

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
INTEROFFICE MEMORANDUM

TO: Commissioners DATE: June 20, 2008

THRU: Todd Chenoweth, Director
Water Supply Division *TC*

Robin Smith, Attorney
Environmental Law Division

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

SUBJECT: Northeast Texas Municipal Water District
Docket # 2008-0791-WR
Application No. 04-4590B to Amend COA No. 04-4590
Cypress Creek, Cypress Basin and the Sabine River Basin
Marion and Harrison Counties

On June 19, 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.

This commission has considered required notice for water right amendments in light of the *Marshall* case at agenda and work sessions. The commission directed staff to bring individual *Marshall*-like applications to the commission for resolution of notice issues on a case-by-case basis. This application is an amendment to an existing water right and therefore the purpose of this memo is to discuss the public notice, if any, that should be given by the above referenced application. Staff is asking for direction on how to proceed with notice. The Executive Director recommends that no notice be given.

Current Permit and Application for Amendment

Northeast Texas Municipal Water District (NETMWD) owns Certificate of Adjudication No. 04-4590, which authorizes NETMWD to store 251,000 acre-feet of water in Lake O' the Pines on Cypress Creek, Cypress Basin, for in-place recreation purposes. The Certificate also authorizes the diversion and use of not to exceed 42,000 acre-feet per year from Lake O' the Pines and Lake

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

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Bob Sandlin on Cypress Creek, Cypress Basin, for municipal and domestic purposes and the diversion and use of not to exceed 161,800 acre-feet of water per year from Lake O' the Pines and Lake Bob Sandlin for industrial purposes. NETMWD is authorized an interbasin transfer of not to exceed 18,000 acre-feet of water per year for industrial purposes and not to exceed 20,000 acre-feet per year for municipal and industrial purposes to the Sabine River Basin and is also authorized to use the bed and banks of Cypress Creek below Lake O' the Pines to convey and deliver water to downstream diversion points. This right has a priority date of September 16, 1957. Several diversion rates and special conditions apply.

NETMWD has entered into a Raw Water Purchase Contract with the City of Marshall. Under the contract, NETMWD will release 9,000 acre-feet of municipal and industrial water per year from Lake O' the Pines. The water will be conveyed using the bed and banks of Cypress Creek and diverted at the City of Marshall's diversion point on Cypress Creek authorized under Certificate of Adjudication No. 04-4614. The water will be used by the City of Marshall in its service area, part of which is located in the Cypress River Basin, and part of which is located in the Sabine River Basin, all within Harrison County.

NETMWD seeks an interbasin transfer under Water Code §11.085(v)(4) for 9,000 acre-feet of water per year from the Cypress Basin to that part of the City of Marshall's service area located in the Sabine River Basin within Harrison County. If the interbasin transfer is granted, NETMWD would have all the authorizations necessary to effectuate the Raw Water Contract with the City of Marshall.

Rules Related to Notice

The Commission has specified what notice is required for applications for an interbasin transfer of water in 30 Texas Administrative Code (TAC) §295.155. Under that rule, in subsection (d)(4), proposed interbasin transfers from a basin of origin to a municipality's retail service area that is partially within the basin of origin for use in that part of the municipality's retail service area not within the basin of origin are exempt from the interbasin transfer notice requirements. This application fits this condition in all respects.

Water Code

This application for an exempt interbasin transfer is governed by Texas Water Code §11.085. Subsection (a) of §11.085 requires a water right holder to obtain authorization to take or divert any state water from a river basin in this state and transfer such water to any other river basin. The applicant here is complying with this provision by filing its application to authorize the exempt interbasin transfer.

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Subsection (v)(4) of Water Code §11.085 states that proposed interbasin transfers from a basin of origin to a municipality's retail service area that is partially within the basin of origin for use in that part of the municipality's retail service area not within the basin of origin are exempt from the interbasin transfer notice requirements. The proposed interbasin transfer in this amendment application meets those criteria. In the Executive Director's view, the exemption of §11.085(v)(4) means that the interbasin transfer is exempt from the notice requirements for interbasin transfers contained in §11.085(g), the specific provision for notice controls over the more general notice requirements for an amendment under §11.122.

Court Case

The Third Court of Appeals has held that an application for an amendment requesting an interbasin transfer under Water Code §11.085(v)(4) does not require notice and an opportunity for a hearing. In the City of Marshall opinion in the court of appeals, the court affirmed the issuance of the exempt interbasin transfer without notice. *City of Marshall v. City of Uncertain*, 124 S.W.3d 690 (Tex. App. – Austin 2004, affirmed in part and reversed in part). That holding was not appealed to the Supreme Court. The Executive Director believes that this case is directly in point and that under that case no notice is required for exempt interbasin transfers.

Other Applicable Requirements

Texas Water Code §11.085 outlines several public notice requirements specific to interbasin transfers. Subsection (d) requires the Commission to hold a public meeting in the basin of origin. Subsection (f) mandates that all water right holders, county judges, mayors, and groundwater conservation districts in the basin of origin, as well as state legislators in both basins, receive mailed notice. Subsection (g) requires published notice in every county in either basin. However, as discussed above, subsection (v)(4) of §11.085 specifically exempts interbasin transfers within one municipality's retail service area or within one county from those extensive notice requirements.

The Executive Director's opinion is that Water Code §11.085 provides the complete set of requirements applicable to interbasin transfers. For an application that seeks an exempt interbasin transfer via an amendment to an existing water right, Texas Water Code §11.122 does not apply. In the event that the Commission disagrees with the Executive Director's opinion, this memo will further analyze the application in light of the factors discussed in the *Marshall* case.

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Adverse Impact on Water Right Holders and the Environment

This amendment application by Northeast Texas Municipal Water District only requests authorization for an exempt interbasin transfer of 9,000 acre-feet of water per year pursuant to Water Code §11.085(v)(4).

The 9,000 acre-feet of water is already authorized for storage, and subsequent diversion for municipal and industrial purposes. In addition, NETMWD is authorized to use the bed and banks of Cypress Creek to convey the water downstream. The contract between NETMWD and the City of Marshall contains provisions requiring the City of Marshall to measure and control the amount of water diverted at the City's diversion point and the parties have agreed to maintain a USGS gaging station upstream of the diversion point. Therefore, diversion of the water at the downstream point for use in the Sabine River Basin should not impact other water right owners in the Cypress Basin. The applicant asserts that release of the stored water into Cypress Creek will benefit the on-stream environment between the Lake O' the Pines and the diversion point.

Other Applicable Requirements

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 May 15, 2008.

Beneficial Use

Proposed appropriations of state water must be for a beneficial use. Beneficial use is the non-wasteful use of water for a purpose recognized under the Water Code. The applicant seeks an interbasin transfer authorization to provide this water under contract for municipal and industrial uses, which are authorized uses in its certificate. Municipal and industrial use are recognized as beneficial uses by Water Code §§11.023(a)(1) and 11.023(a)(2). Staff will consider whether the use is non-wasteful below.

Protection of Public Welfare

A proposed appropriation of state water must not be detrimental to the public welfare. Because there is no definition or limits on public welfare in the Water Code, the Commission has wide discretion in determining benefits or detriments to the public welfare. NETMWD seeks interbasin transfer authorization to provide this water for municipal and industrial use to the City

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of Marshall. The right to use this portion of water for municipal and industrial purposes is authorized by COA 04-4590 with a priority date of September 16, 1957.

The City states that it will commence transit of the 9,000 acre-feet of water when the flow at the City's existing diversion point, authorized by COA 04-4614, is less than the City's diversion rate or when water quality at the existing diversion point is threatened. The proposed interbasin transfer authorization would allow the City to continue to provide water to portions of its service area in Harrison County in the Sabine Basin when its existing water right is not available.

Additionally the applicant indicates that the Regional Water Plan identifies a projected shortage of over 13,000 acre-feet of water in Harrison County in 2060. Given that projected shortage, the City of Marshall, who has contracted with the applicant for this portion of water, has an interest in securing additional water rights.

The applicant does not seek an increase in the amount of water authorized for diversion or an increase in the rate of diversion. The Executive Director's opinion is that there is no detriment to the public welfare by granting this application.

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 the expert engineering contractors hired by the Commission to develop the WAMs.

The Cypress WAM includes the segment of Cypress Creek at which the diversion under this permit occurs. The Cypress WAM does not have channel loss factors associated with Cypress Creek at the permitted diversion point. The WAM Assessment Report for the Cypress Basin indicates that there is little, if any, interaction between surface water and groundwater in the area of the application². The applicant indicates that groundwater in the area of the application is limited in quality and quantity and that granting the application would reduce the potential for use of that groundwater by making surface water available to water users.

