream on the Guadalupe River requires mailed notice to interjacent water right holders pursuant to Commission rules.

The request in this application to add a new place of use requires mailed notice to the co-owner of the permit pursuant to Commission rules. The request does not seek to increase either the amount of water diverted or the rate of diversion. Under the full use assumption, this request will not have an adverse impact on other water right holders or the environment, and there are no negative impacts to other water rights and the environment beyond the full use assumption. Adding a new place of use does not raise any issues of beneficial use, detriment to the public welfare, groundwater effects, consistency with the state and regional water plans, compliance with administrative requirements, or avoidance of waste and achievement of water conservation. As such, Commission rules, statutes, and case law allow the request for a new place of use to be processed with notice given only to the co-owner of the permit.

Therefore, the Executive Director recommends that the only notice for this application be mailed notice, issued to the interjacent water rights holders and to the co-owner of the permit.

★ Kevin & Marth Petermann
Application No. 5528A



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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

P.O. Box 13088, MC-160
Austin, Texas 78711-3088
Telephone No. (512) 239-4691 FAX (512) 239-4770

APPLICATION FOR AMENDMENT TO A WATER RIGHT

REQUIRING MAILED AND PUBLISHED NOTICE
 NOT REQUIRING MAILED AND PUBLISHED NOTICE
Reference Texas Administrative Code § 295.158(b) or (c)

Notice: This form will not be processed until all delinquent fees and/or penalties owed to the TCEQ or the Office of the Attorney General on behalf of the TCEQ are paid in accordance with the Delinquent Fee and Penalty Protocol.

Customer Reference Number (if issued): CN

Note: If you do not have a Customer Reference Number, complete Section II of the Core Data Form (TCEQ-10400) and submit it with this application.

1. Name: Kevin Scott Petermann and wife, Martha Heldridge Petermann
Address: 207 FM 473
Comfort, Texas 78013
Email Address: K.s.petermann@br-cpa.com Fax: (210) 820-3226

2. Applicant owes fees or penalties?
 Yes No
If yes, provide the amount and the nature of the fee or penalty as well as any identifying number:

3. Permit No. 5528 Certificate of Adjudication No. _____
Stream: Guadalupe River Watershed: Guadalupe
Reservoir (present condition, if one exists): _____
County: Kendall

4. Proposed Changes To Water Right Authorizations:
Change point of diversion for 49-acre feet of water to property
described in Exhibit "A" attached hereto.

(ATTACH ADDITIONAL PAGE AS NECESSARY, ATTACH MAP/PLAT DEPICTING PROJECT LOCATION, DIVERSION POINT, PLACE OF USE AND OTHER PERTINENT DATA)

5. I understand the Agency may require additional information in regard to the requested amendment before considering this application.

6. I have submitted the required fees herewith. (Sections 295.131-295.139)

[Signature]
Name (sign)

KEVIN S. PETERMANN
Name (print)

[Signature]
Name (sign)

Martha H. Petermann
Name (print)

Subscribed and sworn to me as being true and correct before me this 13 day of October, 2006



[Signature]
Notary Public, State of Texas

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JUL 03 2007
WATER RIGHTS PERMITTING

BEING a 94.069 acre tract of land out of the Antonio Constante Survey No. 22, Abstract No. 95, and the R. Davis Survey No. 20, Abstract No. 139, Kendall County, Texas, also being out of a 134.484 (135.3 acres, R1) tract of land conveyed to Dalton Frank Neill by Warranty Deed recorded on January 21, 1971 in Volume 104, Page 140 of Deed Records (R1), Kendall County, Texas, said 94.069 acre tract being more particularly described by metes and bounds as follows:

BEGINNING at a 1/2" steel rod found for the northeast corner of herein described 94.069 acre Tract 1, being located on the southeast Right-of-Way line of F.M. 473, the northeast corner of said 134.484 acre tract, the northwest corner of the Clarence and Eleanor Wiedenfeld 84.74 acre second tract recorded in Volume 83, Page 63 of Deed Records (R2), Kendall County, Texas;

