



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
ZELESKEY

LAW FIRM MAY 16 AM 10:32

CHIEF CLERKS OFFICE

Timothy J. Karczewski
Of Counsel

May 12, 2011

- Robert Alderman, Jr.
- Jeff "Marty" Barnhill
- Robert T. Cain, Jr.
- R. Brandon Davis
- Jack D. Hicks
- Todd L. Kassaw
- Erika L. Keese
- Josh H. Lowe
- Joe M. McElroy
- Krystal E. Riley
- Scott C. Skelton
- Aimee C. Slusher
- Brent L. Watkins
- Judi C. Wells

VIA CMRRR NO. 7006 2760 0000 9052 9384
 Chief Clerk
 Texas Commission on Environmental Quality
 MC - 105
 P.O. Box 13087
 Austin, Texas 78711

IWD
72037 *H*
OPA
MAY 16 2011
 BY *[Signature]*

In re: Aspen Power LLC
 Proposed Permit No. WQ-0004921000
 EPA I.D. No. TX0132578

We are writing on behalf of our client, Suzbrekensal Investments, Ltd. and its General Partner, Mr. Kenneth Rogers, ("SI Ltd") regarding the above referenced matter. By this correspondence, we request a contested case hearing on behalf of SI Ltd.

All correspondence regarding this matter may be directed to:

- Of Counsel*
- Timothy J. Karczewski
- Linda O. Poland
- William R. Ricks
- Steve Roper
Emeritus
- John D. Stover

Timothy J. Karczewski
 c/o Zeleskey Law Firm PLLC
 P.O. Drawer 1728
 Lufkin, Texas 75902-1728
 Phone (936) 632-3130
 Fax No. (936) 632-6545

AFFECTED PARTY – The route of the proposed discharge is to pass through a five acre tract owned by SI Ltd. The aforementioned five acre tract is adjacent to and immediately down "stream" from the Aspen Tract. In addition, the proposed discharge route is not a natural water course but rather a man-made water course that has occurred only because of the railroad embankment and trestle along the west boundary of the SI Ltd tract. Because of the location of the SI Ltd tract in relation to the Aspen Power tract and the route of the proposed discharge, SI Ltd is an affected party as that term is defined by TCEQ Rules.

ZELESKEY LAW FIRM PLLC

PO Drawer 1728
 1616 South Chestnut
 Lufkin, Texas 75902-1728
 tel: 936.632.3381 fax: 936.632.6545
 www.zeleskey.com

Additional offices: Nacogdoches and Livingston

[Handwritten signature]

Chief Clerk
May 12, 2011
Page Two

CONTESTED ISSUE NO. 1 – Aspen Power has no legal right to discharge its wastewater across the SI Ltd. Tract. As predicted in our public comment, the Executive Director has responded that the granting of a permit “does not grant the permittee the right to use private property.” Although this is true in a technical sense, it does represent a contested issue for the purposes of the issuance of the proposed permit. In the imperfect process that is water quality permitting, certain assumptions must be made in forming conclusions regarding the ultimate issuance of a permit. However, any and all presumptions may be shown to be false, resulting in the need for a significant modification to the permit or not issuing the permit in the first place. In the case at hand, the draft permit is based upon the presumption of a discharge route across the SI Ltd Tract. However, Aspen Power does not have the current authority to discharge across the SI Ltd Tract, nor do they have the ability to compel SI Ltd to grant them permission to so discharge. Therefore, the permit as currently drafted is based upon an incorrect assumption and cannot be issued as is. In addition, such a permit being issued will be a significant impediment to SI Ltd from selling its property to other willing buyers. SI Ltd will have to disclose the burden of the permitted flow across their property, which is effectively notice to the buyer that purchasing this tract includes the purchase of a lawsuit to protect the tract. People do not buy things that come with a built-in lawsuit. It is important to note that such a lawsuit would not exist but for the granting of an improper permit. For the foregoing reasons, the failure of Aspen Power to have the right to discharge across the SI Ltd Tract is fatal to its permit application or, at a minimum, it serves as a contested legal and factual issue that necessitates a hearing.

