

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts new §§311.101 - 311.103.

New §§311.101 - 311.103 are adopted *with changes* to the proposal as published in the June 25, 2021, issue of the *Texas Register* (46 TexReg 3486) and, therefore, will be republished.

Background and Summary of the Factual Basis for the Adopted Rules

The Texas Aggregates and Concrete Association (TACA) and the Lake Houston Area Grassroots Flood Prevention Initiative (FPI) filed separate petitions for rulemaking with TCEQ on June 15, 2020, and June 23, 2020, respectively (Non-Rule Project Numbers 2020-042-PET-NR and 2020-044-PET-NR). Both organizations proposed the TCEQ revise Chapter 311 rules to include a new subchapter that will require the executive director (ED) to establish a guidance document of best management practices (BMPs) for commercial sand mining and other lawful purposes within the San Jacinto River Watershed. The adopted rulemaking applies to sand mining facilities within the San Jacinto River Watershed. On August 12, 2020, the commissioners instructed the ED to initiate rulemaking with stakeholder involvement to amend Chapter 311.

A virtual stakeholder meeting was held on November 10, 2020. Stakeholders were offered the opportunity to provide comments on the draft rule, including the San Jacinto River watershed definition, and sand mining BMPs. Comments were received

from 17 stakeholders, including the rule petitioners, United States Fish and Wildlife Service, Texas Parks and Wildlife Department, San Jacinto River Authority, Texans for Responsible Aggregate Mining, Bayou Land Conservancy, and ten individual citizens. The adopted rulemaking establishes a new subchapter to include: a definition of the San Jacinto River watershed, based on the petitions; requirements for the ED to develop a guidance document of BMPs for sand mining facilities; requirements for sand mining facility operators in the watershed to utilize the guidance document of BMPs at their site; requirements for sand mining facility operators to develop a Mine Plan prior to commencing or continuing regulated activities; requirements for sand mining facility operators to prepare and submit a Final Stabilization Report to the TCEQ for review prior to operations terminating at the site or portion(s) of the site; requirements for sand mining facility operators to implement the approved Final Stabilization Report prior to operations terminating at the site or portion(s) of the site; a compliance period of 180 days for operators registered as an APO with the commission on the effective date of this rule to comply with §§311.103(a) - (e), (g), and (h)(1).

Stakeholders generally agreed that requirements for sand mining facilities to submit reclamation and restoration plans with financial assurance bonds should be included as part of this rulemaking. The rulemaking adoption seeks to address the concerns raised in the requests, while working within the scope of the ED's rulemaking authority. The ED cannot impose requirements for sand mining facilities to submit

reclamation and restoration plans along with financial assurance bonds without a mandate from the legislature. In response to stakeholders' concern that sand mining facility operators might terminate operations without properly stabilizing the site, adopted new §311.103 establishes requirements for sand mining facilities within the defined watershed to submit a Final Stabilization Report to the ED for review and approval and to implement the approved final stabilization report prior to operations terminating at the site or portion(s) of the site and allows for additional investigation by ED staff prior to approval.

Section by Section Discussion

Subchapter J: Best Management Practices for Sand Mining Facilities Within the San Jacinto River Basin

§311.101, Definitions

Adopted new §311.101 will define the terms used within the subchapter. Definitions for the following terms are consistent with definitions found in Texas Pollutant Discharge Elimination System (TPDES) stormwater general permits: BMPs, infeasible, and minimize. The definition for Aggregate Production Operation (APO) is consistent with other state rules found in 30 Texas Administrative Code (TAC) Chapter 342. The definitions for sand mining facilities, operator, and San Jacinto River Watershed were developed specifically to reference APOs within distinct portions of Harris, Montgomery, Walker, Grimes, Waller, and Liberty Counties where impacts from sand mining are of concern. The definition for operator was modified from the definition in

the TPDES Multi-Sector General Permit (TXR050000) for stormwater to address APOs. To further clarify the definition for San Jacinto River Watershed, a map of the watershed area is indicated as a figure located in §311.101(a)(7). The map was developed using United States Geological Survey (USGS) information to delineate the appropriate watershed according to the proposed definition. The definition for storm event is consistent with the United States Environmental Protection Agency 2021 Multi-Sector General Permit for stormwater.

§311.102, Scope and Applicability

Adopted new §311.102(a) and (b) identify activities regulated by this subchapter. Activities regulated by this subchapter include sand mining facility operations within the San Jacinto River Watershed.

Adopted new §311.102(c) specifically requires the ED to develop and maintain a guidance document of BMPs for use by regulated sand mining facilities.

§311.103, General Requirements

Adopted new §311.103 outlines requirements specific to sand mining facilities in the San Jacinto River Watershed. Subsection (a) requires operators to develop and implement all vegetative BMPs from the guidance document of BMPs.

Subsection (b) requires operators to develop and implement all structural BMPs from

the guidance document of BMPs.

Subsection (c) requires operators to identify, develop, and implement all other BMPs from the guidance document of BMPs for pre-mining, mining, and post-mining phases. Subsection (d) requires that if an operator determines a BMP is infeasible, the operator must use an alternative BMP and maintain onsite detailed, supporting documentation demonstrating why the BMP is infeasible, that the alternative BMP is more appropriate for the site, and that the alternative BMP provides equivalent or improved water quality protection. A BMP may be determined to be infeasible following criteria included in paragraphs (1) - (11).

Subsection (e) specifies that the operator's BMPs must be properly installed.

Subsection (f) indicates that the operator must modify or replace controls in a timely manner, but no later than the next anticipated storm event, or when an inspection by the operator or the ED reveals the controls are not installed correctly or are not adequate.

Subsection (g) requires the operator to obtain certification of BMPs by a licensed Texas professional engineer or a licensed Texas professional geoscientist.

