

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



Vic McWherter, Public Interest Counsel

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

September 23, 2016

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 SAND, LLC**
TCEQ DOCKET NO. 2016-1210-IWD

Dear Ms. Bohac:

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

Sincerely,

A handwritten signature in black ink, appearing to read "Rudy Calderon".

Rudy Calderon, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2016-1210-IWD

**IN THE MATTER OF THE
APPLICATION OF FML SAND,
LLC FOR TPDES PERMIT
NO. WQ0005166000**

**BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL QUALITY**

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE TO
REQUESTS FOR HEARING**

To the Honorable Members of the Texas Commission on Environmental Quality:

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) files this Response to Requests for Hearing.

I. Introduction

A. Background of Facility

FML Sand, LLC (FML or Applicant) has applied to the TCEQ for a new Texas Pollutant Discharge Elimination System (TPDES) permit, No. WQ0005166000, that 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.

B. Procedural Background

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. On June 3, 2016, the ED filed his Response to Public Comment, and on June 7, 2016, the Chief Clerk mailed notice of the Executive Director's (ED) final decision and Response to Comments. The deadline to request a contested case hearing or reconsideration of the ED's decision was July 7, 2016.

TCEQ received timely comments and requests for a contested case hearing jointly from John Harkey Jr. and The Mason Trust, through their attorney John J. Vay of the law firm Enoch Kever, PLLC.

II. Applicable Law

Hearing Request

The ED declared this application administratively complete on August 21, 2015. Because the application was declared administratively complete after September 1, 1999, a person may request a contested case hearing on the application pursuant to the

requirements of House Bill 801, Act of May 30, 1999, 76th Leg., R.S., § 5 (codified at TEX. WATER CODE (TWC) § 5.556).

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 the application.

30 TAC § 55.201(d).

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."

30 TAC § 55.203(a). This justiciable interest does not include an interest common to the general public. *Id.* Governmental entities with authority under state law over issues contemplated by the application may be considered affected persons. *Id.* Relevant factors considered in determining whether a person is affected 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 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; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

30 TAC § 55.203(c).

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, 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 of 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.

30 TAC § 55.209(e).

A group or association may request a contested case hearing if:

- (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.

30 TAC § 55.205(a). The ED, OPIC, or applicant may request the group or association provide an explanation of how the group or association meets these requirements. *Id.*

III. Discussion

A. Determination of Affected Person Status

John Harkey Jr. and The Mason Trust

In his hearing request, John Vay, on behalf of John Harkey Jr. and the Mason Trust, brought up issues related to water quality, human, health, environmental impact, application completeness, appropriateness of the discharge route, and other issues that are more specifically enumerated in Section III.B and discussed in Section III.F.

According to the hearing request, a map included in the application, and a map provided to OPIC by the ED, Mr. Harkey lives on property adjacent to the facility and owned by the Mason Trust. Additionally, Mr. Harkey is a trustee and beneficiary under the trust and oversees activities such as ranching and hunting that occur on the property. Section 55.205(a) lays out the factors for determining whether a group or association can be granted party status. OPIC has determined that the Mason Trust, through Mr. Harkey, has met the criteria for being designated as an affected person. OPIC also concludes that Mr. Harkey, individually, has demonstrated his affectedness in this matter.

OPIC, therefore, has determined that John Harkey Jr, and the Mason Trust, qualify as affected persons under TCEQ rule.

B. Issues Raised in the Hearing Request

The following issues have been raised in the hearing requests:

- (1) Whether 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?
- (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?
- (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?
- (5) Whether the Applicant's proposed controls and treatment equipment constitute the best available technology and otherwise meet regulatory requirements?
- (6) Whether the Applicant's proposed control 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?
- (8) Whether the draft permit is sufficiently definite in its terms and conditions to ensure compliance with all 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?
- (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?
- (11) Whether 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?
- (13) Whether the proposed facilities and discharges will cause or contribute to a nuisance condition?
- (14) Whether 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?
- (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?
- (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?
- (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?
- (19) Whether 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?
- (21) Whether 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?

C. Issues Raised in the Comment Period

All of the issues raised in the hearing request were raised in the comment period and have not been withdrawn. 30 TAC §§ 55.201(c) and (d)(4), 55.211(c)(2)(A).

