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Blas J. Coy, Jr., *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

July 14, 2014

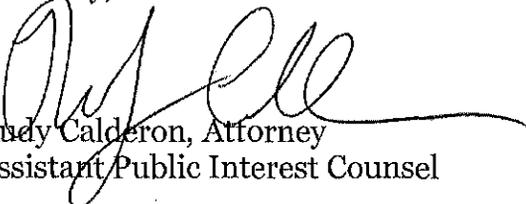
Bridget Bohac, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

RE: FML SANDS, LLC
TCEQ DOCKET NO. 2014-0526-AIR

Dear Ms. Bohac:

Enclosed for filing is the Office of Public Interest Counsel's Response to Hearing Requests in the above-entitled matter.

Sincerely,



Rudy Calderon, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

DOCKET NO. 2014-0526-AIR

| | | |
|-------------------------------|----------|----------------------------|
| APPLICATION BY | § | BEFORE THE |
| FML SANDS, LLC | § | TEXAS COMMISSION ON |
| INDUSTRIAL SAND PLANT | § | ENVIRONMENTAL |
| KATEMICY, MASON COUNTY | § | QUALITY |

OFFICE OF PUBLIC INTEREST COUNSEL'S
RESPONSE TO HEARING REQUESTS

To the Members of the Texas Commission on Environmental Quality:

The Office of Public Interest Counsel (OPIC) at the Texas Commission on Environmental Quality (TCEQ) files this response to the hearing requests filed in the above-referenced matter.

I. BACKGROUND

FML Sand, LLC (FML or Applicant) has applied to the TCEQ for New Source Review authorization under Texas Clean Air Act (TCAA) §382.0518. This permitting action would authorize the construction of new facilities that may emit air contaminants.

The permit will authorize the Applicant to construct an industrial sand processing plant consisting of material loading operations, screens, conveyance systems, a dryer, stockpiles, and truck loading operations. The plant will be located on the north side of RR 1222 approximately $\frac{3}{4}$ of a mile from the intersection of Highway 87 and RR 1222 near Katemcy, Mason County.

Before work is begun on the construction of a new facility that may emit air contaminants, the person planning the construction must obtain a permit from TCEQ. This permit application is for the initial issuance of a single permit document which would be numbered Air Quality Permit No. 97199.

The application was received July 19, 2011, and declared administratively complete August 1, 2011, by the Executive Director's (ED) staff. The Notice of Receipt and Intent to Obtain an Air Quality Permit was published August 17, 2011, in the *Mason County News*. The Notice of Application and Preliminary Decision for an Air Quality Permit was published March 13, 2013, in the *Mason County News*. The comment period closed on April 12, 2013, and the Executive Director's Decision and Response to Comments was mailed on March 11, 2014. The deadline for filing hearing requests and requests for reconsideration was April 10, 2014.

TCEQ received timely hearing requests from Gail Baker; Robert J. Beaulieu; Gerald L. (Gerry) Gamel; Merlina and Steven Gamel; James R. and Lisa K. Heath; Lydia, Tifnee, and Trey Nesloney; Connie Stockbridge; Janis K. and Weldon B. Strickland; Wesley B. Strickland; Danny K. and Sharon L. Thomason; James Bode; Cheryl Glass; Jeanne M. Nixon; Mason County Rural Preservation Society; and Brenda L. and Walter G. Wiggs. For the reasons stated herein, OPIC recommends

the Commission deny the hearing requests of Gail Baker; Robert J. Beaulieu; Gerald L. (Gerry) Gamel; Merlina and Steven Gamel; James R. and Lisa K. Heath; Lydia, Tifnee, and Trey Nesloney; Connie Stockbridge; Janis K. and Weldon B. Strickland; Wesley B. Strickland; Danny K. and Sharon L. Thomason; Cheryl Glass; James Bode; Jeanne M. Nixon; Mason County Rural Preservation Society; and Brenda L. and Walter G. Wiggs.

