

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 for granting a water rights 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 is required.

The Court offered the following example of when the public interest might be impacted:

- 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.

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.

The Court offered the following examples of 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

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 applies 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 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 in the basin 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 in the basin 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 decides 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 in the basin 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 in the basin 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 or 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.