

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** November 23, 2021

Thru: Laurie Gharis, Chief Clerk
Toby Baker, Executive Director

From: Earl Lott, Director
Office of Water

Docket No.: 2021-0372-RUL

Subject: Commission Approval for Rulemaking Adoption
Chapter 311, Watershed Protection
Sand Mining BMPs in the San Jacinto River Watershed
Rule Project No. 2020-048-311-OW

Background and reason(s) for the rulemaking:

The Texas Aggregates and Concrete Association (TACA) and the Lake Houston Area Grassroots Flood Prevention Initiative (FPI) filed separate petitions for rulemaking with Texas Commission on Environmental Quality (TCEQ, agency, or commission) 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 that the TCEQ revise 30 Texas Administrative Code (TAC) 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 rulemaking adoption applies to sand mining facilities within the San Jacinto River Watershed. On August 12, 2020, the TCEQ commissioners instructed the ED to initiate rulemaking with stakeholder involvement to amend Chapter 311.

If adopted, this rulemaking will add three sections to Chapter 311 to define the watershed where the rules will apply, establish requirements for the ED to develop a guidance document of BMPs, and make requirements for sand mining facilities to implement the guidance document of BMPs, develop and maintain onsite a Mine Plan prior to commencing or continuing regulated activities at the site, submit to the ED a Final Stabilization Report prior to operations terminating at the site or portion(s) of the site, and establish 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 rule related to the BMPs and the Mine Plan.

This rulemaking is not required by new or revised state or federal laws or regulations.

Scope of the rulemaking:

A.) Summary of what the rulemaking will do:

- Define the San Jacinto River Watershed which will identify the areas to which the adopted watershed protection rules will apply;
- Require the ED to develop a guidance document of BMPs for sand mining facilities in the San Jacinto River Watershed;

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- Require sand mining facilities in the San Jacinto River Watershed to develop and implement BMPs from the guidance document of BMPs developed by the ED;
- Require sand mining facilities in the San Jacinto River Watershed to develop a Mine Plan prior to commencing or continuing regulated activities at the site which includes the elements described in the guidance document of BMPs developed by the ED. The Mine Plan must be kept current and updated as necessary to address changing conditions at the site, and must be signed and certified by a licensed Texas professional engineer or geoscientist;
- Require sand mining facilities in the San Jacinto River Watershed to develop and submit to the ED, prior to operations terminating at the site or portion(s) of the site, a Final Stabilization Report including the elements described in the guidance document of BMPs developed by the ED and signed and certified by a licensed Texas professional engineer or geoscientist; and
- Require sand mining facilities to implement and complete the approved Final Stabilization Report prior to terminating permit coverage required by 30 TAC Chapters 205 and 305.
- Establish a 180-day compliance period for sand mining facility 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) related to implementation of BMPs and the Mine Plan.

B.) Scope required by federal regulations or state statutes:

None.

C.) Additional staff recommendations that are not required by federal rule or state statute:

The following are recommendations that staff included in the rulemaking adoption which are an addition to the FPI and TACA petitions:

- In §311.103(f), requirements are included for sand mining facility operators to obtain certification of BMPs by a licensed Texas professional engineer or geoscientist.
- In §311.103(h)(1), requirements are included for sand mining facility operators to develop and maintain onsite a Mine Plan prior to commencing or continuing regulated activities at the site. The Mine Plan must be kept current, be updated to reflect changing conditions at the site, and be signed and certified by a licensed Texas professional engineer or geoscientist.
- In §311.103(h)(2), requirements are included for sand mining facility operators to develop and submit to the ED for review and approval a Final Stabilization Report and implement the report prior to terminating permit coverage under 30 TAC

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Chapters 205 and 305. The Final Stabilization Report must be signed and certified by a licensed Texas professional engineer or geoscientist.

- In §311.103(k)(1), a compliance period of 180 days is established for sand mining facility operators registered as an APO with the commission on the effective date of this rule to comply with §§311.103(a) - (e) and (g). All future updates or changes to BMPs must be certified in accordance with the subchapter.
- In §311.103(k)(2), a compliance period of 180 days is established for sand mining facility operators registered as an APO with the commission on the effective date of this rule 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.

