

Bryan W. Shaw, Ph.D., P.E., *Chairman*
Toby Baker, *Commissioner*
Jon Niermann, *Commissioner*
Richard A. Hyde, P.E., *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

September 23, 2016

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

Re: FML Sand, LLC; Permit No.WQ0005166000 ; Docket No. 2016-1210-IWD

Dear Ms. Bohac:

Attached for filing please find an original and seven copies of the Executive Director's Response to Hearing Requests in the above referenced matter. Please feel free to contact me at hollis.henley@tceq.texas.gov or (512) 239-2253 if you have any questions.

Sincerely,

A handwritten signature in black ink that reads "Hollis Henley".

Hollis Henley
Staff Attorney
Environmental Law Division

Enclosure

cc: Mailing List

TCEQ DOCKET NO. 2016-1210-IWD

APPLICATION BY	§	BEFORE THE
FML Sand, LLC	§	TEXAS COMMISSION
FOR TPDES PERMIT NO.	§	ON
WQ0005166000	§	ENVIRONMENTAL QUALITY

EXECUTIVE DIRECTOR'S RESPONSE TO HEARING REQUESTS

The Executive Director (ED) of the Texas Commission on Environmental Quality (Commission or TCEQ) files this Response to Hearing Requests on the application by FML Sand, LLC (applicant) for a new Permit No. WQ0005166000. John D. Harkey, Jr. and the Mason Trust (Trust) filed a timely hearing request.

Attached for the Commission's consideration is:

Attachment A—Satellite map of the area.

I. FACILITY DESCRIPTION

The applicant operates the FML Voca Sand Plant (facility), an industrial sand mining and processing facility, and has applied to the TCEQ for new TPDES permit No. WQ0005166000, which would authorize the discharge of process wastewater commingled with stormwater at an intermittent and variable flow via Outfall 001. The facility is located at 300 Private Road 685, south of the intersection of State Highway 71 and County Road 216 and west of County Road 216, in McCulloch County, Texas 76887. The discharge route for Outfall 001 is to an unnamed tributary, thence to Tiger Creek, thence to San Saba River in Segment No. 1416 of the Colorado River Basin. The unclassified receiving waters have minimal aquatic life use for the unnamed tributary and Tiger Creek. The designated uses for Segment No. 1416 are high aquatic life use, primary contact recreation, and public water supply.

II. BACKGROUND

The TCEQ received the application on June 12, 2015, and declared it administratively complete on August 21, 2015. The applicant published the Notice of Receipt and Intent to Obtain a Water Quality Permit in McCulloch County, Texas on September 9, 2015, in the *Brady Standard-Herald*. The ED completed the technical

review of the application on September 21, 2015, and prepared a draft permit, which if approved, would establish the conditions under which the facility must operate. The applicant published the Notice of Application and Preliminary Decision for a Water Quality Permit in the *Brady Standard-Herald* twice, once on November 4, 2015, and again on January 13, 2016. The public comment period closed on February 12, 2016. The Executive Director's Response to Comments (RTC) was mailed on June 6, 2016. The hearing request period ended on July 7, 2016. This application was declared administratively complete on or after September 1, 1999; therefore, this application is subject to the procedural requirements adopted pursuant to House Bill 801, 76th Legislature, 1999.

III. THE EVALUATION PROCESS FOR HEARING REQUESTS

House Bill 801 established statutory procedures for public participation in certain environmental permitting proceedings. For those applications declared administratively complete on or after September 1, 1999, it established new procedures for providing public notice and public comment and for the Commission's consideration of hearing requests. The application in this case was declared administratively complete on May 29, 2015. Therefore, it is subject to the House Bill 801 requirements. The Commission implemented House Bill 801 by adopting procedural rules in title 30, chapters 39, 50, and 55 of the Texas Administrative Code (TAC).

A. Response to Requests

"The Executive Director, the public interest counsel, and the applicant may submit written responses to [hearing] requests . . ."¹

According to 30 TAC § 55.209(e), responses to hearing requests must specifically address the following:

- (1) Whether the requester 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

¹ 30 TEX. ADMIN. CODE § 55.209(d) (West 2015).

