

Marisa Weber

From: PUBCOMMENT-OCC
Sent: Thursday, July 07, 2016 2:46 PM
To: PUBCOMMENT-WQ; PUBCOMMENT-ELD; PUBCOMMENT-OCC2; PUBCOMMENT-OPIC
Subject: FW: Public comment on Permit Number WQ0005166000
Attachments: Harkey Reply to Response to Comment - FML Sand LLC - TPDES Permit (w Attachments) (July 6, 2016)2.pdf

H

From: jvay@enochkever.com [mailto:jvay@enochkever.com]
Sent: Wednesday, July 06, 2016 11:38 AM
To: PUBCOMMENT-OCC <PUBCOMMENT-OCC@tceq.texas.gov>
Subject: Public comment on Permit Number WQ0005166000

MND

99185

REGULATED ENTY NAME FML VOCA

RN NUMBER: RN105156624

PERMIT NUMBER: WQ0005166000

DOCKET NUMBER:

COUNTY: MCCULLOCH

PRINCIPAL NAME: FML SAND LLC

CN NUMBER: CN604371484

FROM

NAME: John Vay

E-MAIL: jvay@enochkever.com

COMPANY: Enoch Kever PLLC

ADDRESS: 600 CONGRESS AVE Ste, 2800
AUSTIN TX 78701-3238

PHONE: 5126151200

FAX:

COMMENTS: Request for Contested Case Hearing is attached.

MND



John J. Vay
Direct: (512) 615-1231
jvay@enochkever.com

July 6, 2016

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

Re: Request for Contested Case Hearing
Application for TPDES Permit No. WQ0005166000
FML Sand, LLC – CN604371484
FML Voca – RN105156624

Dear Ms. Bohac:

On December 4, 2015, Mr. John D. Harkey, Jr., and The Mason Trust (collectively, “protesting parties”) submitted written public comments and a request for a contested case hearing (“the request”) concerning the above-referenced TPDES permit application by FML Sand, LLC (“the applicant”). Included with the request was a listing of 22 relevant and material disputed issues for referral to the State Office of Administrative Hearings (“SOAH”) regarding alleged application and draft permit deficiencies and the potential adverse impacts of the proposed discharges of industrial wastewater and stormwater.

The protesting parties recently received notice of the Executive Director’s decision and a copy of the Executive Director’s Response to Public Comment (“response”). The protesting parties appreciate the Executive Director’s response and associated revisions to the draft permit. The protesting parties also appreciate the Executive Director’s efforts to work with the applicant to clarify certain aspects of the pending application.

Nevertheless, the protesting parties have ongoing, substantial concerns related to the pending application, draft permit, and proposed discharges. As outlined more specifically in the request, the protesting parties believe the application does not meet applicable requirements, the applicant has not satisfied its burden to demonstrate the proposed discharges will be protective of public health, safety and the environment, and the protesting parties will be adversely affected as a result thereof. Some of the protesting parties’ concerns were not specifically addressed in the response, while others were discussed but not resolved to the protesting parties’ satisfaction. These relevant and material disputed issues can best be explored and resolved by a contested case hearing.

Bridget C. Bohac
July 6, 2016
Page 2 of 2

Accordingly, for these reasons and the additional reasons detailed in the protesting parties' request of December 4, 2015, which request is attached and incorporated herein by reference, **the protesting parties respectfully reaffirm and reurge their request for a contested case hearing.** If this docketed matter is not directly referred to SOAH for a contested case hearing, the pending application for a permit should be set on the Commission's agenda, and the Commissioners should: (i) determine that the protesting parties are affected persons, (ii) refer all relevant and material disputed issues listed in the protesting parties' request to SOAH for a contested case hearing, and (iii) direct SOAH to complete the contested case hearing within one year.

Your attention to this matter is sincerely appreciated. Should you have any questions or desire any further information from the protesting parties, please do not hesitate to contact me.

Sincerely,



John J. Vay

**For and on Behalf of
John D. Harkey, Jr.
and The Mason Trust**

Attachment

cc: John D. Harkey, Jr.

John Vay

From: donotreply@tceq.texas.gov
Sent: Friday, December 04, 2015 3:06 PM
To: John Vay
Subject: TCEQ Confirmation: Your public comment on Permit Number WQ0005166000 was received.
Attachments: Harkey Request for Hearing - FML Sand LLC - Voca TPDES Permit (November 4, 2015).pdf

REGULATED ENTITY NAME FML VOCA

RN NUMBER: RN105156624

PERMIT NUMBER: WQ0005166000

DOCKET NUMBER:

COUNTY: MCCULLOCH

PRINCIPAL NAME: FML SAND LLC

CN NUMBER: CN604371484

FROM

NAME: John J. Vay

E-MAIL: jvay@enochkever.com

COMPANY: Enoch Kever PLLC

ADDRESS: 600 CONGRESS AVE Suite 2800
AUSTIN TX 78701-3238

PHONE: 5126151200

FAX:

COMMENTS: See Attached Comments and Request for Contested Case Hearing by John D. Harkey, Jr. and The Mason Trust (attachment).