Statutory authority:

- Texas Government Code, §2001.021, which establishes the procedures by which an interested person may petition a state agency for the adoption of a rule;
- Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission over other areas of responsibility as assigned to the commission under the TWC and other laws of the state;
- TWC, §5.102, which establishes the commission's authority necessary to carry out its jurisdiction;
- TWC, §5.103 and §5.105, which authorize the commission to adopt rules and policies necessary to carry out its responsibilities and duties under TWC, §5.013;
- TWC, §5.120, which authorizes the commission to promote the maximum conservation and protection of the quality of the environment and natural resources of the state; and
- TWC, §26.0135, which authorizes the commission to monitor and assess the water quality of each watershed and river basin in the state.

Effect on the:

A.) Regulated community:

The requirement for sand mining facilities to implement BMPs and provide a Final Stabilization Report to the executive director applies to all sand mining facilities in the San Jacinto River Watershed. These sand mining facility operators will be directly affected as they will be required to implement BMPs from the guidance document of BMPs developed and maintained by the ED. In addition, the rulemaking adoption will require these facilities to develop and maintain onsite a Mine Plan prior to commencing or continuing regulated activities at the site which includes the elements described in the guidance document of BMPs developed by the ED. These facilities will also be required to develop and submit to the ED and implement a Final Stabilization Report prior to terminating permit coverage required by Chapters 205 and 305. The rulemaking adoption

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does not create a group of affected entities in the regulated community who were not affected previously.

The ED estimates that 114 Aggregate Production Operation (APO) facilities are located in the San Jacinto River Watershed. There will be a fiscal impact to several permitted facilities. The adopted amendments have potential cost implications associated with implementing new BMPs or updating existing BMPs, obtaining certification from a licensed Texas professional engineer or geoscientist, preparing a Mine Plan, preparing a Final Stabilization Report, and implementing the Final Stabilization Report. These primary cost implications are associated with hiring a licensed Texas professional engineer or geoscientist to design and certify the BMPs, Mine Plan, and Final Stabilization Report. Operators may have to change or employ new BMPs or update BMPs to comply with the rulemaking requirements. These changes may range from establishing vegetative buffer zones to building dikes. Existing facilities will have 180 days from the effective date of this rule to develop and implement their initial Mine Plan, and to develop, certify, and implement their initial BMPs.

B.) Public:

If adopted, the rulemaking will have the anticipated public benefit of a reduced environmental impact during heavy rains, better-equipped sand mining facilities for large rain events, and more aesthetically pleasing bodies of water in the San Jacinto River Watershed. The public also may experience an increase in water quality in the creeks in the region.

C.) Agency programs:

Implementation of the adopted rules will not require any changes in current wastewater permitting staffing and will not cause a significant increase in workload. ED staff will be required to develop and maintain the guidance document of BMPs and review and approve Final Stabilization Reports submitted by regulated sand mining facilities. Finally, staff in the Office of Compliance and Enforcement will assist in the review of Final Stabilization Reports and may be required to conduct site visits or investigations.

The rulemaking does not create a group of affected agency programs which were not affected previously.

Stakeholder meetings:

On August 12, 2020, the commission instructed the ED to initiate rulemaking with stakeholder involvement to amend Chapter 311. The ED held a virtual stakeholder meeting on November 10, 2020. Approximately 69 individuals attended the stakeholder meeting. Electronic notices of the stakeholder meeting were sent to the petitioners, regulated sand mining facility operators, APO operators, local government entities, environmental groups, as well as to individuals interested in local sand mining and water quality issues in Harris, Montgomery, and Liberty Counties. Notice of the meeting was posted on TCEQ's Events Calendar and Water Quality Division's Sand Mining Rulemaking webpage. Stakeholders were offered the opportunity to provide comments on the draft rule, the San Jacinto River Watershed definition, and a proposed list of sand mining BMPs.

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Staff accepted written comments until December 10, 2020, and received comments from 17 stakeholders, including the two 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. Commentors supported the proposed rulemaking and provided feedback on the watershed definition, sand mining BMPs, and draft rule language. The feedback received from stakeholders was incorporated into the proposed rule. None of the comments received expressed opposition to the proposed new rule.

On July 20, 2021, the ED held a virtual stakeholder meeting to discuss the guidance document of BMPs being developed by the ED in conjunction with the proposed rule. This meeting included a brief discussion of the published proposed rule language. The ED did not accept comments or feedback on the rule language during this meeting. Stakeholders were offered the opportunity to provide separate comments on the draft BMPs guidance document within 30 days.