² Water Availability Modeling (WAM) Assessment Report. Prepared by KSA Engineers, Inc. and others for the Texas Natural Resource Conservation Commission. Appendix H. Channel Losses and Groundwater Interaction Modeling Assumptions. March 2002.

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The applicant indicates that the releases of stored water down the bed and banks of Cypress Creek to the diversion point may contribute to recharge of groundwater resources.

The amount of water authorized to be released from Lake O' the Pines for downstream diversion by the NETMWD will be the same whether that water is used by the NETMWD or by the City of Marshall. Thus, the use of water by the City of Marshall will have no greater effect on groundwater resources or groundwater recharge than the use of water by NETMWD. 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.

The Executive Director notes that the *2006 North East Texas Regional Water Plan* identifies total water demand for the City of Marshall at 5,559 acre-feet in 2060. Marshall's current supplies consist of 16,000 acre-feet under COA 04-4614 and 9,000 acre-feet from NETMWD under the contract in this proposed amendment.

NETMWD indicates that the Regional Water Plan identifies a projected shortage of over 13,000 acre-feet water in Harrison County in 2060. Given that projected shortage, the City of Marshall, who has contracted with NETMWD for this portion of water, has an interest in securing additional water rights. NETMWD also indicates that providing 9,000 acre-feet of water to the City of Marshall is included in the *2006 North East Texas Regional Water Plan*, and the project is therefore consistent with the state and regional water plans. The Executive Director concludes that either conditions warrant a waiver of the consistency determination, or the requested amendment is consistent with the relevant regional water plan and the state water plan.

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 applicant is not increasing the amount of its appropriation. The applicant is seeking an exempt interbasin transfer authorization for 9,000 acre-feet of water per year for municipal and industrial purposes to allow the City of Marshall to provide water to its customers in that portion of Harrison County

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in the Sabine River Basin when its own water right cannot be diverted. The applicant has submitted water conservation and drought contingency plans. Staff has reviewed the plans and finds that the applicant will achieve water conservation and avoid waste. A memo addressing the water conservation and drought contingency plans is attached to this memo.

Conclusion

This application seeks authorization for an exempt interbasin transfer pursuant to Water Code §11.085(v)(4). Under the City of Marshall court of appeals opinion, no notice is required for this application. The application does not seek an increase in either the amount of water diverted, or the rate of diversion. The application 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. Commission rules allow this application to be processed without notice. Therefore, the Executive Director recommends that no notice be issued for this application.

Kathleen Hartnett White. *Chairman*
R. B. "Ralph" Marquez. *Commissioner*
Larry R. Soward. *Commissioner*
Glenn Shankle. *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

August 8, 2005

Mr. Walt Sears, Jr., General Manager
Northeast Texas Municipal Water District
P.O. Box 955
Hughes Springs, Texas 75656

**Re: Administrative Review
Northeast Texas Municipal Water District's April 2005 Water Conservation and
Drought Contingency Plan**

Dear Mr. Sears:

The Texas Commission on Environmental Quality (TCEQ) has completed its review of the above referenced water conservation and drought contingency plan. The plan, required by TCEQ rules in Title 30 Texas Administrative Code (TAC) Chapter 288, was received on December 7, 2004.

Title 30 TAC Chapter 288.30(1) states:

The holder of an existing permit, certified filing, or certificate of adjudication for the appropriation of surface water in the amount of 1,000 acre-feet a year or more for municipal, industrial and other non-irrigation uses shall develop, submit and implement a water conservation plan meeting the requirements of Subchapter A of this Chapter.

TCEQ records indicate that North Texas Municipal Water District holds a water right for the amount of 1,000 acre-feet or more for municipal use.

Title 30 TAC Chapter 288.30(5)(A) states:

For retail public water systems providing water service to 3,300 or more connections shall submit a drought contingency plan meeting the requirements of Subchapter B of this chapter to the executive director.

TCEQ records indicate that North Texas Municipal Water District provides water service to 3,300 or more connections.

The submitted plan meets the minimum requirements for municipal and wholesale use by a public water supplier as defined in TCEQ Rules, Title 30 TAC Chapters 288.5 and 288.22, the

Mr. Walt Sears
Page 2
August 8, 2005

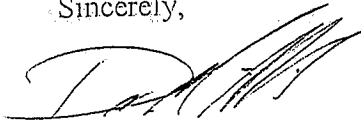
Re: Administrative Review
Northeast Texas Municipal Water District's April 2005 Water Conservation and Drought
Contingency Plan

plan is declared administratively complete.

Please be advised that in accordance with Title 30 TAC Chapter 288, the next revision of water conservation and drought contingency plans shall be updated, adopted, and submitted to TCEQ no later than May 1, 2009. Additionally, any future revised water conservation and drought contingency plans shall be submitted to TCEQ within 90 days of adoption.

Should you have any questions, the Resource Protection Team can be reached at (512) 239-4691.

Sincerely,



Dean Minchillo, Water Conservation Specialist
Resource Protection Team
Water Supply Division