Based on TCEQ rule Section 1.10(h), the TCEQ General Counsel has waived the filing requirements of Section 1.10(c) to allow the filing of comments, requests, or withdrawals using this online system. The General Counsel also has waived the requirements of Section 1.10(e) so that the time of filing your electronic comments or requests is the time this online system receives your comments or requests. Comments or requests are considered timely if received by 5:00 p.m. CST on the due date.

ATTACHMENT TO REQUEST FOR CONTESTED CASE HEARING



John J. Vay
Direct: (512) 615-1231
jvay@enochkever.com

December 4, 2015

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

Re: Request for a Contested Case Hearing
FML Sand, LLC – CN604371484
FML Voca – RN105156624
Application for TPDES Permit No. WQ0005166000

Dear Ms. Bohac:

I. Request for a Contested Case Hearing

The following individuals and entities (collectively the “protesting parties” or “protestants”) hereby respectfully request a contested case hearing concerning the above-referenced TPDES permit application by FML Sand, LLC (“applicant”). The following information is provided for each protesting party as requested in the TCEQ’s *Notice of Application and Preliminary Decision for TPDES Permit for Industrial Wastewater* published on November 4, 2015. The application was received by the TCEQ on June 12, 2015, and is not subject to Senate Bill 709 (84th Reg. Legislative Session).

- A. **John D. Harkey, Jr., 3639 Beverly Drive, Dallas, Texas 75205, daytime telephone (972) 888-8199.** Mr. Harkey is the trustee and a present beneficiary under The Mason Trust which owns approximately 4,150 acres of real property and improvements in McCulloch and Mason Counties, much of which is located adjacent to the applicant’s property and active operations. Mr. Harkey generally oversees the ranching, hunting, and other activities on the referenced property and he personally maintains a dwelling, recreates, and entertains guests on the property. Among other things, Mr. Harkey’s 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.

- B. **The Mason Trust, John D. Harkey, Jr., Trustee, 14 Canyon Creek, Brownwood, Texas 76801, daytime telephone (972) 888-8199.** The Mason Trust owns approximately 4,150 acres of real property and improvements in Mason and McCulloch Counties, much of which is located adjacent to the applicant's property and active operations. Among other things, 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.

II. Public Notice Deficiency

As a preliminary matter, despite representations contained in the recently published public notice, copies of the complete permit application, the Executive Director's preliminary decision, and the draft permit were not all available for viewing and copying at the local public library when representatives of the protesting parties (and apparently other interested persons) made post-publication efforts to obtain and review the required documentation from the librarian. As of noon on December 4, 2015, these materials had still not been filed with or otherwise made available at the library, as required by law and as declared in the newspaper notice. Accordingly, the application suffers from a public notice defect and a failure to comply with the TCEQ's public participation requirements which must be cured by the applicant before the public comment period can officially close (*i.e.*, republication of the *Notice of Application and Preliminary Decision* in the newspaper and contemporaneous reposting of all required documentation at the local public library on the first day of such newspaper publication).

III. General Statement of Concerns and Adverse Impacts

The permit application appears to present alternative discharge routes through two unnamed drainage-ways or swales, thence to Tiger Creek and the San Saba River in Segment No. 1416 of the Colorado River Basin. The southernmost drainage-way or swale flows from the point of discharge on the applicant's property to the south-southeast, directly toward and in very close proximity to the protestants' adjacent property, before entering Tiger Creek. Tiger Creek passes through the protesting parties' property near the applicant's operations.

The unnamed drainage-ways or swales, and their respective confluences with Tiger Creek, do not have sufficiently well-defined beds and banks, topographic relief, and other stream characteristics necessary to effectively convey the variable flows (upwards of 43 million gallons per day) of industrial wastewater and stormwater downstream from the applicant's operations and assure the proper assimilation of entrained pollutants. Among other things, the protestants are concerned that industrial wastewater and stormwater flows will hydraulically overload the drainage-ways or swales, as well as the downstream confluences and receiving waters, thereby allowing waterborne pollutants to overflow the banks, be discharged across the surface of the ground, cause significant erosion, deposit substantial pollutants, and otherwise result in poor water quality and nuisance conditions. Additionally, industrial wastewater and stormwater flows may intermittently pool and backup within and along these poorly defined drainage-ways or

swales and the downstream confluences and receiving waters, further affecting the adjacent property owners through increased flooding, poor water quality and nuisance conditions.