D. Disputed Issues

There is no agreement between the hearing requestors and the ED on the issues raised in the hearing requests.

E. Issues of Fact

Before referring an issue to hearing, the Commission is required to consider whether the issue is one of fact, rather than one of law or policy. TWC §5.556(d)(1).

Issues of fact are appropriate for referral to SOAH for a contested case hearing. 30 TAC § 55.211(c)(2)(A). Responses to hearing requests are required to address whether issues

raised in a request are disputed issues of fact or disputed issues of law. 30 TAC § 55.209(e)(3). All of the issues presented are issues of fact.

F. Relevant and Material Issues

The hearing requests raise issues relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4) and 55.211(c)(2)(A). In order to refer an issue to SOAH, the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny this permit. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–51 (1986) (in discussing the standards applicable to reviewing motions for summary judgment the Court stated “[a]s to materiality, the substantive law will identify which facts are material . . . it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs”). Relevant and material issues are those governed by the substantive law under which this permit is to be issued. *Id.*

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

The requestors have raised the issue of the completeness of the application. Information requirements for a new TPDES permit are contained in 30 TAC §§ 305.45 and 305.48. The completeness of an application and adequacy of the information provided is relevant and material to the Commission's decision on the application. Therefore, OPIC finds that this issue is appropriate for referral to SOAH for a contested case hearing on this issue.

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 requestors have raised the issue of the completeness of the application. Information requirements for a new TPDES permit are contained in 30 TAC §§ 305.45 and 305.48. The completeness of an application and adequacy of the information provided is relevant and material to the Commission's decision on the application. Therefore, OPIC finds that this issue is appropriate for referral to SOAH for a contested case hearing on this issue.

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 requestors have raised the issue of the completeness of the application. Information requirements for a new TPDES permit are contained in 30 TAC §§ 305.45 and 305.48. The completeness of an application and adequacy of the information provided is relevant and material to the Commission's decision on the application. Therefore, OPIC finds that this issue is appropriate for referral to SOAH for a contested case hearing on this issue.

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 requestors have raised the issue of the completeness of the application. Information requirements for a new TPDES permit are contained in 30 TAC §§ 305.45 and 305.48. The completeness of an application and adequacy of the information provided is relevant and material to the Commission's decision on the application.

Therefore, OPIC finds that this issue is appropriate for referral to SOAH for a contested case hearing on this issue.

Whether the Applicant's proposed controls and treatment equipment constitute the best available technology and otherwise meet regulatory requirements

The requestors have raised the issue of whether the technology used by the Applicant meets the regulatory requirements. Adequate and appropriate technology requirements are addressed in 40 CFR §122.44(a)(1) (incorporated by reference at 30 TAC §305.531) and 40 CFR §401.10. The issue of appropriate technology is relevant and material to the Commission's decision on the application. Therefore, OPIC finds that this issue is appropriate for referral to SOAH for a contested case hearing on this issue.

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 requestors have raised the issue of whether all representations made in the application and during the application process are fully incorporated in the draft permit. The application is incorporated into the draft permit under Permit Conditions, Item 10, pg. 10. Therefore, the sufficiency of the draft permit terms and conditions to ensure that application representations are incorporated and enforceable is an issue which is relevant and material to the Commission's decision on the application. Therefore, OPIC finds that this issue is appropriate for referral to SOAH for a contested case hearing on this issue.

Whether the Applicant's proposed control and treatment equipment are capable of meeting the effluent limitations, performance, characteristics, and efficiencies set forth in the application

The requestors have raised the issue of whether the equipment used by the Applicant is adequate to meet the conditions of the draft permit and those set forth in

the application. Adequate and appropriate equipment requirements are addressed in 40 CFR §122.44(a)(1) (incorporated by reference at 30 TAC §305.531) and 40 CFR §401.10. The issue of appropriate equipment is relevant and material to the Commission's decision on the application. Therefore, OPIC finds that this issue is appropriate for referral to SOAH for a contested case hearing on this issue.