CONTESTED ISSUE NO. 2 – In their response to our Public Comments, the Executive Director states that “property value is not a factor applicable to a wastewater permit.” This is incorrect in at least two respects. First, in that same response the Executive Director states that the Commission will consider all relevant factors including economic interests. Therefore, the Executive Director has negated its own argument because a negative impact on the property value of the SI Ltd Tract would certainly constitute an economic interest. Second, Chapter 2007 of the Texas Government Code, commonly referred to as the Private Real Property Rights Preservation Act (“Act”), covers “a governmental action that affects an owner’s private real property that is the subject of the governmental action, in whole or in part, or temporarily or permanently...” Clearly, as the point where the Aspen Power discharge will leave the custody of Aspen Power, the SI Ltd Tract is subject of this governmental action at least in part. In the event this governmental action results in a sufficient reduction in the value of the SI Ltd Tract, it would constitute a governmental taking under the Act on the part of the TCEQ. Seeing as the TCEQ does not have eminent domain authority, such a taking would be outside its statutorily granted authority. The resulting diminution in value to the SI Ltd Tract is a contested issue of fact that necessitates a hearing.

Chief Clerk
May 12, 2011
Page Three

CONTESTED ISSUE NO. 3 – In our public comment we stated that the water to be discharged will have a higher temperature than the receiving stream which will contribute to an excessive production of bacteria and other pathogens resulting in an additional risk to both human and aquatic life in and along the discharge route. In response, the Executive Director states that the “the proposed permit does not authorize the Applicant to discharge domestic wastewater” as if domestic wastewater is the only place bacteria and other pathogens exist. This statement is uninformed or disingenuous. Either way it is inaccurate. Bacteria and other pathogens exist virtually everywhere and multiply more rapidly when exposed to temperatures between 90 and 105 degrees Fahrenheit. The Executive Director claims that the average temperature of the receiving water is 93 degrees F. This may be true during July and August when the averaged daily high temperature is 93 F and 94 F respectively. However, it is most certainly not the case during December and January when the average daily highs are 61 F and 59 F respectively. By introducing heated water to the receiving waters at a rate of 214,000 gallons per day year round, any natural ability of the receiving waters to lower the ambient bacteria and pathogen concentrations is significantly diminished if not eliminated altogether. As the Executive Director did correctly point out, the ultimate destination for this discharge is Segment 0615 of the Angelina River which is a 303(d) listed segment for, among other things, bacteria. Ultimately though, the first recipient of the elevated bacteria and pathogen levels will be the SI Ltd Tract. For these reasons the ambient temperature of the receiving waters and the impact of a constant flow of heated water into those receiving waters is a contested issue of fact and should serve as a basis for a contested case hearing.

CONTESTED ISSUE NO. 4 – In our public comments we raised the issue that certain solvents and chemicals used in maintaining cooling coils contain hazardous chemicals including some that may have long half lives that allow for accumulation. In its response the Executive Director points to Appendix A, 40 CFR Part 423 as an explanation that other than chromium and zinc no other chemical will be discharged in detectable levels. This misstates the cited Appendix. The intent of Appendix A is to establish levels for the discharge of chemical likely to be discharged from cooling tower blow down water. However, there are numerous chemicals that act as fungicides that are not part of this list of 126 Priority Pollutants included in Appendix A. If a pesticide manufacturer or formulator decides to make a product to prevent algae or other fungi from forming in cooling tower coils the active ingredients from those fungicides may find their way into the wastewater stream from Aspen Power. We have not conducted exhaustive research but such products are likely already available. The cited CFR regulations do nothing to prevent the use of such a product particularly if it has been registered for that use under the Federal Insecticide Fungicide and Rodenticide Act (“FIFRA”). It is also a fact that certain fungicides have herbicidal action and will kill vegetation. Also, a number of the things that can be discharged, so long as they are below the detection limits of the specified testing method, are elements and do not break down further. This will allow for accumulation of hazardous amounts. Elements such as arsenic, besides being toxic to humans and animals, are actually used