It is the protestants' understanding that the applicant, in addition to physically processing the mined sand, also treats the processed sands and the accompanying process wastewater streams with a variety of chemicals and additives (e.g., solvents, coatings, resins, etc.) to facilitate their subsequent use in oil and gas hydraulic fracturing. The applicant has not adequately disclosed its use and the composition of such chemicals and additives (e.g., MSDS sheets) nor the extent to which those constituents may potentially be released at the site. Although the applicant is requesting authority to store and discharge process wastewater commingled with stormwater emanating from various operational processes across the site, the applicant has failed to identify and fully evaluate all pollutant-generating sources and species of pollutants that may be discharged from, and allowed to seep or percolate through, its four unlined earthen ponds, thereby adversely impacting both surface water and groundwater resources on or adjacent to the protestants' property.

It is conspicuously apparent from the application and the agency's technical review that there has been no sampling and detailed laboratory analysis of the process wastewater or stormwater that is currently being generated, stored and otherwise managed by the applicant at the site. In the absence of such data, a series of assumptions have been made during the technical review of the application including, by way of limited example, calculations of the dissolved fraction of constituents and water effect ratios that drive the determination of appropriate water quality-based effluent limitations for the discharges. Similarly, technology-based effluent limitations (beyond mere oil and grease) cannot be fully evaluated and established based on best professional judgment ("BPJ") when all potential constituents of concern have not been identified by the applicant. Additionally, there has been no screening for total dissolved solids, chlorides, sulfates, and other common parameters because of the absence of sampling analysis.

The various permitting assumptions established during the agency's technical review, including the conclusion that all sources of process wastewater generated at the site are characteristically similar in composition and origin, have not been supported by actual sampling of all pollutant-generating sources and species of pollutants. The absence of such analytical data has been attributed to the fact that the applicant has not yet been authorized to discharge such process wastewater and stormwater and, therefore, has not had the opportunity to sample such discharges – despite the fact that these facilities have been operational since approximately 2008. Unfortunately, such sampling and analysis, and the technical evaluation of any potentially necessary permit terms and conditions, are proposed to occur after the permit has been issued and the facility has commenced discharging pollutants into and adjacent to waters in the state.

From the protestants' perspective, it is inappropriate to issue a permit without such reasonably ascertainable data, cause the adjacent property owners to be subjected to the adverse effects of such process wastewater and stormwater management and discharges, and then hope that the permit will be subsequently reopened in the future to include additional effluent limitations, monitoring and reporting requirements based on further testing and evaluation (for which the protesting parties may have no ability to formally review or challenge). Based on a review of the applicant's compliance history report and previous notices of violation (NOVs),

there is no assurance that the requisite testing, analysis and reporting will be timely and adequately performed in any event. The applicant has failed to meet its technical burden and the agency's proposed permitting action (TPDES permit) suffers from a lack of finality, leaving it subject to a legal challenge.

The applicant's water balance documentation indicates a 30,000 gallon per minute (gpm) rate of discharge from the outfall (TPDES discharge) which equates to 43 million gallons per day (MGD). The protestants do not believe the proposed receiving waters are physically capable of receiving and properly conveying 43 MGD of flow and will be hydraulically overloaded. At 45 mg/L of total suspended solids (TSS) (*i.e.*, permitted daily maximum), the 43 MGD of flow would convey more than 16,000 pounds per day of TSS into the receiving waters, which the protestants do not believe can be adequately assimilated by those receiving waters without causing water quality and nuisance conditions. Additionally, the applicant's clarifier unit is only associated with the recirculation of process wastewater through its sand washing plant, not the treatment of process wastewater and stormwater to be discharged from the retention ponds. Thus, the actual concentration of TSS to be discharged is not currently known – and it cannot be estimated since no sampling analysis has been provided by the applicant – and there are no associated wastewater treatment facilities immediately preceding the discharge (*i.e.*, no calculable removal efficiency). Accordingly, this is a case of pinning an effluent limitation in a permit without the applicant having demonstrated that its facilities are actually capable of achieving such limitation.

The applicant is proposing to discharge into receiving waters that drain to the San Saba River in Segment No. 1416 of the Colorado River Basin. Segment No. 1416 is currently listed on the State's inventory of impaired and threatened waters (*i.e.*, Clean Water Act § 303(d) list). The protesting parties understand that the § 303(d) listing relates to elevated bacteria levels in the watershed and the applicant is not formally proposing to discharge treated domestic wastewater effluent. However, the applicant does maintain one or more private sewerage systems at its expansive operations, which may potentially contribute bacteria to the stormwater that is commingled with process wastewater and then stored (*i.e.*, allowed to propagate) in retention ponds prior to discharge. Again, in the absence of any sampling and analysis of the process wastewater and stormwater being generated, stored and discharged from the site, the stated assumption that there are "no sources of bacteria" present in the discharges has not been technically supported.

Additionally, the applicant proposes to operate several large (up to 14-acre / 370 million gallon) process wastewater and stormwater management (unlined earthen) retention ponds within the southern portion of its operations in close proximity to the protestants' property. One of the earthen ponds appears to be located within 100 yards of the applicant's property line adjacent to County Road 216 and the protestants' property. The design, placement and use of such earthen ponds presents a risk of breach, overflows, seepage, and nuisance conditions that will adversely and uniquely affect the adjacent protesting parties.