- (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 ED's RTC
- (6) Whether the issues are relevant and material to the decision on the application
- (7) A maximum expected duration for the contested case hearing

B. Hearing Request Requirements

For the Commission to consider a hearing request, the Commission must first determine whether the request meets certain requirements. As noted in 30 TAC § 55.201(c), "A request for a contested case hearing by an affected person must be in writing, must be filed with the chief clerk within the time provided . . . and may not be based on an issue that was 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 RTC."

According to 30 TAC § 55.201(d), a hearing request must substantially comply with the following:

- (1) Give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request. If the request is made by a group or association, the request must identify one person by name, address, daytime telephone number, and, where possible, fax number, and who shall be responsible for receiving all official communications and documents for the group.
- (2) Identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requester's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requester believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the general public.
- (3) Request a contested case hearing.
- (4) List all relevant and material disputed issues of fact that were raised during the public comment period and that are the basis of the hearing request. To facilitate the commission's determination of the number and

scope of issues to be referred to hearing, the requester should, to the extent possible, specify any of the ED's responses to comments that the requester disputes and the factual basis of the dispute and list any disputed issues of law or policy.

- (5) Provide any other information specified in the public notice of application.

C. Requirement that Requester Be an Affected Person

To grant a contested case hearing, the Commission must determine that a requester is an affected person. The factors to consider in making this determination are found in 30 TAC § 55.203 and are as follows:

- (a) 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.
- (b) Governmental entities, including local governments and public agencies, with authority under state law over issues raised by the application may be considered affected persons.
- (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
 - (5) Likely impact of the regulated activity on use of the impacted natural resource by the person
 - (6) For governmental entities, their statutory authority over or interest in the issues relevant to the application.

When the requester is a group or association, it must also comply with

requirements found in 30 TAC § 55.205 which provides:

- (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.

- (c) The executive director, the public interest counsel, or the applicant may request that a group or association provide an explanation of how the group or association meets the requirements of subsection (a) of this section. The request and reply shall be filed according to the procedure in § 55.209 of this title (relating to Processing Requests for Reconsideration and Contested Case Hearing).

D. Referral to the State Office of Administrative Hearings (SOAH)

Section 50.115(b) of 30 TAC details how the Commission refers a matter to SOAH: “When the commission grants a request for a contested case hearing, the commission shall issue an order specifying the number and scope of the issues to be referred to SOAH for a hearing.” Section 50.115(c) further states, “The commission may not refer an issue to SOAH for a contested case hearing unless the commission determines that the issue: (1) involves a disputed question of fact; (2) was raised during the public comment period; and (3) is relevant and material to the decision on the application.”

IV. HEARING REQUEST ANALYSIS

A. Whether the Hearing Request Complies with 30 TAC § 55.201(c) and (d)

John D. Harkey, Jr. filed a timely hearing request individually and as trustee of the Mason Trust. Mr. Harkey and the Trust submitted a timely hearing request that raised issues presented during the public comment period that have not been withdrawn. They provided their addresses and phone numbers, or those of their representative, and requested a hearing. They identified themselves as persons with what they believed to be personal justiciable interests affected by the application, which will be discussed in greater detail below, and provided lists of disputed issues of

fact that were raised during the public comment period. The Executive Director concludes that these hearing requests substantially comply with the section 55.201(c) and (d) requirements.

B. Whether the John D. Harkey, Jr. and the Mason Trust Meet the Affected Person Requirements

The Executive Director reviewed all of the factors found in 30 TAC § 55.203 for determining if a person is an affected person and recommends that the Commission find that John D. Harkey, Jr. and the Mason Trust are affected persons because they have a personal justiciable interest related to a legal right, duty, privilege power or economic interest affected by the application, that is not common to members of the general public, and the issues Mr. Harkey and the Trust raised are included in the factors delineated in 30 TAC § 55.203.

According to the hearing request, Mr. Harkey and the Trust own approximately 4,150 acres of real property, much of which is located adjacent to the applicant's property and active operations. Mr. Harkey generally oversees ranching, hunting, and other activities on the property, and he personally maintains a dwelling, recreates, and entertains guests on the property. Mr. Harkey stated that his personal health, safety and welfare, as well as his property, animals and livestock, will be adversely affected by the industrial wastewater and stormwater management activities and discharges on and from the applicant's property in a way not common to the general public. The Trust stated that the health, safety and welfare of the Trust's trustees, beneficiaries, employees and invitees, as well as the Trust's property, animals and livestock, will be adversely affected by the industrial wastewater and stormwater management activities and discharges on and from the applicant's property in a way not common to the general public.