Chief Clerk
May 12, 2011
Page Four

to defoliate cotton and would certainly negatively impact vegetation as it accumulates. The Executive Director also does not differentiate between trivalent and hexivalent chromium. The latter poses significant hazards to human health and would be included in the "total chromium" allowed to be discharged under the permit. Because of the uncertainty regarding the products to be utilized in maintaining the coils, this matter represents a contested issue of fact and should serve as a basis for a contested case hearing.

CONTESTED ISSUE NO. 5 – In our public comment we raised the issue of the discharge of dissolved solids and oil and grease. In trying to dispel concerns regarding the accumulation of solids, the Executive Director referred to regulatory standards and stated that the solids would not pose a problem because they "are dissolved in the water." Just because things are dissolved in water does not mean they will remain so. Changes in temperature and agitation do allow dissolved material to come out of solution. Therefore, the accumulation of solids on the SI Ltd Tract is inevitable. As for our comment regarding oil and grease accumulations, the Executive Director points out that, under the permit, oil and grease cannot product a visible film of oil or globules of grease on the surface or coat the banks or bottom of the water course, or cause toxicity to man, aquatic life, or terrestrial life in accordance the applicable regulatory requirement. This permit as drafted allows for the discharge of 26 pounds of oil and grease across the SI Ltd Tract each day. As a child my grandmother used Crisco shortening when baking. That product came in a 3 pound can. This permit allows for the dumping across the SI Ltd Tract nearly 9 cans of Crisco each day and over 3,100 cans per year. With such a volume being discharged, there cannot help but be an accumulation along the banks of the water course. That water course starts with the SI Ltd. Tract. As always, the Executive Director will say that if there is a problem the folks from SI Ltd can file a complaint. This is of little comfort and given the TCEQ's reputation regarding enforcement among the people of east Texas. Even if a complaint does bring a result, it will be after the fact and more harm will have come to the environment of the SI Ltd Tract and its usability and marketability. For these reasons, the amount of solids and oil and grease to be discharged across the SI Ltd Tract are a contested issue of fact that serves as a basis for a contested case hearing.

CONTESTED ISSUE NO. 6 – In our public comment we pointed out that the ultimate destination for the proposed discharge is segment 0615 of the Angelina River. That segment is as impaired under Section 303(d) of the Clean Water Act. We would also point out that in Section 26.081 of the Texas Water Code it states that it is the policy of the state to encourage and promote the development of regional collection, treatment and disposal systems in order to prevent pollution and maintain and enhance the water quality of the water in the state. In the case of segment 0615, we would place emphasis on the word enhance. Section 26.0282 of the Water Code allows the Commission to deny a permit based upon the availability of regional collection, treatment and disposal systems. There is a regional facility not more than 3 miles from the Aspen facility with collection lines closer than that. Although Section 26.0282 is

Chief Clerk
May 12, 2011
Page Five

applicable to domestic wastewater, with minor pretreatment, the flow from Aspen could be combined with that of the North Angelina County Regional Facility. By sending it to a regional facility the water will be treated to a higher quality, the problems associated with the temperature issue will be minimized and segment 0615 and the people of east Texas will be the beneficiaries. This would include SI Ltd who would not be burdened with the discharge from the Aspen Power facility. Based upon the foregoing discussion, the relationship of a discharge to a 303(d) listed stream segment and the possibility of the use of a regional facility are contested issues of fact that serve as the basis for a contested case hearing.

For the reasons stated herein, we request that Suzfrekansal Investments, Ltd. by and through its General Partner Mr. Kenneth Rogers, be granted party status and a contested case hearing on Proposed Permit No. WQ0004921000.