The application indicates that process wastewater and stormwater will infiltrate through the unlined water retention ponds into the subsurface, thereby altering the quality of groundwater adjacent to the protesting parties' property and their groundwater wells. By way of example, it

appears that nearly 1,500 gpm of process wastewater and stormwater are infiltrating from retention pond No. 3 and nearly 3,000 gpm are infiltrating from retention pond No. 4 into the subsurface (cumulatively more than 6 MGD from two of the four retention ponds). Those two retention ponds are located in close proximity to six (6) different water wells identified in the TWDB's groundwater database, all of which appear to be shallow wells. Three (3) of those wells are located on adjacent property near or along the applicant's fence line, including a shallow well owned by the protesting parties. Within the ½-mile area of review extending from the applicant's four retention ponds, there are 3 shallow water wells located on the protesting parties' adjacent property. The closest pond (retention pond No. 4) has been excavated below the seasonal high water table, such that the pond and its process wastewater and stormwater constituents are in communication with the groundwater adjacent to the protestants' property.

In addition to the foregoing considerations, the protesting parties are concerned that the treatment processes, operational controls, effluent limitations, monitoring, and reporting requirements proposed in the application and draft permit are insufficient to assure adequate protection of public health, safety and the environment as further indicated below.

IV. Referral and Relevant and Material Disputed Issues

Based on a preliminary review of the applicant's pending application for a TPDES permit, the following relevant and material disputed issues should be referred by the Commissioners to SOAH for a contested case hearing (if this matter is not directly referred to SOAH based on a request of the applicant). The following list is not intended as a direct or implied limitation on the issues that the protesting parties may otherwise raise during the ongoing public comment period or any contested case hearing on the pending application.

1. *Whether the application contains all items and information necessary for administrative and technical completeness under the agency's rules.* The protesting parties do not believe the application contains all items and information necessary for administrative and technical completeness under the agency's rules.
2. *Whether the wastewater and stormwater generating process descriptions set forth in the application are sufficiently specific to properly quantify and regulate contributions and discharges from all sources of pollutants at the facility including, without limitation, all production areas, maintenance areas, materials handling areas, and waste disposal areas.* The protesting parties do not believe the wastewater and stormwater generating process descriptions set forth in the application are sufficiently specific to properly quantify and regulate contributions and discharges from all sources of pollutants at the facility.
3. *Whether all raw materials, intermediate products and final products handled at the facility and all other potential sources of pollutants associated with the facility are sufficiently identified in the application.* The protesting parties do not believe that all potential sources of pollutants associated with the facility are sufficiently identified in the application.

4. *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.* The protesting parties do not believe 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.
5. *Whether the applicant's proposed controls and treatment equipment constitute the best available technology and otherwise meet regulatory requirements.* The protesting parties do not believe the applicant's proposed controls and treatment equipment constitute the best available technology and otherwise meet regulatory requirements.
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.* The protesting parties do not believe the applicant's proposed controls and treatment equipment are capable of meeting the effluent limitations, performance characteristics and efficiencies set forth in the application.
7. *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.* The protesting parties believe the draft permit is not 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.
8. *Whether the draft permit is sufficiently definite in its terms and conditions to ensure compliance with all applicable water quality standards and regulations.* The protesting parties believe the draft permit is not sufficiently definite in its terms and conditions to ensure compliance with applicable water quality standards and regulations.
9. *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.* The protesting parties do not believe 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.
10. *Whether the location, dimensions, freeboard, and liners for the applicant's industrial wastewater and stormwater management basins and other surface impoundments are adequate to prevent unauthorized discharges to surface water, groundwater and the protestants' property and meet effluent limitations.* The protesting parties do not believe the location, dimensions, freeboard, and liners for the applicant's surface impoundments are adequate to prevent unauthorized discharges to surface water, groundwater and the protestants' property and meet effluent limitations.