Mr. Harkey and the Trust identified a personal justiciable interest that is not in common to the general public and identified a reasonable relationship between their concerns and the discharge authorized by the proposed permit; therefore, the Executive Director recommends that the Commission find that John D. Harkey, Jr. and the Mason Trust **are** affected persons.

C. Whether Issues Raised Are Referable to SOAH for a Contested Case Hearing

The Executive Director analyzed the issues raised in the hearing requests that it

has recommended granting in accordance with the regulatory criteria and provides the following recommendations regarding whether the issues can be referred to SOAH if the Commission grants the hearing requests. Except where noted, all issues were raised during the public comment period, and none of the issues were withdrawn. All identified issues are considered disputed unless otherwise noted. The ED has also listed the relevant RTC responses.

Issue 1. Whether the application contains all items and information necessary for administrative and technical completeness under the agency's rules.

(Response 1, 8)

This is an issue of fact that is relevant and material to a decision on the application. The ED recommends the Commission refer this issue to SOAH if it grants the hearing requests.

Issue 2. Whether the draft permit is in compliance with all applicable water quality standards and regulations. (Response 9)

This is an issue of fact that is relevant and material to a decision on the application. The ED recommends the Commission refer this issue to SOAH if it grants the hearing requests.

Issue 3. Whether all species of pollutants that will be managed and discharged by the operations have been identified, quantified, and addressed in the application and draft permit. (Response 1)

This is an issue of fact that is relevant and material to a decision on the application. The ED recommends the Commission refer this issue to SOAH if it grants the hearing requests.

Issue 4. Whether the draft permit is sufficiently definite in its terms and conditions to ensure that the applicant is held to the representations it made in the application and during the application process. (Response 2, 9)

This is an issue of fact that is relevant and material to a decision on the application. The ED recommends the Commission refer this issue to SOAH if it grants the hearing requests.

Issue 5. Whether the proposed controls and treatment equipment constituted the best available technology and otherwise meet regulatory requirements. (Response 1)

This is an issue of fact that is relevant and material to a decision on the application. The ED recommends the Commission refer this issue to SOAH if it grants the hearing requests.

Issue 6. Whether the applicant's proposed controls and treatment equipment are capable of meeting the effluent limitations, performance characteristics, and efficiencies set forth in the application. (Response 1)

This is an issue of fact that is relevant and material to a decision on the application. The ED recommends the Commission refer this issue to SOAH if it grants the hearing requests.

Issue 7. Whether the receiving waters have sufficiently well-defined beds and banks, topographic relief, and other stream characteristics necessary to effectively convey discharges downstream and assure proper assimilation of entrained pollutants. (Responses 2, 5, and 7).

This is an issue of fact that is relevant and material to a decision on the application. The ED recommends the Commission refer this issue to SOAH if it grants the hearing requests.

Issue 8. Whether the location, dimensions, freeboard, and liners for the applicant's industrial wastewater and stormwater management basins and other surface impoundments are adequate to meet effluent limitations and prevent unauthorized discharges to surface water, groundwater and the requestors' property. (Response 6)

This is an issue of fact that is relevant and material to a decision on the application. The ED recommends the Commission refer this issue to SOAH if it grants the hearing requests.

Issue 9. Whether the proposed facilities and discharges will be protective of public health. (Response 2, 7)

This is an issue of fact that is relevant and material to a decision on the application. The ED recommends the Commission refer this issue to SOAH if it grants the hearing requests.

Issue 10. Whether the proposed facilities and discharges will be protective of aquatic and terrestrial life, including requestors' livestock. (Response 2, 7)

This is an issue of fact that is relevant and material to a decision on the application. The ED recommends the Commission refer this issue to SOAH if it grants the hearing requests.

Issue 11. Whether the proposed facilities and discharges will violate the anti-degradation policy and requirements and diminish the quality of water on or near the requestors' property, in the receiving drainage-ways or swales, Tiger Creek and other receiving waters. (Response 4, 7)

This is an issue of fact that is relevant and material to a decision on the application. The ED recommends the Commission refer this issue to SOAH if it grants the hearing requests.

Issue 12. Whether the proposed facilities and discharges will negatively affect the requestors as adjacent landowners by causing or contributing to nuisance conditions. (Response 7)

This is an issue of fact that is relevant and material to a decision on the application. The ED recommends the Commission refer this issue to SOAH if it grants the hearing requests.

