

# Texas Commission on Environmental Quality

## INTEROFFICE MEMORANDUM

**To:** Commissioners **Date:** December 19, 2007

**Thru:** La Donna Castañuela, Chief Clerk  
Stephanie Bergeron Perdue, Deputy Director, Office of Legal Services  
Dan Eden, Deputy Director, OPRR  
Robert Martinez, Director, Environmental Law Division

**From:** Todd Chenoweth, Director, Water Supply Division  
Robin Smith, Attorney, Environmental Law Division

**Subject:** Notice Requirements for Water Right Amendments Docket No. 2007-1921-MIS

### Caption

Consideration of the public notice requirements for water right amendment applications subject to Texas Water Code Section 11.122(b), including the recommendations and any report of the Water Rights Amendment Notice Advisory Group. Docket No. 2007-1921-MIS (Todd Chenoweth, Robin Smith)

### Background

Until recently, the TCEQ's practice and interpretation of Texas Water Code §11.122(b), relating to amending water rights, has been that applications only to change the use or change the place of use do not require notice or the opportunity for a hearing. This practice was challenged in an application involving the City of Marshall. The Texas Supreme Court disapproved the TCEQ's practice, in part.

The Court decided that even in applications for water right amendments, the application must meet some of the requirements of Tex. Water Code §11.134. The Supreme Court referred to these criteria as the "public interest criteria," and listed them as:

- Conformance with administrative requirements
- Beneficial use
- Public welfare
- Effects on groundwater
- Consistency with state and regional water plans
- Avoidance of waste and achievement of water conservation

If the TCEQ finds that there may be an impact on any of these public interest criteria, notice and an opportunity for hearing is required.

At a September 7, 2007 Commission worksession, staff requested guidance on how to proceed with processing water right amendments for changes in permitted use and changes in place of use in light of the *City of Marshall* case. The specific issues formulated by staff were:

- In a water right amendment to add a use or change a use, what notice, if any, should be required?
- In a water right amendment to change a place of use, what notice, if any, should be required?
- What type of supporting information concerning notice should staff prepare for an amendment?
- Are there categories or types of amendments that will either never require notice or will always require notice?

At the September 7th worksession, the Commission asked staff to assemble an Advisory Group of knowledgeable stakeholders to meet on the issues and determine if any consensus could be obtained on which water right applications should receive notice consistent with the *City of Marshall* case. This agenda item is the Executive Director's report to the Commission on the results of that Advisory Group.

#### Advisory Group

The Advisory Group met four times and developed a set of consensus recommendations. "Consensus" was defined for the group as meaning that all members of the group can live with the recommendations. The full set of recommendations from the Group is attached to this memo as Attachment 1. The Advisory Group made comments to a draft of the recommendations, discussed the recommendations at their final meeting, and had an opportunity to review and comment on a revised draft. Changes, based on those comments, were made to the report.

#### Summary of the Attached Recommendations

On the fundamental issue of what type of notice should be required for water right amendments to change a permitted use or to change the in-basin place of use, the Advisory Group recommended that those amendments where the amount of water involved was 500 acre feet or less would presumptively not require notice. The presumption could be rebutted by information raised by the public or by information known to the Executive Director.

The Advisory Group also agreed that notice would not routinely be required for non-substantive amendments such as amendments to cure ambiguities or ineffective provisions in a water right.

The Advisory Group also recommended that for amendments to change a permitted use or to change the in-basin place of use, TCEQ staff should issue an announcement of the receipt of the application. The announcement would be posted on the internet, published in the *Texas Register*, sent to persons on the Chief Clerk's interested parties list, and sent to the County where the reservoir or diversion point was located. The announcement would give persons 30 days in which to register their interest in receiving additional information on that application. Persons could also supply TCEQ staff with information on the public interest criteria.

After the announcement, technical review would proceed. The technical memos would address the public interest criteria identified by the Texas Supreme Court. TCEQ staff would then make a determination on what notice shall be given for that application.

