



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

October 5, 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: Reply to Responses to Hearing Requests
Docket No. 2016-1210-IWD
Application for TPDES Permit No. WQ0005166000
FML Sand, LLC – CN604371484
FML Voca – RN105156624

Dear Ms. Bohac:

Included with this letter, please find an original and seven (7) copies of the *Reply to Responses to Hearing Requests* filed by John D. Harkey, Jr. and The Mason Trust in the above-referenced docket. This matter is scheduled to be heard at the Commission's October 19, 2016 open meeting. Should you have any questions or desire any further information from the protesting parties, please do not hesitate to contact me. Please also note our new mailing address as referenced below.

Sincerely,

John J. Vay

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

Attachment

cc: Mailing List
John D. Harkey, Jr.

TCEQ DOCKET NO. 2016-1210-IWD

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

**JOHN D. HARKEY, JR.'S AND THE MASON TRUST'S
REPLY TO RESPONSES TO HEARING REQUESTS**

John D. Harkey, Jr. and the Mason Trust (“Protestants”) file this *Reply to the Responses to Hearing Requests* filed by FML Sand, LLC (the “Applicant”), the Executive Director of the Texas Commission on Environmental Quality (“ED”), and the Office of Public Interest Counsel (“OPIC”).

The Applicant, in its Response to Hearing Requests, does not raise any objections to the Protestants’ status as affected persons under 30 Tex. Admin. Code § 55.203. Rather, the Applicant provides only brief and conclusory responses regarding the merits of the 22 issues raised by the Protestants in their hearing requests. The Applicant, in providing its conflicting perspective on those issues, does not argue that any issue is improper for a contested case hearing, but rather underscores the fact that each issue raised by the Protestants remains disputed.

OPIC agrees that the Protestants are affected persons, but in its response to hearing requests declined to recommend the referral of Protestants’ Issues 13 and 18, which relate to the potential creation of nuisance conditions. OPIC states that it is unable to adequately analyze this issue without more specific information regarding what nuisance conditions the Protestants are concerned about. (OPIC *Response to Requests for Hearing*, p. 16). By way of example, discharged wastewater that overflows the banks of the receiving draws or streams may pond on or near the Protestants’ property. Standing, ponded wastewater can result in nuisance odors. Additionally, it can serve as a breeding ground for nuisance vectors, such as mosquitoes.

Protestants urge that the Commission determine that Protestants' Issues 13 and 18, related to nuisance conditions that may be created if the permit is issued, are appropriate issues for referral to the State Office of Administrative Hearings ("SOAH").

OPIC also declined to recommend the referral of Protestants' Issue 10, regarding whether the surface impoundments associated with the management of wastewater are adequate to prevent unauthorized discharges to surface water, groundwater, and the Protestants' property, and meet effluent limitations. (*OPIC Response to Requests for Hearing*, p. 17). The Protestants support the ED's position that this is a referable issue. The application for this type of permit requires, and the Applicant submitted, information regarding each of its impoundments, including use designations, liner types, and dimensions (*see* Application pp. 3-5 and Attachment T5). Additionally, the draft permit itself contains requirements regarding facility treatment ponds (*see, e.g.*, Draft Permit, p. 14).

It is not clear whether the rules cited by OPIC (30 Tex. Admin. Code, Chapter 321, Subchapter D, relating to *Sand and Gravel Washing*) are potentially applicable to industrial wastewater facilities such as the Applicant's, which are subject to the Industrial Sand subcategory of the categorical effluent limitations (40 CFR Chapter 436, Subpart D), as opposed to the Construction Sand and Gravel subcategory (40 CFR Chapter 436, Subpart C). Regardless, the Applicant has expressly waived any exemption from consideration of its ponds in this application proceeding by seeking authorization for the ponds within its current individual permit application under Texas Water Code Chapter 26. (*See* 30 Tex. Admin. Code § 321.62, relating to *Exception to Application of Subchapter*). Therefore, the ED is correct in recommending that this important issue be referred to SOAH.

The ED agrees that the Protestants are affected persons, but in its response to hearing requests declined to recommend the referral of issues relating to "flooding" and "erosion."

Those issues arose from the ED's Response to Comments ("RTC") which included a re-characterization of the 22 issues listed in the Protestants' hearing requests. Rather than determining referable issues based on the separate RTC document, we respectfully request the Commissioners work from the Protestants' listing of relevant and material disputed issues in the hearing requests, which is attached hereto for your convenience.

Protestants respectfully renew their request that the Commission grant their unopposed requests for party status and refer for hearing Issues 1-22 as outlined in their *Request for a Contested Case Hearing*.

Respectfully submitted,

ENOCH KEVER PLLC
5918 W. Courtyard Dr., Ste. 500
Austin, Texas 78730
512.615.1231
512.615.1198 FAX

By: _____



John J. Vay

State Bar No. 20527700

jvay@enochkever.com

**ATTORNEYS FOR JOHN D. HARKEY, JR.
AND THE MASON TRUST**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of John D. Harkey, Jr. and the Mason Trust's Reply to Responses to Hearing Requests has been filed with the TCEQ's Office of the Chief Clerk and has been served on all persons listed on the attached mailing list via electronic mail transmission or first class mail on this the 5th day of October, 2016.



John J. Vay

Attachment

Listing of Issues for Referral to SOAH

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 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 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 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 applicable water quality regulations and standards.*
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 nuisance conditions.*
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 and discharges 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 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.*

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

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
Texas Commission on Environmental Quality
Environmental Law Division, MC-173
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-2253 / Fax: (512) 239-0606
hollis.henley@tceq.texas.gov

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

FOR PUBLIC INTEREST COUNSEL:

Rudy Calderon, Asst. Public Interest Counsel
Texas Commission on Environmental Quality
Office of Public Interest Counsel, MC-103
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-3144 / Fax: (512) 239-6377
rudy.calderon@tceq.texas.gov

**FOR ALTERNATIVE DISPUTE
RESOLUTION:**

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

FOR THE CHIEF CLERK:

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