

TCEQ Docket No. 2014-0526-AIR

IN RE: APPLICATION BY	§	BEFORE THE TEXAS
	§	
FML SAND, LLC, FOR	§	COMMISSION ON
	§	
AIR PERMIT NO. 97199	§	ENVIRONMENTAL QUALITY

MEDIATED SETTLEMENT AGREEMENT

To avoid litigating the application of FML Sand, LLC, (“Applicant” or “FML Sand”) for Texas Commission on Environmental Quality (“TCEQ” or “Commission”) Air Permit Number 97199 in a Commission contested public hearing, Applicant, the Executive Director of the Commission (“ED”), the Commission's Office of Public Interest Counsel (“OPIC”), and the following persons/entities (collectively, “Protestants”): 1) Mason County Rural Preservation Society and 2) James Bode mediated their dispute and agree to the following:

- A. Applicant agrees to the following commitments:
 - 1. To address Protestants’ light concerns:
 - a. utilize downwardly shielded (possibly LED) lights wherever practicable within the facility to minimize “light pollution” leaving facility; and
 - b. light areas within the facility only where and when necessary.
 - 2. To address Protestants’ traffic concerns:
 - a. with the goal of improving road safety near the facility, work with TxDOT (and possibly the School District) on - and commit to funding if necessary – appropriate signage, as well as acceleration lanes for both northbound and southbound traffic exiting the facility to U.S. Highway 87 (“U.S. 87”), a left turn lane from U.S. 87 for southbound traffic entering the facility, a deceleration lane on U.S. 87 for northbound traffic entering the facility and a school-bus drop-off area adjacent to U.S. 87 and north of the FML Sand property;
 - b. pave the ingress/egress road to the facility and all relatively permanent internal facility roads, exclusive of mine floor and haul roads;
 - c. locate the facility entrance on U.S. 87; and
 - d. direct that facility truck traffic not travel to or from the facility on RR 1222.
 - 3. To address Protestants’ reclamation concerns:
 - a. **Contemporaneous Reclamation.** Reclamation of the quarries will begin as soon as practical, but no more than 30 months, after startup of the designed production operations by refilling quarries with non-product

sand. Stockpiles of off-grade sand created prior to the refilling operations will be graded, covered with topsoil and seeded.

- b. No off-site waste materials may be used as fill.
 - c. **Temporary Idling of Operations.** If the plant is idled more than two years but is expected to reopen when the business environment improves, the disturbed area outside of the quarry will be reclaimed to a condition to prevent any nuisance conditions. The plant will be maintained in working order and in good esthetic condition.
 - d. **Final Reclamation.** At the conclusion of mining, final reclamation will be completed within 36 months of shutdown. Reclamation will include restoration of the land to roughly original contours. It will also include removal of equipment and structures that cannot be repurposed into the final land use plan.
4. To address Protestants' noise/seismic concerns:
- a. reduce the impacts off-site of backup safety warnings emitted by vehicles on site, such as by utilizing white noise or lower frequency sound beepers or by utilizing strobe-light backup warning systems;
 - b. commit to investigating Protestants' specific complaints and implement as practicable potential sound barriers around operational devices identified as the noise source(s);
 - c. limit the time window for blasting at the facility to Monday – Friday 10:00am–5:00pm, subject to an exception for occasional weather or low-ceiling-related blasting delays;
 - d. maintain a call or email notification system to provide advance notice to local residents of scheduled blasts, and agree to consider accommodation for advance-noticed (i.e., at least 24 hours' notice) specific community events, such as funerals;
 - e. have a third-party contractor conduct pre-blast surveys of individual landowners' structures located within ½ mile of the FML Sand property boundaries, if requested by the landowner; and
 - f. **Groundwater and Blast Monitoring.** Drill two open boreholes, one in the area of the south property line and one in the area of the north property line... These boreholes will be used to monitor water levels and to evaluate borehole integrity. FML will place a seismograph adjacent to each borehole to estimate off-site impacts, if any, of blasting.
5. To address Protestants' air quality concerns, Applicant agrees to conduct 12 months (or until commencement of construction, whichever occurs first) of pre-operation ambient air monitoring of respirable silica concentrations at a location in an area near and south of RR 1222 chosen with the concurrence of Protestants.