If the decision was to issue notice of that application, in addition to the usual recipients, persons who responded to the announcement would get a copy of the notice. If the decision was to not issue notice, persons who responded to the announcement would get a copy of that decision along with the issued amendment.

A full report on the recommendations is given in Attachment 1. Comments by the Office of Public Interest Counsel are included in Attachment 2. The original staff memo for the September 7<sup>th</sup> worksession is given as additional background information in Attachment 3.

### Implementation

If the Commission wishes to adopt the recommendations, staff is of the opinion that the additional "announcement" for the Marshall-type amendments would not require a rule change. Staff also believes that the recommendation that no notice for the 500 acre-feet and less change in use and 500 acre-feet or less change in place of use can be implemented without a rule change. The Commission may wish to initiate rule changes for these concepts.

However, the Advisory Group has also recommended that the formal notice, if any, would come after technical review. That recommendation does not conflict with the statute for water rights notice, but does conflict with one of our rules, §295.151. That rule requires notice (traditional type notice) to be done when the application is filed, which occurs when the application is declared administratively complete. Therefore, the agency should change this rule before implementing that recommendation.

The Advisory Group was not able to reach a consensus on the required notice for water right amendment applications beyond those with de minimis impacts. Without further direction from the Commission, the Executive Director will handle these applications on a case-by-case basis.

As indicated in the full report, Advisory Group was not able to reach a consensus on water right amendment applications in the Rio Grande. The middle and lower Rio Grande (below Lake Amistad) allocate water on the basis of a Texas Supreme Court decision which allocates water with municipal water having a higher priority than agricultural water. The rest of the state operates by state statute on the prior appropriation system that allocates water based on a priority date. The Advisory Group recommended that a separate Rio Grande specific stakeholder group address the Rio Grande issues.

## Recommendations

### Water Rights Amendments Notice Advisory Group

For applications for amendments to water right permits subject to Water Code §11.122(b) that do not involve an increase in the amount of water authorized to be diverted, or an increase in the authorized rate of diversion and prior to the *Marshall* case TCEQ would not have required notice:

The application form for water right amendments should be changed to request information from the applicant on: (1) whether the application conforms to the requirements of Chapter 11 of the Water Code, shows the intended beneficial use, is not detrimental to the public welfare, considers the effects, if any, on groundwater or groundwater recharge, addresses a water supply need in a manner that is consistent with the state water plan and the relevant approved regional water plan, provides evidence that reasonable diligence will be used to avoid waste and achieve water conservation; and (2) whether the amendment will have an impact on water right holders or the environment beyond and irrespective of the fact that the water right can be used to its full authorized amount.

After administrative completeness, an announcement of the application will be given. The announcement will contain a short summary of the application, contact information for the agency application manager assigned to the application, and the Office of Public Assistance (OPA), as well as a web address where more information may be found. The announcement will be posted to the agency website, published in the *Texas Register*, sent to all persons on the Chief Clerk's Interested Parties list who have expressed interest in that water right, that amendment, or applications in that area, and sent to the County where the reservoir or diversion point is located. The inadvertent failure to provide an announcement to one of these entities would not prevent the Commission's consideration of the application.

**NOTE:** Sending the announcement to additional entities was discussed by the Advisory Group but no consensus could be reached on these additional entities. Many in the Advisory Group felt that the city where the reservoir or diversion point was located should also receive the announcement. Others in the Advisory Group felt that groundwater districts should also receive the announcement and others felt that if groundwater districts were included, river authorities also should be added. A minority of the Advisory Group felt that legislators whose district covered the area of the water right should receive the announcement. Ease of identifying the potential recipients was a key consideration in the discussions.