II. APPLICABLE LAW

Hearing Request

This application was declared administratively complete after September 1, 1999, and is subject to the requirements of Texas Water Code (TWC) § 5.556 added by Acts 1999, 76th Leg., Ch. 1350 (commonly known as "House Bill 801"). Under the applicable statutory and regulatory requirements, a hearing request must substantially comply with the following: give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request; identify the requestor's personal justiciable interest affected by the application showing why the requestor is an "affected person" who may be adversely affected by the proposed facility or activity in a manner not common to members of the general public; request a contested case hearing; list all relevant and material disputed issues of fact that were raised during

the comment period that are the basis of the hearing request; and provide any other information specified in the public notice of application. 30 TAC § 55.201(d). Under 30 TAC § 55.203(a), 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." This justiciable interest does not include an interest common to the general public. Section 55.203(c) provides relevant factors to be considered in determining whether a person is affected. These factors include:

- (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, safety, and use of property of the person; and
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person.

Under 30 TAC § 55.205(a), a group or association's hearing request must satisfy the following requirements:

- (a) A group or association may request a contested case hearing only if the group or association meets all of the following requirements:
 - (1) one or more members of the group or association would otherwise have standing to request a hearing in their own right;

- (2) the interests the group or association seeks to protect are germane to the organization's purpose; and
- (3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

The Commission shall grant an affected person's timely filed hearing request if: (1) the request is made pursuant to a right to hearing authorized by law; and (2) the request raises disputed issues of fact that were raised during the comment period and that are relevant and material to the commission's decision on the application.

30 TAC § 55.211(c).

Accordingly, pursuant to 30 TAC § 55.209(e), responses to hearing requests must specifically address:

- (1) whether the requestor is an affected person;
- (2) which issues raised in the hearing request are disputed;
- (3) whether the dispute involves questions of fact or law;
- (4) whether the issues were raised during the public comment period;
- (5) whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director's response to Comment;
- (6) whether the issues are relevant and material to the decision on the application; and
- (7) a maximum expected duration for the contested case hearing.

III. ANALYSIS OF HEARING REQUESTS

A. Determination of Affected Person Status

Gail Baker

According to a map prepared by ED staff, Gail Baker resides approximately 3 miles from the proposed facility. As stated in her hearing request, Ms. Baker's concerns include:

- air emissions
- health effects

Given the intervening distance between the proposed facility and the requestor's property, OPIC finds that Ms. Baker's interests cannot be distinguished from interests common to the general public.

Therefore, OPIC finds that Gail Baker does not qualify as an affected person under TCEQ rules.

Robert J. Beaulieu

According to a map prepared by ED staff, Robert J. Beaulieu resides approximately 2 miles from the proposed facility. As stated in his hearing request, Mr. Beaulieu's concerns include:

- application completeness/technical review
- health effects

Given the intervening distance between the proposed facility and the requestor's property, OPIC finds that Mr. Beaulieu's interests cannot be distinguished from interests common to the general public.

Therefore, OPIC finds that Robert J. Beaulieu does not qualify as an affected person under TCEQ rules.

Gerald L. Gamel

According to a map prepared by ED staff, Gerald L. Gamel resides approximately 1.25 miles from the proposed facility. As stated in his hearing request, Mr. Gamel's concerns include:

- air emissions
- health effects
- application completeness/technical review
- air quality monitoring systems
- traffic
- cumulative effect
- environmental impact

Given the intervening distance between the proposed facility and the requestor's property, OPIC finds that Mr. Gamel's interests cannot be distinguished from interests common to the general public.

Therefore, OPIC finds that Gerald L. Gamel does not qualify as an affected person under TCEQ rules.

Merlina and Steven Gamel

According to a map prepared by ED staff, Merlina and Steven Gamel reside approximately 1.5 miles from the proposed facility. As stated in their hearing request, the Gamels' concerns include:

- air emissions
- health effects
- application completeness/technical review
- air quality monitoring systems
- traffic
- cumulative effect

- environmental impact

Given the intervening distance between the proposed facility and the requestors' property, OPIC finds that the Gamel's interests cannot be distinguished from interests common to the general public.

