

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge
December 2, 2008

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2008 DEC -2 PM 1:50
CHIEF CLERKS OFFICE

Les Trobman, General Counsel
Texas Commission on Environmental Quality
PO Box 13087
Austin Texas 78711-3087

Re: 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

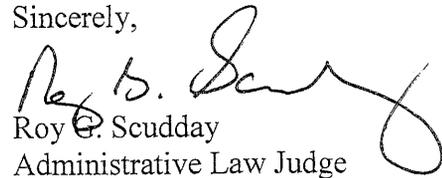
Dear Mr. Trobman:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the original documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than December 22, 2008. Any replies to exceptions or briefs must be filed in the same manner no later than January 3, 2009.

This matter has been designated **TCEQ Docket No. 2008-0559-MWD; SOAH Docket No. 582-08-4359**. All documents to be filed must clearly reference these assigned docket numbers. Copies of all exceptions, briefs and replies must be served promptly on the State Office of Administrative Hearings and all parties. Certification of service to the above parties and an **original and eleven copies** shall be furnished to the Chief Clerk of the Commission. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,


Roy G. Scudday
Administrative Law Judge

RGS/sb
Enclosures
cc: Mailing List

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STYLE/CASE: CITY OF CASTROVILLE

SOAH DOCKET NUMBER: 582-08-4359

REFERRING AGENCY CASE: 2008-0559-MWD

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**ADMINISTRATIVE LAW JUDGE
ALJ ROY SCUDDAY**

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2008 DEC -2 PM 1: 50

SOAH DOCKET NO. 582-08-4359
TCEQ DOCKET NO. 2008-0559-MWD

CHIEF CLERKS OFFICE

<p>IN THE MATTER OF THE APPLICATION OF CITY OF CASTROVILLE FOR AMENDMENT TO TEXAS LAND APPLICATION (TLAP) PERMIT No. WQ0010952-001</p>	<p>§ § § § §</p>	<p>BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS</p>
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I. INTRODUCTION

City of Castroville (City) has applied to the Texas Commission on Environmental Quality (TCEQ or Commission) for a major amendment to Texas Land Application (TLAP) Permit No. WQ0010952001 (Permit). City seeks authority to discharge treated wastewater effluent to an unnamed natural drainage swale; thence to the Medina River below the Medina Diversion Lake in Segment No. 1903 of the San Antonio River Basin, from a wastewater treatment facility located approximately 0.9 mile southwest of the intersection of U.S. Highway 90 and Farm-to-Market Road 1343 in Medina County, Texas. The proposed permit authorizes a maximum permitted discharge of 900,000 gallons per day (gpd) of treated effluent.

II. PROCEDURAL HISTORY

City's application was filed on December 18, 2006. The ED recommended issuance of the Draft Permit and published the requisite notices. On August 12, 2008, the Commission referred the case to the State Office of Administrative Hearings (SOAH) for a contested case hearing. to determine whether Evangeline Bippert, Janice Haby, or Harvey Lee Kunze are affected persons, and whether the Texas Rivers Protection Association (TRPA) has established associational standing in this case. The Commission directed that no other persons, entities, or associations shall be considered for standing, and no other members of TRPA shall be considered for purposes of associational standing in regard to the initial determination of the standing of the above-named persons and association. The ALJ was further instructed that only

in the event that it was determined that any of the above-named persons and association were affected persons, should three environmental impact issues be considered.

A preliminary hearing was conducted on October 8, 2008, in San Antonio, Texas, by ALJ Roy G. Scudday. Prior to that date, Evangeline Bippert and Janice Haby withdrew their hearing requests. City was represented by Barbara Boulware-Wells, attorneys. Harvey Lee Kunze and TRPA were represented by William G. Bunch, attorney. The Office of Public Interest Counsel (OPIC) was represented by Eli Martinez, attorney. The Executive Director of Texas Commission on Environmental Quality (ED) was represented by Chris Ekoh, attorney. The record closed on November 7, 2008.

III. APPLICABLE LAW

The rule at 30 TEX. ADMIN. CODE ANN (TAC) § 55.201 provides that an affected person may request a contested case hearing. To qualify as an affected person, a person must have “a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application.” 30 TAC § 55.203(a). Subsection (c) of that rule provides the following:

- c) In determining whether a person is an affected person, all factors shall be considered, including, but not limited to, the following:
- (1) whether the interest claimed is one protected by the law under which the application will be considered;
 - (2) distance restrictions or other limitations imposed by law on the affected interest;
 - (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
 - (4) likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person; and
 - (5) likely impact of the regulated activity on use of the impacted natural resource by the person.