11. *Whether the proposed facilities and discharges will be protective of public health, aquatic resources, terrestrial life, and other environmental and economic resources.* The protesting parties do not believe the proposed facilities and discharges will be protective of public health, aquatic resources, terrestrial life, and other environmental and economic resources.
12. *Whether the proposed facilities and discharges will cause or contribute to a condition of water pollution.* The protesting parties believe the proposed facilities and discharges will cause or contribute to a condition of water pollution.
13. *Whether the proposed facilities and discharges will cause or contribute to nuisance conditions.* The protesting parties believe the proposed facilities and discharges will cause or contribute to nuisance conditions.
14. *Whether the proposed facilities and discharges will be injurious to human health, animals and livestock.* The protesting parties believe the proposed facilities and discharges will be injurious to human health, animals and livestock.
15. *Whether the proposed facilities and discharges will adversely impact the quality of water on or near the protestants' property.* The protesting parties believe the proposed facilities and discharges will adversely impact the quality of water on or near the protestants' property.
16. *Whether the proposed facilities and discharges will diminish and degrade the quality of water in the receiving drainage-ways or swales, Tiger Creek and other receiving waters.* The protesting parties believe the proposed facilities and discharges will diminish and degrade the quality of water in the receiving drainage-ways or swales, Tiger Creek and other receiving waters.
17. *Whether the proposed facilities, discharges, and permit will cause a condition of pollution in or along the receiving drainage-ways or swales, Tiger Creek and other receiving waters.* The protesting parties believe the proposed facilities, discharges, and permit will cause a condition of pollution in or along the receiving drainage-ways or swales, Tiger Creek and other receiving waters.
18. *Whether the proposed facilities, discharges, and permit will cause nuisance conditions in and along the receiving drainage-ways or swales, Tiger Creek and other receiving waters.* The protesting parties believe the proposed facilities, discharges, and permit will cause nuisance conditions in and along the receiving drainage-ways or swales, Tiger Creek and other receiving waters.
19. *Whether the proposed facilities and discharges will negatively exceed the in-stream surface water quality standards and other criteria for the receiving waters and river segment.* The protesting parties believe the proposed facilities, discharges, and permit will negatively exceed the in-stream surface water quality standards and other criteria for the receiving waters and river segment.

20. *Whether the proposed facilities and discharges will impair (not maintain and protect) the existing uses of Tiger Creek and other receiving waters.* The protesting parties believe the proposed facilities and discharges will impair (not maintain and protect) the existing uses of Tiger Creek and other receiving waters.
21. *Whether the proposed facilities and discharges will violate the anti-degradation policy and requirements.* The protesting parties believe the proposed facilities and discharges will violate the anti-degradation policy and requirements.
22. *Whether approval of the application and issuance of a permit will contravene the intent of the Texas Water Quality Control Act.* The protesting parties believe approval of the application and issuance of a permit will contravene the intent of the Texas Water Quality Act (Chapter 26 of the Texas Water Code).

III. Request for Relief

It appears to the protesting parties that the pending application for a permit is deficient in a number of significant respects. As such, the applicant has not met its burden of demonstrating compliance with all applicable requirements intended to protect public health, safety and the environment. If such an application is approved by the TCEQ, the health, safety and welfare of the protesting parties, as well as their invitees, property, animals and livestock, will be adversely affected by the applicant's management and discharge of industrial wastewater and stormwater in a manner not common to the general public.

Based on the foregoing considerations, the pending application for a permit should be set on the TCEQ's contested agenda, and the Commissioners should (i) determine that the protesting parties are affected persons, (ii) refer the preceding list of relevant and material disputed issues to SOAH for a contested case hearing, and (iii) direct SOAH to complete the contested case hearing within a period of one year.

Your kind attention to these matters is sincerely appreciated. Should you have any questions or desire any further information from the protesting parties, please do not hesitate to contact me.

Sincerely,



John J. Vay

**For and on Behalf of
John D. Harkey, Jr.
and The Mason Trust**

cc: John D. Harkey, Jr.

Delivery Method

Type

Date Time AM PM

Acknowledgment Date

See Attached Comments and Request for Contested Case Hearing by John D. Harkey, Jr. and The Mason Trust (attachment).

Documents

FileName

Harkey Request for Hearing - FML Sand LLC - Voca TPDES Permit (November 4, 2015).pdf

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John J. Vay
Direct: (512) 615-1231
jvay@eochkever.com

December 4, 2015

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

Re: Request for a Contested Case Hearing
FML Sand, LLC – CN604371484
FML Voca – RN105156624
Application for TPDES Permit No. WQ0005166000

Dear Ms. Bohac:

I. Request for a Contested Case Hearing

The following individuals and entities (collectively the “protesting parties” or “protestants”) hereby respectfully request a contested case hearing concerning the above-referenced TPDES permit application by FML Sand, LLC (“applicant”). The following information is provided for each protesting party as requested in the TCEQ’s *Notice of Application and Preliminary Decision for TPDES Permit for Industrial Wastewater* published on November 4, 2015. The application was received by the TCEQ on June 12, 2015, and is not subject to Senate Bill 709 (84th Reg. Legislative Session).

- A. **John D. Harkey, Jr., 3639 Beverly Drive, Dallas, Texas 75205, daytime telephone (972) 888-8199.** Mr. Harkey is the trustee and a present beneficiary under The Mason Trust which owns approximately 4,150 acres of real property and improvements in McCulloch and Mason Counties, much of which is located adjacent to the applicant’s property and active operations. Mr. Harkey generally oversees the ranching, hunting, and other activities on the referenced property and he personally maintains a dwelling, recreates, and entertains guests on the property. Among other things, Mr. Harkey’s 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.

- B. **The Mason Trust, John D. Harkey, Jr., Trustee, 14 Canyon Creek, Brownwood, Texas 76801, daytime telephone (972) 888-8199.** The Mason Trust owns approximately 4,150 acres of real property and improvements in Mason and McCulloch Counties, much of which is located adjacent to the applicant's property and active operations. Among other things, 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.