Public comment:

The commission held a virtual public hearing on the published proposed rule on July 22, 2021. The comment period closed on July 27, 2021. Comments were received from: the two rule petitioners, Bayou Land Conservancy, Kings Point Community Association, San Jacinto River Authority (SJRA), and 98 individual citizens. Stakeholders expressed concern over the flexibility for operators included in the proposed rule language which allows for operators to determine if a BMP is infeasible (using a list of criteria) and implement an alternative equivalent BMP. Individuals requested that any variation in BMP selection be submitted to TCEQ for review and approval. Conversely, industry stakeholders expressed concern that the rule did not allow for enough flexibility in BMP selection. Additionally, individuals also expressed concern that Final Stabilization Reports would not be reviewed and approved until the completion of the mining operations. Individuals requested that these reports be submitted at the beginning of operations and then annually. Finally, a few individuals requested clarification on the watershed definition.

Significant changes from proposal:

Section 311.103(c) of the proposed rule was revised to remove from this section the infeasibility considerations applicable to only BMPs for pre-mining, mining, and post-mining phases.

Section 311.103(d) was added to the proposed rule to include the infeasibility requirements for an operator to determine if a BMP for vegetative controls, structural controls, and controls used during pre-mining, mining, and post-mining phases may be infeasible. This section was revised to require operators to maintain onsite documentation demonstrating why a BMP is infeasible and an alternative BMP is more appropriate for the site, and that the alternative BMP provides equivalent or improved water quality protection. Operators must implement the documented alternative BMP at the site.

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Section 311.103(g) of the proposed rule was revised to require operators to develop a Mine Plan prior to commencing or continuing operations at the site. The Mine Plan, similar to the Final Stabilization Plan, must be developed according to the guidance document of BMPs and be certified by a licensed Texas professional engineer or geoscientist. The Mine Plan must be maintained onsite, kept current, and updated as necessary to address changing conditions at the site.

Section 311.103(k) was added to the proposed rule to establish a compliance period for existing sand mining facility operators. Operators registered as an APO with the commission on the effective date of this rule have 180 days to comply with §§311.103(a) - (e), (g) and (h)(1).

Potential controversial concerns and legislative interest:

There has been active legislative interest and critical comment from stakeholders in the San Jacinto River Watershed area in the past three years regarding sand mining operations.

The Water Quality Division has received questions about sand mining APOs in the San Jacinto River watershed from several legislators, including State Representative Dan Huberty and State Senator Brandon Creighton. Additionally, eight bills related to APOs and water quality were introduced during the 86th Texas Legislative Session and five bills related to APOs and water quality have been introduced during the 87th Texas Legislative Session.

Will this rulemaking affect any current policies or require development of new policies?

This rulemaking will require the development of new policies to coordinate with the regional offices (9 and 12) to review and approval of Final Stabilization Reports submitted by sand mining facilities as required under this rulemaking adoption.

This rulemaking will also require the development of new policies and procedures for the development and maintenance of the guidance document of BMPs required under this rulemaking adoption.

What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking?

Without the rulemaking, sand mining facilities in the San Jacinto River Watershed will continue to develop and implement BMPs determined by the operator to comply with existing permitting requirements without the aid of a guidance document developed by the executive director. Sand mining facilities will also continue to terminate permit coverage according to existing permit requirements, which do not include requirements to develop, submit, and implement a Mine Plan and Final Stabilization Report. The rulemaking adoption supports and strengthens existing permit requirements by prescribing specific BMPs, rather than leaving BMP selection to the discretion of the operator, and certification of BMPs by a licensed Texas professional engineer or geoscientist.

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A potential alternative to the rulemaking adoption that will achieve similar results will require the development of a guidance document of BMPs and changes to the existing stormwater Multi-Sector General Permit (TXR050000) and Individual Stormwater permits with stakeholder input for sand mining facilities to include additional requirements as described by this rulemaking adoption. There is no precedent for adding this watershed level specificity to general or individual stormwater permits without reference to a rule. It will be more appropriate to address this issue in the context of a watershed protection rule.

Key points in the rulemaking adoption schedule:

***Texas Register* proposal publication date:** June 25, 2021

Anticipated *Texas Register* adoption publication date: December 31, 2021

Anticipated effective date: January 6, 2022

Six-month *Texas Register* filing deadline: December 27, 2021

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Attachments:

FPI & TACA Petition Orders

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