THENCE along the east boundary line of said 134.484 acre tract, the west boundary line of said 84.74 acre second tract and the west boundary line of the Clarence and Eleanor Wiedenfeld 10.26 acre first tract recorded in Volume 83, Page 63 of Deed Records (R2) Kendall County, Texas, with a fence line the following courses and distances:

S 00°19'04" W for a distance of 1092.06 feet to a 1/2" steel rod set for angle;
 S 00°07'57" W for a distance of 394.81 feet to a 1/2" steel rod set for angle;
 S 00°15'56" W for a distance of 270.74 feet to a 1/2" steel rod set for angle;
 S 01°14'34" E for a distance of 389.43 feet to a 1/2" steel rod set for angle;
 S 02°24'15" E for a distance of 325.20 feet to a 1/2" steel rod set for angle;
 S 02°14'21" E for a distance of 305.19 feet to a 1/2" steel rod set for angle;

THENCE continuing along the west boundary line of said 10.26 acre first tract with a fence line S 04°40'06" E for a distance of 388.91 feet to a 1/2" steel rod set for the southeast corner of the herein described 94.069 acre Tract 1, the southeast corner of said 134.484 acre tract, the southwest corner of said 10.26 acre first tract, located on the north bank of the Guadalupe River;

THENCE along the north bank of the Guadalupe River upstream and with its meanders the following courses and distances:

S 59°44'51" W for a distance of 87.83 feet to a point on the north bank of the Guadalupe River;
 S 51°13'12" W for a distance of 74.45 feet to a point on the north bank of the Guadalupe River;
 S 47°07'06" W for a distance of 189.41 feet to a point on the north bank of the Guadalupe River;

THENCE continuing along the north bank of the Guadalupe River upstream and with its meanders S 40°39'27" W for a distance of 218.87 feet to a point for angle at the centerline of Flat Rock Creek, where Flat Rock Creek flows into the Guadalupe River;

THENCE along the centerline of Flat Rock Creek upstream the following courses and distances:

S 62°56'15" W for a distance of 47.16 feet to a point for angle;
S 38°29'44" W for a distance of 369.65 feet to a point for angle;
S 52°10'16" W for a distance of 182.84 feet to a point for angle;
S 40°44'37" W for a distance of 103.69 feet to a point for angle;
S 23°00'13" W for a distance of 121.41 feet to a point for angle;
S 33°59'43" W for a distance of 20.25 feet to a point for angle;
S 71°49'54" W for a distance of 174.65 feet to a point for angle;
N 81°11'25" W for a distance of 45.12 feet to a point for angle;
N 73°54'05" W for a distance of 209.63 feet to a point for angle;

THENCE continuing along the centerline of Flat Rock Creek N 85°53'36" W for a distance of 91.44 feet to a point for corner for the southwest corner of herein described 94.069 acre Tract 1;

THENCE leaving the centerline of Flat Rock Creek and severing the said 134.484 acre tract N 09°33'31" E, at a distance of 50.00 feet pass a 1/2" steel rod set for a point on line, a total distance of 1750.57 feet to a 1/2" steel rod set for angle on the west boundary line of the herein described 94.069 acre Tract 1;

THENCE N 00°00'00" E for a distance of 860.66 feet to a 1/2" steel rod set for angle on the west boundary line of herein described 94.069 acre Tract 1;

THENCE N 04°35'44" E for a distance of 1057.49 feet to a 1/2" steel rod set for the northwest corner of the herein described 94.069 acre Tract 1 located on the southeast Right-of-Way line of F.M. 473;

THENCE along the southeast Right-of-Way line of F.M. 473 on a curve concave to the right (radius = 11399.20 feet, delta = 00°09'31", chord = 31.55 feet, chord bearing = N 63°00'37" E) for a distance of 31.55 feet to a 1/2" steel rod set for point of tangency on the southeast Right-of-Way line of F.M. 473, on the northwest boundary line of the herein described 94.069 acre Tract 1;

THENCE continuing along the southeast Right-of-Way line of F.M. 473 N 63°05'22" E for a distance of 337.06 feet to a Tx.D.O.T. Right-of-Way monument found for point on line, being on the northwest boundary line of the herein described 94.069 acre Tract 1;


THENCE continuing along the southeast Right-of-Way line of F.M. 473 N 63°05'22" E for a distance of 784.87 feet to the POINT OF BEGINNING.