II. Public Notice Deficiency

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III. General Statement of Concerns and Adverse Impacts

The permit application appears to present alternative discharge routes through two unnamed drainage-ways or swales, thence to Tiger Creek and the San Saba River in Segment No. 1416 of the Colorado River Basin. The southernmost drainage-way or swale flows from the point of discharge on the applicant's property to the south-southeast, directly toward and in very close proximity to the protestants' adjacent property, before entering Tiger Creek. Tiger Creek passes through the protesting parties' property near the applicant's operations.

The unnamed drainage-ways or swales, and their respective confluences with Tiger Creek, do not have sufficiently well-defined beds and banks, topographic relief, and other stream characteristics necessary to effectively convey the variable flows (upwards of 43 million gallons per day) of industrial wastewater and stormwater downstream from the applicant's operations and assure the proper assimilation of entrained pollutants. Among other things, the protestants are concerned that industrial wastewater and stormwater flows will hydraulically overload the drainage-ways or swales, as well as the downstream confluences and receiving waters, thereby allowing waterborne pollutants to overflow the banks, be discharged across the surface of the ground, cause significant erosion, deposit substantial pollutants, and otherwise result in poor water quality and nuisance conditions. Additionally, industrial wastewater and stormwater flows may intermittently pool and backup within and along these poorly defined drainage-ways or

swales and the downstream confluences and receiving waters, further affecting the adjacent property owners through increased flooding, poor water quality and nuisance conditions.

It is the protestants' understanding that the applicant, in addition to physically processing the mined sand, also treats the processed sands and the accompanying process wastewater streams with a variety of chemicals and additives (e.g., solvents, coatings, resins, etc.) to facilitate their subsequent use in oil and gas hydraulic fracturing. The applicant has not adequately disclosed its use and the composition of such chemicals and additives (e.g., MSDS sheets) nor the extent to which those constituents may potentially be released at the site. Although the applicant is requesting authority to store and discharge process wastewater commingled with stormwater emanating from various operational processes across the site, the applicant has failed to identify and fully evaluate all pollutant-generating sources and species of pollutants that may be discharged from, and allowed to seep or percolate through, its four unlined earthen ponds, thereby adversely impacting both surface water and groundwater resources on or adjacent to the protestants' property.

It is conspicuously apparent from the application and the agency's technical review that there has been no sampling and detailed laboratory analysis of the process wastewater or stormwater that is currently being generated, stored and otherwise managed by the applicant at the site. In the absence of such data, a series of assumptions have been made during the technical review of the application including, by way of limited example, calculations of the dissolved fraction of constituents and water effect ratios that drive the determination of appropriate water quality-based effluent limitations for the discharges. Similarly, technology-based effluent limitations (beyond mere oil and grease) cannot be fully evaluated and established based on best professional judgment ("BPJ") when all potential constituents of concern have not been identified by the applicant. Additionally, there has been no screening for total dissolved solids, chlorides, sulfates, and other common parameters because of the absence of sampling analysis.

The various permitting assumptions established during the agency's technical review, including the conclusion that all sources of process wastewater generated at the site are characteristically similar in composition and origin, have not been supported by actual sampling of all pollutant-generating sources and species of pollutants. The absence of such analytical data has been attributed to the fact that the applicant has not yet been authorized to discharge such process wastewater and stormwater and, therefore, has not had the opportunity to sample such discharges – despite the fact that these facilities have been operational since approximately 2008. Unfortunately, such sampling and analysis, and the technical evaluation of any potentially necessary permit terms and conditions, are proposed to occur after the permit has been issued and the facility has commenced discharging pollutants into and adjacent to waters in the state.

From the protestants' perspective, it is inappropriate to issue a permit without such reasonably ascertainable data, cause the adjacent property owners to be subjected to the adverse effects of such process wastewater and stormwater management and discharges, and then hope that the permit will be subsequently reopened in the future to include additional effluent limitations, monitoring and reporting requirements based on further testing and evaluation (for which the protesting parties may have no ability to formally review or challenge). Based on a review of the applicant's compliance history report and previous notices of violation (NOVs),

there is no assurance that the requisite testing, analysis and reporting will be timely and adequately performed in any event. The applicant has failed to meet its technical burden and the agency's proposed permitting action (TPDES permit) suffers from a lack of finality, leaving it subject to a legal challenge.