Whether the draft permit is sufficiently definite in its terms and conditions to ensure compliance with all applicable water quality standards and regulations

The requestors have raised the issue of whether the draft permit is adequate to protect water quality and meets all standards and regulations. The TCEQ is responsible for the protection of water quality under Chapter 26 of the TWC and 30 TAC Chapters 305, 307, and 308. The Texas Surface Water Quality Standards in 30 TAC Chapter 307 require the proposed permit "maintain the quality of water in the state consistent with public health and enjoyment." 30 TAC § 307.1. The issue of water quality and the adequacy of the draft permit to meet all standards and requirements is relevant and material to the Commission's decision on the application. Therefore, OPIC finds that this issue is appropriate for referral to SOAH for a contested case hearing on this issue.

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 requestors have raised the issue of the appropriateness of the discharge route by questioning whether it has the characteristics required to be considered a watercourse suitable for receiving discharges. Discharging wastewater into state watercourses is allowed under Texas law. Yet, before the State may burden a watercourse, the preliminary determination of whether a watercourse even exists must be made. The test for whether or not the discharge route at issue here is a watercourse

is found in substantive case law. See *Hoefs v. Short*, 273 S.W. 785, 788 (Tex. 1925), establishes this test. A watercourse will have “(1) a defined bank and beds, (2) a current of water, and (3) a permanent source of supply.” *id.* Whether a watercourse exists and may be discharged into is relevant and material to the Commission’s decision on the application. Therefore, OPIC finds that this issue is appropriate for referral to SOAH for a contested case hearing on this issue.

Whether the proposed facilities and discharges will be protective of public health, aquatic resources, terrestrial life, and other environmental and economic resources

The requestors have raised the issues of effects on human health, fauna, the environment, and economic resources. These issues are addressed by the statutes and rules applicable to this application. Tex. Health & Safety Code § 361.002; 30 TAC §§ 307.1, 312.11(g)(2), 312.44(j)(1), and 30 TAC § 312.83. Whether the discharge allowed under the draft permit will adversely impact human health, fauna, and the environment is relevant and material to the Commission’s decision on the application, however, without more specificity on what types of economic resources are impacted, OPIC cannot properly evaluate this particular issue. Therefore, OPIC finds that the issues of effects on human health, fauna, and the environment are appropriate for referral to SOAH for a contested case hearing on this issue.

Whether the proposed facilities and discharges will cause or contribute to a condition of water pollution

The requestors have raised the issue of water quality. The TCEQ is responsible for the protection of water quality under Chapter 26 of the TWC and 30 TAC Chapters 305, 307, and 308. The Texas Surface Water Quality Standards in 30 TAC Chapter 307 require the proposed permit “maintain the quality of water in the state consistent with public health and enjoyment.” 30 TAC § 307.1. Whether the discharge allowed under

the draft permit will adversely impact water quality is relevant and material to the Commission's decision on the application. Therefore, OPIC finds that this issue is appropriate for referral to SOAH for a contested case hearing on this issue.

Whether the proposed facilities and discharges will be injurious to human health, animals, and livestock

The requestors have raised the issues of effects on human health and fauna. These issues are addressed by the statutes and rules applicable to this application. Tex. Health & Safety Code § 361.002; 30 TAC §§ 312.11(g)(2), 312.44(j)(1), and 30 TAC § 312.83. Whether the discharge allowed under the draft permit will adversely impact human health and fauna is relevant and material to the Commission's decision on the application. Therefore, OPIC finds that this issue is appropriate for referral to SOAH for a contested case hearing on this issue.

Whether the proposed facilities and discharges will adversely impact the quality of water on or near the protestants' property

The requestors have raised the issue of water quality. The TCEQ is responsible for the protection of water quality under Chapter 26 of the TWC and 30 TAC Chapters 305, 307, and 308. The Texas Surface Water Quality Standards in 30 TAC Chapter 307 require the proposed permit "maintain the quality of water in the state consistent with public health and enjoyment." 30 TAC § 307.1. Whether the discharge allowed under the draft permit will adversely impact water quality is relevant and material to the Commission's decision on the application. Therefore, OPIC finds that this issue is appropriate for referral to SOAH for a contested case hearing on this issue.

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 requestors have raised the issue of water quality. The TCEQ is responsible for the protection of water quality under Chapter 26 of the TWC and 30 TAC Chapters 305, 307, and 308. The Texas Surface Water Quality Standards in 30 TAC Chapter 307 require the proposed permit “maintain the quality of water in the state consistent with public health and enjoyment.” 30 TAC § 307.1. Whether the discharge allowed under the draft permit will adversely impact water quality is relevant and material to the Commission’s decision on the application. Therefore, OPIC finds that this issue is appropriate for referral to SOAH for a contested case hearing on this issue.