Subsection (h)(1) requires that operators develop and maintain onsite a Mine Plan prior

to commencing or continuing regulated activities. Subparagraph (A) outlines the requirements for the Mine Plan, including: developing the Mine Plan as outlined in the guidance document of BMPs, keeping the Mine Plan current and updating it as necessary to reflect changing conditions at the site, and having the Mine Plan certified by a licensed Texas professional engineer or a licensed Texas professional geoscientist. The Mine Plan may be consolidated with the BMPs into a single, certified document. Subsection (h)(2) requires operators to develop a Final Stabilization Report prior to operations terminating at the site or portion(s) of the site. Subparagraph (A) outlines the requirements for the Final Stabilization Report, including: development as outlined in the guidance document of BMPs, certification by a licensed Texas professional engineer or licensed Texas professional geoscientist, submittal to the ED for review and approval prior to terminating operations at the site or portion(s) of the site, and ED approval prior to implementation. Subparagraph (B) requires implementation of the Final Stabilization Report prior to operations terminating at portion(s) of the site or terminating any permit or authorization required by Chapter 205 or 305 of this title because of operations terminating at the site.

Subsection (i) allows for the ED to conduct an investigation of a sand mining facility prior to approval of the final stabilization report.

Subsection (j) requires operators to maintain documentation related to compliance with the adopted subchapter onsite and make the documentation available upon

request to ED staff and local pollution control entities. In addition, the ED may require additional information necessary to demonstrate compliance with the provisions of Texas Water Code (TWC), Chapter 26 or the adopted subchapter.

Subsection (k) establishes a compliance period of 180 days for operators registered as an APO with the commission on the effective date of this rule to comply with certain portions of the subchapter. Subsection (k)(1) allows existing operators 180 days to comply with §§311.103(a) – (e) and (g). All future updates or changes to BMPs must be certified in accordance with this subchapter.

Subsection (k)(2) allows existing operators 180 days to comply with §311.103(h)(1). All future updates or changes to the Mine Plan must be completed and certified in accordance with this subchapter.

This compliance period does not waive an operator’s responsibility to implement existing BMPs as required by the Multi-Sector General Permit (TXR050000) or other discharge permits.

Final Regulatory Impact Determination

The TCEQ reviewed the adopted rulemaking in consideration of the regulatory analysis of major environmental rules required by Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to Texas Government Code,

§2001.0225(a) because it does not meet the definition of a “Major environmental rule” as defined in Texas Government Code, §2001.0225(g)(3). The following is a summary of that review.

Texas Government Code, §2001.0225 applies to a “Major environmental rule” adopted by a state agency, the result of which is to exceed standards set by federal law, exceed express requirements of state law, exceed requirements of delegation agreements between the state and the federal government to implement a state and federal program, or adopt a rule solely under the general powers of the agency instead of under a specific state law. A “Major environmental rule” is a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector or the state.

On June 15, 2020, and June 23, 2020, the TACA and the FPI respectively filed separate petitions for rulemaking with TCEQ. Both organizations proposed to revise Chapter 311 to include a new subchapter that will require the ED to establish a guidance document of BMPs for commercial sand mining and other lawful purposes within the San Jacinto River Watershed. The rulemaking adoption will apply to sand mining facilities within the San Jacinto River Watershed. On August 12, 2020, the commission instructed the ED to initiate rulemaking with stakeholder involvement to amend

Chapter 311.

Therefore, the specific intent of the rulemaking adoption is to add a new Subchapter J for the San Jacinto Watershed within the TCEQ's existing rules. The adopted rulemaking amends 30 TAC to add the new subchapter establishing a guidance document of BMPs and requirements for sand mining facilities to implement BMPs and prepare and implement a Mine Plan and Final Stabilization Report to apply in the San Jacinto Watershed.

Certain aspects of the TCEQ's Watershed Protection Rules are intended to protect the environment or reduce risks to human health from environmental exposure. However, the adopted rulemaking will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs; nor will the adopted rulemaking adversely affect in a material way the environment, or the public health and safety of the state or a sector of the state. Therefore, the adopted rulemaking does not fit the Texas Government Code, §2001.0225 definition of major environmental rule.

Even if this rulemaking was a major environmental rule, this rulemaking meets none of the criteria in Texas Government Code, §2001.0225 for the requirement to prepare a full Regulatory Impact Analysis. First, this rulemaking is not governed by federal law. Second, it does not exceed state law but rather applies state law to a specified

environmental need within the San Jacinto Watershed. Third, it does not come under a delegation agreement or contract with a federal program, and finally, it is not being adopted under the TCEQ's general rulemaking authority. This rulemaking is being adopted under existing state law found at TWC, §26.0135 that states that the commission must establish strategic and comprehensive monitoring of water quality and the periodic assessment of water quality in each watershed and river basin of the state. Because the adopted rulemaking does not constitute a major environmental rule, a regulatory impact analysis is not required.

Therefore, the commission does not adopt the rule solely under the commission's general powers.

The commission invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. No comments were received on the Draft Regulatory Impact Analysis Determination.

Takings Impact Assessment

The TCEQ evaluated the rulemaking adoption and performed an analysis of whether it constitutes a taking under Texas Government Code, Chapter 2007. The following is a summary of that analysis.

Under Texas Government Code, §2007.002(5), "taking" means a governmental action

that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Section 17 or 19, Article I, Texas Constitution; or a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that will otherwise exist in the absence of the governmental action and is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The specific purpose of the adopted rulemaking is to amend Chapter 311 to add a new subchapter for the San Jacinto Watershed related to BMPs required for sandmining in the watershed. Promulgation and enforcement of the adopted rules will not be a statutory or constitutional taking of private real property because, as the commission's analysis indicates, Texas Government Code, Chapter 2007 does not apply to these adopted rules because these rules will not impact private real property in a manner that will require compensation to private real property owners under the United States Constitution or the Texas Constitution. Specifically, the adopted rulemaking does not apply to or affect any landowner's rights in any private real property because it does

not burden (constitutionally), restrict, or limit any landowner's right to real property and reduce any property's value by 25% or more beyond that which would otherwise exist in the absence of the regulations. The Chapter 311 rules do not regulate property but instead regulate water quality in the specific watersheds. The adopted rulemaking is reasonably taken to fulfill requirements of state law. Therefore, the adopted rulemaking will not cause a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the adopted rules and found that they are neither identified in Coastal Coordination Act implementation rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act implementation rules, 31 TAC §505.11(a)(6). Therefore, the adopted rules are not subject to the Texas Coastal Management Program (CMP).