The announcement would give persons 30 days in which to register their interest in receiving additional information on that application. The announcement will also state that persons have the ability to comment on: (1) whether the application conforms to the requirements of Chapter 11 of the Water Code, shows the intended beneficial use, is not detrimental to the public welfare, considers the effects, if any, on groundwater or

groundwater recharge, addresses a water supply need in a manner that is consistent with the state water plan and the relevant approved regional water plan, and provides evidence that reasonable diligence will be used to avoid waste and achieve water conservation; and (2) whether the amendment will have an impact on 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 announcement will give instructions on where to send those comments. The announcement or the full application will be sent to the Texas Parks and Wildlife Department.

The applicant should be allowed the option to ask that traditional notice be given after the application is declared administratively complete, in which case the announcement would not be given. The applicant's choice will be indicated on the application form. If the traditional notice is given, the application would proceed with the technical review while the notice process is underway.

After technical review, TCEQ staff will prepare its technical memorandums which will at a minimum address: (1) whether the application conforms to the requirements of Chapter 11 of the Water Code, identifies the intended beneficial use, is not detrimental to the public welfare, considers the effects, if any, on groundwater or groundwater recharge, addresses a water supply need in a manner that is consistent with the state water plan and the relevant approved regional water plan, and provides evidence that reasonable diligence will be used to avoid waste and achieve water conservation; and (2) whether the amendment will have an impact on water right holders or the environment beyond and irrespective of the fact that the water right can be used to its full authorized amount. TCEQ staff will then make a determination on what notice, if any, shall be given. When a presumption of de minimis impacts applies, as described below, the technical memorandums may simply note, in addressing the criteria listed in this paragraph, the applicability of the presumption. If information comes to the attention of the TCEQ staff indicating that, despite the presumption, impacts are not likely to be de minimis, staff will prepare an analysis of applicable criteria.

Water right amendments with de minimis impacts will not require notice. Applications to amend a water right that will presumptively be considered as having de minimis impacts are applications for amendments where the amount affected by the proposed change is 500 acre-feet or less and the amendment involves only changes in permitted use or in-basin changes in places of permitted use. The presumption may be rebutted by information raised in response to the announcement or by information known to the Executive Director. The announcement shall provide that unless an issue is timely raised in response to the announcement, no further notice will be given, on those applications where the amount affected by the proposed change is 500 acre-feet or less and the amendment involves only changes in permitted use or in-basin changes in places of permitted use.

**Note:** The amount of a "de minimis" impact was the subject of discussion by the stakeholders, and some members did not agree that 500 acre-feet was the largest volume of a proposed change that should be considered "de minimis." These stakeholders argued

that the Legislature has explicitly recognized that changes in places of use from one basin to another that do not involve more than 3,000 acre-feet of water per year, may be authorized without notice or the opportunity for hearing (Texas Water Code §11.085(v)(1)), and that 3,000 acre-feet should be the minimum on applications that are considered to be "de minimis."

Notice will not routinely be required for non-substantive amendments such as amendments to cure ambiguities or ineffective provisions in a water right. The Executive Director may require notice even in an application of this nature, if special conditions warrant it.

If notice is required, the notice shall state that the only issues that the Commission will consider are limited to: (1) whether the application conforms to the requirements of Chapter 11 of the Water Code, identifies the intended beneficial use, is not detrimental to the public welfare, considers the effects, if any, on groundwater or groundwater recharge, addresses a water supply need in a manner that is consistent with the state water plan and the relevant approved regional water plan, and provides evidence that reasonable diligence will be used to avoid waste and achieve water conservation; and (2) whether the amendment will have an impact on 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 Commission may choose to further limit the fact issues for a particular application when it makes its decision whether to send the application to the State Office of Administrative Hearings.

The Executive Director's decision to issue notice to a person or class of persons does not preclude the Executive Director from recommending that the person or class of persons is not an affected party for purposes of granting a contested case hearing. The Commission should not make any inference of who might be affected by what notice the Executive Director required.

If the Executive Director's decision is to not issue notice, the decision will be sent to all persons who responded to the original announcement and expressed interest in the application along with information about how to contest the decision. The decision not to issue notice may be sent with a copy of the final amendment. The decision will also be posted on the agency's web site.

