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Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

Re: Texas Commission on Environmental Quality staff notice recommendation for
Northeast Texas Municipal Water District; Docket No. 2008-0791-WR

To the Honorable Commissioners:

Texas Parks and Wildlife Department (TPWD) thanks you for the opportunity to provide comments in this matter. TPWD has reviewed the Texas Commission on Environmental Quality (TCEQ) staff notice recommendation for the Northeast Texas Municipal Water District ("District") water right amendment application scheduled for commission consideration September 24, 2008. TPWD has several concerns regarding this application and the staff review.

I. Inconsistency Between Application and Staff Review

The June 20, 2008 TCEQ staff memo reviews an interbasin transfer that is more limited than the interbasin transfer described in the District's July 30, 2007 application. The staff analysis is of the District's request to authorize an exempt "interbasin transfer of 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." However, the District's application describes the requested transfer as one to allow for use of the transferred water in *all* of Harrison County, rather than the limited service area of the City of Marshall located in the Sabine Basin within Harrison County. The expansion of Marshall's use of water into areas of Harrison County outside of Marshall's service area raises issues relevant to the consideration of who may need notice of this application. Because the TCEQ staff memo does not analyze issues related to the use of water in all of Harrison County, it's unclear whether the staff is planning to issue an authorization limited to Marshall's service area or whether the omission of factors related to use of water in all of Harrison County was simply an oversight in the staff analysis. In any case, this issue should be resolved before commission action on the notice decision so that the commission may make a fully informed decision.

Carter P. Smith
Executive Director

II. Applicability of Texas Water Code Sections 11.085 and 11.122

Both the District and the TCEQ staff conclude that the District's interbasin transfer application falls under Texas Water Code Section 11.085(v)(4), which exempts such a transfer from the requirements imposed by Section 11.085(b)-(u), including notice and opportunity for a contested case hearing. Section 11.085(v)(4) provides:

(v) 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 municipality's retail service area not within the basin.

Support for the determination that Section 11.085(v)(4) is dispositive of notice requirements is cited from the appellate decision in *City of Marshall v. City of Uncertain*, 124 S.W.3d 690 (Tex. App.—Austin 2004, affirmed in part and reversed in part). TPWD agrees that the court found that interbasin transfer applications meeting Section 11.085(v)(4) are not subject to notice and hearing requirements. However, in the *Marshall* case, the court found that the City of Marshall's application was governed by Section 11.085(v)(4) because the application was to transfer water to areas within Marshall's retail service area. The court noted that, "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. (Emphasis added.) (*Marshall*, at 694.) The court also noted that "retail service area" was not defined in the Water Code. (*Marshall*, at 693.)

The TCEQ rule that tracks and implements Texas Water Code Section 11.085(v)(4) governing interbasin transfers is more detailed than the statutory provision. Rule 297.18(k)(4) provides:

(4) a proposed interbasin transfer from the basin of origin to a county or municipality or the municipality's retail service area that is partially within the basin of origin for use in the part of the county or municipality and the municipality's retail service area not within the basin of origin. The further transfer and use of this water outside of such county or municipal retail service area as existing at the time of the transfer or as may exist in the future other than back to the basin of origin shall not be exempt under this paragraph. For purposes of this paragraph, a county, municipality, or municipality's retail service area refers to a geographic area.

As discussed above, TPWD is concerned that an ambiguity exists as to whether the District's transfer is indeed limited to Marshall's retail service area or is in

fact outside of the service area. This fact issue should be clarified to determine whether Texas Water Code Section 11.085(v)(4) controls the notice issues of the District's application.

III. Texas Water Code Section 11.122 Analysis

The TCEQ staff memo acknowledges that the commission may find that Texas Water Code Section 11.085(v)(4) is not dispositive of notice of the District's application; the staff provides alternative analysis should the commission determine that the application is subject to Texas Water Code Section 11.122(b). TPWD also offers comments relevant to a Section 11.122(b) analysis.