The commission invited public comment regarding the consistency with the CMP during the public comment period. No comments were received regarding the CMP.

Public Comment

The commission held a public hearing on July 22, 2021. The comment period closed on July 27, 2021. The commission received comments from Bayou Land Conservancy, Kings Point Community Association, FPI, San Jacinto River Authority (SJRA), TACA, and 98 individuals.

One individual indicated their position as against the proposed rule. Each commentor suggested changes to the proposed rule.

Response to Comments

Miscellaneous

Comment 1

TACA commented that the Best Management Practices (BMP) Guidance Document should not be subject to commission approval. TACA requested clarification on whether the BMP document is subject to formal adoption by the commission. Additionally, TACA expressed concern that making the BMP guidance document subject to commission approval would unnecessarily delay improvements and innovation.

Response 1

The commission agrees with the comment. The BMP Guidance Document being developed by the executive director to accompany this proposed rulemaking is being developed through a separate agency publication process which does not require commission approval. The BMP Guidance Document will be updated on a frequency determined by the executive director to allow for technological advancements and improved industry practices. Future updates to the guidance document will not be subject to commission approval. No change was made as a result of these comments.

Comment 2

One individual commented on the need for rulemaking documents. The individual added that it is a necessary and sufficient condition for developers, contractors, and mining companies to document and codify the disposition of sand, and other excavation products.

Response 2

The commission notes that §311.103(i) of the proposed rulemaking requires sand mining facility operators to maintain documentation related to compliance with this subchapter. Additionally, operators are required to implement BMPs from the ED's BMP Guidance Document to address the discharge of sand from their facility or site and to protect water quality. In response to this comment, and other similar comments, the following language was added to §311.103(g) of the proposed rule to require sand mining operators to prepare and maintain a Mine Plan which will address the overall process of mining at the site including the susceptibility of the site to erosion:

(h)(g) Mine Plan and Final Stabilization Report.

(1) The operator shall develop ~~submit to the executive director a Final Stabilization Report for review and approval~~ a Mine Plan prior to commencing or

continuing regulated activities at the site operations terminating at the site or portion(s) of the site.

(A) The Mine Plan This report shall:

(i)(A) be developed and maintained onsite in accordance with the guidance document of BMPs developed by the executive director;

(ii)(B) be kept current and updated as necessary to address changing conditions at the site;

(iii)(B) be signed and certified by a licensed Texas ~~licensed~~ professional engineer or a licensed Texas ~~licensed~~ professional geoscientist; and

(C) ~~receive executive director approval prior to implementation.~~

(2) Using the Mine Plan referenced in §311.103(h)(1)(A), the operator shall develop a Final Stabilization Report prior to operations terminating at the site or portion(s) of the site.

(A) The Final Stabilization Report shall:

(i) be developed in accordance with the guidance document of BMPs developed by the executive director;

(ii) be signed and certified by a licensed Texas professional engineer or a licensed Texas professional geoscientist;

(iii) be submitted to the executive director for review and approval prior to operations terminating at the site or portion(s) of the site;

(iv) receive executive director approval prior to implementation.

(B)(2)-All required elements of the approved Final Stabilization Report shall be implemented and completed prior to operations terminating at portion(s) of the site or cancelling any permit or authorization required by Chapter 205 or 305 of this title as a result of operations terminating at the site.

As part of the requirement that sand mining facilities document their BMPs and prepare a mine plan as noted above, the commission acknowledges that existing sand mining facility operators will need time to adequately implement those portions of the rule which require certification by a licensed Texas professional

engineer or licensed Texas professional geoscientist prior to continuing operations, such as the BMPs and the additional requirement to develop a Mine Plan. As a result, the following subsection has been added to §311.103 of the rule to establish a compliance period of 180 days for existing sand mining facility operators.

(k) Existing Sand Mining Facilities.

(1) Sand mining facility operators registered as an APO with the commission on the effective date of this rule must comply with §§311.103(a) – (e) and (g) of this title within 180 days following the effective date of this subchapter. All future updates or changes to BMPs must be certified in accordance with §311.103(g).

(2) Sand mining facility operators registered as an APO with the commission on the effective date of this rule must comply with §311.103(h)(1) of this title within 180 days following the effective date of this subchapter. All future updates or changes to the Mine Plan must be made in accordance with §311.103(h)(1).

Comment 3

One individual requested strict BMPs for sand mines along the San Jacinto River, upstream from Kingwood.

Response 3

The commission notes that the proposed rulemaking requires operators in the San Jacinto River Watershed to develop and implement BMPs from the ED's BMP Guidance Document. BMPs included in the ED's BMP Guidance Document must be developed and implemented to minimize water pollution from sand mining facilities and be based on technically supported information that is generally relied upon by professionals within the appropriate environmental area or discipline. No change was made in response to this comment.

Comment 4

One individual commented that sand mining operations, along the San Jacinto waterway, need to abide by stricter regulations to prevent sand from filling up the waterways during rain events. The individual added that TCEQ needs to make sand mining operators follow BMP's.

Response 4

The proposed rule requires sand mining facility operators in the San Jacinto River Watershed to develop and implement BMPs from the ED's BMP Guidance Document. The BMPs included in the ED's BMP Guidance Document will minimize water pollution from sand mining facilities, including pollution from sediment, and are required to be developed and implemented based on technically supported

information that is generally relied upon by professionals within the appropriate environmental area or discipline. Additionally, operators are required to implement final stabilization reports to protect water quality after operations at the site or portion(s) of the site have terminated. If an inspection by the executive director finds that a regulated facility is out of compliance with the rule, the facility may be subject to violations and enforcement. No change was made in response to this comment.

Comment 5

One individual commented that there should be no exceptions to BMPs.

Response 5

The commission disagrees with this comment. The commission recognizes that each sand mining facility differs in available area, site topography, site soils, and other similar technological considerations. Additionally, local codes or ordinances may prevent some operators from implementing all BMPs in the ED's BMP Guidance Document. Because of these differences among sand mining facility operators, variance in the appropriate BMPs is to be expected. No change was made in response to this comment.

Comment 6

One individual commented that strict rules are necessary.