The applicant's water balance documentation indicates a 30,000 gallon per minute (gpm) rate of discharge from the outfall (TPDES discharge) which equates to 43 million gallons per day (MDG). The protestants do not believe the proposed receiving waters are physically capable of receiving and properly conveying 43 MGD of flow and will be hydraulically overloaded. At 45 mg/L of total suspended solids (TSS) (*i.e.*, permitted daily maximum), the 43 MGD of flow would convey more than 16,000 pounds per day of TSS into the receiving waters, which the protestants do not believe can be adequately assimilated by those receiving waters without causing water quality and nuisance conditions. Additionally, the applicant's clarifier unit is only associated with the recirculation of process wastewater through its sand washing plant, not the treatment of process wastewater and stormwater to be discharged from the retention ponds. Thus, the actual concentration of TSS to be discharged is not currently known – and it cannot be estimated since no sampling analysis has been provided by the applicant – and there are no associated wastewater treatment facilities immediately preceding the discharge (*i.e.*, no calculable removal efficiency). Accordingly, this is a case of pinning an effluent limitation in a permit without the applicant having demonstrated that its facilities are actually capable of achieving such limitation.

The applicant is proposing to discharge into receiving waters that drain to the San Saba River in Segment No. 1416 of the Colorado River Basin. Segment No. 1416 is currently listed on the State's inventory of impaired and threatened waters (*i.e.*, Clean Water Act § 303(d) list). The protesting parties understand that the § 303(d) listing relates to elevated bacteria levels in the watershed and the applicant is not formally proposing to discharge treated domestic wastewater effluent. However, the applicant does maintain one or more private sewerage systems at its expansive operations, which may potentially contribute bacteria to the stormwater that is commingled with process wastewater and then stored (*i.e.*, allowed to propagate) in retention ponds prior to discharge. Again, in the absence of any sampling and analysis of the process wastewater and stormwater being generated, stored and discharged from the site, the stated assumption that there are "no sources of bacteria" present in the discharges has not been technically supported.

Additionally, the applicant proposes to operate several large (up to 14-acre / 370 million gallon) process wastewater and stormwater management (unlined earthen) retention ponds within the southern portion of its operations in close proximity to the protestants' property. One of the earthen ponds appears to be located within 100 yards of the applicant's property line adjacent to County Road 216 and the protestants' property. The design, placement and use of such earthen ponds presents a risk of breach, overflows, seepage, and nuisance conditions that will adversely and uniquely affect the adjacent protesting parties.

The application indicates that process wastewater and stormwater will infiltrate through the unlined water retention ponds into the subsurface, thereby altering the quality of groundwater adjacent to the protesting parties' property and their groundwater wells. By way of example, it

appears that nearly 1,500 gpm of process wastewater and stormwater are infiltrating from retention pond No. 3 and nearly 3,000 gpm are infiltrating from retention pond No. 4 into the subsurface (cumulatively more than 6 MGD from two of the four retention ponds). Those two retention ponds are located in close proximity to six (6) different water wells identified in the TWDB's groundwater database, all of which appear to be shallow wells. Three (3) of those wells are located on adjacent property near or along the applicant's fence line, including a shallow well owned by the protesting parties. Within the ½-mile area of review extending from the applicant's four retention ponds, there are 3 shallow water wells located on the protesting parties' adjacent property. The closest pond (retention pond No. 4) has been excavated below the seasonal high water table, such that the pond and its process wastewater and stormwater constituents are in communication with the groundwater adjacent to the protestants' property.

In addition to the foregoing considerations, the protesting parties are concerned that the treatment processes, operational controls, effluent limitations, monitoring, and reporting requirements proposed in the application and draft permit are insufficient to assure adequate protection of public health, safety and the environment as further indicated below.

IV. Referral and Relevant and Material Disputed Issues

Based on a preliminary review of the applicant's pending application for a TPDES permit, the following relevant and material disputed issues should be referred by the Commissioners to SOAH for a contested case hearing (if this matter is not directly referred to SOAH based on a request of the applicant). The following list is not intended as a direct or implied limitation on the issues that the protesting parties may otherwise raise during the ongoing public comment period or any contested case hearing on the pending application.

1. *Whether the application contains all items and information necessary for administrative and technical completeness under the agency's rules.* The protesting parties do not believe the application contains all items and information necessary for administrative and technical completeness under the agency's rules.
2. *Whether the wastewater and stormwater generating process descriptions set forth in the application are sufficiently specific to properly quantify and regulate contributions and discharges from all sources of pollutants at the facility including, without limitation, all production areas, maintenance areas, materials handling areas, and waste disposal areas.* The protesting parties do not believe the wastewater and stormwater generating process descriptions set forth in the application are sufficiently specific to properly quantify and regulate contributions and discharges from all sources of pollutants at the facility.
3. *Whether all raw materials, intermediate products and final products handled at the facility and all other potential sources of pollutants associated with the facility are sufficiently identified in the application.* The protesting parties do not believe that all potential sources of pollutants associated with the facility are sufficiently identified in the application.