Issue 13. Whether the proposed facilities and discharges will impair the existing uses of Tiger Creek and other receiving waters. (Response 2, 4, 10)

This is an issue of fact that is relevant and material to a decision on the application. The ED recommends the Commission refer this issue to SOAH if it grants the hearing requests.

Issue 14. Whether approval of the application and issuance of a permit will contravene the intent of the Texas Water Quality Act. (Response 1, 10)

This is an issue of fact that is relevant and material to a decision on the application. The ED recommends the Commission refer this issue to SOAH if it grants the hearing requests.

Issue 15. Whether all public notice and public participation requirements were met prior to the close of the comment period. (Response 11)

This is an issue of fact that is relevant and material to a decision on the application. The ED recommends the Commission refer this issue to SOAH if it grants the hearing requests.

Issue 16. Whether the ED is correct in its conclusion that all sources of process wastewater at the site are characteristically similar in origin and composition. (Response 1)

This is an issue of fact that is relevant and material to a decision on the application. The ED recommends the Commission refer this issue to SOAH if it grants the hearing requests.

Issue 17. Whether the proposed facilities and discharges will cause flooding. (Response 7)

This is a question of fact, however, it is not relevant and material to a decision on the application. The ED recommends the Commission not refer this issue to SOAH if it grants the hearing requests.

Issue 18. Whether the proposed facilities and discharges will cause erosion. (Response 7)

This is a question of fact, however, it is not relevant and material to a decision on the application. The ED recommends the Commission not refer this issue to SOAH if it grants the hearing requests.

V. CONTESTED CASE HEARING DURATION

If there is a contested case hearing on this application, the Executive Director recommends that the duration of the hearing be nine months from the preliminary hearing to the presentation of a proposal for decision to the Commission.

VI. CONCLUSION

The Executive Director recommends the following actions by the Commission:

1. The Executive Director recommends that the Commission find John D. Harkey, Jr. and the Mason Trust are affected persons and grant their hearing request.
2. If referred to SOAH, first refer the matter to Alternative Dispute Resolution for a reasonable period.
3. If referred to SOAH, refer the following issues as identified by the Executive Director:

Issue 1. Whether the application contains all items and information necessary for administrative and technical completeness under the agency's rules.

Issue 2. Whether the draft permit is in compliance with all applicable water quality standards and regulations.

Issue 3. Whether all species of pollutants that will be managed and discharged by the operations have been identified, quantified, and addressed in the application and draft permit.

Issue 4. Whether the draft permit is sufficiently definite in its terms and conditions to ensure that the applicant is held to the representations it made in the application and during the application process.

Issue 5. Whether the proposed controls and treatment equipment constituted the best available technology and otherwise meet regulatory requirements.

Issue 6. Whether the applicant's proposed controls and treatment equipment are capable of meeting the effluent limitations, performance characteristics, and efficiencies set forth in the application.

Issue 7. Whether the receiving waters have sufficiently well-defined beds and banks, topographic relief, and other stream characteristics

necessary to effectively convey discharges downstream and assure proper assimilation of entrained pollutants.

- Issue 8.** Whether the location, dimensions, freeboard, and liners for the applicant's industrial wastewater and stormwater management basins and other surface impoundments are adequate to meet effluent limitations and prevent unauthorized discharges to surface water, groundwater and the requestors' property.
- Issue 9.** Whether the proposed facilities and discharges will be protective of public health.
- Issue 10.** Whether the proposed facilities and discharges will be protective of aquatic and terrestrial life, including requestors' livestock.
- Issue 11.** Whether the proposed facilities and discharges will violate the anti-degradation policy and requirements and diminish the quality of water on or near the requestors' property, in the receiving drainage-ways or swales, Tiger Creek and other receiving waters.
- Issue 12.** Whether the proposed facilities and discharges will negatively affect the requestors as adjacent landowners by causing or contributing to nuisance conditions.
- Issue 13.** Whether the proposed facilities and discharges will impair the existing uses of Tiger Creek and other receiving waters.
- Issue 14.** Whether approval of the application and issuance of a permit will contravene the intent of the Texas Water Quality Act.
- Issue 15.** Whether all public notice and public participation requirements were met prior to the close of the comment period.