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 requestors have raised the issue of water quality. The TCEQ is responsible for the protection of water quality under Chapter 26 of the TWC and 30 TAC Chapters 305, 307, and 308. The Texas Surface Water Quality Standards in 30 TAC Chapter 307 require the proposed permit “maintain the quality of water in the state consistent with public health and enjoyment.” 30 TAC § 307.1. Whether the discharge allowed under the draft permit will adversely impact water quality is relevant and material to the Commission’s decision on the application. Therefore, OPIC finds that this issue is appropriate for referral to SOAH for a contested case hearing on this issue.

Whether 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

The requestors have raised the issue of water quality. The TCEQ is responsible for the protection of water quality under Chapter 26 of the TWC and 30 TAC Chapters

305, 307, and 308. The Texas Surface Water Quality Standards in 30 TAC Chapter 307 require the proposed permit “maintain the quality of water in the state consistent with public health and enjoyment.” 30 TAC § 307.1. Whether the discharge allowed under the draft permit will adversely impact water quality is relevant and material to the Commission’s decision on the application. Therefore, OPIC finds that this issue is appropriate for referral to SOAH for a contested case hearing on this issue.

Whether the proposed facilities and discharges will impair (not maintain and protect) the existing uses of Tiger Creek and other receiving waters

The requestors have raised the issue of water quality. The TCEQ is responsible for the protection of water quality under Chapter 26 of the TWC and 30 TAC Chapters 305, 307, and 308. The Texas Surface Water Quality Standards in 30 TAC Chapter 307 require the proposed permit “maintain the quality of water in the state consistent with public health and enjoyment.” 30 TAC § 307.1. Whether the discharge allowed under the draft permit will adversely impact water quality is relevant and material to the Commission’s decision on the application. Therefore, OPIC finds that this issue is appropriate for referral to SOAH for a contested case hearing on this issue.

Whether the proposed facilities and discharges will violate the anti-degradation policy and requirements

The requestors have raised the issue of whether the proposed permit would violate the anti-degradation policy set forth in 30 TAC § 307.5. The TCEQ is responsible for the protection of water quality under Chapter 26 of the TWC and 30 TAC Chapters 305, 307, and 308. The Texas Surface Water Quality Standards in 30 TAC Chapter 307 require the proposed permit “maintain the quality of water in the state consistent with public health and enjoyment.” 30 TAC § 307.1. Whether the discharge allowed under the draft permit will violate the anti-degradation policy is relevant and material to the

Commission's decision on the application. Therefore, OPIC finds that this issue is appropriate for referral to SOAH for a contested case hearing on this issue.

Whether approval of the application and issuance of a permit will contravene the intent of the Texas Water Quality Control Act

The requestors have raised the issue of whether this drafty permit will contravene the intent of the Texas Water Quality Control Act. Tex. Water Code § 26.003 lays out the intent of the Texas Water Quality Control Act. Whether the draft permit contravenes the intent of this act is relevant and material to the Commission's decision on the application. Therefore, OPIC finds that this issue is appropriate for referral to SOAH for a contested case hearing on this issue.

Whether the proposed facilities and discharges will cause or contribute to a nuisance condition

The requestors have raised the issue of nuisance conditions being created by the facility and discharges. Without more specificity on what nuisance conditions the requestors are concerned with, OPIC cannot adequately analyze this particular issue. Therefore, OPIC cannot at this time recommend referral to SOAH for a contested case hearing on this issue.

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 requestors have raised the issue of nuisance conditions being created by the facility and discharges. Without more specificity on what nuisance conditions the requestors are concerned with, OPIC cannot adequately analyze this particular issue. Therefore, OPIC cannot at this time recommend referral to SOAH for a contested case hearing on this issue.

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 requestors have raised the issues of the adequacy of the construction and design of the surface impoundments at the facility. The surface impoundments are governed by a permit by rule under 30 TAC Chapter 321, Subchapter D and are not subject to review under the current application process. Therefore, OPIC does not recommend referral to SOAH for a contested case hearing on this issue.

G. Issues Recommended for Referral

OPIC recommends that the following disputed issues of fact are appropriate for referral to SOAH for a contested case hearing.