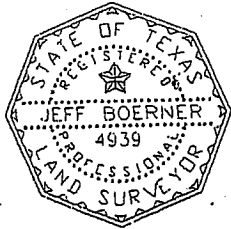
CONTAINING 94.069 acres, more or less.

Note: This description is based on the ground survey performed on October 11, 2005. A survey plat of the above described tract was prepared on October 21, 2005 by MDS Land Surveying Company, Inc.

References:

- R1 - Volume 104, Pages 140-141 - Deed Records
- R2 - Volume 83, Pages 63-65 - Deed Records
- R3 - Volume 69, Pages 593-594 - Deed Records
- R4 - Volume 120, Page 3 - Deed Records


 Jeff Boerner
 Registered Professional Land Surveyor
 No. 4939 Job #05-2490



Filed for Record in:
 Kendall County
 Darlene Herrin
 County Clerk

On: Nov 15, 2005 at 03:22P

Document Number: 00202611
 Total Fees : 35.00

Receipt Number - 81417
 By Deputy: Paula Pfeiffer

This Document has been received by this Office for Recording into the Official Public Records. We do hereby swear that we do not discriminate due to Race, Creed, Color, Sex or National Origin.

kcac

STATE OF TEXAS
 COUNTY OF KENDALL
 I hereby certify that this instrument was filed in File Number Sequence on the date and at the time stamped hereon and was duly recorded in the Official Records of Kendall County, Texas on:

NOV 16 2005



DARLENE HERRIN, County Clerk
 Kendall County, Texas

By: *AKM* Deputy

Burnside & Rishebarger

A Professional Limited Liability Company
Certified Public Accountants
8700 Tesoro Drive, Suite 340 • San Antonio, Texas 78217-6218
(210) 820-3900 • Fax (210) 820-3226

RECEIVED
TCEQ
WATER SUPPLY DIV.

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May 5, 2008

Mr. Ron Ellis, Project Manager
Mail Code 160
Water Rights Permitting Team
Water Rights Permitting & Availability Section
P.O. Box 13087
Austin, TX 78711-3087

Re: Kevin and Martha Petermann
WRPERM 5528
CN603162173, CN603162181, RN105178578
Application No. 5528 A to Amend Water Use Permit No. 5528
TWC Section 11.122
Guadalupe River, Guadalupe Basin
Kendall County, Texas

Dear Mr. Ellis:

This letter is in response to your letter dated April 9, 2008 (copy enclosed) in which the TCEQ Staff requested responses to 7 numbered items in order to determine notice requirements for water right amendment applications pursuant to Texas Water Code Section 11.122(b). The responses below correspond to the numbered items in your letter.

1. The application that was provided to the TCEQ relating to amending Water Permit No. 5528 included the following:
 - Sworn application
 - Detail maps, measurements, and pictures of diversion point
 - A completed System Inventory and Water Conservation Plan for Individually-Operated Irrigation Systems
 - All appropriate fees to the TCEQ have been remitted
 - All other items as requested by the Staff in order to perfect the application have been supplied and were declared administratively complete on November 16, 2007.
2. This proposed amendment is a beneficial use of the water right as defined in TWC Section 11.002 and listed in TWC Section 11.023. TWC Section 11.023 includes

agricultural uses as a purpose for which the state water may be appropriated. Section 11.002(12) defines "Agriculture" to include activities such as the cultivating of soil to produce crops for animal feed and raising, feeding, or keeping animals for breeding purposes.

The purpose of the proposed water right amendment is to be able to supplement rainfall in order to more properly sustain hay production (currently Klein grass and Coastal varieties) and manage and increase the cattle carrying capacity of the acreage. Current plans are to rotate pastures to maximize production and to be good stewards of the water and the land. Growing up in the Texas Hill Country has given us a keen awareness of the importance of keeping good ground cover on pasture and field land to not only increase production but to eliminate possibilities for erosion.

