TCEQ Interoffice Memorandum

To: Susan M. Jablonski, P.E., Central Texas Area Director

Thru: David Van Soest, Regional Director, Austin and Waco Regions
Lori Wilson, Assistant Regional Director, Austin and Waco Regions
Robert Sadlier, Section Manager, Edwards Aquifer Protection Program

From: Edwards Aquifer Protection Program Committee

Date: October 22, 2020

Subject: Defining "larger common plan of development or sale"

The Edwards Aquifer Protection Program (EAPP) committee recommends that for clarity of understanding, the need to memorialize issues surrounding the current and historical implementation of common plan of development issues. The following guidance was developed to memorialize and ensure continued consistency in the EAPP's application processing.

Brief Description of Issue

Subchapter B of the Edwards Aquifer rules (Title 30 Texas Administrative Code (30 TAC), Chapter 213-Subchapter B) known as the Contributing Zone rules ("CZ" and CZ Rules) regulates activities in the Edwards Aquifer Contributing Zone with the potential for polluting surface streams which recharge the Edwards Aquifer. The CZ rules also protect existing and beneficial uses of groundwater in the Edwards Aquifer. Subchapter B specifically "…applies only to regulated activities disturbing at least five acres, or regulated activities disturbing less than five acres which are part of a larger common plan of development or sale with the potential to disturb cumulatively five or more acres." "Common plan of development or sale" ("common plan") is not defined in the rules.

Because the Contributing Zone rules were effective in 1999, staff with the EAPP regularly determine if regulated activities trigger rule applicability during compliance investigations, as well as when providing input to the regulated community regarding proposed development projects over the CZ. With the lack of a definition for a "common plan of development," EAPP staff spend significant amounts of time determining when regulated activities meet the applicability of Subchapter B.

Defining a "larger common plan of development or sale" will help ensure the CZ Rules are applied consistently and implemented as intended when staff make rule applicability determinations, allowing EAPP staff to provide helpful and consistent guidance to the regulated community.

Background

Subchapter B of 30 TAC 213 was originally adopted September 23, 1998 and effective June 1, 1999, and specifically requires that a Contributing Zone Plan be obtained for regulated activities that meet subchapter applicability (30 TAC Subsection 213.21(d)).

Understanding and adhering to the intent of the rules is required when making a determination of a "larger common plan." Therefore, excerpts from the Texas Register, speaking to the intent of the rules are included and discussed below.[1]

According to the Texas Register, the US Environmental Protection Agency (EPA) National Pollutant Discharge Elimination System (NPDES) Construction General Permit's standard of applicability for a "common plan" was intentionally used by the Texas Commission on

Environmental Quality (TCEQ) as a threshold for applicability of the Contributing Zone rules, “…in order to provide consistency between state and federal stormwater pollution control requirements and avoid unnecessary confusion and expense for the regulated community,” and, “…no greater impact to business activities will result from this [CZ] rule than that already caused by the EPA NPDES General Storm Water Permit.”[1]

Title 40, Code of Federal Regulations Section 122.26(b)(14) requires operators of construction or demolition projects disturbing five or more acres of earth, or less than five acres if part of a "larger common plan of development or sale" that cumulatively disturbs five or more acres to obtain an NPDES permit.

Guidance from the EPA regarding the NPDES General Permit explains a “common plan” is broadly defined as any announcement or piece of documentation (including a sign, public notice or hearing, sales pitch, advertisement, drawing, permit application, zoning request, computer design, etc.) or physical demarcation (including boundary signs, lot stakes, surveyor markings, etc.) indicating construction activities may occur on a specific plot. This definition is consistent with the way staff from the EAPP currently evaluate “common plan” questions.