If an applicant decides to withdraw an application, the Executive Director will notify all persons of that fact who responded to the original announcement and expressed interest in the application. The fact that the application was withdrawn will be posted on the agency's web site.

**Note:** The foregoing recommendations are for the entire state except the middle and lower Rio Grande (below Lake Amistad). Several members of the group strongly felt that no changes are necessary to agency rules and the Executive Director's practice related to notice in those portions of the Rio Grande. Some members also felt that no changes are needed for any portion of the Rio Grande, but there was no consensus regarding the upper

Rio Grande. Other members of the group felt that notice issues for the Rio Grande should be taken up by a balanced stakeholder group of persons familiar with Rio Grande water resource issues.

Buddy Garcia, *Chairman*  
 Larry R. Soward, *Commissioner*  
 Bryan W. Shaw, Ph.D., *Commissioner*



Blas J. Coy, Jr., *Public Interest Counsel*

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

November 14, 2007

*via e-mail*

Dear Advisory Group Member:

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (TCEQ) appreciates your participation and efforts in working toward a consensus recommendation to the TCEQ Commissioners on post-*Marshall* public notice requirements for water rights applications that would not have previously required notice. We would like to take an opportunity to provide you with our position on several of the issues discussed by the Group to-date. We hope you will consider the following assessment as you prepare for the Group's last meeting.

The Group has been discussing a hybrid procedure for *Marshall* applications that were not previously noticed by the Commission. With respect to the "announcement" contemplated at the time of administrative completeness, we agree that a notice of application should be issued upon administrative completeness, perhaps with some hybrid qualities. However, OPIC advocates a notice of application that includes comprehensive mailed notice and website posting. We do not think it is necessary to publish this initial notice, which may reduce some cost concerns for small water rights holders who are applying for an amendment that probably will not require a second notice at all. A comprehensive mailing for the notice of application will ensure that members of the public have an adequate opportunity to "raise an issue," as stated in *Marshall*,<sup>1</sup> without the expense of published notice.

In further response to concerns about the cost of mailed notice, we would support limiting the mailing list for the second notice, if required, to persons or entities who respond to the notice of application. If no one responds to the notice of application, OPIC believes that the second notice would only need to be published. Thus, OPIC would support a procedural scheme that limits the mailing list for both the ED's letter that no notice is required and the second notice, if required. This procedure should fully comply with the *Marshall* decision and eliminate concerns about requiring full mailed notice two times for one application.

<sup>1</sup> *City of Marshall v. City of Uncertain*, 206 S.W.3d 97, 111 (Tex.2006). Sending mailed notice of the application to the basin also fulfills the statutory requirement that "[n]otice shall be given to the persons who in the judgment of the commission may be affected by an application...." TWC § 11.132 (2006) (emphasis added).

REPLY TO: PUBLIC INTEREST COUNSEL, MC 103 • P.O. BOX 13087 • AUSTIN, TEXAS 78711-3087 • 512-239-6363

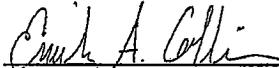
P.O. Box 13087 • Austin, Texas 78711-3087 • 512-239-1000 • Internet address: [www.tceq.state.tx.us](http://www.tceq.state.tx.us)

In addition, we are not opposed to using a *de minimus* standard for not requiring a second notice at all provided that a reasoned justification exists for the *de minimus* amount established for each type of amendment. If all water rights holders in the basin are given an initial opportunity to comment on the application, and the opportunity to rebut the presumption that the application would have a *de minimus* impact on public interest considerations, OPIC would support limiting the mailing list for the ED's determination that no notice is required to persons who responded to the notice of application.

Again, we appreciate your work in crafting a scheme to provide adequate notice to the public for these specific applications. We look forward to your recommendation, and we hope that our comments provide some assistance to you in developing a consensus.