Response 6

The commission notes that the proposed rules, when adopted, will be enforceable. If an inspection by the executive director finds that a regulated facility is out of compliance with the rule, the facility may be subject to violations and enforcement. No change was made in response to this comment.

Comment 7

One individual commented that BMP's should apply to all Texas rivers and waterways.

Response 7

The commission disagrees with this comment. The proposed rulemaking is limited to the San Jacinto River Watershed as described in the original petitions for the rulemaking as approved by the commission. Application of this rule to all Texas rivers and waterways would go beyond the scope of this rulemaking. No change was made in response to this comment.

Comment 8

One individual expressed concern about mining operations being a source of sand in the San Jacinto River due to recent flooding events. The individual requested that the expenses of removing sand be covered by standards and fines on sand mining operators. Lastly, the individual expressed concern that current fines are not sufficient

to protect the San Jacinto River.

Response 8

The proposed rulemaking requires sand mining facility operators to develop and implement BMPs to protect water quality. The implementation of BMPs will minimize the discharge of sand in quantities that may adversely impact water quality. Sand mining facility operators within the San Jacinto River Watershed which fail to comply with the rule will be subject to violations and enforcement. The commission notes that this rulemaking concerns Chapter 311, the Watershed Protection Rules, which is not the appropriate rule to address fines enforced by this agency. The addition or increase of fines, and the use of funds from fines assessed to operators is outside of the scope of this rulemaking. No change was made in response to this comment.

Comment 9

BLC commented that because of the adverse impacts from aggregate mining operations in the river basin, the national organization American Rivers placed the San Jacinto on its "Most Endangered Rivers" list in 2006. BLC also commented that they do not seek to end the practice of mining in the watershed but express concern that without comprehensive, evidence-based best management practices (BMPs) that include reclamation and restoration of closed mines, the industry will harm nearby and downstream communities.

Response 9

The commission agrees that discharges from sand mining facilities in the San Jacinto River Watershed have the potential to adversely impact water quality without the implementation of proper BMPs. See Response 3 related to the requirement for operators to implement BMPs. No change was made in response to these comments.

Comment 10

One individual suggested that sand mines should not be allowed at all.

Response 10

Although sand mining facilities have the potential to adversely impact water quality, with the existing regulatory scheme and proper BMPs, sand mining facilities can be protective of water quality in the San Jacinto River Watershed and still operate. Therefore, the commission disagrees with this comment. No change was made in response to this comment.

Comment 11

One individual expressed concern for air quality and dust particulates produced by sand mining operations.

Response 11

The commission notes that this rulemaking is limited to addressing water quality concerns and the implementation of BMPs to protect water quality. Although sand mining facility operations have the potential to impact air quality, air quality goes beyond the scope of this rulemaking. No change was made in response to this comment.

Comment 12

One individual commented that they are pleased with progress of these proposed rules and guidelines.

Response 12

The commission acknowledges this comment.

Comment 13

SJRA noted that there are inconsistencies between “Licensed Texas” and “Texas Licensed” throughout the proposed rule.

Response 13

The commission agrees with the comment and language in §311.103(g) of the proposed rule has been revised for consistency to read as follows, “licensed Texas professional engineer or geoscientist.”

Comment 14

One individual commented that the state of Texas and the legislature do not want to stop flooding. As a result, that will prevent people from moving to the state and start an exodus.

Response 14

The commission does not have the jurisdiction to regulate flooding as part of a rulemaking and is limited to controlling the discharge of pollutants into water in the state. This rulemaking addresses water quality protection from activities that occur at sand mining facilities in the San Jacinto River Watershed. For any flooding concerns, members of the public may wish to contact their local floodplain administrator. No change was made in response to this comment.

Comment 15

One individual commented that the costs of remediation to remove sediment deposits after flooding has been substantial for individuals and the region. The individual also expressed concerns over health impacts related to the release of chemicals used by mining operations.

The individual commented that the agency should review its mission statement and determine what part of the statement is most important.

Response 15

The commission notes that the proposed rule requires operators to develop and implement BMPs to protect water quality. See Responses 2 and 4 related to the discharge of sediment. The commission disagrees with the representation that the agency's mission is not being implemented fairly. The commission protects water quality through decisions based on the law, common sense, sound science, and fiscal responsibility. In addition, the commission strives to promote flexibility in achieving environmental goals. No change was made in response to this comment.

Comment 16

One individual commented that the current rule, as written, does not prohibit the miners from doing anything they want.

Response 16

The commission disagrees with the comment. The proposed rule establishes clear requirements for sand mining facility operators to implement BMPs to protect water quality, develop, update, and maintain a current Mine Plan, and to perform final stabilization prior to terminating operations at the site or portion(s) of the site. No change was made in response to this comment.

Comment 17

One individual complimented TCEQ's efforts. The individual also expressed concern over the best practices and stated that the rules will make it easy for operators to choose not to follow them. The commenter stated that it will result in millions of dollars in costs to taxpayers and public officials.

Response 17

The commission disagrees with the comment. See Response 16 related to established requirements for sand mining facility operators. The proposed rule establishes clear requirements for operators and once effective, the final rule will be enforced by the commission. Operators that fail to comply with the requirements of the proposed rule will be subject to violations and enforcement. No change was made in response to this comment.

Comment 18

One individual expressed concern over a sand mine operator potentially selling their facility. The individual is uncertain whether the new buyer will use the land for development or continue to use it for sand mining. The individual requests TCEQ's help communicating with the buyers/sellers, regarding reclamation.

Response 18

The obligation for operators to comply with the proposed rule is not affected by the sale or transfer of sand mining facilities. Any sand mining facility operator located

within the San Jacinto River Watershed must comply with the rule. No change was made in response to this comment.

Comment 19

One individual commented that there should be more protection for the forested ecosystems along the San Jacinto River. The individual suggested there should be less sand mining and that BMPs should be required. The individual also commented that the Sand Mining Best Management Practices Guidance document should include a summary in the introduction, emphasizing the importance of forested ecosystems.

