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## City of Marshall v. City of Uncertain, 124 S.W.3d 690 (Tex. Ct. App. Oct. 16, 2003)

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City of Marshall v. City of Uncertain, 124 S.W.3d 690 (Tex. Ct. App. Oct. 16, 2003)

Chocolate Bayou and Sand Supply also challenged the legislation requiring the TQEC to reissue the original Allens Creek permit as an unconstitutional "local law." The court held this challenge untimely because such a challenge must occur prior to a final agency action.

*Sean R. Biddle*

**City of Marshall v. City of Uncertain, 124 S.W.3d 690 (Tex. Ct. App. Oct. 16, 2003)** (holding statutory notice and hearing requirements did not apply to municipality's request to amend its water permit to allow an interbasin transfer, but that the same requirements did apply to the municipality's request to amend its purpose of use; holding the executive director of the Texas Commission on Environmental Quality could not issue the permit as amended).

The City of Uncertain, along with other concerned organizations and individuals ("Uncertain"), appealed a Texas Commission on Environmental Quality ("TCEQ") order that had amended the City of Marshall's ("Marshall") water right permit. The District Court of Travis County, 53<sup>rd</sup> Judicial District reversed TCEQ's order and remanded the issue to TCEQ. TCEQ and Marshall appealed the district court's decision. The Court of Appeals of Texas, Third District, Austin heard the case on appeal.

In 1947, Marshall obtained a water permit to divert water from Cypress Creek. In 1986, Marshall sought and received authorization from the Texas Water Commission to divert 16,000 acre-feet ("af") of water from Cypress Creek for municipal purposes. Marshall used its water to provide water service to customers in the Cypress Creek Basin. In 2001, Marshall applied to TCEQ for recognition of its historical practice of providing water to customers in the Sabine River Basin in addition to customers in the Cypress Creek Basin. Marshall's application also requested a change in authorized use, from municipal use only to both municipal and industrial uses.

TCEQ determined that Marshall's amendment did not fall under statutory notice and hearing requirements. Under the Texas Water Code, inter-basin transfer applications where the proposed transfer is from one basin to a municipality within that basin for use in the municipality's service area outside the basin are not subject to the statutory provisions concerning public notice and hearings. TCEQ also determined that amending Marshall's authorized use from municipal to both municipal and industrial would not create greater adverse impacts than the existing permit on either the environment or other water right holders. Following its two determinations, TCEQ granted Marshall's request for an amended permit.

Uncertain filed a motion for TCEQ to overturn its decision and a motion for a public hearing. When TCEQ denied the motions, Uncertain filed suit in the district court. The district court granted

Uncertain's motion for summary judgment, concluding that TCEQ erred in granting the amended permit without notice or opportunity for a contested-case hearing. The district court further found that under the statute, TCEQ's executive director did not have authority to issue the amended permit. TCEQ and Marshall appealed to the appellate court.

The appellate court distinguished between Marshall's inter-basin transfer request and its request to change the authorized use. Regarding the inter-basin transfer request, the court agreed with TCEQ that the statutory notice and hearing provisions did not apply to that part of Marshall's application. Thus, the court reversed the district court's decision on the point of whether the statute required TCEQ to provide notice and a contested-case hearing for Marshall's request for an inter-basin transfer. However, the court affirmed the district court's decision on Marshall's additional request to change the authorized use from municipal only to municipal and industrial, holding the statute did apply to that request for a change in use. Thus, since the notice and hearing requirements applied to part of Marshall's application, TCEQ should have complied with the statutory provisions with respect to the application in its entirety.

Uncertain also argued that TCEQ's executive director did not have statutory authority to grant Marshall's request for an amended permit. TCEQ had determined that since it was uncontested and did not require a hearing, the executive director could approve the application. However, because the court held the application was subject to the notice and hearing requirements, the application did require a hearing, and thus TCEQ's executive director did not have the authority to grant Marshall's request.

Thus, the appellate court reversed the district court on the point that Marshall's request for an amended permit to authorize an inter-basin transfer was not subject to statutory notice and hearing requirements. The appellate court affirmed the remainder of the district court's ruling.

*Katharine J. Ellison*

**City of San Marcos v. Texas Comm'n on Env'tl. Quality, No. 03-02-0072-CV, 2004 Tex. App. LEXIS 96 (Tex. Ct. App. Jan. 8, 2004)**

(holding that when a city discharges treated sewage effluent into a natural flowing stream system, the discharged water—after commingling with natural waters—may lose all characteristics distinguishing the effluent as property of the city).

The appellee, Texas Commission on Environmental Quality ("Commission"), has primary responsibility for protecting the environment and implementing any law and regulations concerning the environment in the state. On July 2, 1998, the Commission