Therefore, OPIC finds that Merlina and Steven Gamel do not qualify as affected persons under TCEQ rules.

James R. and Lisa K. Heath

According to a map prepared by ED staff, James and Lisa Heath reside approximately 1.5 miles from the proposed facility. As stated in their hearing request, the Heath's concerns include:

- air emissions
- health effects
- environmental impact
- proposed location of the facility
- air quality monitoring systems
- application completeness/technical review
- traffic
- control technology
- cumulative effect

Given the intervening distance between the proposed facility and the requestors' property, OPIC finds that the Heath's interests cannot be distinguished from interests common to the general public.

Therefore, OPIC finds that James and Lisa Heath do not qualify as affected persons under TCEQ rules.

Lydia, Tifnee, and Trey Nesloney

According to a map prepared by ED staff, Lydia Nesloney resides approximately 1.25 miles from the proposed facility. As stated in her hearing request, Ms. Nesloney's concerns include:

- air emissions
- health effects
- mining operations
- traffic
- environmental impact
- control technology
- cumulative effect

Given the intervening distance between the proposed facility and the requestor's property, OPIC finds that Ms. Nesloney's interests cannot be distinguished from interests common to the general public. Therefore, OPIC finds that Lydia Nesloney does not qualify as an affected person under TCEQ rules. Additionally, the hearing requests submitted by Tifnee and Trey Nesloney do not identify the property which is the subject of the request. Their requests merely state they own property near the proposed facility. Therefore, they have not complied with the applicable statutory and regulatory requirements to be considered for affected person status.

Connie Stockbridge

According to a map prepared by ED staff, Connie Stockbridge resides approximately 1.5 miles from the proposed facility. As stated in her hearing request, Ms. Stockbridge's concerns include:

- air emissions
- health effects
- location of the facility
- traffic
- cumulative effect
- enforcement and compliance

Given the intervening distance between the proposed facility and the requestor's property, OPIC finds that Ms. Stockbridge's interests cannot be distinguished from interests common to the general public. Therefore, OPIC finds that Connie Stockbridge does not qualify as an affected person under TCEQ rules.

Janis K. and Weldon B. Strickland

According to a map prepared by ED staff, Janis and Weldon Strickland reside approximately 1.5 miles from the proposed facility. As stated in their hearing request, the Stricklands' concerns include:

- air emissions
- health effects
- environmental impact
- application completeness/technical review

Given the intervening distance between the proposed facility and the requestors' property, OPIC finds that the Stricklands' interests cannot be distinguished from interests common to the general public. Therefore, OPIC finds that Janis and Weldon Strickland do not qualify as affected persons under TCEQ rules.

Wesley B. Strickland

According to a map prepared by ED staff, Wesley Strickland resides approximately 12 miles from the proposed facility. As stated in his hearing request, Mr. Strickland's concerns include:

- air emissions
- health effects
- environmental impact
- application completeness/technical review

Given the intervening distance between the proposed facility and the requestor's property, OPIC finds that Mr. Strickland's interests cannot be distinguished from interests common to the general public. Therefore, OPIC finds that Wesley Strickland does not qualify as an affected person under TCEQ rules.

Danny K. and Sharon L. Thomason

According to a map prepared by ED staff, Danny and Sharon Thomason reside approximately 1.25 miles from the proposed facility. As stated in their hearing request, the Thomason's concerns include:

- air emissions
- health effects
- traffic
- enforcement/compliance
- mining operations
- cumulative effect
- application completeness/technical review

Given the intervening distance between the proposed facility and the requestors' property, OPIC finds that the Thomasons' interests cannot be distinguished from interests common to the general public.

Therefore, OPIC finds that Danny and Sharon Thomason do not qualify as affected persons under TCEQ rules.