Response 19

The proposed rulemaking requires sand mining facilities to develop and implement BMPs to protect water quality. The implementation of this rule in the San Jacinto River Watershed will lead to protection of water quality throughout the watershed including in forested ecosystems within the watershed. The commission notes that the sand mining BMP Guidance Document is being developed in conjunction with the rule with stakeholder involvement but separately from this rulemaking. No change was made in response to this comment.

§311.101. Definitions.

Comment 20

SJRA requested clarification on whether the Lake Conroe watershed would be exempt

from the provision, and if so, requested the reasoning behind that. SJRA also requested clarification if Luce Bayou should be included in the listed of watersheds and tributaries as both Lake Conroe and Luce Bayou are encompassed in the figure.

Response 20

The definition for San Jacinto River Watershed in §311.101(7) of the proposed rule, as written, encompasses Lake Conroe and Luce Bayou. Lake Conroe and Luce Bayou are encompassed in the definition because they are within the watershed of the listed waterbodies and its tributaries. No change was made in response to this comment.

Comment 21

SJRA requested that the watershed definition be revised to read as follows: “San Jacinto River Watershed - Those portions of the San Jacinto River Watershed that includes the watersheds of the following and their tributaries,” instead of “San Jacinto River Watershed - Those portions of the San Jacinto River Watershed that includes the watersheds of the following and its tributaries.”

Response 21

The commission declines to make the requested change to the definition of San Jacinto River Watershed. The terminology used in the definition for San Jacinto River Watershed in §311.101(7) of the proposed rule is consistent with the

definitions included in other sections of Chapter 311 Watershed Protection Rules.

No change was made in response to this comment.

Comment 22

One individual commented that there is a conflict between the geographic scope described in the written definition and that shown in the graphic. The individual suggested defining the watershed as “everything flowing into Lake Houston.”

Response 22

The commission disagrees with this comment and declines to make the suggested change. The graphic was developed using the USGS National Watershed Boundary Dataset. The watershed boundaries included in the graphic are the USGS Hydrologic Unit Code eight-digit watershed boundaries encompassing the waterbodies and tributaries described in the written definition. No change was made in response to this comment.

§311.103. General Requirements.

Comment 23

TACA commented that as proposed §311.103(a), (b), and (c) require operators to develop and implement “all” best management practices (BMPs) identified in the guidance document even if one is not appropriate. TACA stated that the intent behind their petition was to provide operators with a menu of options to select suitable BMPs

from for their specific site. TACA requests that the term “all” be removed from these subsections and replace with the term “technically appropriate” or a similar term.

Response 23

The commission agrees with the comment. See Response 5 related to BMP flexibility for sand mining facilities. The commission declines to make the suggested change, instead, §311.103 has been revised as follows:

“(a) Vegetative Controls. The operator shall develop and implement all vegetative Best Management Practices (BMPs) identified in the guidance document developed by the executive director for the appropriate phases of the sand mining facility’s operation.

(b) Structural Controls. The operator shall develop and implement all structural BMPs identified in the guidance document developed by the executive director for the appropriate phases of the sand mining facility’s operation.

(c) Pre-mining, Mining, and Post-mining. The operator shall identify, develop and implement all other BMPs identified in the guidance document developed by the executive director for pre-mining, mining, and post-mining phases of the sand mining facility’s operation. , unless they are infeasible. If a BMP is infeasible, the operator shall use an alternative equivalent BMP and maintain documentation of the

reason onsite. The following considerations may be used to determine if a BMP is infeasible:

- ~~(1) financial considerations;~~**
- ~~(2) health and safety concerns;~~**
- ~~(3) local restrictions or codes;~~**
- ~~(4) site soils;~~**
- ~~(5) slope;~~**
- ~~(6) available area;~~**
- ~~(7) precipitation pattern;~~**
- ~~(8) site geometry;~~**
- ~~(9) site vegetation;~~**
- ~~(10) infiltration capacity;~~**
- ~~(11) geotechnical factors;~~**
- ~~(12) depth to groundwater; and~~**
- ~~(13) other similar considerations.~~**

(d) Infeasibility. Certain BMPs for sections (a), (b), and (c) above may be infeasible for some sand mining facility operations based on site-specific factors. An infeasibility determination is required when BMPs may be infeasible, as defined in §311.101(3). Detailed, supporting documentation shall be maintained onsite demonstrating why the BMP is infeasible, that the alternative BMP is more

appropriate for the site, and that the alternative BMP provides equivalent or improved water quality protection. The operator shall implement the documented alternative, equivalent BMP at the site. The following criteria shall be used when documenting and determining the infeasibility of a BMP and that an alternative, equivalent BMP is more appropriate for the site:

- (1) human health and safety concerns;**
- (2) local restrictions or codes;**
- (3) cost effectiveness;**
- (4) site soils;**
- (5) slope;**
- (6) available area;**
- (7) precipitation patterns;**
- (8) site geometry;**
- (8)(9) site vegetation;**
- (9)(10) infiltration capacity;**
- (11) geotechnical factors;**
- (10) depth and distance to water in the state; and**
- (11) other similar technological considerations.”**

Comment 24

TACA commented that it is possible an operator could identify an engineering or other

approach to protect water quality that is not listed in the BMP guidance document.

TACA commented that the rule should allow the operator an opportunity to work with the executive director to implement these BMPs as an alternative which could later be incorporated into the guidance document. TACA commented that TCEQ has a well-established track record of allowing for alternative means of compliance, most recently in the newly adopted Multi-Sector General Permit and that §311.103 should be revised to provide the executive director authority to approve BMPs that are not listed in the guidance document on a case-by-case basis.

Response 24

The commission agrees with the comment in part. The commission recognizes that advances in technology will occur and that the ED's BMP Guidance Document must be updated to accommodate these advances. At any time, operators or stakeholders may submit suggested changes or additions to the ED's BMP Guidance Document in writing to the ED. The ED will evaluate any suggested changes or additions to determine if updates to the ED's BMP Guidance Document are necessary. The commission disagrees that §311.103 of the proposed rule needs to include an option for case-by-case approval of BMPs. Operators must implement BMPs from the ED's BMP Guidance Document unless they are infeasible. See also Response 1 related to updates to the guidance document of BMPs developed by the ED. No change was made in response to this comment.