3. This proposed amendment should not be detrimental to the public welfare. The amendment is for a change in the diversion point downstream from the current diversion point. No change is being requested in the use of the water nor is any increase requested in the amount of the water being appropriated on an annual basis. The amendment to move the diversion point downstream will actually increase water flow rates of the Guadalupe River upstream. The GBRA has consented to the amendment and a new Subordination Agreement has been agreed to with the GBRA, which supports the fact that consideration of the public welfare has been considered. No change in the flow rate levels of the Guadalupe River that would allow pumping has been requested.

There are very few landowners between the current diversion point and the proposed diversion point and water levels should actually increase for those landowners as they are upstream. This amendment should have a positive impact on those landowners. This amendment is not detrimental to the public welfare in any way and is actually positive to public welfare.

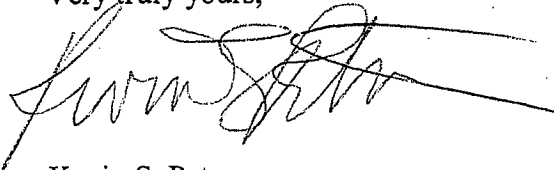
4. The appropriation of water as a supplement and added to rainfall will increase plant growth, allow for better erosion control and allow water not utilized by plants to percolate back into the water table. This should not be detrimental to the groundwater or groundwater recharge. The water is not being utilized in any industrial use nor is being diverted in any way that would reduce groundwater.
5. Irrigation for agricultural use is an appropriation of water that is consistent with the State Water Plan. No change in use, increase in appropriation rate, nor change in Guadalupe River level to allow pumping is being requested.
6. We have previously provided a System Inventory and Water Conservation Plan to the TCEQ. Two families living within 100 yards of the acreage to be irrigated ensures constant observation of the water delivery systems to protect against leaks, metering of water flow so that only allowable amounts are used, and so

there is no irrigation during the heat of the day or on excessively windy days. The acreage where the water would be utilized is virtually flat and should have zero run-off. In addition, there is an old, elevated railroad right-of-way that acts as a natural levy for a majority of the acreage. The limits of the ability to appropriate water based upon water flow rates of the Guadalupe River at the U.S. Geological Service monitoring site at Comfort, Texas help to ensure water conservation during times of drought and low water availability. In addition, the GBRA Subordination Agreements give the GBRA certain rights to protect and/or suspend water appropriation.

7. The proposed amendment should not impact other Water Rights holders as this is a change of diversion point downstream from the current diversion point. Also, no increase in water appropriation rates or any change in water flow rates that allow appropriation is being requested. Please see discussion in Number 3 above for additional information.

I hope that the above responses address your request for information as laid out in your letter of April 9, 2008. Please do not hesitate to contact me if you should have need of any additional information or clarification of the information provided.

Very truly yours,

A handwritten signature in black ink, appearing to read "Kevin S. Petermann", with a long horizontal flourish extending to the right.

Kevin S. Petermann

Buddy Garcia, *Chairman*
Larry R. Soward, *Commissioner*
Bryan W. Shaw, Ph.D., *Commissioner*
Glenn Shankle, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

April 9, 2008

Mr. Kevin Petermann
207 FM473
Comfort, TX 78013

CERTIFIED MAIL

RE: Kevin and Martha Petermann
WRPERM 5528
CN603162173, CN603162181, RN105178578
Application No. 5528A to Amend Water Use Permit No. 5528
TWC §11.122
Guadalupe River, Guadalupe Basin
Kendall County

Dear Mr. Petermann:

This acknowledges receipt, on November 10, 2007, of your request to put your application on hold pending a decision on notice requirements.

The Commission is reviewing notice requirements for water right amendment applications pursuant to Texas Water Code (TWC) §11.122(b). On Friday, January 18, 2008, the Commission decided that in order to determine if an amendment application requires notice, staff must consider how an application addresses the relevant public interest criteria described in TWC §11.134 and outlined by the Texas Supreme Court in the case of *Marshall v. Uncertain* as well as how the proposed amendment will or will not impact water right holders or the environment beyond and irrespective of the fact that the water right can be used to its full authorized amount.