Cheryl Glass

As stated in her hearing request, Ms. Glass' concerns include:

- health effects
- environmental impact
- economic impact

The hearing request submitted by Ms. Glass does not identify the property which is the subject of the request. The requests merely states she lives 10 miles away. Therefore, she has not complied with the applicable statutory and regulatory requirements to be considered for affected person status. Additionally, given the intervening distance between the proposed facility and the requestors' property, OPIC finds that Ms. Glass' interests cannot be distinguished from interests common to the general public.

James Bode

As stated in his hearing request, Mr. Bode's concerns include:

- health effects
- environmental impact
- air quality monitoring systems
- location of the facility

The requestor states his address is in San Angelo, Texas which is approximately 80 miles away from the proposed facility. Given the intervening distance between the proposed facility and the requestors'

property, OPIC finds that Mr. Bode's interests cannot be distinguished from interests common to the general public.

Jeanne M. Nixon

As stated in her hearing request, Ms. Nixon's concerns include:

- health effects
- environmental impact

The hearing request submitted by Ms. Nixon does not identify the property which is the subject of the request. Therefore, she has not complied with the applicable statutory and regulatory requirements to be considered for affected person status.

Mason County Rural Preservation Society

As stated in its hearing request, the Mason County Rural Preservation Society's concerns include:

- health effects
- environmental impact
- air emissions
- application completeness/technical review
- control technology
- cumulative effect
- location of the facility

OPIC recommends denial of this group's request because OPIC cannot find that any identified member would otherwise have standing to request a hearing in their own right as required by 30 TAC § 55.205(a)(1).

Brenda L. and Walter G. Wiggs

According to a map prepared by ED staff, Brenda and Walter Wiggs reside approximately 1.25 miles from the proposed facility. As stated in their hearing request, the Wiggs' concerns include:

- mining operations
- health effects

Given the intervening distance between the proposed facility and the requestors' property, OPIC finds that the Wiggs' interests cannot be distinguished from interests common to the general public.

Therefore, OPIC finds that Brenda and Walter Wiggs do not qualify as affected persons under TCEQ rules.

B. Disputed Issues

All of the issues raised in the hearing requests are disputed.

C. Disputed Questions of Fact or Law

All of the disputed issues involve questions of fact.

D. Issues Raised During Public Comment Period

All of the issues were raised during the public comment period.

E. Hearing Request Based on Withdrawn Public Comment

None of the hearing requests are based on issues raised solely in a public comment which has been withdrawn.

F. Relevant and Material Issues

OPIC cannot find that any requestor qualifies as an affected person. Therefore, OPIC recommends denial of all hearing requests. In the event the Commission disagrees and refers the application for hearing, OPIC submits the analysis below regarding the issues raised in the hearing request.

Air Emissions

Gail Baker; Gerald L. (Gerry) Gamel; Merlina and Steven Gamel; James R. and Lisa K. Heath; Lydia, Tifnee, and Trey Nesloney; Connie Stockbridge; Janis K. and Weldon B. Strickland; Wesley B. Strickland, Danny K. and Sharon L. Thomason; the Mason County Rural Preservation Society; and Brenda L. and Walter G. Wiggs have raised the issue of air quality. The purpose of the Texas Clean Air Act is to safeguard the state's air resources from pollution by controlling or abating air pollution and emissions of air contaminants. TEX. HEALTH & SAFETY CODE § 382.002. The issue of air quality is therefore relevant and material to the Commission's decision on this application.

Health Effects

Gail Baker; Robert J. Beaulieu; Gerald L. (Gerry) Gamel; Merlina and Steven Gamel; James R. and Lisa K. Heath; Lydia, Tifnee, and Trey Nesloney; Connie Stockbridge; Janis K. and Weldon B. Strickland; Wesley B. Strickland; Cheryl Glass; James Bode; Jeanne M. Nixon; the

Mason County Rural Preservation Society; and Danny K. and Sharon L. Thomason have raised the issue of impacts to human health and welfare resulting from or being exacerbated by the proposed air emissions. The Texas Clean Air Act is intended to protect public health and general welfare. TEX. HEALTH & SAFETY CODE § 382.002. The issue of health and welfare effects is therefore relevant and material to the Commission's decision on this application.