4. *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.* The protesting parties do not believe 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.
5. *Whether the applicant's proposed controls and treatment equipment constitute the best available technology and otherwise meet regulatory requirements.* The protesting parties do not believe the applicant's proposed controls and treatment equipment constitute the best available technology and otherwise meet regulatory requirements.
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.* The protesting parties do not believe the applicant's proposed controls and treatment equipment are capable of meeting the effluent limitations, performance characteristics and efficiencies set forth in the application.
7. *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.* The protesting parties believe the draft permit is not 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.
8. *Whether the draft permit is sufficiently definite in its terms and conditions to ensure compliance with all applicable water quality standards and regulations.* The protesting parties believe the draft permit is not sufficiently definite in its terms and conditions to ensure compliance with applicable water quality standards and regulations.
9. *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.* The protesting parties do not believe 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.
10. *Whether the location, dimensions, freeboard, and liners for the applicant's industrial wastewater and stormwater management basins and other surface impoundments are adequate to prevent unauthorized discharges to surface water, groundwater and the protestants' property and meet effluent limitations.* The protesting parties do not believe the location, dimensions, freeboard, and liners for the applicant's surface impoundments are adequate to prevent unauthorized discharges to surface water, groundwater and the protestants' property and meet effluent limitations.

11. *Whether the proposed facilities and discharges will be protective of public health, aquatic resources, terrestrial life, and other environmental and economic resources.* The protesting parties do not believe the proposed facilities and discharges will be protective of public health, aquatic resources, terrestrial life, and other environmental and economic resources.
12. *Whether the proposed facilities and discharges will cause or contribute to a condition of water pollution.* The protesting parties believe the proposed facilities and discharges will cause or contribute to a condition of water pollution.
13. *Whether the proposed facilities and discharges will cause or contribute to nuisance conditions.* The protesting parties believe the proposed facilities and discharges will cause or contribute to nuisance conditions.
14. *Whether the proposed facilities and discharges will be injurious to human health, animals and livestock.* The protesting parties believe the proposed facilities and discharges will be injurious to human health, animals and livestock.
15. *Whether the proposed facilities and discharges will adversely impact the quality of water on or near the protestants' property.* The protesting parties believe the proposed facilities and discharges will adversely impact the quality of water on or near the protestants' property.
16. *Whether the proposed facilities and discharges will diminish and degrade the quality of water in the receiving drainage-ways or swales, Tiger Creek and other receiving waters.* The protesting parties believe the proposed facilities and discharges will diminish and degrade the quality of water in the receiving drainage-ways or swales, Tiger Creek and other receiving waters.
17. *Whether the proposed facilities, discharges, and permit will cause a condition of pollution in or along the receiving drainage-ways or swales, Tiger Creek and other receiving waters.* The protesting parties believe the proposed facilities, discharges, and permit will cause a condition of pollution in or along the receiving drainage-ways or swales, Tiger Creek and other receiving waters.
18. *Whether the proposed facilities, discharges, and permit will cause nuisance conditions in and along the receiving drainage-ways or swales, Tiger Creek and other receiving waters.* The protesting parties believe the proposed facilities, discharges, and permit will cause nuisance conditions in and along the receiving drainage-ways or swales, Tiger Creek and other receiving waters.
19. *Whether the proposed facilities and discharges will negatively exceed the in-stream surface water quality standards and other criteria for the receiving waters and river segment.* The protesting parties believe the proposed facilities, discharges, and permit will negatively exceed the in-stream surface water quality standards and other criteria for the receiving waters and river segment.

20. *Whether the proposed facilities and discharges will impair (not maintain and protect) the existing uses of Tiger Creek and other receiving waters.* The protesting parties believe the proposed facilities and discharges will impair (not maintain and protect) the existing uses of Tiger Creek and other receiving waters.
21. *Whether the proposed facilities and discharges will violate the anti-degradation policy and requirements.* The protesting parties believe the proposed facilities and discharges will violate the anti-degradation policy and requirements.
22. *Whether approval of the application and issuance of a permit will contravene the intent of the Texas Water Quality Control Act.* The protesting parties believe approval of the application and issuance of a permit will contravene the intent of the Texas Water Quality Act (Chapter 26 of the Texas Water Code).

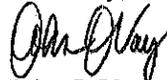
III. Request for Relief

It appears to the protesting parties that the pending application for a permit is deficient in a number of significant respects. As such, the applicant has not met its burden of demonstrating compliance with all applicable requirements intended to protect public health, safety and the environment. If such an application is approved by the TCEQ, the health, safety and welfare of the protesting parties, as well as their invitees, property, animals and livestock, will be adversely affected by the applicant's management and discharge of industrial wastewater and stormwater in a manner not common to the general public.

Based on the foregoing considerations, the pending application for a permit should be set on the TCEQ's contested agenda, and the Commissioners should (i) determine that the protesting parties are affected persons, (ii) refer the preceding list of relevant and material disputed issues to SOAH for a contested case hearing, and (iii) direct SOAH to complete the contested case hearing within a period of one year.

Your kind attention to these matters is sincerely appreciated. Should you have any questions or desire any further information from the protesting parties, please do not hesitate to contact me.

Sincerely,



John J. Vay

**For and on Behalf of
John D. Harkey, Jr.
and The Mason Trust**

cc: John D. Harkey, Jr.