Therefore, staff is requesting responses to Items 1-7 below. In lieu of providing responses, you may agree to the issuance of published notice and mailed notice to the water right holders in the Guadalupe River Basin.

If you elect to proceed without agreeing to published and mailed notice, please respond to the following items.

1. Confirm whether this application meets the administrative requirements for an amendment to a water use permit pursuant to TWC Chapter 11, and Title 30 Texas Administrative Code (TAC) §§ 281, 295, and 297. An amendment application should include, but is not limited to, a sworn application, maps, completed conservation plan, fees, etc.
2. Discuss how the proposed amendment is a beneficial use of the water right as defined in TWC §11.002 and listed in TWC §11.023. Identify the specific proposed use of the water (e.g., road construction, hydrostatic testing, etc.) for which the amendment is requested.

3. Explain how the proposed amendment is not detrimental to the public welfare. Consider any public welfare matters you think might be relevant to a decision on the application. Examples could include concerns related to the well-being of humans and the environment.
4. Discuss the effects, if any, of the proposed amendment on groundwater or groundwater recharge.
5. Describe how the proposed amendment addresses a water supply need in a manner that is consistent with the state water plan or the applicable approved regional water plan for any area in which the proposed appropriation is located or, in the alternative, describe conditions that warrant a waiver of this requirement. The state and regional water plans are available for download at this website: http://www.twdb.state.tx.us/RWPG/planning_page.asp.
6. Provide evidence that reasonable diligence will be used to avoid waste and achieve water conservation as defined in TWC §11.002. Examples of evidence could include, but are not limited to, a water conservation plan or, if required, a drought contingency plan, meeting the requirements of 30 TAC §288.
7. Explain how the proposed amendment will or will not impact water right holders or the environment beyond and irrespective of the fact that the water right can be used to its full authorized amount.

The responses will be reviewed by the Executive Director's staff to make a determination of the application's notice requirement. The staff-recommended notice determination may then be set on Commissioner's Agenda for consideration.

If you elect to proceed with published and mailed notice, please remit fees in the amount of \$350.62, described below.

Filing Fee	\$ 100.00
Ownership Fee	\$ 100.00
Recording Fee	\$ 1.25
Notice Fee (Guadalupe River Basin)	\$ 352.50
TOTAL FEES	\$ 553.75
FEES PAID	\$ 203.13
BALANCE DUE	\$ 350.62

Please provide the information requested above or the notice fees by May 12, 2008, or the application may be returned pursuant to 30 Texas Administrative Code §281.19.

If you have any questions concerning this application, please contact me at (512) 239-1282 or by email at roellis@tceq.state.tx.us.

Sincerely,



Ron Ellis, Project Manager
Mail Code 160
Water Rights Permitting Team
Water Rights Permitting & Availability Section

TEXAS NATURAL RESOURCE CONSERVATION COMMISSION



PERMIT TO APPROPRIATE STATE WATER

APPLICATION NO. 5528

PERMIT NO. 5528

TYPE: \$11.121

Name	: George Alfred Smith and wife, Barbara Franklin-Schmidt	Address	: P.O. Box 44 Waring, Texas 78074
Filed	: May 19, 1995	Granted	: AUG 04 1995
Purpose	: Irrigation	County	: Kendall
Watercourse	: Guadalupe River	Watershed	: Guadalupe River Basin

WHEREAS, George Alfred Schmidt and wife, Barbara Franklin-Schmidt (applicants) have requested authorization to divert 98 acre-feet of water per annum from the Guadalupe River, based on a Subordination Agreement with the Guadalupe-Blanco River Authority, to irrigate 50 acres of land approximately 1.5 miles east of Comfort and 15 miles northwest of Boerne, Kendall County, Texas;

WHEREAS, Commission environmental staff have recommended a certain diversion streamflow restriction to protect the environment of the area and downstream users of the Guadalupe River;

WHEREAS, the Texas Natural Resource Conservation Commission finds that jurisdiction over the application is established; and

WHEREAS, the Commission has complied with the requirements of the Texas Water Code and Rules of the Texas Natural Resource Conservation Commission in issuing this permit.