Environmental Effects

Gerald L. (Gerry) Gamel; Merlina and Steven Gamel; James R. and Lisa K. Heath; Lydia, Tifnee, and Trey Nesloney; Cheryl Glass; James Bode; Jeanne M. Nixon; Janis K. and Weldon B. Strickland; the Mason County Rural Preservation Society; and Wesley B. Strickland are concerned that air emissions from the proposed facility will adversely affect the surrounding environment, including wildlife and vegetation. This concern involves the protection of natural resources. One of the purposes of the Texas Clean Air Act is to protect the general welfare of the state's natural resources. TEX. HEALTH & SAFETY CODE § 382.002. The issue of environmental effects is therefore relevant and material to the Commission's decision on this application.

Control Technology

James R. and Lisa K. Heath; the Mason County Rural Preservation Society; and Lydia, Tifnee, and Trey Nesloney question

whether FLM is proposing and TCEQ is requiring the most environmentally advanced equipment. The control technology proposed by FLM is subject to BACT (Best Available Control Technology). Under the Texas Clean Air Act, FLM must use at least BACT. TEX. HEALTH & SAFETY CODE § 382.0518(b). Therefore, control technology is an issue which is relevant and material to the Commission's decision on this application.

Proposed Location of Facility

James Bode; the Mason County Rural Preservation Society; and James R. and Lisa K. Heath and Connie Stockbridge state that the proposed location of the facility is inappropriate due to the proximity of residential areas and other factors such as terrain and variable winds. Because TCEQ lacks the jurisdiction to regulate local zoning, the agency cannot control or dictate where an applicant locates. This issue is therefore not relevant and material to the Commission's decision.

Air Quality Monitoring

Gerald L. (Gerry) Gamel; Merlina and Steven Gamel; James Bode; and James R. and Lisa K. Heath want air quality monitoring in the vicinity of the proposed facility. TCEQ does not have the authority to require FLNG to install an offsite ambient air monitor as part of this

permit application. Therefore, this issue is not relevant and material to the Commission's decision.

Traffic

Gerald L. (Gerry) Gamel; Merlina and Steven Gamel; James R. and Lisa K. Heath; Lydia, Tifnee, and Trey Nesloney; Connie Stockbridge; and Danny K. and Sharon L. Thomason are concerned about increased traffic, diesel emissions, and road damage. The proposed facility is not in a county identified as a non-attainment county for ozone and would not be subject to additional controls concerning truck emissions. Additionally, under the Texas Clean Air Act, the TCEQ lacks jurisdiction to regulate traffic on public roads or consider damage caused to public roads as a factor in reviewing an application for an air permit. Therefore, this issue is not relevant and material to the Commission's decision.

Application Completeness/Technical Review

Robert J. Beaulieu; Gerald L. (Gerry) Gamel; Merlina and Steven Gamel; James R. and Lisa K. Heath; the Mason County Rural Preservation Society; Janis K. and Weldon B. Strickland; and Wesley B. Strickland are concerned about application completeness and the sufficiency of the technical review. The members of the ED's staff review all permit applications for completeness upon being received. These administrative and technical reviews cover items such as notice

requirements, emissions calculations, compliance history, and appropriateness of control technologies. While these issues are relevant and material to the Commission's decision, the requestors failed to state with sufficient particularity the areas of concerns relating to application completeness and technical review for these issues to be referred to SOAH for a contested case hearing.