Respectfully submitted,

Blas J. Coy, Jr.  
Public Interest Counsel

By   
Emily A. Collins  
Assistant Public Interest Counsel

# Texas Commission on Environmental Quality

## INTEROFFICE MEMORANDUM

**To:** Commissioner's Work Session                      **Date:** September 7, 2007

**Thru:** Stephanie Bergeron Perdue, Deputy Director, Legal Services  
Dan Eden, Deputy Director, OPRR  
Robert Martinez, Director, Environmental Law Division

**From:** Todd Chenoweth, Director, Water Supply Division  
Robin Smith, Attorney, Environmental Law Division

**Subject:** Water Right Amendment Notice and Hearing Issues

**Issue** Consideration of public notice requirements for water rights applications subject to Tex. Water Code § 11.122(b).

### **Background and Current Practice**

Until recently, the TCEQ's practice and interpretation of the Water Code § 11.122(b), relating to amending water rights, has been that applications to add a use or change the use, as long as the applicant is not increasing a consumptive use, do not require notice or the opportunity for a hearing. This practice was challenged in an application involving the City of Marshall. The Texas Supreme Court disapproved the TCEQ's practice, in part.

The City of Marshall holds a certificate of adjudication recognizing its right to divert and use up to 16,000 acre feet of water for municipal use. In 2001, Marshall applied to change the purpose of use in that certificate so that it could supply water for industrial use. The application did not request a change in the amount of water or rate of diversion. Opponents of the amendment requested a contested case hearing.

The Commission denied the request for hearing based on Texas Water Code (TWC) Section 11.122(b), which it interpreted to mandate authorization when the proposed amendment does not request a change in the amount of water or rate of diversion. Section 11.122(b) says:

Subject to meeting all other applicable requirements of this chapter for the approval of an application, an amendment, except an amendment to a water right that increases the amount of water authorized to be diverted or the authorized rate of diversion, shall be authorized 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, certified filing, or certificate of adjudication that is sought to be

amended was fully exercised according to its terms and conditions as they existed before the requested amendment.

The Marshall case was appealed to the Supreme Court of Texas, which concluded that Section 11.122(b) does not preclude a contested case hearing on every amendment application that does not request a change in the amount of water or rate of diversion.

The Court gave some guidance on what types of changes the Commission should refer to hearing and circumstances in which a hearing might not be necessary, and remanded the case to the Commission for a decision in light of the Supreme Court's opinion. The case is currently pending before the TCEQ.

### Supreme Court Decision

#### **A. Court's Discussion of "Other Applicable Requirements"**

Section 11.122(b) states that an amendment *shall* be authorized "*subject to meeting all other applicable requirements of this chapter for approval of an application.*" The Supreme Court decided that this phrase referred to the requirements of Tex. Water Code § 11.134, which sets forth when the commission may act on an application, other than the requirements that implicate impact on other water right holders and the environment. The Supreme Court referred to these criteria as the "public interest criteria," and listed them as:

- conformance with administrative requirements
- beneficial use
- public welfare
- effects on groundwater
- consistency with state and regional water plans
- avoidance of waste/water conservation

If the TCEQ finds that there may be an impact on any of these public interest criteria, notice and an opportunity for hearing would be required.

#### **B. Court's Discussion of Impact on Other Water Right Holders and the Environment**

Section 11.122(b) further provides that in order to be authorized without a contested case hearing, *the requested change cannot cause an "adverse impact on other water right holders or the environment on the stream"* any more so than full-use of the original permit would. The Court determined that the TCEQ must analyze whether an application for an amendment could have this impact. If the TCEQ finds that there is possibly an impact on other water rights and the environment beyond or irrespective of the full use of the original permit, notice and an opportunity for a hearing would be required.

#### **C. Court's Guidance to Commission**

The Court directed the Commission to determine whether notice and hearing are required for Marshall's amendment application in light of the Court's construction of the amendment statute. However, the Court's decision would apply to all amendments.

The Court states that it may generally be possible for the Commission to determine from the face of a proposed amendment that the relevant criteria are met or are not implicated by a particular amendment application, in which event a hearing would not be necessary. If a determination cannot be made from the face of the application, a limited hearing would be necessary to assess those effects.

