

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
**AGENDA ITEM REQUEST**  
for Proposed Rulemaking

**AGENDA REQUESTED:** June 9, 2021

**DATE OF REQUEST:** May 21, 2021

**INDIVIDUAL TO CONTACT REGARDING CHANGES TO THIS REQUEST, IF NEEDED:** Lee Bellware, Rule/Agenda Coordinator, (512) 239-6095

**CAPTION: Docket No. 2021-0372-RUL.** Consideration for publication of, and hearing on, proposed new Subchapter J, Best Management Practices for Sand Mining Facility Operations Within the San Jacinto River Basin, Sections 311.101-311.103 of 30 TAC Chapter 311, Watershed Protection.

The proposed rulemaking would require the executive director to develop and maintain a guidance document of best management practices and establish requirements for sand mining facilities in the San Jacinto River Watershed to implement the best management practices. In addition, the proposed rulemaking would establish requirements for sand mining facilities in the San Jacinto River Watershed to submit to the executive director a final stabilization report for review and approval prior to operations terminating at the site or portion(s) of the site. This rulemaking is a follow up to petition requests by Texas Aggregates and Concrete Association, submitted on June 15, 2020, and Lake Houston Area Grassroots Flood Prevention Initiative, submitted on June 23, 2020 (Non-Rule Project Nos. 2020-042-PET-NR and 2020-044-PET-NR). (Macayla Coleman, Michael Parr) (Rule Project No. 2020-048-311-OW)

Earl Lott  
\_\_\_\_\_  
**Director**

David Galindo  
\_\_\_\_\_  
**Division Deputy Director**

Lee Bellware  
\_\_\_\_\_  
**Agenda Coordinator**

Copy to CCC Secretary? NO  YES

# Texas Commission on Environmental Quality

## Interoffice Memorandum

**To:** Commissioners **Date:** May 21, 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 Proposed Rulemaking  
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 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 that the Texas Commission on Environmental Quality (TCEQ, agency, or commission) revise 30 Texas Administrative Code (TAC) Chapter 311 rules to include a new subchapter that would 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 proposed rulemaking 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.

The proposed rulemaking would add three sections to Chapter 311 to define the watershed where the rules would 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 BMPs and submit a final stabilization report prior to operations terminating at the site or portion(s) of the site.

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 would do:**

- Define the San Jacinto River Watershed which would identify the areas to which the proposed 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;
- 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;

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- Require sand mining facilities in the San Jacinto River Watershed to submit to the ED, prior to operations terminating, a final stabilization report including the elements described in the guidance document of BMPs developed by the ED and signed and certified by a Texas licensed professional engineer or geoscientist; and
- Require sand mining facilities to implement and complete the final stabilization report prior to terminating authorizations required by 30 TAC Chapters 205 and 305.

**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 proposed rulemaking 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(g), requirements are included for sand mining facility operators to submit for review and approval a final stabilization report and implement the report prior to terminating permit coverage at the site or portion(s) of the site under Chapters 205 and 305. The final stabilization report must be certified by a licensed Texas professional engineer or geoscientist.

**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;

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- 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 would 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 would require these facilities to submit to the ED and implement a final stabilization report prior to terminating authorizations required by Chapters 205 and 305. The rulemaking 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 proposed 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 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 and the 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.

**B.) Public:**

The proposed rulemaking would 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 proposed rules would not require any changes in current wastewater permitting staffing and would not cause a significant increase in workload. ED staff would 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 would assist in the

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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.

Staff accepted written comments until December 10, 2020, and received comments 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. 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.

**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.

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

This rulemaking will require the development of new policies to coordinate the review and approval of final stabilization reports submitted by sand mining facilities as required under this proposed rulemaking with the regional office.

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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 proposed rulemaking.

**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 would also continue to terminate permit coverage according to existing permit requirements, which do not include requirements to develop, submit, and implement a final stabilization report. The proposed rulemaking 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.

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

**Key points in the proposal rulemaking schedule:**

**Anticipated proposal date:** June 9, 2021

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

**Anticipated public hearing date (if any):** July 22, 2021

**Anticipated public comment period:** June 25 - July 27, 2021

**Anticipated adoption date:** November 17, 2021

**Agency contacts:**

Macayla Coleman, Rule Project Manager, Water Quality Division, (512) 239-3925

Michael Parr, Staff Attorney, (512) 239-0611

Lee Bellware, Texas Register Rule/Agenda Coordinator, (512) 239-6095

**Attachments:**

FPI & TACA Petition Orders

cc: Chief Clerk, 2 copies  
Executive Director's Office

Commissioners

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Re: Docket No. 2021-0372-RUL

Jim Rizk  
Morgan Johnson  
Brody Burks  
Office of General Counsel  
Macayla Coleman  
Lee Bellware  
Rebecca L. Villalba