Sincerely,


Timothy J. Karczewski

TJK/rc
@PFDesktop\ODMA\PCDOCS\DOCS1\344144\1

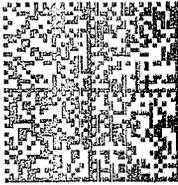
cc: Mr. Kenneth Rogers

ZELESKEY LAW FIRM PLLC
1616 South Chestnut, P.O. Drawer 1728
Lufkin, TX 75902-1728



Return Service Requested

7006 2760 0000 9052 9384



016H16504046

\$05.590

05/12/2011

Mailed From 75901

US POSTAGE



ZELESKEY

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2011 MAY 16 AM 10:31
CHIEF CLERKS OFFICE

Chief Clerk
Texas Commission on Environmental Quality
MC - 105
P.O. Box 13087
Austin, Texas 78711

RECEIVED

MAY 16 2011

TOEC MAIL CENTER
JH




ZELESKEY
LAW FIRM

IWD
72637

Timothy J. Karczewski
Of Counsel

OPA

H DEC 03 2010
BY 

November 29, 2010

- Robert Alderman, Jr.
- Jeff "Marty" Barnhill
- Robert T. Cain, Jr.
- R. Brandon Davis
- Jack D. Hicks
- Todd L. Kassaw
- Erika L. Keese
- Josh H. Lowe
- Joe M. McElroy
- Krystal E. Riley
- Scott C. Skelton
- Aimee C. Slusher
- Brent L. Watkins
- Judi C. Wells

VIA TELECOPIER (512)239-3311
AND REGULAR MAIL
Chief Clerk
Texas Commission on Environmental Quality
MC - 105
P.O. Box 13087
Austin, Texas 78711-3087

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
2010 DEC -1 PM 3:05
CHIEF CLERKS OFFICE

In re: Aspen Power LLC
Proposed Permit No. WQ-0004921000
EPA I.D. No. TX0132578

We are writing on behalf of our client, Suzbrekensal Investments, Ltd. and its General Partner, Mr. Kenneth Rogers, ("SI Ltd") regarding the above referenced matter.

By this correspondence, SI Ltd requests a hearing on the Permit Application for Proposed Permit No. WQ-0004921000 for the following reasons.

- Of Counsel
- Timothy J. Karczewski
- Linda O. Poland
- William R. Ricks
- Steve Roper
Emeritus
- John D. Stover

1. The route of the proposed discharge passes through a five acre tract of land owned by SI Ltd immediately down stream from the Aspen Power tract. In addition, the discharge route is not a natural water-way but rather a man-made course that has occurred only because of the railroad embankment and trestle along the west boundary of the SI Ltd tract. Because of the location of its property in relation to the Aspen Power tract and its proposed discharge, SI Ltd is an affected party as that term is defined by Texas Commission on Environmental Quality ("TCEQ") Rules.
2. Aspen Power has no legal right to use the water course through the SI Ltd tract for its discharge. Therefore, any such use would constitute a trespass on the part of Aspen Power. For this reason, the TCEQ cannot and should not authorize a permit that is premised upon using the water course as method for the discharging of Aspen Power's effluent. Invariably the TCEQ will argue that the issuance of the Permit would not give Aspen Power the right to use private property.

ZELESKEY LAW FIRM PLLC

PO Drawer 1728
1616 South Chestnut
Lufkin, Texas 75902-1728
tel: 936.632.3381 fax: 936.632.6545
www.zeleskey.com
Additional offices: Nacogdoches and Livingston



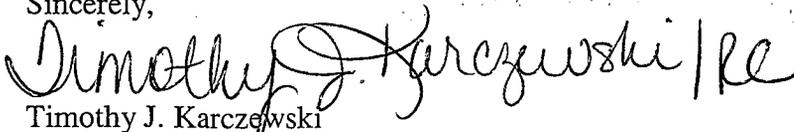
Chief Clerk
November 29, 2010
Page Two

However, until the matter of the planned trespass is resolved, the issuance of a Permit sole basis of which is authorizing a discharging through private property would be an irresponsible governmental act, if not actionable on a constitutional basis as a taking.