This monitoring will begin as soon as practicable after the effective date of this Agreement, but no later than February 1, 2015, and, at the Applicant's election, may be terminated after a year. Once facility operations commence, one year of the same type of air monitoring will be performed at two (2) locations similarly chosen with the concurrence of Protestants (presumably, one location will be near the north property line, e.g., on a Gamel property, and one at the location of the pre-operational monitoring). All monitoring results shall be provided to or otherwise made available to Protestants as determined by the "Forum" described in Paragraph A.8, below.

6. To address Protestants' esthetic concerns:

- a. make all reasonable efforts to maintain whatever tree growth currently exists along the creek areas on the facility property;
- b. provide drought-tolerant landscaping;
- c. to the maximum extent possible, choose neutral paint coloring on all facility buildings; and
- d. to the extent and in locations recommended by the "Forum" described in Paragraph A.8, below, construct and vegetate earthen berms in perimeter areas of the facility property.

7. To address Protestants' surface water concerns, Applicant will consult with and consider the input of members of the "Forum" described in Paragraph A.8, below, regarding the site's storm water pollution prevention plan before submitting to TCEQ Applicant's notice of intent for TPDES storm water discharge authorization.

8. To address Protestants' communication concerns:

- a. work with Protestant James Heath and Society member Gay Nesloney to form a committee (the "FML-Katemcy Forum" or "Forum") of five members to provide a venue for discussions related to FML Sand's operations and the impacts of those operations on the local community; the FML-Katemcy Forum, unless otherwise specified by its own bylaws, will consist of 5 members, two selected by the Protestants and two selected by FML Sand and one selected by the other four; the Forum may meet as often as desired by a majority of its members but shall meet at least semi-annually, beginning no later than January 20, 2015, until a year following the first sales of processed sand from the FML Sand Katemcy plant. ;
- b. provide Protestants with data concerning the flocculants used at the facility, allowing them input into which flocculants are used;
- c. provide Protestants' representatives with facility monitoring data at Forum the meetings if requested;
- d. by October 15, 2014, provide James Heath and Gay Nesloney the name and contact information for at least one FML Sand official to

whom persons interested in FML Sand Katemcy operations may direct questions and complaints; and

- e. maintain a neighbor landowner email distribution list, the initial composition of which will be determined by James Heath and Gay Nesloney and which, thereafter, may be altered as determined by the Forum, by which to provide information and updates regarding events at the FML Sand Katemcy plant, including advance notice of blasting events.

9. In allocating charitable contributions over which it has control, FML Sand, LLC, will give preference to contributions that benefit Katemcy-community families and organizations (such as, the Peter's Prairie School Community Association and the Bethel Church and Cemetery Association).

- B. This Agreement is a legal contract between Applicant and Protestants and the successors-in-interest of each, is enforceable by either party against the other in a court of competent jurisdiction in Mason County, and is effective as of the date the last party executes this Agreement. If an action for enforcement becomes necessary, a substantially-prevailing party may recover its reasonable and necessary costs of litigation and charges of counsel and technical experts.
- C. Protestants acknowledge that time is of the essence in implementing the pre-facility-construction monitoring term of this Agreement, and they commit to actively cooperate to and support implementation of that term.

In consideration of the provisions listed above and actions to be taken by Applicant, Protestants hereby agree to withdraw, within three (3) business days of the effective date of this agreement, their hearing requests previously filed on this matter. [The text of the withdrawal is attached to this Agreement and labeled "Attachment A"].