# Texas Commission on Environmental Quality



**DECISION OF THE COMMISSION  
REGARDING THE PETITION FOR RULEMAKING  
FILED BY TEXAS AGGREGATES & CONCRETE ASSOCIATION**

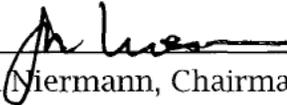
Docket No. 2020-0821-PET  
Rule Project No. 2020-042-PET-NR

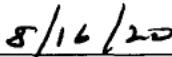
On August 12, 2020, the Texas Commission on Environmental Quality (Commission) considered the petition for rulemaking filed by the Texas Aggregates & Concrete Association (petitioner). The petitioner filed the request on June 15, 2020 and requested that the Commission adopt a new rule that would establish best management practices for commercial sand mining and other lawful purposes within the San Jacinto River Watershed.

IT IS THEREFORE ORDERED BY THE COMMISSION, pursuant to Administrative Procedure Act, Texas Government Code, § 2001.021 and Texas Water Code, §§ 5.013, 5.102, 5.103, 5.105, and 5.120 to initiate rulemaking concerning the issues raised in the petition.

This Decision constitutes the decision of the Commission as required by Administrative Procedure Act, Tex. Gov't Code Ann., § 2001.21(c)(2). (West 2016).

TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

  
\_\_\_\_\_  
Jon Niermann, Chairman

  
\_\_\_\_\_  
Date Signed

# Texas Commission on Environmental Quality



**DECISION OF THE COMMISSION  
REGARDING THE PETITION FOR RULEMAKING  
FILED BY LAKE HOUSTON AREA GRASSROOTS FLOOD PREVENTION INITIATIVE**

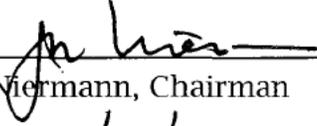
Docket No. 2020-0836-PET  
Rule Project No. 2020-044-PET-NR

On August 12, 2020, the Texas Commission on Environmental Quality (Commission) considered the petition for rulemaking filed by the Lake Houston Area Grassroots Flood Prevention Initiative (petitioner). The petitioner filed the request on June 23, 2020 and requested that the Commission adopt a new rule that would establish best management practices for commercial sand mining and other lawful purposes within the San Jacinto River Watershed.

IT IS THEREFORE ORDERED BY THE COMMISSION, pursuant to Administrative Procedure Act, Texas Government Code, § 2001.021 and Texas Water Code, §§ 5.013, 5.102, 5.103, 5.105, and 5.120 to initiate rulemaking concerning the issues raised in the petition.

This Decision constitutes the decision of the Commission as required by Administrative Procedure Act, Tex. Gov't Code Ann., § 2001.21(c)(2). (West 2016).

TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

  
\_\_\_\_\_  
Jon Niermann, Chairman  
8/16/20  
\_\_\_\_\_  
Date Signed

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

### **Background and Summary of the Factual Basis for the Proposed 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 would 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 proposed 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 proposed 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 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; and 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.

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 proposed rulemaking 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, proposed 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*

Proposed new §311.101 would 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 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 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*

Proposed 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.

Proposed 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*

Proposed 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 unless they are documented as infeasible. A BMP may be determined to be infeasible considering certain financial and site conditions included in paragraphs (1) - (13). If a BMP is infeasible, the operator must use an alternative BMP and keep documentation of the reason on site.

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

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

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

Subsection (g)(1) requires that operators submit to the ED for review, prior to operations terminating at the site or portion(s) of the site, a final stabilization report. Subparagraphs (A) - (C) outline 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 a licensed Texas professional geoscientist, and ED approval prior to implementation. Subsection (g)(2) requires operators to implement and complete the approved final stabilization report prior to operations terminating at the site or portion(s) of the site.

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

Subsection (i) requires operators to maintain documentation related to compliance

with the proposed 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, Chapter 26 or the proposed subchapter.

**Fiscal Note: Costs to State and Local Government**

Jené Bearse, Analyst in the Budget and Planning Division, has determined that for the first five-year period the proposed rules are in effect, no fiscal implications are anticipated for the agency or for other units of state or local government as a result of administration or enforcement of the proposed rulemaking.

This rulemaking addresses necessary changes which would require the ED to develop and maintain a guidance document with requirements for BMPs for sand mining facility operations located in the San Jacinto River Watershed.

**Public Benefits and Costs**

Ms. Bearse determined that for each year of the first five years the proposed rules are in effect, the anticipated public benefit would be a reduced environmental impact during heavy rains, better-equipped 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.

The proposed rulemaking is anticipated to result in fiscal implications for businesses or individuals who are owners or operators of sand mining facilities in the San Jacinto River Watershed. The agency estimates that 114 APO facilities regulated under the Multi-Sector General Permit for stormwater discharges through Section J, for Mineral Mining and Processing facilities or registered APOs may be affected by the rule.