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
INTEROFFICE MEMORANDUM

TO: Chief Clerk

DATE: June 20, 2008

THRU:  Diana Delgado, Team Leader
Water Rights Permitting Team

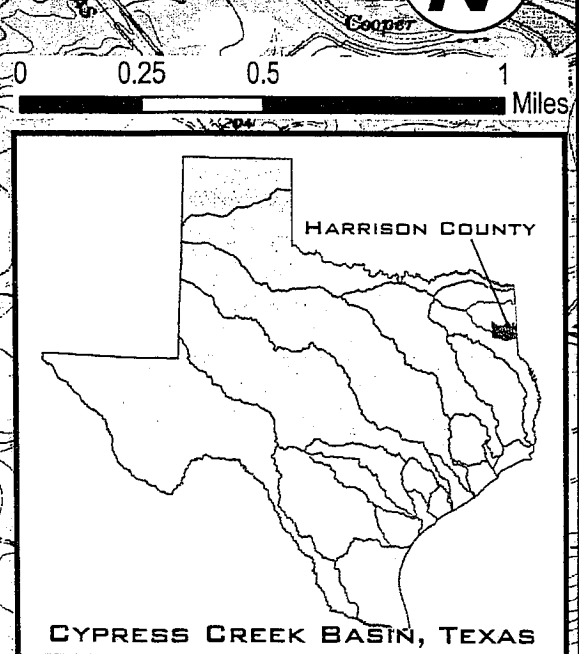
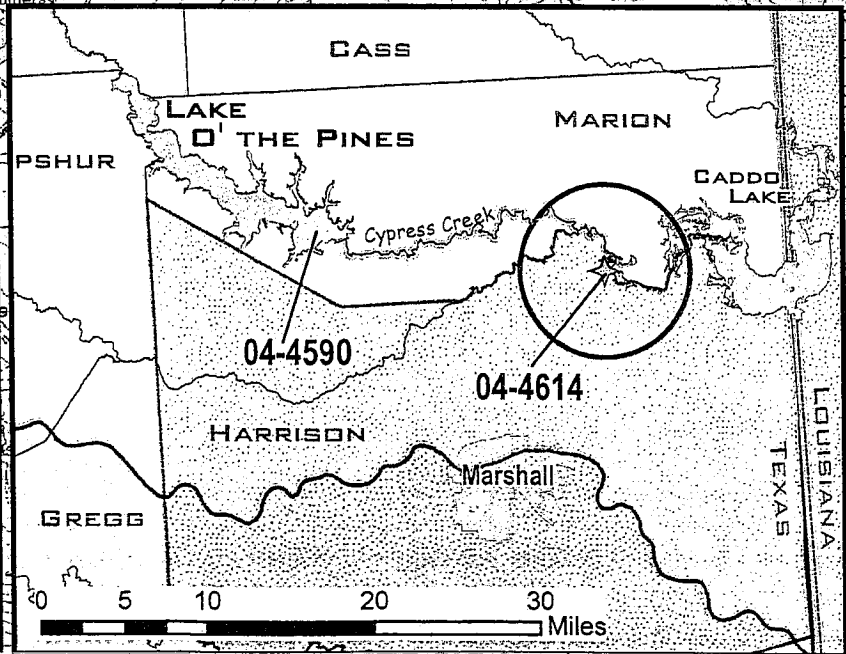
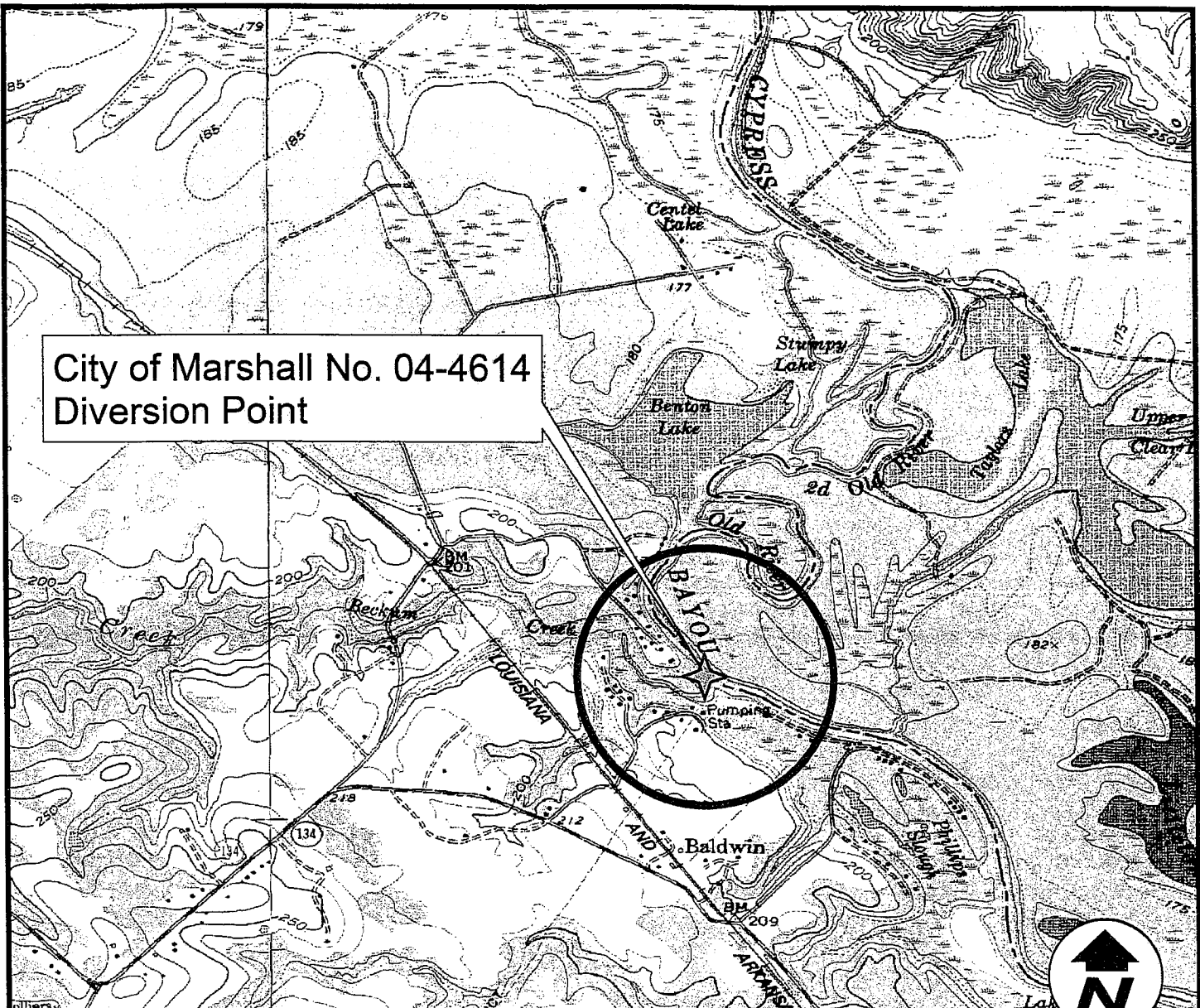
FROM: Ron Ellis, Project Manager
Water Rights Permitting Team

SUBJECT: Northeast Texas Municipal Water District
Docket # 2008-0791-WR
ADJ 4590
CN601368368
RN103186771
Application No. 04-4590B to Amend Certificate of Adjudication No. 04-4590
TWC §11.085
Cypress Creek, Cypress Basin and Sabine River Basin
Marion and Harrison Counties

Below is the caption for this application:

Consideration of the public notice required for Northeast Texas Municipal Water District's application to amend Certificate of Adjudication No. 04-4590 to authorize the release and exempt interbasin transfer of 9,000 acre-feet of Lake O' the Pines water per year for municipal and industrial purposes from the Cypress Basin to that part of the City of Marshall's service area located in the Sabine River Basin within Harrison County. The water will be conveyed using the bed and banks of Cypress Creek and diverted at the City of Marshall's diversion point on Cypress Creek authorized under Certificate of Adjudication No. 04-4612, pursuant to a Raw Water Purchase Contract with the City of Marshall. Northeast Texas MWD [Applicant] owns Certificate of Adjudication No. 04-4590 which authorizes the Owner to store 251,000 acre-feet of water in Lake O' the Pines on Cypress Creek, Cypress Basin, for in-place recreation purposes and to divert and use not to exceed 42,000 acre-feet per year from Lake O' the Pines and Lake Bob Sandlin on Cypress Creek, Cypress Basin, for municipal and domestic purposes and to divert and use not to exceed 161,800 acre-feet of water per year from Lake O' the Pines and Lake Bob Sandlin for industrial purposes of which no more than 10,000 acre-feet of water per year may be from Lake Bob Sandlin. Owner is authorized interbasin transfer of not to exceed 18,000 acre-feet of water per year for industrial purposes and not to exceed 20,000 acre-feet per year for municipal and industrial purposes in the Sabine River Basin and is also authorized to use the bed and banks of Cypress Creek below Lake O' the Pines to convey and deliver water to downstream diversion points. [This right has a priority date of September 16, 1957. Several diversion rates and special conditions apply. The Commission will also consider requests for hearing or reconsideration, related responses and replies, and public comment.] The Executive Director recommends that no public notice be required for this application. (Kellye Rila, Todd Chenoweth, Robin Smith)

City of Marshall No. 04-4614
Diversion Point





TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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

RECEIVED

JUL 30 2007

WATER RIGHTS PERMITTING

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 601368368**

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: Northeast Texas Municipal Water District
Address: P.O. Box 955, Hughes Springs, Texas 75656
Email Address: netmwd@aol.com Fax: (903)639-2208

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

3. Certificate of Adjudication No. 04-4590
Stream: Cypress Creek Watershed: Cypress Creek Basin
Reservoir (present condition, if one exists): Lake O' the Pines
County: Marion

4. Proposed Changes To Water Right Authorizations:

Pursuant to Texas Water Code § 11.085(v)(4), the District seeks to amend Certificate of Adjudication No. 04-4590, as amended, to authorize an exempt interbasin transfer of 9,000 acre-feet of Lake O' the Pines water, per annum, from that portion of Harrison County located in the Cypress Creek Basin to that portion of Harrison County located in the Sabine River Basin. On February 1, 2006, the City of Marshall entered into a raw water purchase contract with the District for the purchase of up to 9,000 acre-feet of water per annum from the District's rights in Lake O' the Pines. This water will be diverted at the City's existing diversion facilities located on Cypress Creek. Because the City of Marshall currently serves and will serve customers in those portions of Harrison County located in both the Cypress Creek Basin and the Sabine River Basin, it is requested that 9,000 acre-feet of water authorized under COA No. 04-4590, as amended, be available for use in all of Harrison County, including that portion located in the Sabine River Basin. Please see the attached supplement for additional information.

5. The District understands the Agency may require additional information in regard to the requested amendment before considering this application.

6. The District has submitted the required fees herewith. Please advise if additional fees are necessary. (Sections 295.131-295.139)

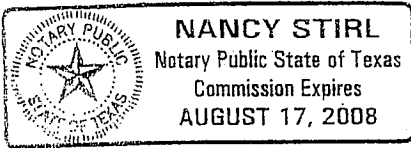
Walt Sears, Jr.
Name (sign)

Walt Sears, Jr.
Name (print)

Name (sign)

Name (print)

Subscribed and sworn to me as being true and correct before me this 24th day of July, 2007.