Comment 25

FPI commented that the list of infeasibility considerations in §311.103(c) are counterproductive and would allow operators to declare a BMP infeasible for almost any reason. FPI also expressed concern that the infeasibility declaration does not require TCEQ approval.

Response 25

The commission disagrees with the comment. See Response 5 related to BMP flexibility. The commission revised the language at §311.103(c) of the proposed rule, see Response 23. The amended rule language retains a revised list of infeasibility criteria. This list of criteria is necessary to guide operators in making accurate determinations of infeasibility and establishing the appropriate documentation to demonstrate any infeasibility determination and alternative equivalent BMP selection. Operators will be required to maintain this documentation onsite. The requirement for operators to maintain compliance documentation onsite is consistent with the existing regulatory scheme for stormwater discharge permits and other agency programs. In addition, compliance documentation may be subject to a records review during an investigation.

Comment 26

Seventy-four individuals and the Kings Point Community Association commented that the list of infeasibility considerations in §311.103(c) gives sand mine operators free

license to ignore BMPs for a virtually infinite number of reasons. The individuals and the Kings Point Community Association also commented requesting that the rule language be revised to require BMP approval by TCEQ. One individual added that the list of considerations provides so much latitude to operators that the rule is useless.

Response 26

The commission disagrees with the comment. The list of infeasibility considerations included in the proposed rule was developed based on those included in the TPDES Construction General Permit and Municipal Separate Storm Sewer System General Permit. These infeasibility considerations are used by TPDES permittees to implement alternative or modified stormwater controls where the controls required by the permit are infeasible for their site-specific conditions. The commission intends for operators subject to this rule to use these considerations in the same way. Operators may have site-specific conditions that make it infeasible for them to implement a BMP from the ED's BMP Guidance Document, considering best industry practices (*see definition of infeasibility in the proposed rule*). It is necessary for the commission to allow for some flexibility to meet the requirements of the rule in these cases. See also Responses 5, 23, and 25.

Comment 27

One individual commented that the wording in §311.103(c) invites operators to take one of the twelve or more excuses for exemptions with no repercussions. The

individual commented that to make the rule effective, any exemptions for infeasibility should have to be reviewed and approved by TCEQ.

Response 27

The commission disagrees with the comment. See Responses 23 and 25.

Comment 28

One individual commented in opposition of the rule because the individual believes the proposed rule includes no real regulation for mine operators. The individual also commented that any and all variances from BMP standards must be approved in advance by TCEQ.

Response 28

The commission disagrees with the comments. See Responses 16, 23, and 25.

Comment 29

One individual expressed concern that the wording of the proposed rule would allow sand mine operators to continue releasing sand to the San Jacinto River. The individual commented that any variation to the rules should be approved by TCEQ and subject to a public hearing.

Response 29

The commission disagrees with the comment. See Responses 4, 23, and 25.

Comment 30

One individual commented that the exemptions for operators in §311.103(c) would be ineffective and allow operators to bypass consequences by drafting and maintaining a document onsite.

Response 30

The commission disagrees with the comment. See Responses 23 and 25.

Comment 31

One individual commented that the considerations listed in §311.103(c) completely negate the purpose of the proposed rule. The individual stated that the negligent practice of mining operations contributed to the loss of millions of dollars, as well as the loss of life. Lastly, the individual commented that the rule does not require mandatory compliance.

Response 31

The commission disagrees with this comment. The commission notes that the proposed rule requires operators to implement and maintain BMPs to protect water quality and that compliance with the rule is enforceable. See also Responses 16, 23, and 25.

Comment 32

One individual commented that the requirement in §311.103(g) for selected BMPs to be independently certified as appropriate is hardly a mandate for oversight and gives leeway and incentive to not implement important parts of the guidance document as infeasible. The individual commented that the same amount of oversight applied to final stabilization reports in the rule should be given to the approval of BMPs.

Response 32

The commission disagrees with the comments. The commission notes that the proposed rule requires operators to implement and maintain BMPs to protect water quality and that compliance with the rule is enforceable. See Responses 16, 23, and 25.

Comment 33

SJRA commented that §311.103(e) should be rewritten from:

“Periodic inspections include those performed by the operator in compliance with the guidance document of BMPs or permits required by Chapters 205 or 305 of this title (relating to General Permits for Waste Discharges and Consolidated Permits, respectively) or inspections performed by the executive director determine that such measures have been used inappropriately, or incorrectly, or are not adequate.”

to instead read:

“Periodic inspections include those performed by the operator in compliance with the guidance document of BMPs or permits required by Chapters 205 or 305 of this title (relating to General Permits for Waste Discharges and Consolidated Permits, respectively) or inspections performed by the executive director to determine that such measures have been used inappropriately, or incorrectly, or are not adequate.”

Response 33

The commission has modified the text at §311.103(e) of the proposed rule as follows:

“Periodic inspections include those performed by the operator in compliance with the guidance document of BMPs or permits required by Chapters 205 or 305 of this title (relating to General Permits for Waste Discharges and Consolidated Permits, respectively) or inspections performed by the executive director which determine that such measures have been used inappropriately, or incorrectly, or are not adequate.”

Comment 34

Two individuals commented that the rule should not allow variance or deviation in BMPs without TCEQ review and approval.

Response 34

The commission disagrees with this comment. See Responses 23 and 25 related to alternative equivalent BMPs.

Comment 35

One individual expressed concern that the rule does not include public notification of proposed BMPs. The individual commented that notification would go a long ways towards increasing transparency of proposed activities.

Response 35

See Response 25.

Comment 36

FPI commented that the final stabilization report is like a blueprint for restoration and reclamation at the site. FPI also commented that leaving all restoration and reclamation until the very end is not in the best interests of all concerned.

FPI commented that having a comprehensive plan for restoration at the beginning of operations would ensure that operators will take steps in the beginning to streamline and coordinate their operations and BMPs so that partial reclamation is done at every stage. FPI commented that the stabilization report should be submitted to TCEQ for

review with the original application and updated annually to reflect areas already mined and restored.

Response 36

The commission notes that a final stabilization report is required to ensure that operators leave the site in a stabilized condition before terminating operations at the site or portion(s) of the site to reduce discharge of sediments from the site or portion(s) of the site after the operator has terminated operations.

