

SOAH Docket No. 582-08-4359  
TCEQ Docket No. 2008-0559-MWD

CITY OF CASTROVILLE §  
APPLICATION TO AMEND TLAP §  
PERMIT No. WQ0010952001 §  
§

2008 DEC 02 PM 4:29  
BEFORE THE  
STATE OFFICE OF  
ADMINISTRATIVE  
HEARINGS  
CLERK'S OFFICE

**PROTESTANTS' EXCEPTIONS TO THE ALJ'S PROPOSAL FOR DECISION**

**TO THE HONORABLE ROY SCUDDAY, ADMINISTRATIVE LAW JUDGE:**

Texas Rivers Protection Association ("TRPA") and TRPA member Harvey Lee Kunze file these Exceptions to the Proposal for Decision issued by the Administrative Law Judge on December 2, 2008

Specifically, TRPA and Mr. Kunze make the following exceptions:

Exception No. 1: That portion of proposed Finding of Fact No. 9 stating that the property owned by Ms. Norene Kunz is located "between a mile and a mile and a half from the discharge point" is not supported by the overwhelming weight of the evidence. Exhibits produced by both the Executive Director and the Applicant establish that the Kunze property is located at the sharp bend in the river and that this location is clearly within the one mile radius of, and downstream of, the point of discharge.

Exception No. 2: Proposed Finding of Fact No. 11 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. Mr. Kunze testified, without dispute from any witness or other evidence, that he was authorized by his wife to be caretaker of the subject property, that in that role he sought party status in this matter, and that he had specific authority from his wife to do so on her behalf. Mrs. Kunze was present at the hearing and neither she nor anyone else disputed Mr. Kunze's sworn

testimony that he was authorized to act on Mrs. Kunze's behalf in taking care of the property and seeking a contested case hearing in this matter in order to protect her property interests from being damaged by the proposed discharge.

Exception No. 3: Proposed Conclusion of Law No. 3 that Mr. Kunze "is not an affected person" and Proposed Conclusion of Law No. 4 that "TRPA does not have associational standing" are not supported by the evidence or the applicable law, and that such conclusions are, therefore, arbitrary and capricious, and not in accordance with the law.

Protestants TRPA and Mr. Kunze respectfully submit that the PFD incorrectly concludes that Mr. Kunze has failed to show "affected person" status based on a misinterpretation of the charging order from TCEQ and, secondly, on a misinterpretation of standing law in Texas.

First, the order of assignment from the TCEQ to the State Office of Administrative Hearings charged SOAH with determining if Mr. Kunze was an affected person. That order did not tie Mr. Kunze to a burden of establishing any specific set of facts that would show an "affected person." Thus, Mr. Kunze had no burden to show he owned the property that his wife owned. Mr. Kunze was free to show, as he did, that he had a right of use of the property and obligation to care for the property, and that among those rights and his actions pursuant thereto, Mr. Kunze both enjoyed use of the river at the Kunze property and acted to protect the property and enjoyment of the river by the Kunze's son and the Kunze family. That Mr. Kunze himself did not own the subject property was not essential to showing standing pursuant to the TCEQ order.

Secondly, while Mr. Kunze's authority as caretaker and agent for his wife in caring for the property generally, and specifically in protecting Mrs. Kunze's property interests from being harmed by the proposed discharge, gives Mr. Kunze a basis for standing, Mr. Kunze established standing in his own right by virtue of his actual use and enjoyment of the river a short distance downstream of the proposed discharge. The PFD correctly quotes the relevant rule on "affected person" status. However, nothing in that rule requires an interest in real property to show standing. 30 Tex. Admin. Code § 55.203(c). Rather, the rule only calls for showing an interest "protected by the law," which includes an interest in having the Medina River comply with "swimmable/fishable" standards of the Clean Water Act. *Id.* The rule also looks to the "likely impact of the regulated activity on the health and safety of the person" and to the likely impact of "the regulated activity on use of the impacted natural resource by the person." *Id.* Mr. Kunze testified without dispute that he swims and fishes on the river at the Kunze property and that he was concerned that his health and his enjoyment of the river would be harmed and/or curtailed by the proposed wastewater discharge.

Further, 30 Tex. Admin. Code § 55.203(a) provides that: "For any application, an affected person is one 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." Mr. Kunze demonstrated that he had a "legal right," a "legal duty," a "privilege," and an "economic interest" in keeping the Medina River safe for swimming, fishing, and drinking at the location of his wife's property. Moreover, his actual use and enjoyment of the river at the Kunze property makes clear that his interest is not an "interest common

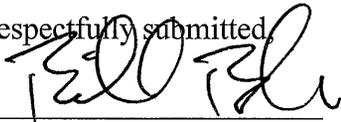
to members of the general public” who do not actually enjoy the Medina River downstream of the proposed discharge for swimming, fishing and/or drinking.

As quoted in our initial brief, “An injury need not affect “vested” property rights to confer standing; the harm may be economic, recreational, or environmental.” *Texas Rivers Protection Assoc. v. Texas Natural Resource Conservation Comm’n*, 910 S.W.2d 147 (Tex. App.—Austin 1995); see also *City Council of Austin v. Save Our Springs Coalition*, 828 S.W.2d 340 (Tex. App.—Austin 1992, orig. proceeding); *Save Our Springs Alliance, Inc. v. Lowry*, 934 S.W.2d 161 (Tex. App.—Austin 1996, orig. proceeding). The evidence clearly established that Mr. Kunze enjoyed and continues to enjoy economic, recreational and environmental interests that are likely to be harmed by the proposed discharge. These interests are protected equally under the law to private property interests that may be harmed by degraded water quality resulting from the proposed discharge.

Finally, because Mr. Kunze demonstrated “affected person” status, and TRPA otherwise established “associational standing,” TRPA is entitled to be recognized as an “affected person” through Mr. Kunze as a TRPA member pursuant to 30 Tex. Admin. Code § 55.205. With Mr. Kunze establishing standing, the other parties seeking party status should also be given party status.

WHEREFORE, TRPA and Mr. Kunze respectfully except to the Proposal for Decision as set out above and pray that the PFD be reconsidered and, upon reconsideration, the Commission direct SOAH to grant Mr. Kunze and TRPA party status and hold a contested case hearing on the City of Castroville permit application.

Respectfully submitted,



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CHIEF CLERKS OFFICE

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TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

**Certificate of Service**

I hereby certify that on the 22nd day of December, 2008, a true and correct copy of the foregoing Protestant TRPA's Exceptions to the ALJ's PFD was filed with the Office of the Chief Clerk and served by hand-delivery or facsimile to the following persons listed below.



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