Nancy Stirl
Notary Public, State of Texas

JUL 3 2006

**SUPPLEMENT TO APPLICATION TO AMEND
CERTIFICATE OF ADJUDICATION NO. 04-4590, AS AMENDED
NORTHEAST TEXAS MUNICIPAL WATER DISTRICT**

In addition to the TCEQ Application Form (Form 10201), a narrative description of the amendment sought with this application is found below. The following documents are also attached to this application:

- A. Certificate of Adjudication No. 04-4590, as amended
- B. Northeast Texas Municipal Water District ("the District") Raw Water Purchase Contract by and between the District and the City of Marshall ("Marshall") and Supplemental Agreement by and between the District and the City
- C. TCEQ's Acceptance for Filing of the Raw Water Purchase Contract
- D. Marshall's Bed and Banks Notification Pursuant to 30 TAC 295.111(a)
- E. Resolution Authorizing Application

I. Background Information

The Northeast Texas Municipal Water District holds Certificate of Adjudication ("COA") No. 04-4590, as amended, which authorizes, in part, the District to store 251,000 acre-feet of water in Lake O' the Pines ("LOTP") and divert and use water for domestic, municipal and industrial purposes of use. LOTP is located on Cypress Creek in the Cypress Creek River Basin. A copy of COA No. 04-4590, as amended, is provided as Attachment A. On February 1, 2006, the District entered into a raw water purchase contract (the "Contract") with Marshall for the sale of up to 9,000 acre-feet of water per annum from the District's rights in LOTP. A copy of this Contract is provided as Attachment B. The Contract contemplates that the water provided under the Contract will be made available to Marshall "at a point in Big Cypress Bayou immediately below the outfall of LOTP" and that Marshall will divert such water at Marshall's existing diversion point on Cypress Creek, as authorized in COA No. 04-4614, as amended.

On March 8, 2006, the District submitted a copy of the Contract to the Texas Commission on Environmental Quality ("TCEQ") for approval pursuant to the contractual permit requirements in 30 TAC § 295.101. The Contract was accepted for filing by TCEQ staff on June 28, 2006. A copy of TCEQ's letter accepting the Contract for filing is included as Attachment C. Pursuant to 30 TAC § 295.111(a) and Texas Water Code § 11.042(a), the 9,000 acre-feet of water per annum released from LOTP for Marshall's use is authorized to be conveyed down the bed and banks of Cypress Creek from LOTP to Marshall's existing diversion facilities. A copy of the documents filed with TCEQ regarding this conveyance of stored water down the bed and banks of Cypress Creek is provided as Attachment D.

II. Applicant Information

Name of Applicant:	The Northeast Texas Municipal Water District
Address:	P.O. Box 955, Hugh Springs, Texas 75656
Principal Contact:	Mr. Walt Sears (General Manager)
Telephone:	(903) 639-7538
Fax:	(903) 639-2208

III. Exempt Interbasin Transfer

Marshall is located in Harrison County, which is situated in both the Cypress Creek Basin and the Sabine River Basin. Pursuant to Texas Water Code § 11.085(v)(4) and 30 TAC 295.13(c)(4), the District seeks to amend COA No. 04-4590, as amended, to authorize an exempt interbasin transfer of up to 9,000 acre-feet of LOTP water, per annum, from that portion of Harrison County located in the Cypress Creek Basin to that portion of Harrison County located in the Sabine River Basin. This application does not request any additional appropriation of State waters and no further changes are sought to COA No. 04-4590, as amended.

IV. Source of Supply

The source of water associated with this amendment is Cypress Creek and LOTP, an impoundment on Cypress Creek.

V. Amount and Purpose of Diversion and Use

No amendment is sought regarding the amount and purposes of use currently authorized under COA 04-4590, as amended.

VI. Diversion Information

Pursuant to the Contract, up to 9,000 acre-feet of water to be transferred from that portion of Harrison County in the Cypress Creek Basin to that portion of Harrison County in the Sabine River Basin will be diverted at Marshall's existing diversion facilities, as authorized under COA 04-4614, as amended.

VII. Surplus or Re-Use

Return flows resulting from this interbasin transfer will be returned through Marshall's wastewater treatment plant and/or customer-owned treatment or disposal facilities to streams in the both the Cypress Creek Basin and the Sabine River Basin, pursuant to any appropriate and necessary regulatory authority authorizing such treatment and disposal.

VIII. Water Conservation and Drought Contingency

The District has adopted a Water Conservation Plan and Drought Contingency Plan pursuant to the agency's regulations found in 30 TAC § 288. These plans have been submitted to TCEQ. Likewise, Marshall's water conservation and drought contingency plans have been submitted to TCEQ.

IX. Administrative Requirements and Fees

This application provides relevant information to address the administrative requirements of 30 TAC § 295, Subchapter A and the requirements of Texas Water Code Chapter 11. In accordance with 30 TAC § 295.131 and other TCEQ rules relating to fees, the District is submitting payment of \$100.00 with this application. With filing this application, the District

requests a determination of any additional fees that may be required. Upon receipt of such determination, the District will forward such fees to the Commission.

X. Additional Information

To the extent additional information regarding the District's pending application is required, please contact the District's General Manager, Walt Sears.

TIMOTHY L. BROWN
ATTORNEY AT LAW
1600 West 38th Street, Suite 206
Austin, Texas 78731

Telephone (512) 371-7070

Telecopier (512) 450-0389

April 17, 2008

Mr. Ron Ellis
Project Manager MC-160
Water Rights Permitting Team
Water Rights Permitting & Availability Section
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711

RECEIVED
TCEQ
WATER SUPPLY DIV.
2008 APR 18 PM 3 44

**RE: Application by Northeast Texas Municipal Water District to Amend
Certificate of Adjudication No. 04-4590**

Dear Ron:

Thanks for your letter of April 4, 2008, in which you ask certain questions about notice of our application and details about Marshall's point of diversion. In essence, you ask us whether the Northeast Texas Municipal Water District ("District") would agree to give notice of the application or, if not, to address the questions in your letter. The District does not wish to give notice, believing it is not required due to the nature of the application. Consequently, we are happy to provide these responses to your questions.

First, I must observe that the nature of your questions suggests that the agency understands our application to being a request under Water Code § 11.122(b). This is not the case. Rather, we are proceeding under the Interbasin Transfer statute, specifically Water Code § 11.085(v)(4). That statute has been interpreted by the Commission previously and ruled upon in the original Marshall controversy with the City of Uncertain. The Commission's prior ruling was that an interbasin transfer application under § 11.085(v)(4) did not require notice or the opportunity for a contested case hearing. When appealed, the Third Court of Appeals concurred with the Commission's construction of the statute by affirming the Commission's action in that matter. Since that specific issue was not appealed to the Texas Supreme Court, it, therefore, became final and non-appealable. Thus, it is unnecessary for the Commission to require the District's § 11.085(v)(4) IBT application to address the limited public interest criteria identified by the Supreme Court in its opinion related to the City of Marshall's § 11.022(b) amendment seeking an additional purpose of use.

Nevertheless, in order to expedite the agency's review, and to get this matter resolved as

Mr. Ron Ellis
April 17, 2008
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quickly as possible, we now commence to answer your questions, which will be addressed in the order presented. As noted below, we request that the District's application be placed on the Commission's agenda for its decision as soon as possible, assuming the Executive Director continues to take the position that this application is governed by the Supreme Court's decision in the *City of Marshall* case related to § 11.022(b) applications. Otherwise, we request that this amendment be issued without further delay.

Question 1: You ask that we confirm whether the application meets the administrative requirements for an amendment pursuant to Water Code Chapter 11 and 30 TAC §§ 281, 295 and 297. This application seeks one thing: to use Cypress Basin water in the Sabine Basin, because Marshall's service area is located in both basins. This comports with the interbasin transfer statute which provides an exemption from any number of requirements in § 11.085, including the notice and hearing requirements of that statute. In view of the material included in our application, we answer your question that our application conforms to both the Water Code and the Commission rules. If, however, you believe additional information is necessary in order for the District's application to conform to the statutory or regulatory requirements related to IBT applications, please notify me as soon as possible so that the District may further supplement its application.

Question 2: You request that we discuss how the proposed application is a beneficial use of water as defined in the Water Code. If this was a new appropriation, then the question would be timely. However, the application is not a new application. It seeks permission to use water already appropriated and permitted for municipal and industrial purposes in that portion of Harrison County located outside of the Cypress Creek Basin. This application meets the criteria of being for a beneficial use for the reason that the water right is already authorized for municipal and industrial use. In this regard, no change is being proposed.

Question 3: You request that we explain how the proposed amendment is not detrimental to the public welfare. Our application is not detrimental to the public welfare for the reason that the municipal and industrial use for which the water will be used by the City of Marshall are already authorized under the water right. More specifically, the issue of whether the District's request to use water for municipal and industrial purposes is not detrimental to the public welfare was resolved back in the 1950s, when the Commission originally granted the District's appropriation for the storage of water in and use of water from Lake O'the Pines. As stated above, the only change the application seeks is to allow the City of Marshall to receive the water it is purchasing under the District's existing water right and to make and use of the water in that portion of Harrison County outside of the Cypress Creek Basin. Furthermore, when the Lake O'the Pines permit was originally granted, the issue of whether the municipal and industrial uses were not detrimental to the public welfare was affirmatively resolved.