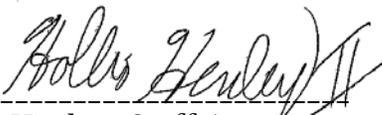
Issue 16. Whether the ED is correct in its conclusion that all sources of process wastewater at the site are characteristically similar in origin and composition.

Respectfully submitted,

Texas Commission on Environmental Quality

Richard A. Hyde, P.E., Executive Director

Robert Martinez, Environmental Law Division
Director

By: 

Hollis Henley, *Staff Attorney*
Environmental Law Division
State Bar No. 24066672
P.O. Box 13087, MC 173
Austin, Texas 78711-3087
Phone: (512) 239-2253
Fax: (512) 239-0606
E-mail: Hollis.Henley@tceq.texas.gov

Representing the Executive Director of the
Texas Commission on Environmental Quality

CERTIFICATE OF SERVICE

I certify that on September 23, 2016, the original and seven copies of the "Executive Director's Response to Hearing Request" for new Permit WQ0005166000 for FML Sand, LLC was filed with the TCEQ's Office of the Chief Clerk, and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, inter-agency mail, electronic submittal, or by deposit in the U.S. Mail.



Hollis Henley, Staff Attorney
Environmental Law Division
State Bar No. 24066672

MAILING LIST
FML SAND, LLC
DOCKET NO. 2016-1210-IWD; PERMIT NO. WQ0005166000

FOR THE APPLICANT

via First Class mail:

Mark Redlin, Plant Manager

FML Sand, LLC
P.O. Box 238
Voca, Texas 76887-0238
Tel: (325) 239-5600

Trent Campbell

FML Sand, LLC
P.O. Box 238
Voca, Texas 76887-0238
Tel: (580) 235-5824 / Fax: (580) 456-7558

Mike Melton, Director of Environmental
Fairmount Santrol
8834 Mayfield Road
Chesterland, Ohio 44026-2690
Tel: (440) 214-3200 / Fax: (440) 729-0265

FOR THE EXECUTIVE DIRECTOR

via electronic mail:

Dex Dean, Technical Staff
Texas Commission on Environmental Quality
Water Quality Division, MC-148
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-4570 / Fax: (512) 239-4430
dex.dean@tceq.texas.gov

Brian Christian, Director
Texas Commission on Environmental Quality
Environmental Assistance Division
Public Education Program, MC-108
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-4000 / Fax: (512) 239-5678
brian.christian@tceq.texas.gov

FOR PUBLIC INTEREST COUNSEL

via electronic mail:

Vic McWherter, Attorney
Texas Commission on Environmental Quality
Public Interest Counsel, MC-103
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-6363 / Fax: (512) 239-6377
vic.mcwherter@tceq.texas.gov

FOR ALTERNATIVE DISPUTE RESOLUTION

via electronic mail:

Kyle Lucas
Texas Commission on Environmental
Quality
Alternative Dispute Resolution, MC-222
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-4010 / Fax: (512) 239-4015
kyle.lucas@tceq.texas.gov

FOR THE CHIEF CLERK

via electronic filing:

Bridget C. Bohac
Texas Commission on Environmental
Quality
Office of Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-3300 / Fax: (512) 239-3311

REQUESTER(S)/INTERESTED PERSON(S):

John J. Vay
Enoch Kever PLLC
600 Congress Avenue, Suite 2800
Austin, Texas 78701-3044

ATTACHMENT A

FML Sand, LLC
TPDES Permit No. WQ0005166000
 Map Requested by TCEQ Office of Legal Services
 for Commissioners' Agenda