- D. The Agreement is conditioned upon the expeditious issuance of Air Quality Permit No. 97199 ("Permit") by the TCEQ based on the withdrawal of all hearing requests and protests previously filed by the Protestants in this matter and the cancellation of the pending contested-case hearing proceeding at the State Office of Administrative Hearings ("SOAH"), SOAH Docket No. 582-15-0012. Applicant and Protestants warrant they will cooperate with one another and actively seek to ensure that this condition is realized. If, without the fault of FML Sand or any of the Protestants, the SOAH hearing presently scheduled for October 20, 2014, is not cancelled or otherwise dismissed and the Permit application is not remanded to the Executive Director from SOAH by November 7, 2014, FML Sand may elect to terminate the Agreement with fifteen day written notice to Protestants. Should the construction or operation in the manner authorized by the Permit of the FML Sand's Katemcy Project be prevented through the action of third parties to challenge the validity of the Permit or FML Sand's legal authority to construct and operate the FML Sand's Katemcy Project, this Agreement is

terminated as of the date the success of the challenge becomes final and not subject to further judicial review, and FML Sand is entitled, at its discretion, during the pendency of the challenge to suspend the pre-construction air quality monitoring to which it is committed by Paragraph 5. Should the construction or operation in the manner authorized by the Permit of the FML Sand's Katemcy Project be delayed through the action of third parties to challenge the validity of the Permit or FML Sand's legal authority to construct and operate the FML Sand's Katemcy Project, FML Sand is entitled, at its discretion, during the pendency of the challenge to suspend the pre-construction air quality monitoring to which it is committed by Paragraph 5. Termination of the Agreement under this paragraph terminates all obligations of FML Sand under the Agreement.

- E. The ED and OPIC participated in the mediation but are not parties to this Agreement. They have signed this Agreement only as witnesses to the Agreement.

_____	_____	_____
FML Sand, LLC, by its Representative	[<i>print name</i>]	Date

_____	_____	_____
Mason County Rural Preservation Society, Protestant, by its President, James Heath		Date

_____	_____	_____
James Bode, Protestant		Date

_____	_____	_____
For the Executive Director	[<i>print name</i>]	Date

_____	_____	_____
For the Office of Public Interest Counsel	[<i>print name</i>]	Date

TCEQ AIR QUALITY PERMIT NO. 97199
SOAH DOCKET NO. 582-15-0012
TCEQ DOCKET NO. 2014-0526-AIR

APPLICATION BY FML SAND, LLC, § Before the State Office
INDUSTRIAL SAND PLANT § Of
KATEMCY, MASON § Administrative Hearings

**WITHDRAWAL OF PROTESTS
AND AGREED REQUEST FOR REMAND**

JUDGE NEWCHURCH:

The Party Protestants to this docket are the Mason County Rural Preservation Society (“Society”) and James R. Bode. The Society and Mr. Bode have reached an accord with the Applicant, FML Sand, LLC, and hereby withdraw their hearing requests in this matter. They join the Applicant in a request that you remand this matter to the Executive Director of the Texas Commission on Environmental Quality for his issuance of the air quality permit, as drafted.

Respectively Submitted,

Frederick, Perales, Allmon & Rockwell,
PC

By, David Frederick
St. Bar No. 07412300

707 Rio Grande, Ste. 200
Austin, Texas 78701
(512) 469-6000
(512) 482-9346 (facsimile)

CERTIFICATE OF SERVICE

By my signature, above, I, David Frederick, certify I have this date, October ____, 2014, served by electronic transmission a true and correct copy of the foregoing pleading on each of the parties listed, below.

Mr. Paul Seals
Guida, Slavich & Flores, PC
816 Congress Avenue, Ste 1500
Austin, Texas 78701
512-476-6300 (o)
512-476-6331 (f)
COUNSEL FOR APPLICANT

Ms. Becky Nash Petty, Attorney
Environmental Law Division
Texas Commission on Environmental Quality
PO Box 13087, MC 173
Austin, Texas 78711-3087
512-239-1088 (o)
COUNSEL FOR THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Mr. Rudy Calderon
Assistant Public Interest Counsel
Texas Commission on Environmental Quality
P.O. Box 13087, MC 103 Austin, Texas 78711
512-239-3144 (o)
512-239-6377 (f)
COUNSEL OF THE OFFICE OF PUBLIC INTEREST COUNSEL

Ms. Bridget Bohac
Chief Clerk
Texas Commission on Environmental Quality
Building F, Room 4301
12015 Park 35 Circle
Austin, Texas 78753
Mail Code 105
P.O. Box 13087
Austin, Texas 78711-3087
512-239-3300 (o)
512-239-3311 (f)