Question 4: Next, you ask about the effects, if any, of the proposed amendment on

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groundwater or groundwater recharge. As noted in the 2007 State Water Plan, groundwater in this portion of the state is of limited value both in terms of quantity and quality. However, if anything, the granting of the amendment may have a positive effect on groundwater or groundwater recharge in this area of the state. This is because when stored water is requested by Marshall, the District will make releases from Lake O'the Pines. The water will then flow down gradient to the Marshall point of diversion, during which time the water will have an opportunity soak into the streambed and possibly recharge groundwater resources in the area.

Question 5: You then ask how the proposed amendment addresses a water supply need in a manner consistent with the state water plan or the applicable approved regional water plan for any area in which the proposed appropriation is located or, as an alternative, describe the conditions that warrant a waiver of this requirement. As with all the other questions, the inapplicability of this question is revealed through use of the term "proposed appropriation" in the question. As explained above, this application does not seek a new appropriation of water. Merely, it seeks use of an existing appropriation of water Harrison County, which lies in both the Sabine and the Cypress Creek Basins. Nevertheless, the application is consistent with both the state and the regional water plans. Those plans include water from Lake O'the Pines for use in Harrison County and Northeast Texas. According to the data provided in the 2006 North East Texas Regional Water Plan, as approved by the Texas Water Development Board, water demands for this region are projected to increase, specifically for municipal, manufacturing, and steam-electric purposes of use. Further, it is estimated that the region's population will grow nearly 72 % (from a population of 704,171 in 2000 to 1,213,000 by 2060). Logically, with this projected population growth, the total demand for water is expected to increase by 277,900 acre-feet over the next 50 years. Harrison County is projected to have a water shortage of over 13,000 acre-feet by 2060. It is also noteworthy that the current 2007 State Water Plan highlights an expected increased demand for municipal, manufacturing and steam-electric purposes of use. In conclusion, we call your attention to the regional water plan and note that approval of this amendment will specifically implement a portion of the approved regional water plan. See Table 4.29.

Thus, based on the identified need in both the regional water plan and the state water plan for additional water supplies, particularly for municipal and industrial purposes, the City of Marshall entered into a water supply contract with the District so as to secure additional supplies and to ensure that its water may be put to the most efficient use possible. By securing industrial use water that will not require treatment, economic savings will occur as opposed to treating municipal water and then using it for industrial use purposes.

Question 6: You ask that evidence be provided that reasonable diligence will be used to avoid waste and achieve water conservation as defined in the Water Code. Reasonable diligence will be used to avoid waste because the diverter is the City of Marshall which has both a water conservation plan and a drought contingency plan. These plans have been reviewed by the Commission previously and deemed satisfactory. The District has no reason to doubt that Marshall will not

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comply with its plans.

Question 7: Finally, you ask for an explanation of how the proposed amendment will or will not impact water right holders or the environment. There will be no impact water rights holders or the environment because the application deals with water already appropriated and impounded in Lake O'the Pines. On request from the City of Marshall, releases of such appropriated water from storage will be made into Cypress Creek, to flow downstream to the Marshall point of diversion. If anything, the on-stream environment between Lake O'the Pines and the City's existing diversion point on Cypress Creek will be benefited by the District's release of water from storage down Cypress Creek for the City's subsequent diversion.

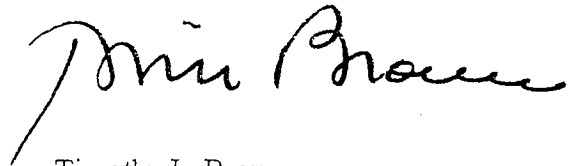
Lastly, you provide us with a map and ask that we confirm that the City's existing diversion point is correctly marked. We have confirmed that the information you have afforded related to latitude and longitude of the City's existing diversion point is correct. Additionally, the City's point of diversion, as referenced in its existing Certificate of Adjudication No. 04-4614, as amended, is "at a point on Cypress Creek in the A. Abrams Survey 275, Abstract 25, Harrison County." However, the District does not believe this information is necessary in order to grant the requested IBT authorization. The City's diversion point has not changed, and it has been specifically referenced in that certain "Northeast Texas Municipal Water District Raw Water Contract" dated February 1, 2006, which was submitted to the Commission for approval on March 8, 2006, by the District, and which has been approved by the Commission by letter of June 28, 2006. This Contract, which has been assigned Water Supply Contract No. 12029 by the Commission, includes a reference to the City's diversion point, in compliance with agency rules at 30 TAC 295.101(b)(4). Given that it has been determined that the Contract meets the Commission's Water Supply Contract regulations related to releases of water from storage, authorization of this diversion point by way of the District's pending application is not necessary or appropriate.

If you have any questions about any of these responses, please do not hesitate to give me a call. Again, the District does not believe the inquiries made to it, or the responses made herein, have any bearing on its application—this is not a Water Code § 11.122(b) application to which these inquiries may otherwise apply; instead, the District's application is a Water Code § 11.085(v)(4) application to which these inquiries do not apply. If the Executive Director's staff persist in its determination that the Supreme Court's decision in the *City of Marshall* case applies to the District's exempt IBT application, we request that the application be placed on a Commission agenda for consideration by the Commissioners at the earliest opportunity. Otherwise, we request that the

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application be granted at the earliest opportunity.

Sincerely,

A handwritten signature in black ink, appearing to read "Tim Brown", written in a cursive style.

Timothy L. Brown

Attorney for the Northeast Texas
Municipal Water District

cc: General Manager
Martin Rochelle
Rick Lowerre

Table 4.29 – Water Supplies and Demands for Northeast Texas Municipal Water District

SUPPLIES (ac-ft/yr)	2010	2020	2030	2040	2050	2060
Lake O' The Pines	175,892	174,902	173,912	172,922	171,932	170,942
Lake Bob Sandlin	12,000	12,000	12,000	12,000	12,000	12,000
Johnson Creek Lake	6,668	6,668	6,668	6,668	6,668	6,668
Lake Monticello	10,000	10,000	10,000	10,000	10,000	10,000
Swauno Creek	4,500	4,500	4,500	4,500	4,500	4,500
TOTAL	209,060	208,070	207,080	206,090	205,100	204,110

DEMANDS (ac-ft/yr)	2010	2020	2030	2040	2050	2060
Contractual:						
Avinger	1,116	1,116	1,116	1,116	1,116	1,116
Daingerfield	7,606	7,606	7,606	7,606	7,606	7,606
Hughes Springs	4,158	4,158	4,158	4,158	4,158	4,158
Jefferson	7,031	7,031	7,031	7,031	7,031	7,031
Lone Star	3,482	3,482	3,482	3,482	3,482	3,482
Longview	20,000	20,000	20,000	20,000	20,000	20,000
Marshall	9,000	9,000	9,000	9,000	9,000	9,000
Ore City	1,994	1,994	1,994	1,994	1,994	1,994
Pittsburg	10,347	10,347	10,347	10,347	10,347	10,347
Harleton WSC	55	55	55	55	55	55
Mims WSC	801	801	801	801	801	801
Tryon Road SUD	2,263	2,263	2,263	2,263	2,263	2,263
Diana	739	739	739	739	739	739
Glenwood WSC	419	419	419	419	419	419
NETMWD South Side	775	775	775	775	775	775
Manufacturing	32,400	32,400	32,400	32,400	32,400	32,400
Steam Electric	58,900	58,900	58,900	58,900	58,900	58,900
TOTAL	161,086	161,086	161,086	161,086	161,086	161,086

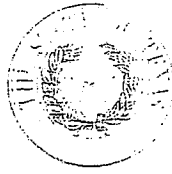
SURPLUS (ac-ft/yr)	2010	2020	2030	2040	2050	2060
TOTAL	47,974	46,984	45,994	45,004	44,014	43,024

4.3 (h) Sabine River Authority

The Sabine River Authority (SRA) holds water rights in Lake Fork (Wood and Rains Counties) and Lake Tawakoni (Hunt, Rains, and Van Zandt Counties). The SRA supplies the cities of Commerce, Edgewood, Emory, Greenville, Quitman, Kilgore, Longview, Point, West Tawakoni, Wills Point, the Ables Springs WSC, Cash WSC, Combined Consumers WSC, Community Water Company, MacBee WSC and South Tawakoni, as well as industry.