The commission agrees that operators should have a plan prepared at the beginning of operations to address the details of the site and how operators will perform the regulated activity at the site. This plan, developed from the beginning of operations, will then be used by operators in developing the final stabilization plan prior to termination at the site or portion(s) of the site. Revisions were made to §311.103(g) of the proposed rule language to require a Mine Plan as described in Response 2.

SUCHAPTER J: BEST MANAGEMENT PRACTICES FOR SAND MINING FACILITY

OPERATIONS WITHIN THE SAN JACINTO RIVER BASIN

§§311.101 - 311.103

Statutory Authority

The new rules are adopted under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102, which provides the commission with the authority to carry out its duties and general powers under its jurisdictional authority as provided by TWC, §5.103; TWC, §5.103, which requires the commission to adopt any rule necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §5.120, which requires the commission to administer the law so as to promote judicious use and maximum conservation and protection of the environment and the natural resources of the state; and TWC, §26.0135, which requires the commission to establish the strategic and comprehensive monitoring of water quality and the periodic assessment of water quality in each watershed and river basin of the state.

The adopted new rules implement, TWC, §§5.013, 5.102, 5.103, 5.120. and 26.0135.

§311.101. Definitions.

The following words and terms, when used in this subchapter, have the following meanings.

(1) Aggregate Production Operation (APO)--As defined in Chapter 342 of this title (relating to Regulation of Certain Aggregate Production Operations).

(2) Best management practices (BMPs)--Schedules of activities, prohibitions of practices, maintenance procedures, and other techniques to control, prevent or reduce the discharge of pollutants into surface water in the state. The BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spills or leaks, sludge or waste disposal, or drainage from raw material storage areas.

(3) Infeasible--Not technologically possible or not economically practicable and achievable in light of best industry practices.

(4) Minimize--To reduce or eliminate to the extent achievable using control measures that are technologically available and economically practicable and achievable in light of best industry practices.

(5) Operator--A person responsible for the management of an aggregate production operation (APO) facility subject to the provisions of this subchapter. The APO facility operators include entities with operational control over APO regulated activities, including the ability to modify those activities; or entities with day-to-day

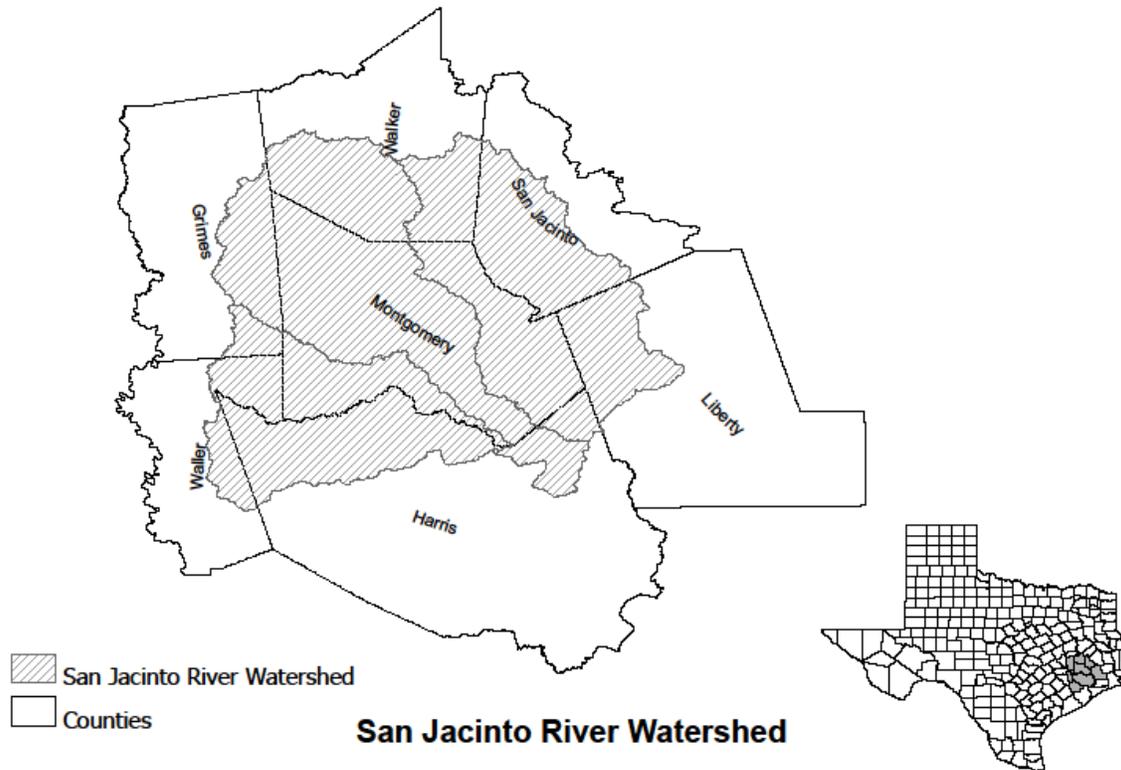
operational control of activities at a facility necessary to ensure compliance with this subchapter (e.g., the entity is authorized to direct workers at a facility to carry out activities required by this subchapter).

(6) Sand Mining Facilities--The aggregate production operations (APOs) engaged in activities described by Standard Industrial Classification codes 1442 and 1446, concerning industrial and construction sand. Additionally, this applies to any other APO that the executive director has determined to be a sand mining facility by sending written notice to the APO operator.

(7) San Jacinto River Watershed--Those portions of the San Jacinto River Watershed that includes the watersheds of the following and its tributaries:

Figure: 30 TAC §311.101(a)(7)

Figure 1: 30 TAC §311.101(a)(7)



(A) the East Fork of the San Jacinto River in Montgomery,

Harris and Liberty Counties;

(B) Peach Creek in Montgomery County;

(C) Caney Creek in Montgomery and Harris Counties;

(D) the West Fork of the San Jacinto River from the Lake Conroe Dam in Montgomery and Harris Counties to the Lake Houston Dam in Harris County;

(E) Lake Creek in Montgomery and Grimes Counties;

(F) Spring Creek in Montgomery and Harris Counties; and

(G) Cypress Creek in Harris and Waller Counties.