The Court offered the following examples as to when notice and hearing for an amendment application could be required:

- Water rights holders or the on-stream environment could be affected notwithstanding the assumption that a water right is fully used:
  - 1) If a proposed amendment moves the *point of diversion* upstream above a senior right holder, it could affect that person's diversion of water even if the applicant's amount and rate of diversion were unchanged or
  - 2) If the proposed use changes from a *non-consumptive use to a consumptive* one
- The TCEQ should determine if removal of the potability requirement (by going from municipal to industrial use) in the Marshall case could be an adverse impact to the public interest criteria.

The Court emphasizes that the Commission "must focus on the impacts that are inherent in the type of use that is proposed, and not on the fact that the applicant may fully use its permitted water right" when an applicant seeks a change in use, such as the *City of Marshall*.

### Issues

- 1) **In a water right amendment to add a use or change a use, what notice, if any, should be required?**

### **Options:**

**A.** Under the *City of Marshall*, no notice is required because a change in use does not impact the public interest criteria or other water rights and the environment beyond the full use criteria. Staff will provide additional supporting information in the record for each application. If persons believe that staff is incorrect, they can file a Motion to Overturn.

**B.** Staff will make a determination as to whether notice will be required based on the set of facts presented by that application. If staff decides no notice is required a person can file a Motion to Overturn. If notice is required and there are protesters, the Commission will determine whether the protesters are affected persons.

**C.** Staff will require mailed notice to water right holders and notice published in a newspaper of general circulation in the area for all amendments. Notice will specify which limited public interest criteria listed in the Supreme Court opinion, or what impacts to the environment or water rights, are subject to a hearing. If there are protesters, whether the protesters are affected and whether a fact issue is raised by the protesters will be determined by Commission.

**D.** Staff will require mailed notice to water right holders and notice published in a newspaper of general circulation in the area for all amendments. Notice will be similar to notice for new appropriations and will not specify limited issues. If there are protesters, whether the protesters are affected persons will be determined by Commission.

**2) In a water right amendment to change a place of use, what notice, if any, should be required?**

**Options:**

**A.** Under the *City of Marshall* analysis, no notice is required because none of the criteria discussed by the Court can be impacted by changing the location of use. Staff will provide additional supporting information in the record for each application. If persons believe that staff is incorrect, they can file a Motion to Overturn.

**B.** Staff will make a determination as to whether notice will be required based on the set of facts presented by that application. If staff decided no notice is required then a person can file a Motion to Overturn. If notice is required and there are protesters, the Commission will determine whether the protesters are affected persons.

**C.** Staff will require mailed notice to water right holders and notice published in a newspaper of general circulation in the area. Notice will specify which limited public interest criteria listed in the Supreme Court opinion, or what impacts to the environment or water rights, are subject to a hearing. If there are protesters, whether the protesters are affected and whether a fact issue is raised by the protesters will be determined by Commission.

**D.** Staff will require mailed notice to water right holders and notice published in a newspaper of general circulation in the area. Notice will be similar to notice for new appropriations and will not specify limited issues. If there are protesters, whether the protesters are affected persons will be determined by Commission.

**3) What type of supporting information concerning notice should staff prepare for an amendment?**

**Options:**

**A.** No written analysis is necessary.

**B.** Staff will prepare a memorandum discussing notice requirements only for those criteria staff finds could be impacted.

**C.** Staff will prepare a memorandum discussing the possible impact of the application on each of public interest criteria and the impact on the environment and water rights beyond the full use assumption

**4) Are there categories of types of amendments that will either never require notice or will always require notice?**

**Options:**

- A. As stated by the Court in Marshall, changing a diversion point and changing a use from a non-consumptive to a consumptive use will always require some notice. These are the only categories that can be determined.
- B. In addition to A, changing the place of use should be a category that requires no notice.
- C. There should be no categories – the decision whether to provide notice should be case by case.