Several of the Sabine River Authority's customers have water shortages, all caused by contract expiration or inadequate contract amounts. Approximately 79 percent of the firm water supply

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 4, 2008

Mr. Walt Sears
Northeast Texas Municipal Water District
P.O. Box 955
Hughes Springs, TX 75656

CERTIFIED MAIL

RE: Northeast Texas Municipal Water District
ADJ 4590
CN601368368, RN103186771, RN103186482
Application No. 04-4590B for an Amendment to Certificate of Adjudication No. 04-4590
TWC §11.085
Cypress Creek, Cypress Basin
Marion and Harrison Counties

Dear Mr. Sears:

This acknowledges receipt, on July 30, 2007, of the referenced application and fees in the amount of \$102.50 (Receipt No. R755486, enclosed).

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 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 and because of the uncertainty on what is covered by the Marshall decision, the Applicant may agree to the issuance of notice.

If you elect to proceed without agreeing to notice, additional information is required.

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 will then be set on Commissioner's Agenda for consideration. In lieu of responding to Items 1-7 above, you may agree to notice. If you elect to proceed with notice, fees will be determined.

Please provide the information requested above or inform us of your decision to proceed with notice by May 5, 2008, or the application may be returned pursuant to 30 Texas Administrative Code §281.18.

In addition to the information requested above, the following information is required before the application can be declared administratively complete.

1. Examine the enclosed map and confirm that the diversion point is marked correctly and that the latitude and longitude are correct. If the point is incorrectly marked, submit a USGS 7.5 minute topographic map showing the correct location and give the correct latitude and longitude.
2. Provide the bearing and distance from a General Land Office survey corner for the proposed diversion point.

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

cc: Tim Brown

4 of 5 DOCUMENTS

City of Marshall and Texas Commission on Environmental Quality (formerly Texas Natural Resources Conservation Commission), Appellants v. City of Uncertain; Caddo Lake Area Chamber of Commerce and Tourism; Greater Caddo Lake Association; Caddo Lake Institute; John T. Echols; and Barry L. Bennick, Appellees

NO. 03-03-00154-CV

COURT OF APPEALS OF TEXAS, THIRD DISTRICT, AUSTIN

124 S.W.3d 690; 2003 Tex. App. LEXIS 8819

October 16, 2003, Filed

SUBSEQUENT HISTORY: Petition for review granted by *City of Marshall v. City of Uncertain*, 2004 Tex. LEXIS 603 (Tex., July 2, 2004). Affirmed by, in part, Remanded by *City of Marshall v. City of Uncertain*, 2006 Tex. LEXIS 526, 49 Tex. Sup. Ct. J. 695 (Tex., 2006).

PRIOR HISTORY: **[**1]** FROM THE DISTRICT COURT OF TRAVIS COUNTY, 53RD JUDICIAL DISTRICT. NO. GN2-01217, HONORABLE SUZANNE COVINGTON, JUDGE PRESIDING.

DISPOSITION: Affirmed in Part; Reversed and Rendered in Part.

COUNSEL: For Texas Commission: Mr. George Thomas Bohl, Ms. Cynthia Woelk, Mr. Brian E. Berwick, Assistant Attorney Generals, Texas Commission of Environmental Quality, Austin, TX.

For City of Marshall: Ms. Martha S. Dickie, Minton, Burton, Foster & Collins, PC, Austin, TX. Mr. Lambeth Townsend, Mr. Martin C. Rochelle, Ms. Kathleen M. McPartilin, Lloyd, Gosselin, Blevins, Rochelle, Baldwin & Townsend, PC, Austin, TX.

Mr. Richard W. Lowerre, Lowerre & Kelly, Austin, TX.

JUDGES: Before Chief Justice Law, Justices Kidd and Puryear.

OPINION BY: Mack Kidd

OPINION

[*691] This is a suit for judicial review of a Texas Commission on Environmental Quality (the "Commis-

sion") order granting an amendment to a water right permit submitted by the City of Marshall ("Marshall") [*692] without providing the opportunity for a contested-case hearing to the City of Uncertain, the Caddo Lake Area Chamber of Commerce and Tourism, the Greater Caddo Lake Association, the Caddo Lake Institute, John T. Echols, and Barry L. Bennick (collectively, "appellees"). The district court reversed the Commission's order and remanded the cause to the Commission to provide appellees a contested-case hearing. The Commission and Marshall appeal from the district court's judgment. We will affirm in part and reverse and render in part.

BACKGROUND AND PROCEDURE

Marshall is located in Harrison County, Texas, which is located partially within the Cypress Creek Basin¹ and partially within the Sabine River Basin. In 1947, the Texas **[**2]** Board of Water Engineers granted Marshall a water permit authorizing it to divert water from Cypress Creek.² In 1986, following a water rights adjudication proceeding, the Texas Water Commission issued Marshall a certificate of adjudication³ that authorized Marshall to divert 16,000 acre-feet of water from Cypress Creek for municipal purposes.

1 Cypress Creek flows into Caddo Lake, which has been designated a "Wetland of International Importance" by the Ramsar Bureau, an agency established by the international treaty known as the Ramsar Convention on Wetlands. The U.S. Fish & Wildlife Service has assigned the highest priority level for acquisition and preservation to the Caddo Lake wetlands.

2 Marshall's permit was amended in both 1957 and 1970.

3 A certificate of adjudication is essentially a water right permit that has been subjected to a water rights adjudication proceeding. See *Water Rights Adjudication Act, Tex. Water Code Ann. §§ 11.301-.341* (West 2000 & Supp. 2003). For ease of reference, and because the principles we will discuss apply equally to water right permits and certificates of adjudication, we will refer to Marshall's certification of adjudication as a permit.

[**3] In 2001, Marshall applied to the Commission for an amendment to Marshall's permit. Marshall sought recognition of its historical practice of providing water to its customers in that portion of Harrison County located within the Sabine River Basin in addition to its existing authorization to provide water to its customers in that portion of Harrison County located within the Cypress Creek Basin (the "interbasin transfer"). Marshall also requested authorization to use water for industrial use, in addition to its existing authorization to use water for municipal use.⁴

4 Commission rules define "municipal use" as "the use of potable water within a community or municipality and its environs for domestic, recreational, commercial, or industrial purposes." *30 Tex. Admin. Code § 297.1(30)* (2003). Under the 1986 permit, Marshall was permitted to sell water for industrial use, but only after treating the water to make it potable. Obtaining an authorization for industrial use would allow Marshall to sell untreated water to industrial users.

[**4] The Commission determined that Marshall's amendment was not subject to the general notice and hearing procedures of *sections 11.132 and 11.133* of the Texas Water Code for two reasons. See *Tex. Water Code Ann. §§ 11.132-.133* (West 2000). First, the Commission determined that Marshall's request for recognition of its practice of selling water to customers in both the Cypress Creek Basin and the Sabine River Basin was the exact type of transfer contemplated by the legislature when it drafted *section 11.085(v)(4)* of the water code. See *id. § 11.085(v)(4)* (West Supp. 2003).⁵ The Commission determined [**693] that under the language of *section 11.085(v)(4)*, Marshall's requested interbasin transfer was exempted from the requirements of notice and the opportunity for a contested-case hearing.

5 *Section 11.085 of the water code* is entitled "Interbasin Transfers," and subsection (a) provides:

No person may take or divert any state water from a river basin in this state and transfer such water to any other river basin without first apply-

ing for and receiving a water right or an amendment to a permit, certified filing, or certificate of adjudication from the commission authorizing the transfer.

Tex. Water Code Ann. § 11.085(a) (West Supp. 2003). *Subsections (b) through (u)* are provisions involving penalties, notice, public meetings, fees, and other requirements. See *id. § 11.085(b)-(u)*. The applicable portion of *subsection (v)* provides:

The provisions of this section, except subsection (a), do not apply to:

...

(4) a proposed transfer from a basin to a county or municipality or the municipality's retail service area that is partially within the basin for use in that part of the county or municipality and the municipality's retail service area not within the basin.

Id. § 11.085(v)(4).

[**5] Second, the Commission determined that Marshall's request for the addition of an industrial use was an amendment covered by *section 11.122(b)* of the water code. See *id. § 11.122(b)* (West Supp. 2003).⁶ Except for an amendment that "increases the amount of water authorized to be diverted or the authorized rate of diversion," *section 11.122(b)* mandates approval of amendments that "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." *Id.* According to the Commission's reading of *section 11.122(b)*, the determination of whether an amendment will have "adverse impacts on other water right holders or the environment on the stream" is to be made by the Commission, without notice or a hearing. Therefore, following a review of Marshall's application, the Commission determined that approval of Marshall's amendment application would not result in a greater magnitude of adverse impacts.

6 *Section 11.122(b)* provides:

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 circum-

stances 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.

Id. § 11.122(b) (West Supp. 2003).