The District's application is one of several test cases for commission action in compliance with the 2006 Texas Supreme Court decision in *City of Marshall v. City of Uncertain*. TPWD believes that refinements in the standard staff analysis are necessary to build a record sufficient for meeting the letter and intent of the *Marshall* decision. A comprehensive record evidencing the consideration of all relevant factors and clearly setting out the basis for discretionary determinations by TCEQ staff will assist all parties interested in ensuring that notice decisions are supported and correct.

TPWD does not object to the ultimate recommendation of no notice for this specific application, chiefly because the subject water has already been appropriated and found to meet applicable requirements at the time of appropriation. TPWD does object specifically to the analysis regarding consistency of the application with the regional and state water plans and to the lack of any foundation to determine whether the District's application is consistent with the plans or that a waiver is warranted for this requirement. TPWD agrees there may be grounds for waiver, but the staff analysis is silent on the subject.

TPWD respectfully offers the following comments to assist in refining the staff analysis:

A. Consistency with State and Regional Water Plans

Texas Water Code §11.134(b)(3)(E) requires that the proposed appropriation address a water supply need in a manner that is consistent with the state water plan and an approved regional water plan for any area in which the proposed appropriation is located, unless the commission determines that conditions warrant waiver of this requirement. Review of applications would be eased by a rule or written policy statement defining "consistency."

In looking at the three previous applications considered by the commission on August 20, 2008 along with the staff memos prepared for the City of Marshall and

Northeast Texas Municipal Water District, it is unclear what the standard is for "consistency" or what rubrics are employed to determine granting a waiver of the consistency requirement. For example, it is unclear whether a proposed amendment must appear as the selected water supply for a reported shortage or whether a reported shortage alone is enough to meet the consistency requirement. A more detailed report with specific citation to the state and regional water plans would aid in understanding the consistency analysis and identifying the basis of the staff judgment.

For the District's application, the staff analysis notes that, "NETMWD indicates that the Regional Water Plan identifies a projected shortage of over 13,000 acre-feet water in Harrison County in 2060." The staff memo goes on to report that, given the projected shortage, the City of Marshall has an interest in securing the 9,000 acre-feet interbasin transfer as an additional water right. No citations to the regional or state water plans are provided to verify whether the specific request under the District application is consistent with the plans' consideration of the projected shortage and the selected water management strategy to meet the shortage.

The North East Texas Regional Water Plan (Region D) identifies a 12,914 acre-feet shortage of industrial water for steam electric users in the year 2060.¹ The Plan identifies the purchase of additional Northeast Texas Municipal Water District by steam electric water users as the recommended water management strategy to meet the noted actual shortage of 3,184 acre-feet.² Harrison County shows a surplus of 9,530 acre-feet of water for manufacturing demands in 2060.³ The City of Marshall itself is shown to have a surplus of 19,441 acre-feet of water (approximately 75% of its supply) above its demands in 2060.⁴ These kinds of data and specific findings and recommendations are relevant and necessary for the analysis of whether a proposed amendment is consistent with state and regional water plans. In this case, while the regional water plan provides a link between the actual shortage of 3,184 acre-feet of water for steam electric industrial use and the proposed additional supply from the District to meet that use (supplied directly to the steam electric users), the plan provides no indication that the City of Marshall's

¹ North East Texas Regional Water Plan, January 2006, p. 4-5.

² *Id.*, p. 4-72. The remainder of the 12,914 acre-feet reported storage is not an actual physical shortage but rather a shortage caused by the expiration of a water supply contract.

³ *Id.*, p. 4-33.

⁴ *Id.*, p. 4-23.

anticipated supply from the District is needed to meet any projected shortage.

The staff memo provides the ambiguous conclusion that “either conditions warrant a waiver of the consistency determination or the application is consistent with the relevant regional water plan and the state water plan.” TPWD asserts that it is contradictory to determine that both options apply. The TCEQ staff

should make a factually supported determination of whether an application is consistent with the relevant water plans. If the determination is that an application is consistent with water plans, the analysis should end there. If the determination is that an application *is not* consistent with the water plans, the commission should then make a clear determination whether conditions warrant a waiver of the consistency requirement. As it stands, TPWD cannot discern the basis of the TCEQ staff decision on the District’s application.