The EPA accepts that a common plan of development or sale may “end” where projects are substantially completed with less than five acres remaining of the original common plan of development or sale and there is a clearly identifiable period of time where there is not any on-going construction, including meeting the criteria for final stabilization. The EPA uses a “couple years or more” as a reasonable timeframe. However, the CZ rules and the preamble to the CZ rules make no mention of any time-separation component exempting a common plan of development from being a common plan. In other words, once a project is deemed a common plan of development or sale, for purposes of the CZ rules, the project is a common plan until project completion.

An important consideration and clear distinction between the NPDES/Texas Pollutant Discharge Elimination System (TPDES) permits and the Contributing Zone rule requirements is that the NPDES/TPDES permits only contemplate potential pollution during construction of regulated activities until final stabilization; whereas the Contributing Zone rules aim to prevent pollution both during construction of regulated activities and to permanently prevent/mitigate stormwater runoff pollution after project completion for the life of the regulated facility. This distinction is made clear in the Texas Register which states, “…EPA’s general permit does not specifically address post development BMPs,” “…studies indicate a significant pollution potential from post-construction sites,” and “stormwater runoff from parking lots, highways, roof tops, yards, and sidewalks and other impervious surfaces will contain increased concentrations of suspended solids, pesticides, bacteria, petroleum residues (oil and grease), fertilizers, animal waste and metals.”[1]

Additionally, EPA guidance for NPDES General Permits has a different goal than an Edwards Aquifer Authorization, separation of a distinct area from an original common plan of development or sale over time can create complexities for the EAPP. The threshold for regulation at five (5) acres establishes when permanent best management practices (BMPs) are necessary and this permanent potential for pollution does not diminish over time. Rather, separations from common plans over time would likely result in aggregation and cumulative permanent pollution potential that would have otherwise been mitigated by permanent BMPs, something the CZ rules never intended or envisioned.

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RE: Defining “larger common plan of development or sale”

Committee Recommendation

The EAPP recommends, for clarity of understanding and until such time as “larger common plan of development or sale” is defined through rule, the EAPP will rely on the EPA’s guidance for “larger common plan of development or sale” without consideration for time span separation. Adhering to the intent of the rule for applicability purposes will preserve and advance the goal of maintaining the quality of stormwater runoff after construction.

The EAPP also recommends implementing a series of criteria for determining when a project is part of a larger common plan of development or sale. This will result in consistency among EAPP staff and the regulated community when determining the applicability of the Contributing Zone rules for sites that are less than five acres.

A project site, that is less than five acres, will be considered part of a larger common plan of development or sale if the site:

1. can be identified by plats, blueprints, marketing plans, contracts, building permits, public notices or hearings, zoning requests, and/or other documentation demonstrating the project site is, or was, part of an overall proposed plan that exceeds five acres.

2. was originally part of a larger development or tract, that had an overall area of at least five acres, but the land was parceled off and construction occurs on each individual plot by separate, independent builders.

3. is located where multiple individual, distinct soil disturbing construction activities may occur at different times but will utilize common infrastructure constructed by a previous developer for a larger area exceeding five acres. Examples are common connecting roads, utility construction projects, etc.

4. utilizes the existing structures and improvements of a neighboring site(s) and the cumulative area exceeds five acres. For example, shared access drives, parking areas, drainage improvement structures, easements, restrictive covenants, etc.

5. is owned by same individual/company as the adjacent property(s) and cumulatively exceed five acres.

6. was originally subject of a previous CZP approval and has been separated and sold to a different owner.

Documentation, such as plats, blueprints, etc., dated prior to the June 1, 1999 Subchapter B effective rule date will not be considered when determining if a site is part of a larger common plan of development. The parceling of a larger tract that occurred prior to the effective date will also not be considered.

References

1. *Texas Register*, Volume 23, Number 41, October 1998, pgs. 10399-
2. *Federal Register*, Volume 63, Number 128, July 6, 1998, pgs. 36490-

Feedback to the Committee

☑ The recommendation is accepted as proposed.

☐ The recommendation is accepted with the following modifications. Comments:

Click here to enter text.

☐ The recommendation is being returned for further consideration. Comments: Click here to enter text.