[**6] Following these two determinations, the executive director of the Commission approved Marshall's requested amendment without published or mailed notice of the application.⁷ On March 25, 2002, the Commission mailed notice of the executive director's final approval of Marshall's application to interested parties. On April 4, 2002, appellees filed a motion to overturn the executive director's decision and a motion for rehearing with the Commission. The Commission subsequently denied both motions. Appellees then sued both the Commission and Marshall in the district court. In granting appellees' motion for [*694] summary judgment and in denying the Commission's and Marshall's motions and cross-motions for summary judgment, the district court concluded that the Commission erred by determining that Marshall's amendment application could be approved without notice or the opportunity for a contested-case hearing and by allowing the executive director to issue the order amending Marshall's water right permit.

7 The Commission determined that, under section 5.122 of the water code, it could delegate the power to approve Marshall's application to the executive director because, according to the Commission, the application was uncontested and did not require an evidentiary hearing. *See id.* § 5.122(a) (West 2000).

[**7] The Commission and Marshall now argue in three issues that the district court erred in determining that (1) Marshall's application for authorization of an interbasin transfer required notice and the opportunity for a contested-case hearing, (2) Marshall's application for an industrial use required notice and the opportunity for a contested-case hearing, and (3) the Commission could not allow the executive director to issue the order amending Marshall's permit. The Commission separately argues that its actions were required by statute and therefore do not fall within the category of individualized governmental determinations that would entitle appellees to argue a constitutional due process deprivation.⁸

8 Because we determine that the Commission incorrectly applied sections 5.122(a) and 11.122(b) of the water code, we need not address this issue.

STANDARD OF REVIEW

Summary Judgment

When both parties move for summary judgment, each party must carry its own burden as the movant. [**8] *Guynes v. Galveston County*, 861 S.W.2d 861, 862, 36 Tex. Sup. Ct. J. 1046 (Tex. 1993); *Jun v. Lloyds & Other Various Insurers*, 37 S.W.3d 59, 62 (Tex. App.--Austin 2000, *pet. denied*). When the district court grants one party's motion and denies the other's, the reviewing court should determine all questions presented and render the judgment that the court below should have rendered. *Commissioners Court v. Agan*, 940 S.W.2d 77, 81, 40 Tex. Sup. Ct. J. 355 (Tex. 1997); *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 322 (Tex. App.--Austin 2002, *no pet.*). The propriety of summary judgment is a question of law; therefore, we review the trial court's decision *de novo*. *Texas Dep't of Ins. v. American Home Assurance Co.*, 998 S.W.2d 344, 347 (Tex. App.--Austin 1999, *no pet.*); *see Natividad v. Alexsis, Inc.*, 875 S.W.2d 695, 699, 37 Tex. Sup. Ct. J. 722 (Tex. 1994). When a trial court's order granting summary judgment does not specify the grounds relied upon, the reviewing court must affirm summary judgment if any of the summary judgment grounds are meritorious. *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 873, 43 Tex. Sup. Ct. J. 835 (Tex. 2000). Because appellees' [**9] motion for summary judgment was based on two grounds, we must affirm the judgment if either of the grounds has merit. *See id.*

Statutory Construction

Because this appeal requires us to interpret sections 11.085(v)(4) and 11.122(b) of the Texas Water Code, we restate the basic principles of statutory construction. Interpreting statutes is a legal matter also subject to *de novo* review. *Bragg v. Edwards Aquifer Auth.*, 71 S.W.3d 729, 734, 45 Tex. Sup. Ct. J. 375 (Tex. 2002); *Texas Workers' Comp. Comm'n v. Continental Cas. Co.*, 83 S.W.3d 901, 904 (Tex. App.--Austin 2002, *no pet.*). The overriding goal of statutory interpretation is to determine the legislature's intent. *Continental Cas. Co. v. Downs*, 81 S.W.3d 803, 805, 45 Tex. Sup. Ct. J. 755 (Tex. 2002). In order to ascertain legislative intent, we first look to the plain and common meaning of the words used by the legislature. *Tex. Gov't Code Ann.* § 311.011 (West 1998); *Argonaut Ins. Co. v. Baker*, 87 S.W.3d 526, 529, 45 Tex. Sup. Ct. J. 866 (Tex. 2002).

[*695] Statutes are interpreted by considering the entire statute, not just disputed provisions. *Thomas v. Cornyn*, 71 S.W.3d 473, 481 [**10] (Tex. App.--Austin 2002, *no pet.*). Disputed provisions are to be considered in context, not in isolation. *Continental Cas. Co.*, 83 S.W.3d at 904; *see Fitzgerald v. Advanced Spine Fixation Sys.*, 996 S.W.2d 864, 866, 42 Tex. Sup. Ct. J. 985 (Tex. 1999). When interpreting statutes, courts consider

such things as the circumstances under which the statute was enacted, former statutory provisions on the same or similar subjects, and the consequences of a particular construction. *Kroger Co. v. Keng*, 23 S.W.3d 347, 349, 43 Tex. Sup. Ct. J. 738 (Tex. 2000). We do not give one provision an interpretation that is inconsistent with the other provisions of the act. *Id.*

DISCUSSION

The district court concluded that the Commission erred in determining that Marshall's application could be approved without notice or the opportunity for a contested-case hearing and by allowing the executive director to issue the order granting Marshall's amendment. We will address the propriety of each of these rulings separately.

Notice and Hearing

Appellees argue that Marshall's application for a permit amendment, which requested both a recognition of an interbasin transfer and an authorization [**11] for an industrial use, was subject to notice and hearing requirements. Because each requested change implicates a separate section of the water code--sections 11.085(v)(4) and 11.122(b), respectively--we will address each issue in turn.

The Interbasin Transfer

At issue first is whether Marshall's request for authorization to transfer water from the Cypress Creek Basin and to use the water in both the Cypress Creek Basin and the Sabine River Basin triggered the notice and hearing requirements found in section 11.085 of the water code. See Tex. Water Code Ann. § 11.085. Marshall's application requested an amendment to its permit that would "authorize the City to use its rights in that portion of Harrison County located within the Sabine River Basin, in addition to its current authorization to use such water in that portion of Harrison County located within the Cypress Creek Basin." 9

9 The approved amendment provided that Marshall could divert water "from Cypress Creek for municipal and industrial purposes within those portions of Harrison County that are located within the Cypress Creek Basin as well as those portions of Harrison County that are located within the Sabine River Basin."

[**12] Appellees argue that this requested amendment required notice and the opportunity for a hearing under the water code. Section 11.085(a) of the water code states that no person may transfer water from one river basin to another river basin without receiving authorization. *Id.* § 11.085(a). Subsections (b) through (u)

are provisions involving penalties, notice, public meetings, fees, and other requirements. See *id.* § 11.085(b)-(u). Subsection (v) provides that "the provisions of this section, except subsection (a)"--in other words, the provisions of subsections (b) through (u)--do not apply to:

(4) a proposed transfer from a basin to a county or municipality or the municipality's retail service area that is partially within the basin for use in that part of the county or municipality and the municipality's retail service area not within the basin.

Id. § 11.085(v)(4).

All parties agree that under certain circumstances--specifically, the exemptions [*696] laid out in subsection (v)--an application for an amendment authorizing an interbasin transfer may be granted without adhering to the notice and public hearing requirements. Appellees argue, however, that Marshall's [**13] request for an interbasin transfer authorization in this case was subject to notice and hearing requirements for two reasons. First, appellees argue that because Marshall's application also sought an authorization for industrial use in addition to an interbasin transfer, Marshall's amendment cannot properly be disposed of under the language of section 11.085(v)(4). Because we believe that Marshall's application can, and should, be bifurcated into two parts--the interbasin transfer and the industrial use--and because each part implicates a separate section of the water code, we will address Marshall's request for an industrial use in our discussion of section 11.122(b) below.

Appellees' second argument is that the exception found in section 11.085(v)(4) does not apply to Marshall because Marshall desires to sell water outside of its "retail service area." Appellees argue that, because Marshall sought to sell water outside of its city limits, Marshall cannot qualify for the section 11.085(v)(4) exception because Marshall requests a transfer not within its retail service area.

Although "retail service area" is not defined in the water code, nothing in the code suggests that a municipality's [**14] retail service area must be restricted to its city limits. Appellees further contend, however, that because there is no showing that the entirety of Harrison County is within Marshall's retail service area, Marshall should not be allowed to use the section 11.085(v)(4) exception as a way to gain access to new customers outside of its city limits.¹⁰ What this argument overlooks, however, is that the amendment request was designed to recognize Marshall's historical practice of selling water in both the Cypress Creek Basin and the Sabine River Basin. Acceptance of appellees' argument that a municipality's retail service area must be the same both before and after an amendment would vitiate the underlying purpose of section 11.085(v)(4), which is to streamline

the approval process and forego unnecessary hearings where a municipality seeks authorization for interbasin transfers within the municipality's retail service area. Therefore, without evidence in the record that this amendment was outside of Marshall's retail service area, we agree with the Commission that *section 11.085(v)(4)* applies.