B. Beneficial Use

TPWD believes that the District’s application does not raise any questions regarding beneficial use. The water requested for the interbasin transfer has already been appropriated and determined to be for beneficial uses. However, the staff analysis addresses beneficial use; TPWD believes the standard language developed by staff for all applications that trigger a beneficial use analysis should be expanded and refined. Texas Water Code §11.134(b)(3)(A) requires that the proposed appropriation be intended for a beneficial use. The application analysis should reflect the legal definition of beneficial use rather than the shorthand definition that beneficial use “is the non-wasteful use of water for a purpose recognized under the Water Code.” Texas Water Code §11.002(4) defines beneficial use as the “use of the amount of water which is economically necessary for a purpose authorized by this chapter, when reasonable intelligence and reasonable diligence are used in applying the water to that purpose and must include conserved water.” The legal definition contains both quantitative and economic components that are missing in the staff analysis. The specific amount and the economic necessity factors are important for determining whether the water will serve a concrete purpose or whether the proposed amendment is speculative. The analysis should be expanded beyond the determination of whether the proposed purpose of use is one recognized by Texas Water Code §11.023.

Addressing the correct amount economically necessary to achieve a specified purpose is also important in light of Texas Water Code §11.025,

which provides that a right to use state water is limited “not only to the amount specifically appropriated but also to the amount which is being or can be beneficially used for the purposes specified in the appropriation, and all water not so used is considered not appropriated.”

C. Public Welfare

Texas Water Code §11.134(b)(3)(C) requires that the proposed appropriation not be detrimental to the public welfare. The information requested in the standardized TCEQ application may not be sufficient for a public welfare analysis; indeed, TCEQ staff requested additional information from the test case applicants in order to perform its analysis. TPWD believes that the scope of the

TCEQ information requests and subsequent analysis should be refined to include information beyond the applicant’s opinion.⁵ For example, a governmental entity applicant may have considered its proposed amendment application in a public meeting; there may be a record of oral or written public comment that provides some evidence of potential public welfare impacts. The TCEQ itself may have received public comments relevant to the public welfare. There may have been news or editorial coverage of the matter in media sources. The TCEQ analysis should reflect a meaningful effort to catalogue existing evidence of potential public welfare impacts. TPWD notes that a written public comment of August 1, 2007 is contained in the TCEQ official file on the District application, but the TCEQ analysis fails to analyze or even mention the comment as part of its review. Additionally, the prospect of the City of Marshall using water outside of its historic service area in Harrison County may trigger public welfare concerns of Harrison County citizens or entities.

D. Surface Water and Groundwater Connection

Texas Administrative Code Chapter 30 Section 297.47 requires that the commission shall consider any hydrological connections between surface water and groundwater and any effects from the granting of the application on groundwater use, quality, or recharge. The staff analysis relies on information gleaned from surface water availability models. In some cases, additional relevant information may be readily available for

⁵ The staff request to the District was to “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.” (Emphasis added.) See letter of April 4, 2008 from Ron Ellis to the District.

staff consideration. Groundwater availability models and estimated recharge rates for different major aquifers in Texas are available from the Texas Water Development Board and the University of Texas Bureau of

Economic Geology. In addition, local groundwater conservation districts are logical sources for site-specific data.

IV. Conclusion

A decision of no notice is essentially a decision that places the underlying water right amendment application in position to be issued immediately by the Executive Director without opportunity for additional input from interested persons. As such, notice decisions can become *de facto* decisions on the issuance of an application. This situation creates the need for a very careful and comprehensive analysis to form the basis of a record of decision. As a sister agency with a shared goal of protecting the state's natural resources, Texas Parks & Wildlife Department appreciates your consideration of these comments as the TCEQ considers decisions that affect the water, fish, wildlife, and habitat resources of Texas. If desired, TPWD can be called upon for assistance in developing policy and practice guidelines for water right amendment matters. Should you have any questions, please contact me at (512) 389-8899.

Sincerely,



Colette Barron, Attorney

cc: Carter Smith, Executive Director, TPWD
Ann Bright, General Counsel, TPWD