- (1) Whether 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?
- (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?
- (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?
- (5) Whether the applicant's proposed controls and treatment equipment constitute the best available technology and otherwise meet regulatory requirements?
- (6) Whether the applicant's proposed control 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?

- (8) Whether the draft permit is sufficiently definite in its terms and conditions to ensure compliance with all 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?
- (10) Whether the proposed facilities and discharges will be protective of public health, aquatic resources, terrestrial life and other environmental and economic resources?
- (11) Whether the proposed facilities and discharges will cause or contribute to a condition of water pollution?
- (12) Whether the proposed facilities and discharges will be injurious to human health, animals and livestock?
- (13) Whether the proposed facilities and discharges will adversely impact the quality of water on or near the protestants' property?
- (14) 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?
- (15) 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?
- (16) Whether 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?
- (17) Whether the proposed facilities and discharges will impair (not maintain and protect) the existing uses of Tiger Creek and other receiving waters?
- (18) Whether the proposed facilities and discharges will violate the anti-degradation policy and requirements?
- (19) Whether approval of the application and issuance of a permit will contravene the intent of the Texas Water Quality Control Act?

H. Maximum Expected Duration of Hearing

Commission Rule 30 TAC § 50.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that no hearing shall be longer than one year from the first day of the preliminary hearing to the date the proposal for decision is issued. To assist the Commission in stating a date by which the judge is expected to issue a proposal for

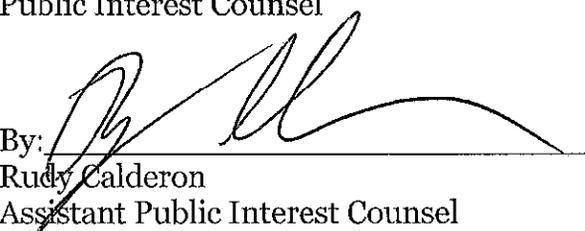
decision, and as required by 30 TAC § 55.209(d)(7), OPIC estimates that the maximum expected duration of a hearing on this application would be nine months from the first date of the preliminary hearing until the proposal for decision is issued.

IV. Conclusion

OPIC recommends granting the hearing requests of John Harkey Jr. and The Mason Trust. OPIC finds the issues referenced in Section III.G above, are appropriate for referral. OPIC further recommends a hearing duration of nine months should a contested case hearing be granted.

Respectfully submitted,

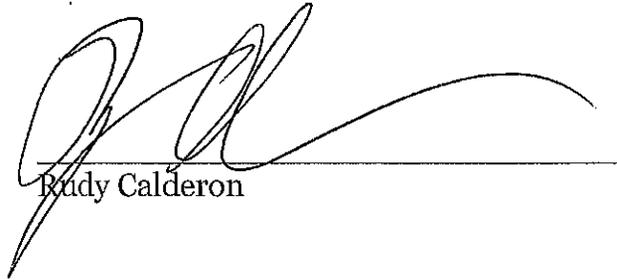
Vic McWherter
Public Interest Counsel

By: 

Rudy Calderon
Assistant Public Interest Counsel
State Bar No. 24047209
P.O. Box 13087, MC 103
Austin, Texas 78711-3087
(512) 239-3144 Phone
(512) 239-6377 Fax

CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2016 the original and seven true and correct copies of the Office of Public Interest Counsel's Response to Requests for Hearing were filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail, electronic mail, or by deposit in the U.S. Mail.



Rudy Calderon

**MAILING LIST
FML SAND, LLC
TCEQ DOCKET NO. 2016-1210-IWD**

FOR THE APPLICANT:

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:

Hollis Henley, Staff Attorney
TCEQ Environmental Law Division
MC-173
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-0600 Fax: 512/239-0606

Dex Dean, Technical Staff
TCEQ Water Quality Division
MC-148
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-6009 Fax: 512/239-2214

Brian Christian, Director
TCEQ Environmental Assistance
Division, MC-108
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-4000 Fax: 512/239-5678

FOR ALTERNATIVE DISPUTE

RESOLUTION:

Kyle Lucas
TCEQ Alternative Dispute
Resolution, MC-222
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-4010 Fax: 512/239-4015

FOR THE CHIEF CLERK:

Bridget Bohac
TCEQ Office of Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-3300 Fax: 512/239-3311

REQUESTER:

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