The rule at 30 TAC § 55.205 provides that a group or association may request a contested case only if one or more members of the group or association would otherwise have standing to request a hearing, the interests of the group or association seeks to protect are germane to the purposes of the group or association, and neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

IV. DISCUSSION

Because Mr. Kunze is the only individual requesting a contested case hearing, the only basis for TRPA to meet the associational standing test is for Mr. Kunze, as a member of TRPA, to qualify as an affected person.

Mr. Kunze asserted that he was the owner of property located within one mile of the proposed discharge point. However, at the preliminary hearing it was established that Mr. Kunze is not the owner of the property in question. In fact, the property is owned by his wife, Norene Marie Kunze as her sole separate property by reason of inheritance from her mother. Neither Mr. nor Mrs. Kunze resides on the property. Mr. Kunze provided no evidence that he was authorized to act on behalf of Mrs. Kunze in regard to the property. Based on these undisputed facts, without having to consider the actual distance of the property from the discharge point, Mr. Kunze has no justiciable interest related to a legal right, duty, privilege, power, or economic interest in regard to the property.

TRPA argues that because Mr. Kunze occasionally fishes and swims in the river next to the property, because his son lives on the property, and because the property has a shallow well near the river, Mr. Kunze has a legal right, duty, and privilege to access, enjoy, and take care of the property. However, as pointed out by City and ED, neither Mrs. Kunze nor their son, who arguably may have such a justiciable interest, requested a contested case hearing regarding this permit amendment, nor is there any evidence that Mr. Kunze was given authority to act on their behalf.

The ALJ concludes that Harvey Lee Kunze is not an affected person. As a result, TRPA has no associational standing in this case.

V. STANDARD LANGUAGE

In addition to addressing the issues referred by the Commission, the proposed order also includes a conclusion of law and an ordering provision stating that the terms of the permit and the Executive Director's review of the application comply with all applicable federal and state requirements. These items are included as a convenience to the Commission in order to allow it to more easily issue a single decision on the application in accordance with 30 TAC Section 50.117(g). The ALJ makes no recommendation regarding issues not referred for hearing.

VI. RECOMMENDATION

No person or organization having been shown to be a "person affected" within the meaning of the TCEQ rules and entitled to a hearing on the permit amendment, the ALJ recommends that the ED's determination to issue the amendment be affirmed without hearing.

SIGNED December 2, 2008.



ROY G. SCUDDAY
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**ORDER
CONCERNING THE APPLICATION BY
CITY OF CASTROVILLE
FOR AMENDMENT TO TPDES PERMIT NO. WQ0010952001
TCEQ DOCKET NO. 2008-0559-MWD
SOAH DOCKET NO. 582-08-4359**

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the application of City of Castroville (City) for a major permit amendment to authorize a discharge of treated wastewater effluent to an unnamed natural drainage swale; thence to the Medina River below the Medina Diversion Lake in Segment No. 1903 of the San Antonio River Basin in Medina County, Texas. A Proposal for Decision (PFD) was presented by Roy G. Scudday (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a public hearing on this matter on October 8, 2008, in San Antonio, Texas. The record closed on November 7, 2008.

The following participated in the preliminary hearing: City; the Executive Director (ED); Harvey Lee Kunze, the Texas Rivers Protection Association (TRPA); and the Office of Public Interest Counsel (OPIC).

After considering the Proposal for Decision, the Commission makes the following Findings of Fact and Conclusions of Law.

