

TCEQ DOCKET NO. 2008-0559-MWD

SOAH DOCKET NO. 582-08-4359 2009 JAN -2 PM 4: 25

APPLICATION OF THE CITY OF § BEFORE THE CHIEF CLERK'S OFFICE  
CASTROVILLE FOR TPDES PERMIT §  
FOR MUNICIPAL WASTEWATER § OF ADMINISTRATIVE  
AMENDMENT TO PERMIT NO. §  
WQ0010952001 § HEARINGS

**APPLICANT'S REPLY BRIEF REGARDING PROTESTANTS' EXCEPTIONS  
TO THE ALJ'S PROPOSAL FOR DECISION AND THE EXECUTIVE  
DIRECTOR'S SPECIAL EXCEPTION TO CORRECT CITATIONS IN THE  
ORDER ATTACHED TO THE PROPOSAL FOR DECISION**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the City of Castroville, and files this Reply Brief Regarding Protestants' Exceptions to the ALJ's Proposal for Decision and the Executive Director's Special Exception to Correct Citations in the Order Attached to the Proposal for Decision, and in support thereof shows the following:

I

**INTRODUCTION**

Harvey Lee Kunze ("Requestor") and Texas River Protection Association ("TRPA"), filed their Exceptions to the Proposal for Decision citing to three exceptions: distance, authority, and lacking standing as an affected person. The City of Castroville ("Applicant") hereby responds to such exceptions in the following order: authority, affected person, and distance. The Executive Director filed a Special Exception for the limited purpose of correcting two citations in the order attached to the Proposal for Decision; the Applicant hereby supports such Special Exception of the Executive Director.

II

**FACTUAL BACKGROUND**

On December 2, 2008, the Administrative Law Judge ("ALJ") issued a Proposal for Decision and Order in the matter of SOAH Docket No. 582-08-4359; TCEQ Docket No. 2008-0559-MWD; In Re: In the Matter of the Application of City of Castroville for Amendment to Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0010952-001. On December 22, 2008, Requestor and TRPA, filing jointly as Protestants, filed exceptions to the Proposal for Decision and the Executive Director filed a Special Exception to Correct Citations in the Order Attached to the Proposal for Decision.

III

**REPLY TO EXCEPTIONS OF PROTESTANTS**

Reply to Exception No. 2. Protestants allege that the Proposed Finding of Fact No. 11 stating that "Mr. Kunze is not authorized to act on behalf of Mrs. Kunze in regard to the subject property" is not supported by the overwhelming weight of the evidence. However, the evidence at the hearing was clear: only Mrs. Kunze owns the property; Mrs. Kunze did not file nor join in the hearing request; and only Mr. and Mrs. Kunze's son and his family reside on the property. The Family Code Section 3.104 clearly states:

(a) During marriage, property is presumed to be subject to the sole management, control, and disposition of a spouse if it is held in that spouse's name, as shown by muniment, contract, deposit of funds, or other evidence of ownership, or if it is in that spouse's possession and is not subject to such evidence of ownership.

Section 3.101, Texas Family Code states that “[e]ach spouse has the sole management, control and disposition of that spouses’ separate property.”<sup>1</sup>

In stating that Mr. Kunze had authority to act on behalf of Mrs. Kunze, he simply stated: “she has given me authority to speak for her....” At no time, although there was clearly opportunity as Mrs. Kunze was in attendance, did Mrs. Kunze present herself on the witness stand and offer into evidence that she was allowing Requestor to take the actions he was concerning her property. Mrs. Kunze spoke up, although not on the stand, to clarify that she owned the property as her sole and separate property, being given such property by her mother when her mother died. As presented into evidence, the deed to the property was in Noreen Marie Kunze’s name only. Requestor’s ability to act as Mrs. Kunze’s agent shall not be presumed.<sup>2</sup> All of this evidence is contradictory to the hearing request filed by Requestor, in his sole capacity and without reference to his wife. Such letter was admitted into evidence at the contested case hearing and in such letter, Requestor represents himself as:

... an ‘affected person’ owning property within one-mile of the discharge point of the proposed City of Castroville Wastewater plant. I am a landowner within a reasonable distance along the watercourse and should have been entitled to written notice.<sup>3</sup>

Protestants Exception No. 2 should be overruled.

Reply to Exception No. 3: Protestants have argued that the charge of SOAH from the TCEQ concerning the determination of Mr. Kunze as an affected person was not tied to any burden of establishing any specific set of facts. Such position is contrary to

<sup>1</sup> Coggin v. Coggin, 204 S.W.2d 47 (Tex. Civ. App – Amarillo, 1947, rehrg denied) (In this state each marital partner is given the sole management and control of his separate property.)

<sup>2</sup> Magee v. White, 23 Tex. 180 (1859).