3. The water to be discharged is cooling tower blow-down water. As such it will have a higher temperature than the water naturally occurring in the area. This increase temperature will result in the formation of additional bacteria and other pathogens that will serve as a human health risk to persons wishing to utilize the SI Ltd tract. This will also serve as a risk to aquatic life within the receiving waters and adjacent thereto.
4. Solvents and other chemicals used in maintaining cooling coils contain hazardous chemicals. Some of these may have long half-lives that will allow for accumulation to unsafe levels
5. Some of the chemicals used along with the increased temperature are likely to result in the death of vegetation along the discharge route.
6. The 1,491 lbs of dissolved solids allowed during each day of discharge will result in an excessive buildup of solids within the receiving waters. The impact of this will be imposed disproportionately on the SI Ltd tract. Under the Proposed Permit, over 272 tons per year of additional solids will be dumped on the SI Ltd tract.
7. The Proposed Permit as drafted authorizes the discharge of over 26 lbs per day or almost 9,500 lbs per year of grease to be discharged through the SI Ltd tract. This will be hazardous to human health and wild life and negatively impact the value and marketability of the SI Ltd tract.
8. **Last but not least, the discharge is into Segment 615 of the Angelina/Neches River, a 303(d) listed stream segment.**

For the reasons stated herein, we request that Suzfrekensal Investments, Ltd. by and through its General Partner Mr. Kenneth Rogers, be granted party status and a hearing on Proposed Permit No. WQ0004921000.

Sincerely,


Timothy J. Karczewski

TJK/rc
@PFDesktop\ODMA\PCDOCS\DOCS1\336366\1

cc: Mr. Kenneth Rogers



ZELESKEY
LAW FIRM

Timothy J. Karczewski
Of Counsel

- Robert Alderman, Jr.
- Jeff "Marty" Barnhill
- Robert T. Cain, Jr.
- R. Brandon Davis
- Jack D. Hicks
- Todd L. Kassaw
- Erika L. Keese
- Josh H. Lowe
- Joe M. McElroy
- Krystal E. Riley
- Scott C. Skelton
- Aimee C. Slusher
- Brent L. Watkins
- Judi C. Wells

November 29, 2010

H OPA
NOV 30 2010
BY KH

VIA TELECOPIER (512)239-3311
AND REGULAR MAIL

Chief Clerk
Texas Commission on Environmental Quality
MC - 105
P.O. Box 13087
Austin, Texas 78711-3087

IWD
72637

2010 NOV 29 PM 3:23
CHIEF CLERKS OFFICE

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

In re: Aspen Power LLC
Proposed Permit No. WQ-0004921000
EPA I.D. No. TX0132578

We are writing on behalf of our client, Suzbrekensal Investments, Ltd. and its General Partner, Mr. Kenneth Rogers, ("SI Ltd") regarding the above referenced matter.

- Of Counsel*
- Timothy J. Karczewski
- Linda O. Poland
- William R. Ricks
- Steve Roper
Emeritus
- John D. Stover

By this correspondence, SI Ltd requests a hearing on the Permit Application for Proposed Permit No. WQ-0004921000 for the following reasons.

1. The route of the proposed discharge passes through a five acre tract of land owned by SI Ltd immediately down stream from the Aspen Power tract. In addition, the discharge route is not a natural water-way but rather a man-made course that has occurred only because of the railroad embankment and trestle along the west boundary of the SI Ltd tract. Because of the location of its property in relation to the Aspen Power tract and its proposed discharge, SI Ltd is an affected party as that term is defined by Texas Commission on Environmental Quality ("TCEQ") Rules.
2. Aspen Power has no legal right to use the water course through the SI Ltd tract for its discharge. Therefore, any such use would constitute a trespass on the part of Aspen Power. For this reason, the TCEQ cannot and should not authorize a permit that is premised upon using the water course as method for the discharging of Aspen Power's effluent. Invariably the TCEQ will argue that the issuance of the Permit would not give Aspen Power the right to use private property.