I. FINDINGS OF FACT

1. On December 18, 2006, City applied to the TCEQ for a major amendment to Permit No. WQ0010952001 to authorize a discharge of a maximum of 900,000 gallons per day (gpd) of treated wastewater effluent.
2. On or about March 4, 2008, the TCEQ Executive Director (ED) issued a Notice of Application and Preliminary Decision for Texas Pollution Discharge Elimination System (TPDES) Permit No. WQ0010952001 and recommended issuance of the permit.
3. Public comments and hearing requests were filed by interested persons concerning the Application and Draft Permit, which were considered by the Commission on August 6, 2008.
4. The wastewater treatment facility located is approximately 0.9 mile southwest of the intersection of U.S. Highway 90 and Farm-to-Market Road 1343 in the City of Castroville, Medina County, Texas.
5. On August 6, 2008 the TCEQ determined that Evangeline Bippert, Janice Haby, Harvey Lee Kunze, and TRPA had requested a contested case hearing.
6. By Interim Order dated August 12, 2008, the TCEQ referred the matter to SOAH for a contested-case hearing as follows:
 - a. To determine whether Evangeline Bippert, Janice Haby, or Harvey Lee Kunze are affected persons, and whether the TRPA has established associational standing in this case;
 - b. No other persons, entities, or associations shall be considered for standing, and no other members of TRPA shall be considered for purposes of associational standing in regard to the initial determination of the standing of the above-named persons and association;
 - c. Only in the event that it was determined that any of the above-named persons and association were affected persons, should the following three

environmental impact issues be considered:

- i. Whether the proposed effluent limits are protective of the families' of the requesters recreational use (such as fishing and swimming) of the Medina River and the Regional Park;
- ii. Whether the proposed effluent limits are protective of shallow drinking water wells which may be impacted by the proposed discharge;
- f. Whether proposed effluent limits are protective of water quality and use and enjoyment of the Medina River or whether more stringent limits of 5 mg/L BOD, 5 mg/L TSS, 2 mg/L nitrogen, and 1 mg/L phosphorus are necessary.

7. On September 4, 2008, Notice of Hearing on the application was published in the *Hondo Anvil Herald*, a newspaper published and generally circulated in Medina County, Texas.
8. Prior to the preliminary hearing held on October 8, 2008, Evangeline Bippert and Janice Haby withdrew their hearing requests in this proceeding.
9. Norene Marie Kunze, the wife of Harvey Lee Kunze is the owner of the property located between a mile and a mile and a half from the discharge point. Norene Marie Kunze owns the subject property as her sole separate property by reason of inheritance from her mother.
10. Neither Mr. nor Mrs. Kunze resides on the subject property.
11. Mr. Kunze is not authorized to act on behalf of Mrs. Kunze in regard to the subject property.
12. Norene Marie Kunze did not request a hearing on City's application.
13. Harvey Lee Kunze is a member of TRPA.

II. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over permits for waste treatment facilities pursuant to TEX. WATER CODE ANN. (Code) ch. 361 and 30 TEX. ADMIN. CODE (TAC) ch. 332.

2. SOAH has the authority to conduct evidentiary hearings and prepare proposals for decision on contested matters referred by the Commission pursuant to TEX. GOV'T CODE ANN. § 2003.047.
3. Based on Findings of Fact Nos. 9-12, Harvey Lee Kunze is not an affected person within the meaning of 30 TAC § 55.203.
4. Based on Findings of Fact Nos. 8 and 13, and Conclusion of Law No. 3, TRPA does not have associational standing in this proceeding pursuant to 30 TAC § 55.205.
5. In accordance with 30 TAC § 50.117, the Commission issues this Order and the attached permit as its single decision on the permit amendment application. Information in the agency record of this matter, which includes evidence admitted at the hearing and part of the evidentiary record, document the Executive Director's review of the permit amendment application, including that part not subject to a contested case hearing, and establishes that the terms of the attached permit (Exhibit A) are appropriate and satisfy all applicable federal and state requirements.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:

1. In accordance with 30 TEX. ADMIN. CODE (TAC) § 50.117, the Commission issues this Order issuing TPDES Permit No. WQ0010952001 to City of Castroville, as its single decision on the permit application.

2. The Commission adopts the Executive Director's Response to Public Comment in accordance with 30 TAC § 50.117. Also in accordance with Section 50.117, the Commission issues this Order and the attached permit (Exhibit A) as its single decision on the permit amendment application. Information in the agency record of this matter, which includes evidence admitted at the hearing and part of the evidentiary record, document the Executive Director's review of the permit amendment application, including that part not subject to a contested case hearing, and establishes that the terms of the attached permit are appropriate and satisfy all applicable federal and state requirements.
3. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.
4. The effective date of this Order is the date the Order is final, as provided by TEX. GOV'T CODE ANN. § 2001.144 and 30 TAC § 80.273.
5. The Commission's Chief Clerk shall forward a copy of this Order to all parties.
6. If any provision, sentence, clause, or phase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

ISSUED:

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Buddy Garcia, Chairman
For the Commission