(8) Storm Event--A precipitation event that results in a measurable amount of precipitation.

§311.102. Scope and Applicability.

(a) The purpose of this chapter is to regulate, through Best Management Practices (BMPs), sand mining facilities, which have the potential to adversely impact water quality within the San Jacinto River Watershed as defined in this subchapter.

(b) This subchapter applies to sand mining facilities located in the San Jacinto River Watershed.

(c) The executive director shall develop and maintain a guidance document of BMPs to minimize water pollution from sand mining facilities regulated by this subchapter. The BMPs shall be based on technically supported information that is generally relied upon by professionals within the appropriate environmental area or discipline. The BMPs guidance document shall be updated on a frequency determined by the executive director to allow for technological advancements and improved practices.

§311.103. General Requirements.

(a) Vegetative Controls. The operator shall develop and implement all vegetative Best Management Practices (BMPs) identified in the guidance document developed by the executive director for the appropriate phases of the sand mining facility's operation.

(b) Structural Controls. The operator shall develop and implement all structural BMPs identified in the guidance document developed by the executive director for the appropriate phases of the sand mining facility's operation.

(c) Pre-mining, Mining, and Post-mining. The operator shall identify, develop and implement all other BMPs identified in the guidance document developed by the executive director for pre-mining, mining, and post-mining phases of the sand mining

facility's operation, unless they are infeasible. If a BMP is infeasible, the operator shall use an alternative equivalent BMP and maintain documentation of the reason onsite.

The following considerations may be used to determine if a BMP is infeasible:

(1) financial considerations;

(2) health and safety concerns;

(3) local restrictions or codes;

(4) site soils;

(5) slope;

(6) available area;

(7) precipitation pattern;

(8) site geometry;

(9) site vegetation;

(10) infiltration capacity;

(11) geotechnical factors;

(12) depth to groundwater; and

(13) other similar considerations.

(d) Infeasibility. Certain BMPs for sections (a), (b), and (c) above may be infeasible for some sand mining facility operations based on site-specific factors. An infeasibility determination is required when BMPs may be infeasible, as defined in §311.101(3). Detailed, supporting documentation shall be maintained onsite demonstrating why the BMP is infeasible, that the alternative BMP is more appropriate for the site, and that the alternative BMP provides equivalent or improved water quality protection. The operator shall implement the documented alternative, equivalent BMP at the site. The following criteria shall be used when documenting and determining the infeasibility of a BMP and that an alternative, equivalent BMP is more appropriate for the site:

(1) human health and safety concerns;

(2) local restrictions or codes;

(3) cost effectiveness;

(4) site soils;

(5) slope;

(6) available area;

(7) precipitation patterns;

(8) site vegetation;

(9) infiltration capacity;

(10) depth and distance to water in the state; and

(11) other similar technological considerations.

(e)(d) Installation and Maintenance. The operator shall install and maintain all control measures in accordance with the manufacturer's specifications and good engineering practices.

(f)(e) Replacement or Modification of Controls. Following periodic inspections, the operator shall replace or modify controls in a timely manner, but no later than the next anticipated storm event. Periodic inspections include those performed by the operator in compliance with the guidance document of BMPs or permits required by Chapters 205 or 305 of this title (relating to General Permits for Waste Discharges and Consolidated Permits, respectively) or inspections performed by the executive director which determine that such measures have been used inappropriately, or incorrectly, or are not adequate.

(g)(f) Certification of BMPs. The operator shall obtain certification of the design and installation of all new and existing BMPs, within the appropriate area or discipline, by a licensed Texas professional engineer or a licensed Texas professional geoscientist prior to commencing or continuing regulated activities. The selected BMPs may be independently certified, as appropriate.

(h)(g) Mine Plan and Final Stabilization Report.

(1) The operator shall develop submit to the executive director a Final Stabilization Report for review and approval a Mine Plan prior to continuing regulated activities at the site operations terminating at the site or portion(s) of the site.

(A) The Mine Plan This report shall:

(i)(A) be developed and maintained onsite in accordance with the guidance document of BMPs developed by the executive director;

(ii) be kept current and updated as necessary to address changing conditions at the site;

(iii)(B) be signed and certified by a licensed Texas licensed professional engineer or a licensed Texas licensed professional geoscientist; and.

(C) receive executive director approval prior to implementation.

(2) Using the Mine Plan referenced in §311.103(h)(1)(A), the operator shall develop a Final Stabilization Report prior to operations terminating at the site or portion(s) of the site.

(A) The Final Stabilization Report shall:

(i) be developed in accordance with the guidance document of BMPs developed by the executive director;

(ii) be signed and certified by a licensed Texas professional engineer or a licensed Texas professional geoscientist;

(iii) be submitted to the executive director for review and approval prior to operations terminating at the site or portion(s) of the site;

(iv) receive executive director approval prior to implementation.

(B)(2) All required elements of the approved Final Stabilization Report shall be implemented and completed prior to operations terminating at portion(s) of the site or cancelling any permit or authorization required by Chapter 205 or 305 of this title as a result of operations terminating at the site.

(i)(h) Investigation. The executive director may conduct an investigation in addition to the review of the Final Stabilization Report, prior to the termination of sand mining facility operations at the site or portion(s) of the site.

(j)(†) Documentation. All documentation related to compliance with this subchapter shall be maintained onsite and made readily available for inspection and review upon request by authorized executive director staff as well as local pollution control entities with jurisdiction. The executive director may require any additional information deemed appropriate and necessary to demonstrate compliance with the provisions of Texas Water Code, Chapter 26 or this subchapter.

(k) Existing Sand Mining Facilities.

(1) Sand mining facility operators registered as an APO with the commission on the effective date of this rule must comply with §§311.103(a) - (e) and (g) of this title within 180 days following the effective date of this subchapter. All future updates or changes to BMPs must be certified in accordance with §311.103(g).

(2) Sand mining facility operators registered as an APO with the commission on the effective date of this rule must comply with §311.103(h)(1) of this title within 180 days following the effective date of this subchapter. All future updates or changes to the Mine Plan must be made in accordance with §311.103(h)(1).