10 For example, appellees point specifically to Marshall's proposed sale of water to a power plant located in Harrison County outside of Marshall's city limits and located in the Sabine River Basin rather than the Cypress Creek Basin.

[**15] Because *section 11.085(v)(4)* applies, Marshall's application for an interbasin transfer authorization is not subject to the notice and hearing requirements found in *subsections (b) through (u) of section 11.085*. See *Tex. Water Code Ann. § 11.085(b)-(u)*. "We therefore sustain the point of error and hold that, because the interbasin transfer was not subject to notice and hearing requirements, the district court erred in granting appellees' revised motion for summary judgment in this regard. Next, we turn to the issue of whether the request for an industrial use requires notice and the opportunity for a hearing.

11 All parties agree that if an exception in *section 11.085(v)* applies, then an amendment is not subject to the general notice and hearing requirements found elsewhere in the water code. See *Tex. Water Code Ann. §§ 11.132-.134* (West 2000 & Supp. 2003).

Addition of an Industrial Use

Appellees contend that *section [**16] 11.122(b) of the water code* requires compliance [**697] with the notice and hearing provisions found in *sections 11.132 through 11.134*. See *id. §§ 11.122(b), .132-.134* (West 2000 & Supp. 2003). The Commission and Marshall respond that *section 11.122(b) mandates* approval of Marshall's amendment, and therefore notice and hearing are unnecessary. *Section 11.122(b) provides:*

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.

Id. § 11.122(b).

The appellees' argument focuses on the very first phrase in the statute: "Subject to meeting all other applicable requirements of this chapter for the approval [**17] of an application. . . ." See *id.* Specifically, appellees argue that *sections 11.132, 11.133, and 11.134* are "applicable" sections that must be satisfied. See *id. §§ 11.132-.134*. *Section 11.132* lists the notice procedure and requirements, *section 11.133* describes the hearing,¹² and *section 11.134* provides the requisite proof that must be presented in a contested-case hearing before the Commission may grant an application. See *id.* Appellees argue that because the requirements for an application are set out specifically, the Commission erred in not granting the request for a contested-case hearing.

12 *Section 11.133* provides:

At the time and place stated in the notice, the commission shall hold a hearing on the application. Any person may appear at the hearing in person or by attorney or may enter his appearance in writing. Any person who appears may present objection to the issuance of the permit. The commission may receive evidence, orally or by affidavit, in support of or in opposition to the issuance of the permit, and it may hear arguments.

Id. § 11.133.

[**18] The Commission's view of *section 11.122(b)* differs. The Commission's focus is directed primarily to the language that *mandates* that the Commission "shall" authorize the amendment. In the Commission's view, if the amendment application does not request an increase in the amount of water to be diverted or an increase in the rate of diversion of water, then the Commission is *required* by the language of the statute to grant the amendment.

Appellees rejoin by pointing to the language of the statute that requires that the amendment be authorized only "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." *Id. § 11.122(b)* (emphasis added). The appellees argue that this determination can be made only after the opportunity to present evidence at a contested-case hearing.

The Commission responds that where, as here, it must view the amendment under an assumption of maximum permitted use, as opposed to [**19] actual use, it would be *impossible* for appellees to meet their

burden of proof at a contested-case hearing. Thus, the Commission argues that a contested-case [*698] hearing is unnecessary under the facts and circumstances presented here. Consequently, the Commission argues it acted correctly in handling this case in summary fashion without a hearing.

Finally, the Commission argues that in the first clause of the statute, the key word is "applicable." The Commission contends that the notice and hearing requirements of *sections 11.132 and 11.133* are no longer "applicable" because, according to the Commission, it is bound to grant the amendment under the facts of this case. This final linchpin of the Commission's argument, however, is missing from the statute. We have been unable to find any authority for the proposition that upon initial submission of an application, the Commission could dispense with the notice and contested-case hearing requirements of the statute based upon a preemptive decision that the application will eventually be approved. Indeed, evidence presented at a contested-case hearing and an examination of whether one party or the other has shouldered its burden of proof [**20] are the exact foundational requirements that allow the Commission to make a reasoned decision regarding the requested application. The Commission has failed to cite, and we have been unable to find, any authority for the proposition that the contested-case hearing provisions of *section 11.133* are applicable to all new permit applications but are somehow inapplicable to applications for amendments under *section 11.122(b)*.¹³

13 The legislature has clearly and expressly stated that notice and hearing are not required in other portions of the water code. *See, e.g., Tex. Water Code Ann. § 5.501(b)* (West 2000) (Commission may issue emergency order "without notice or hearing"); *id. § 5.513(b)* (West 2000) (providing hearing to affirm, modify or set aside emergency order "adopted without notice or hearing"); *id. § 11.131* (West 2000) (entitled "Examination and Denial of Application Without Hearing"); *id. § 11.1311* (West 2000) (entitled "Approval of Certain Applications Without Hearing" and concerning reissuance of abandoned, voluntarily cancelled, or forfeited permits for reservoir projects); *id. § 11.176(c)* (West 2000) (permit, certified filing, or certificate of adjudication for a term shall expire according to its terms "without notice or hearing"); *see also id. § 11.085(v)* (notice and hearing provisions of subsections (b) through (u) do not apply to certain interbasin transfers). We find persuasive that the legislature clearly stated its intent to waive the notice and hearing requirements in other portions of the water code, but chose not to include comparable

language in *section 11.122(b)*. *See id. § 11.122(b)*.

[**21] This record is devoid of any evidence that water right holders or the environment on the stream will not be affected. The Commission has apparently made this determination on its own without the benefit of *any* evidentiary record. Therefore, we overrule the Commission's points in this regard and affirm the district court's conclusion that *section 11.122(b)* entitles appellees to an evidentiary hearing on Marshall's request for an industrial use.

Power of the Executive Director to Act

Finally, the district court ruled that the Commission could not allow the executive director to issue the order amending Marshall's permit. The Commission determined that, under *section 5.122 of the water code*, it could delegate the power to approve Marshall's application to the executive director because, according to the Commission, the application was uncontested and did not require an evidentiary hearing. *See Tex. Water Code Ann. § 5.122(a)* (West 2000). *Section 5.122(a)* provides:

(a) The commission by rule or order may delegate to the executive director the commission's authority to act on an application or other request to issue, renew, reopen, transfer, [**22] [*699] amend, extend, withdraw, revoke, terminate, or modify a permit, license, certificate, registration, or other authorization or approval if:

(1) required notice of the application or request for the authorization or approval has been given;

(2) the holder of or applicant for the authorization or approval agrees in writing to the action to be taken by the executive director; *and*

(3) the application or request:

(A) is uncontested *and* does not require an evidentiary hearing; or

(B) has become uncontested because all parties have agreed in writing to the action to be taken by the executive director.

Id. § 5.122(a) (emphasis added).

At issue is whether subsection (a)(3)(A) has been satisfied.¹⁴ This subsection states that the Commission can delegate power to the executive director to approve an application only if the application "is uncontested *and* does not require an evidentiary hearing." *Id. § 5.122(a)(3)(A)* (emphasis added). Because Marshall's application for an amendment required an evidentiary hearing as to the addition of an industrial use, the conditions of subsection (a)(3)(A) have not been satisfied. We

therefore hold [**23] that the district court was correct in ruling that the Commission erred by allowing the executive director to issue the order amending Marshall's permit.

14 It is undisputed that *subsection (a)(3)(B)* does not apply. Therefore, the Commission was empowered to delegate authority to the executive director under *section 5.122* only if *subsection (a)(3)(A)* has been satisfied. *See id.* § 5.122(a).

CONCLUSION

We have determined that the district court was correct in determining that Marshall's application for an industrial use required notice and the opportunity for a contested-case hearing under *section 11.122(b)* of the

water code. The district court was also correct in determining that the Commission could not allow the executive director to issue the order amending Marshall's permit. However, because we have determined that *section 11.085(v)(4)* applies, notice and the opportunity for a hearing do not apply to Marshall's interbasin transfer request. We therefore reverse that portion of the district [**24] court's judgment that Marshall's interbasin transfer request required notice and the opportunity for a contested-case hearing and render judgment that, without the necessity for notice and hearing, the executive director was empowered to amend the permit providing for the interbasin transfer. We affirm the district court's judgment in all other respects.

Mack Kidd, Justice