ZELESKEY LAW FIRM PLLC

PO Drawer 1728
1616 South Chestnut
Lufkin, Texas 75902-1728
tel: 936.632.3381 fax: 936.632.6545
www.zeleskey.com

Additional offices: Nacogdoches and Livingston

Handwritten initials

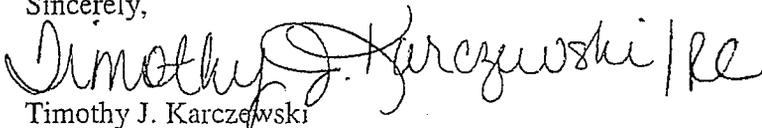
Chief Clerk
November 29, 2010
Page Two

However, until the matter of the planned trespass is resolved, the issuance of a Permit sole basis of which is authorizing a discharging through private property would be an irresponsible governmental act, if not actionable on a constitutional basis as a taking.

3. The water to be discharged is cooling tower blow-down water. As such it will have a higher temperature than the water naturally occurring in the area. This increase temperature will result in the formation of additional bacteria and other pathogens that will serve as a human health risk to persons wishing to utilize the SI Ltd tract. This will also serve as a risk to aquatic life within the receiving waters and adjacent thereto.
4. Solvents and other chemicals used in maintaining cooling coils contain hazardous chemicals. Some of these may have long half-lives that will allow for accumulation to unsafe levels
5. Some of the chemicals used along with the increased temperature are likely to result in the death of vegetation along the discharge route.
6. The 1,491 lbs of dissolved solids allowed during each day of discharge will result in an excessive buildup of solids within the receiving waters. The impact of this will be imposed disproportionately on the SI Ltd tract. Under the Proposed Permit, over 272 tons per year of additional solids will be dumped on the SI Ltd tract.
7. The Proposed Permit as drafted authorizes the discharge of over 26 lbs per day or almost 9,500 lbs per year of grease to be discharged through the SI Ltd tract. This will be hazardous to human health and wild life and negatively impact the value and marketability of the SI Ltd tract.
8. **Last but not least, the discharge is into Segment 615 of the Angelina/Neches River, a 303(d) listed stream segment.**

For the reasons stated herein, we request that Suzfrekansal Investments, Ltd. by and through its General Partner Mr. Kenneth Rogers, be granted party status and a hearing on Proposed Permit No. WQ0004921000.

Sincerely,


Timothy J. Karczewski

TJK/rc
@PFDesktop\ODM\PC\DOCS\DOCS1\336366\1

cc: Mr. Kenneth Rogers



ZELESKEY
LAW FIRM

FAX COVER SHEET

2010 NOV 29 PM 3:23
CHIEF CLERKS OFFICE

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

Date: November 29, 2010

Number of Pages: 3
(including this page)

To: Chief Clerk
(512)239-3311

From: Timothy J. Karczewski

Direct Dial: (936) 633-4208

Re:

Document Description:

Message:

Fax Operator Initials: rc

Should you have any difficulty in receiving this fax, please call 936-632-3381.

This information is intended only for the addressee(s) named above and may contain information that is privileged, confidential and exempt from disclosure under applicable law. Any use, dissemination or copying of this communication other than by the addressee is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone and return the original message to us at the below listed address via the U.S. Postal Service. Thank you.

ZELESKEY LAW FIRM PLLC

PO Drawer 1728
1616 South Chestnut
Lufkin, Texas 75902-1728
tel: 936.632.3381 fax: 936.632.6545
www.zeleskey.com

Additional offices: Nacogdoches and Livingston