

Texas Natural Resource Conservation Commission

INTEROFFICE MEMORANDUM

To: Commissioners **Date:** January 19, 2001

Thru: LaDonna Castañuela
Chief Clerk

From: Randolph Wood, Deputy Director
Office of Environmental Policy, Analysis, and Assessment

Subject: Consideration of a Petition for Proposed Rulemaking

Caption: **Docket No. 2001-0060-RUL.** Consideration of a petition for rulemaking filed by Weirich Bros., Inc. and Texas Aggregates & Concrete Association requesting that the commission amend 30 TAC Chapter 321, Subchapter D.

The proposed amendments would modify Section 321.66 to require any person owning or operating a sand and gravel washing operation that conducts effluent through a point source discharge to water in the state to obtain an individual permit or a general permit. (Snehal R. Patel/Michael Bame) (Rule Log No. 2001-001-321-WT)

Who Submitted the Petition:

On December 15, 2000, the commission received a petition for rulemaking from Weirich Bros., Inc. and Texas Aggregates & Concrete Association.

What the Petition Requests:

The petitioners ask the commission to amend 30 TAC Chapter 321, Subchapter D, §321.66, Prohibition of Unauthorized Discharge, by removing the requirement that any sand and gravel washing owner/operator who discharges into or adjacent to any water in the state must obtain a discharge permit from the commission. Instead, the petitioners propose to replace the language “discharges into or adjacent to any water in the state” with the language “conducts effluent through a point source discharge to water in the state.” The petitioners believe that this revised language will limit the requirement for an individual or a general permit only to those operators that pipe effluent to a watercourse or allow surface flow of effluent directly to a watercourse. According to the petitioners, under these proposed changes, sand and gravel washing operators/owners who return their washwater to unlined gravel pits would not be required to obtain an individual discharge permit but could be authorized under the revised permit by rule.

Reason Rules are Needed:

The petitioners argue that this rule revision is needed because the executive director’s “interpretation of §321.66 makes a permit by rule inapplicable to any sand and gravel washing operation that operates in a manner constituting a discharge to water in the state, including the

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placing of washwater into unlined gravel pits.” The petitioners correctly state that this interpretation limits the applicability of the permit by rule to those facilities that do not include a discharge as defined by Texas Water Code (TWC), Chapter 26. The petitioners point out that the only way washwater in an unlined gravel pit can reach water in the state is through seepage which they argue is not a point source discharge under the Federal Clean Water Act’s National Pollutant Discharge Elimination System (NPDES). The petitioners also assert that there are numerous sand and gravel washing operations that have been in existence and operating under this permit by rule for some time, and there is no evidence of any water quality related problems from these operations. Lastly, the petitioners state that they will incur unnecessary expenditures of time and expense in obtaining individual permits if this petition is denied, and that requiring individual permits for sand and gravel washers that place their used washwater into gravel pits “imposes needless regulation with no environmental benefit.”

Recommended Action and Justification:

The executive director recognizes the petitioners’ concerns about requiring a discharge permit for sand and gravel operations that store washwater in unlined pits; however, the executive director does not believe that the proposed revisions to §321.66 will achieve the results anticipated by the petitioners. The executive director recommends denying this petition for rulemaking; and instead, proposes to address the petitioners’ concerns through the development of a general permit for sand and gravel washing operations.

The executive director disagrees with the petitioners’ assertion that the executive director “appears to have recently changed” its interpretation of §321.66. The plain language of the rule prohibits a discharge into water in the state. Section 321.66 provides that any person owning or operating a sand and gravel washing operation who makes, or proposes to make, *any discharge into or adjacent to any water in the state* shall apply for a discharge permit [Emphasis added]. The term, “discharge” has long been statutorily defined to include seeps. Texas Water Code, Chapter 26, which is the governing statute upon delegation of NPDES permit authority defines discharge as “to deposit, conduct, drain, emit, throw, run, *allow to seep*, or otherwise release or dispose of, or allow, permit, or suffer any of these acts or omissions,” TWC, §26.001(20). [Emphasis added]. While seepage through unlined pits may not fit into the common understanding of a “point source discharge,” the statutory definition of discharge includes this type of activity, and a discharge permit would be required. Therefore, the petitioners’ proposed changes to §321.66 would not exclude sand and gravel washing operations that return washwater to gravel pits from the rule’s prohibition on unauthorized discharges.

Sand and gravel washing operations typically handle their washwater using three methods. Washwater may be: directly discharged to surface water; placed in a pit and allowed to discharge via seepage either to surface water or to groundwater; or placed in a pit and contained through the use of a liner. The revisions to §321.66 requested by the petitioners would only provide authorizations by rule to operations that contain washwater within a lined pit. Instead, the

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executive director proposes to develop a Texas Pollutant Discharge Elimination System general permit that would provide an efficient means for authorizing any of the three methods of handling washwater. A general permit may be developed, with varying requirements for each of these washwater handling methods, such that protection of water in the state is assured and without requiring facilities to obtain a more costly individual permit. A general permit usually takes approximately six months to finalize after stakeholder meetings are completed. Staff proposes to identify stakeholders, and to initiate meetings by March 2001.

Commissioner's Public Meeting:

Based on conversations with the petitioners, the executive director anticipates that Fred Werkenthin, the petitioners' attorney, and Michael Stewart, Vice President of the Texas Aggregates & Concrete Association will be present at the commissioners' public meeting on February 7, 2001.

Conclusion:

The executive director recommends denying this petition for rulemaking; and instead, proposes to address the petitioners' concerns through developing a general permit for sand and gravel washing operations.

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