NOW, THEREFORE, this permit to appropriate and use State water is issued to George Alfred Schmidt and wife, Barbara Franklin-Schmidt, subject to the following terms and conditions:

1. USE

Permittee is authorized to divert 98 acre-feet of water per annum from the Guadalupe River to irrigate 50 acres of land out of a 57.7 acre tract in the Justo Esqueda Original Survey No. 25, Abstract No. 157. Ownership of the land is evidenced by a Warranty Deed recorded in Volume 390, Page 15 in the Official Public Records of Real Property of Kendall County on May 6, 1993. The land to be irrigated is approximately 1.5 miles directly east of Comfort and 15 miles northwest of Boerne, Kendall County, Texas.

2. DIVERSION

Water will be diverted from the Guadalupe River at a maximum rate of 0.56 cfs (250 gpm). Diversions will occur anywhere along the left, or north, bank of the Guadalupe River from a point bearing North 40° West, 3150 feet, from the southeast corner of the aforesaid survey, to a point bearing North 56° West, 1200 feet from the southeast corner of the aforesaid survey, Kendall County. The most downstream point is also at Latitude 29.950° N, Longitude 98.880° W.

3. WATER CONSERVATION

Permittee shall implement a water conservation plan that provides for the utilization of those practices, techniques, and technologies that reduce or maintain the consumption of water, prevent or reduce the loss or waste of water, maintain or improve the efficiency in the use of water, increase the recycling and reuse of water, or prevent the pollution of water, so that a water supply is made available for future or alternative uses.

4. SPECIAL CONDITIONS

- A. Prior to the diversion of the water authorized herein, permittee shall install a measurement device that measures within five percent (5%) accuracy and which accounts for the quantity of water diverted from the Guadalupe River.
- B. Permittee is authorized to divert water hereunder during March through June only when the flow of the Guadalupe River equals or exceeds 70 cfs and during July through February only when the flow equals or exceeds 50 cfs, measured at U.S. Geological Survey gaging station no. 08167000 on the Guadalupe River to protect instream needs.

- C. The authorizations hereunder are subject to a current Subordination Agreement or any extensions thereof, between the permittees and the Guadalupe-Blanco River Authority, which states the diversion volume and rate specified in this permit. The Commission shall be notified immediately by the permittees upon amendment or expiration of such agreement and be provided with copies of appropriate documents effecting such changes. Permittees waive the right to notice and hearing on cancellation of this water right pursuant to expiration of the Subordination Agreement. This permit shall expire and become null and void upon expiration of the agreement with no further Commission action.

This permit is issued subject to all superior and senior water rights in the Guadalupe River Basin.

The right to use State water appropriated hereunder is limited to that amount which can be beneficially used by the permittee for the authorized purpose but not to exceed the amount specifically authorized. Non-beneficial use or waste of water is a violation of this permit.

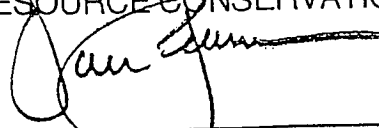
Permittee agrees to be bound by the terms, conditions and provisions contained herein and such agreement is a condition precedent to the granting of this permit.

All other matters requested in the application which are not specifically granted by this permit are denied.

This water right is appurtenant to and is an undivided part of the above described land within which irrigation is authorized. A transfer of any portion of the land described includes, unless otherwise specified, a proportionate amount of the irrigation water right owned by the owner or seller at the time of the transaction.

This permit is issued subject to the Rules of the Texas Natural Resource Conservation Commission and to the right of continuing supervision of State water resources exercised by the Commission.

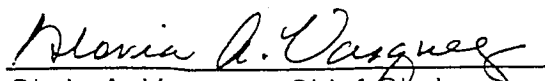
TEXAS NATURAL RESOURCE CONSERVATION COMMISSION



For the Commission

DATE ISSUED: AUG 04 1995

ATTEST:


Gloria A. Vasquez, Chief Clerk