

City seeks clarification of ruling

By MIKE ELSWICK, Managing Editor

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The city of Marshall plans to file a motion for rehearing on a Texas Supreme Court decision issued June 9. Mayor Ed Smith III said the filing is an attempt to clarify the city's use of Caddo Lake water.

Smith said Friday Marshall officials hope to get a more thorough explanation of Justice Harriet O'Neill's ruling on five points concerning the city's permit application before the Texas Commission on Environmental Quality. The city is not asking the state's high court to reconsider its decision, he said.

"It was not clear to our legal counsel exactly what the court intended," Smith said. "We are just hopeful the court will clarify some points to get a better understanding of their intention."

However, Rick Lowerre, president of Caddo Lake Institute and an Austin attorney, questioned the city's method and motive in getting issues clarified. "You don't file a motion for rehearing for clarification," Lowerre said. "The only way they can clarify is to grant the motion for rehearing, call for briefs from all sides and reconsider things.

"What they're suggesting is some minor little thing where you need to cross this 't' or dot that 'i,'" Lowerre said. "That can't be what they're asking for – but we just don't know. They did not supply us or anyone else with an outline or any information on what they are asking the Supreme Court to do."

Lambeth Townsend, the city's Austin legal counsel on the matter, did not agree with Lowerre's assessment.

"It's the mechanism to use once a decision is issued – the procedural rules allow filing a motion for rehearing and that is the way to do it."

"We're just looking for a little clarification," Townsend said. "And since they're trying to give the (TCEQ) commission guidance on how to proceed with the amendments for this one and others in the future, we're just looking for some specific articulation on some of the things they're talking about."

Townsend said TCEQ is aware the city is moving forward with the request. However, TCEQ declined to participate even though they were a party with the city in the appeal, he said.

"If TCEQ needs some clarification, then TCEQ could have filed a motion to clarify – they didn't," Lowerre said. "For Marshall to say they are doing something for TCEQ just can't be right."

City Attorney Todd Fitts said Marshall has until July 11 to file after being given permission by the Supreme Court Thursday.

"We're not trying to get the decision overturned," Fitts said. "We felt it was a little confusing just what the court meant."

The June 9 Supreme Court ruling came after nearly two years of deliberation in a case that pitted Marshall and TCEQ against Caddo Lake Institute, the city of Uncertain and other lake groups.

The five-year-long legal battle began in 2001 when city officials applied to TCEQ for an industrial permit amendment that would allow them to sell untreated water to a proposed power plant south of Marshall. City officials also asked to sell Sabine Basin water to the plant.

Marshall straddles the Sabine and Cypress Basin watersheds. The city gets its water from Big Cypress Bayou, which flows into Caddo Lake, and discharges it into the Sabine watershed.

The city was not asking for permission to use more than the 16,000-acre-feet allotment of water, for which it has had a permit for years. The city wanted permission to sell untreated water as a part of the allotment, since the existing permit allows for the sale of treated water only.

The Caddo Coalition and 200 landowners asked the commission to hold a contested case hearing before it granted Marshall's requested amendments.

The commission said there was no need for a hearing and granted both amendments. The coalition and two landowners appealed that decision to the State District Court in Austin, which ruled that TCEQ must hold hearings.

The Court of Appeals for the Third District of Texas ruled in 2003 TCEQ must hold an amendment hearing concerning the sale of industrial water, but approved the amendment allowing the city to sell water to its customers in the Sabine watershed. The Supreme Court supported part of a 2003 appeals court decision.

Lowerre said he was disappointed in the city's decision to seek a rehearing. "I don't know what the city of Marshall's thinking is behind this. We're obviously disappointed," Lowerre said.

"The city now has at least three options for providing industry with water, the most recent being the contract with Lake O' the Pines where the city and the lake could partner up for delivery of Lake O' the Pines water," he said. Lowerre said under the city's present permit Marshall can provide industrial customers with treated water, with between 90 to

95 percent of industries "wanting treated water anyway." Marshall could also sell industrial customers treated sewage water, he said.

"We were hoping the city would choose not to go forward with this process," Lowerre said. "At this point this means the city is going to spend more money and we're likely going to have to spend more money responding."

Fitts said city leaders know they will likely be back before TCEQ. "We just want things to be as clear as possible when that happens," he said. Those clarifications should save the city time and money when the state environmental agency reviews the city's application, he said.

If the court agrees to accept the city's motion for rehearing on the issues it will be the court that sets the time table, Fitts said. He said the city is limited to what it can ask for. Contact managing editor Mike Elswick via e-mail at: melswick@coxnews.com; or by phone at (903) 927-5962.