<sup>3</sup> See TRPA Exhibit 1 from the October 8, 2008 hearing.

the Texas Water Code Sections 5.556(c); 5.115 as well as Texas Administrative Code Section 55.201 which sets out the parameters for determination of an "affected person." An "affected person" is a person who has a "personal justiciable interest related to a legal right, duty, privilege, power or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest."<sup>4</sup> Whatever Protestants wish the issue to be, Requestor's letter was on his own behalf and he simply does not have a personal justiciable interest which would be affected by the application; he does not own property within a mile of the discharge point and the property he does own is approximately five miles away from the City of Castroville. The legal interest enjoyed by Mrs. Kunze is not shared by Requestor; there is no legal right, obligation or duty upon him to care for the property and his ability to access the property is controlled by Mrs. Kunze. Agency, even between spouses as to their sole and separate property, needs to be evidenced. As stated in *Magee v. White*,

The husband may be her agent to make contracts that will bind her separate estate; but it is not to be presumed that he is her agent, because he is her husband. The agency must be an agency in fact, and not a thing to be presumed, because of the relation of husband and wife.<sup>5</sup>

No deed, lease or power of attorney was presented at the hearing which showed any responsibility of Requestor to tend the property or cultivate such property on behalf of Mrs. Kunze. Any economic benefit or interest derived from the use or sale of the property owned by Mrs. Kunze is her sole and separate property as well. It was essential that Requestor show a *personal justicial interest* and he has not. As far as Requestor's

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<sup>4</sup> TEX. WATER CODE §5.115(a); 30 TEX. ADMIN. CODE §55.203(a).

<sup>5</sup> *Magee v. White*, 23 Tex. 180 at 9.

interest and ability to swim or fish in the Medina River, that interest and ability is shared by the public.

Protestants would urge that standing be conferred on TRPA as well through associational standing. As all parties seem to recognize, TRPA can only become a party if Requestor is recognized as an affected person. However, Requestor simply cannot rise to that position and thus, TRPA is properly held not to have associational standing in this matter. Exception No. 3 of Protestants should be overruled.

Reply to Exception No. 1. The distance from the point of discharge to Requestor's property is approximately five miles. Conflicting testimony was given at the hearing concerning the location of the property of Mrs. Kunze. Assuming there could be a basis for finding that Requestor is an affected person, the distance and impact were inconclusive at the hearing as well. As Mr. Lally's Affidavit filed with Applicant's Brief on November 7, 2008 set out, the Medina County Property Records reflect that Mrs. Kunze's property is outside the one-mile point down river. Applicant's discharge application is phased in over multiple stages. The water to be discharged, however, is the same treated water that is currently used to irrigate land for crops. The current standard being requested and approved by TCEQ for discharge (based on a 30-day average, are 20 mg/l BOD<sub>5</sub> and 20 mg/l TSS) is well within the standards allowed by TCEQ and found to be protective of the waters of the state.<sup>6</sup> All subsequent phases of discharge under the permit are based on a 30-day average, are 10 mg/l BOD<sub>5</sub>, 15 mg/l TXX, 1/0 mg/l Total Phosphorus and 4.0 mg/l minimum dissolved oxygen (DO).<sup>7</sup> The discharge point, into

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<sup>6</sup> See Affidavit of Joseph Painter dated November 8, 2008 filed with Applicant's Brief on November 7, 2008.

<sup>7</sup> *Id.*

the natural drainage swale, allows further natural aeration to occur, along with additional natural environmental treatment methods (absorption, evaporation and dilution). Thus, the rules under which the permit amendment is issued are designed to protect the very nature of the concern expressed by Requestor and no evidence was presented that those rules do not, in fact, protect the waters. Exception No. 1 of Protestants should be overruled.

#### IV

#### REPLY TO SPECIAL EXCEPTION OF EXECUTIVE DIRECTOR

The Executive Director properly noted that the proposed Order Concerning the Application by City of Castroville for Amendment to TPDES Permit No. WQ0010952001 included as its Conclusion of Law No. 1 cites to sections not applicable to the matter before the court. Applicant supports the Executive Director's Special Exception in requesting that the ALJ intended to cite TEX. WATER CODE ANN. Ch. 26 and 30 TEX. ADMIN. CODE chs. 305, 307, 308 or 309. The Executive Director's Special Exception to Correct Citations in the Order Attached to the Proposal for Decision in this Case should be upheld.

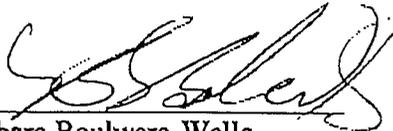
Applicant respectfully requests the ALJ to find:

1. That Protestants' Exceptions to the ALJ's Proposal for Decision be overruled;  
and
2. That Executive Director's Special Exception to Correct Citations in the Order

Attached to the Proposal for Decision in this Case be upheld.

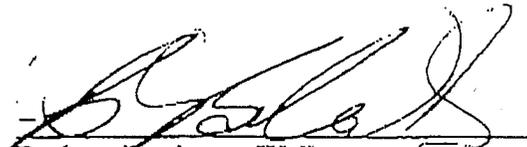
Respectfully submitted,

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By:   
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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true and correct copy of the above and foregoing Applicant's Reply Brief Regarding Protestants' Exceptions To The CLARS OFFICE Proposal For Decision And The Executive Director's Special Exception To Correct Citations In The Order Attached To The Proposal For Decision was filed with the Office of the Chief Clerk and sent by first class mail and/or facsimile to the persons listed in the mailing list attached.

  
Barbara Boulware-Wells

MAILING LIST FOR  
SOAH DOCKET NUMBER 582-08-4359  
TCEQ DOCKET NUMBER 2008-0559-MWD  
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CHIEF CLERKS OFFICE

## FAX COVER SHEET

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Dear Sir or Madam:

Please accept the enclosed "Applicant's Reply Brief Regarding Protestants' Exceptions to the ALJ's Proposal For Decision and the Executive Director's Special Exception To Correct Citations In the Order Attached to the Proposal for Decision " in SOAH docket number 582-08-4359: TCEQ Docket number 2008-0559-MWD: for the City of Castroville, Permit No. WQ0010952001.

Sincerely:

Barbara Boulware-Wells

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