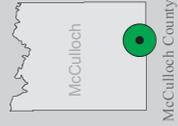
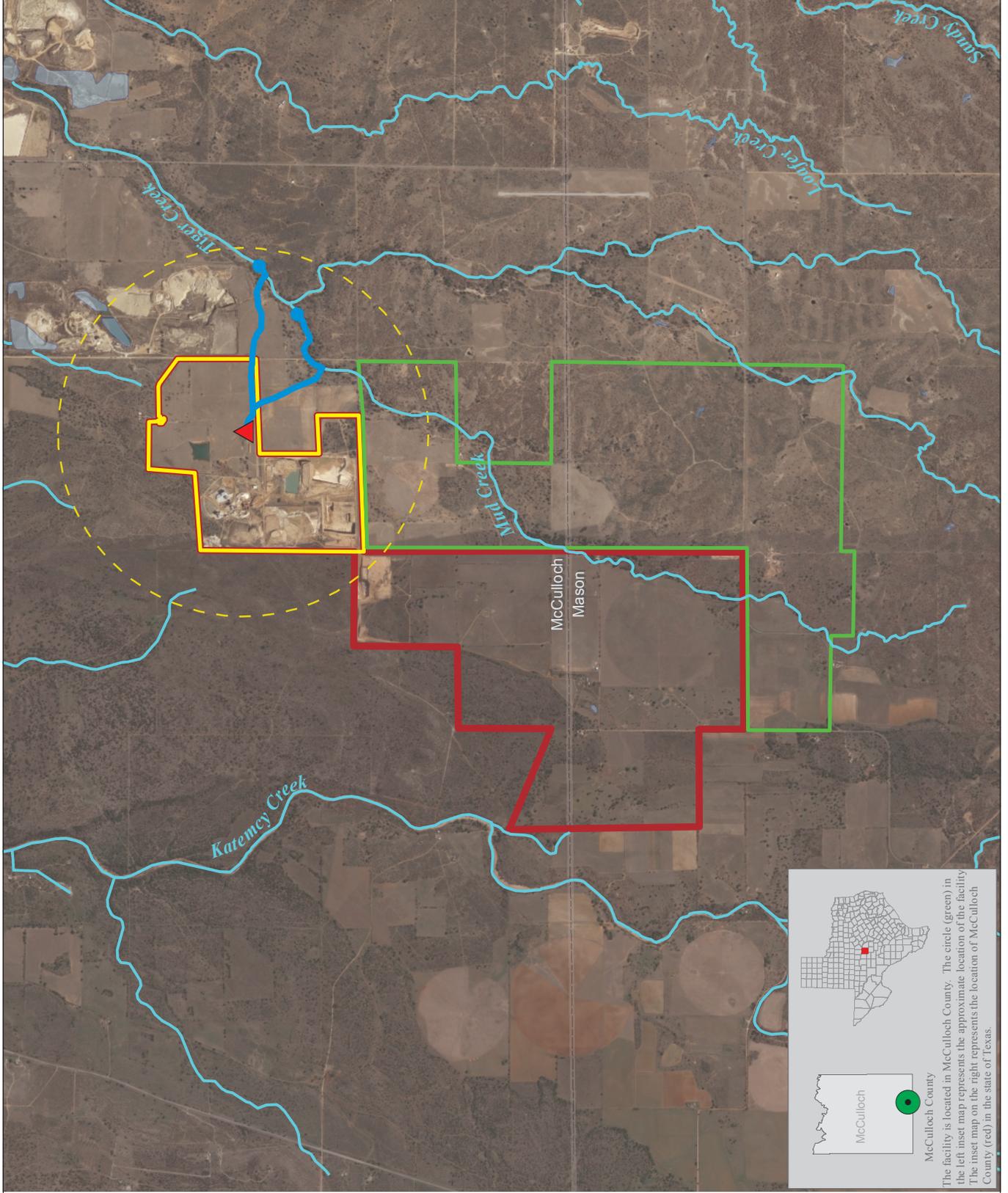
Protecting Texas by
 Reducing and
 Preventing Pollution



Texas Commission on Environmental Quality
 GIS Team (Mail Code 197)
 P.O. Box 13087
 Austin, Texas 78711-3087
 Date: 9/14/2016



- Discharge Point
- 1 mi. Downstream from Discharge Point
- John D. Harkey, Jr. and The Mason Trust Property Boundary
- FML Sand Facility Boundary
- FML Sand Property Boundary
- Buffer - 1 Mile
- Creeks
- Lakes and Reservoirs
- County Boundary



The facility is located in McCulloch County. The circle (green) in the left inset map represents the approximate location of the facility. The inset map on the right represents the location of McCulloch County (red) in the state of Texas.

Source: The location of the facility was provided by the TCEQ Office of Legal Services (OLS). OLS obtained the site location information from the applicant and the requestor information from the requestor.

This map was generated by the Information Resources Division of the Texas Commission on Environmental Quality. This product is for informational purposes and may not have been prepared for or be suitable for legal, engineering, or surveying purposes. It does not represent an on-the-ground survey and represents only the approximate relative location of property boundaries. For more information concerning this map, contact the Information Resource Division at (512) 259-0800.