Enforcement

Gerald L. (Gerry) Gamel; Merlina and Steven Gamel; James R. and Lisa K. Heath; Lydia, Tifnee, and Trey Nesloney; Connie Stockbridge; and Danny K. and Sharon L. Thomason are concerned about the enforcement of permit conditions and other environmental regulations. The TCEQ has in place an enforcement process that is uniformly applied to all regulated entities. Periodic investigations, as well as investigations of all complaints received by the TCEQ, attempt to ensure that all responsibilities are met by a regulated entity. Should a violation of a permit or regulation be discovered, corrective actions and penalties are assessed against the violator. That being said, TCEQ's enforcement process is not relevant and material to the Commission's decision on this permit application.

Cumulative Effect

Gerald L. (Gerry) Gamel; Merlina and Steven Gamel; James R. and Lisa K. Heath; Lydia, Tifnee, and Trey Nesloney; Connie

Stockbridge; the Mason County Rural Preservation Society; and Danny K. and Sharon L. Thomason are concerned about the cumulative effect of an additional sand mining operation in the area. There are several sand mining operations that already exist in this area, specifically in Voca, Texas. As part of the technical review conducted by ED's staff, relevant air modeling and air contaminant predictions for items such as particulate matter and sulfur dioxide are reviewed. The ED's staff concluded, after requesting additional data from the Applicant, that the addition of the proposed site to the area would not impact the air quality enough to deny the permit application. However, this is a relevant and material issue to the Commission's decision.

Mining Operations

Lydia, Tifnee, and Trey Nesloney; Danny K. and Sharon L. Thomason; and Brenda L. and Walter G. Wiggs are concerned about the mining techniques and hours of operation of the proposed facility. Because TCEQ lacks the jurisdiction to regulate they type of techniques used in mining operations or the hours of operation, the agency cannot control or dictate how the Applicant extracts the sand from the ground. This issue is therefore not relevant and material to the Commission's decision.

Economic Impact

Cheryl Glass are concerned about the economic impact on her property. Because TCEQ lacks the jurisdiction to consider economic impact on real or personal property in reviewing an application for an air permit, this issue is not relevant and material to the Commission's decision.

V. CONCLUSION

OPIC finds that Gail Baker; Robert J. Beaulieu; Gerald L. (Gerry) Gamel; Merlina and Steven Gamel; James R. and Lisa K. Heath; Lydia, Tifnee, and Trey Nesloney; Connie Stockbridge; Janis K. and Weldon B. Strickland; Wesley B. Strickland, Danny K. and Sharon L. Thomason; Cheryl Glass; James Bode; Jeanne M. Nixon; the Mason County Rural Preservation Society; and Brenda L. and Walter G. Wiggs do not qualify as affected persons. Therefore, OPIC recommends that all hearing requests be denied.

In the event the Commission disagrees and finds the requestors to be affected persons, OPIC would recommend a nine month hearing on the issues listed below:

- 1) Will facility emissions have an adverse impact on the health of the requestors;
- 2) Will facility emissions have an adverse impact on the surrounding environment, including wildlife and vegetation;

- 3) Is the facility's proposed emissions control equipment the best available control technology (BACT); and
- 4) Given the level of emissions from existing facilities in the area of the proposed facility, would emissions from the operation of the proposed facility result in adverse cumulative effects from emissions from all facilities in the area.

Respectfully submitted,

Office of Public Interest Counsel

By 

Rudy Calderon

Assistant Public Interest Counsel

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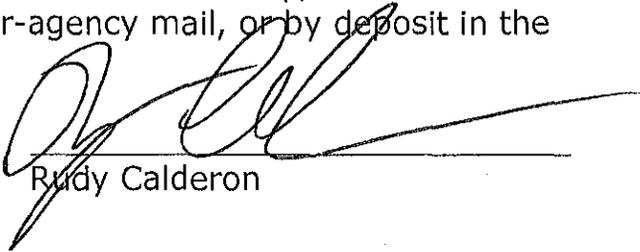
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CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2014, the foregoing document was filed with the TCEQ Chief Clerk, and copies were served to all parties on the attached mailing list via hand delivery, facsimile transmission, electronic mail, Inter-agency mail, or by deposit in the U.S. Mail.



Rudy Calderon

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