The proposed rulemaking would direct the ED to issue guidance to sand mining facility operations in the San Jacinto River Watershed which would require them to implement best practices for vegetative and structural controls, pre-mining, mining, post-mining, as well as control measures. The proposed rulemaking allows the owner to use an alternative best practice if the requirements under §311.103(c) are infeasible due to a variety of factors, including financial considerations.

The proposed rulemaking would require that the operator obtain a certificate of the design and installation of all new and existing BMPs by a licensed Texas professional engineer or a licensed Texas professional geoscientist prior to commencing or continuing regulated activities. Prior to operations terminating at all or part of the site, the proposed rulemaking requires the operator to submit for approval a Final Stabilization Report that is signed and certified by a Texas licensed professional engineer or a Texas licensed professional geoscientist. The agency estimates the cost for contracting for these services is \$150 per hour with some firms requiring a four-hour minimum. The estimated cost per owner or operator cannot be determined

because of the different variables within each facility. The estimated costs in the proposed rulemaking will likely be a one-time cost for the owner or operator of a sand mining facility.

### **Local Employment Impact Statement**

The commission reviewed this proposed rulemaking and determined that a Local Employment Impact Statement is not required because the proposed rulemaking would not adversely affect a local economy in a material way for the first five years that the proposed rules would be in effect.

### **Rural Communities Impact Assessment**

The commission reviewed this proposed rulemaking and determined that the proposed rulemaking would not adversely affect rural communities in a material way for the first five years that the proposed rules would be in effect. The rules would apply to Grimes, Harris, Liberty, Montgomery, San Jacinto, Walker, and Waller Counties and have the same effect in rural communities as in urban communities.

### **Small Business and Micro-Business Assessment**

No adverse fiscal implications are anticipated for small or micro-businesses due to the implementation or administration of the proposed rulemaking for the first five-year period the proposed rules would be in effect.

### **Small Business Regulatory Flexibility Analysis**

The commission reviewed this proposed rulemaking and determined that a Small Business Regulatory Flexibility Analysis is not required because the proposed rules would not adversely affect a small or micro-business in a material way for the first five years the proposed rules would be in effect.

### **Government Growth Impact Statement**

The commission prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking would not create or eliminate a government program and would not require an increase or decrease in future legislative appropriations to the agency. The proposed rulemaking would not require the creation of new employee positions, eliminate current employee positions, nor require an increase or decrease in fees paid to the agency. The proposed rulemaking would expand an existing regulation for certain regulated facilities in the San Jacinto River Watershed region; however, the number of regulated individuals is expected to remain constant. During the first five years, the proposed rules should not impact positively or negatively the state's economy.

### **Draft Regulatory Impact Analysis Determination**

The TCEQ reviewed the proposed 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 would 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 proposed rulemaking would 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 proposed rulemaking is to add a new Subchapter J for the San Jacinto Watershed within the TCEQ’s existing rules. The proposed 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 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 proposed rulemaking would not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs; nor would the proposed 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 proposed 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 proposed under the TCEQ's general rulemaking authority. This rulemaking is being proposed under existing state law found at Texas Water Code, §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 this proposal 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 invites public comment on the Draft Regulatory Impact Analysis Determination.

Written comments on the Draft Regulatory Impact Analysis may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

### **Takings Impact Assessment**

The TCEQ evaluated the proposed rulemaking 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 would 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 proposed 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 proposed rules would 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 proposed rules because these rules would not impact private real property in a manner that would require compensation to private real property owners under the United

States Constitution or the Texas Constitution. Specifically, the proposed 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 proposed rulemaking is reasonably taken to fulfill requirements of state law. Therefore, the proposed rulemaking would not cause a taking under Texas Government Code, Chapter 2007.

#### **Consistency with the Coastal Management Program**

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

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

### **Announcement of Virtual Hearing**

The commission will hold a *virtual* public hearing on this proposal on July 22, 2021, at 2:00 P.M.. The virtual hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, staff will be available to discuss the proposal 30 minutes prior to the hearing and after the virtual hearing via the Teams Live Event Q&A chat function.

### **Registration**

The hearing will be conducted remotely using an internet meeting service. Individuals who plan to attend the hearing and want to provide oral comments and/or want their attendance on record must **register by Friday, July 16, 2021**. To register for the hearing, please email [Rules@tceq.texas.gov](mailto:Rules@tceq.texas.gov) and provide the following information: your name, your affiliation, your email address, your phone number, and whether or not you plan to provide oral comments during the hearing. Instructions for participating in the hearing will be sent on **July 19, 2021**, to those who register for the hearing.

For the public who do not wish to provide oral comments but would like to view the hearing may do so at no cost at:

<https://teams.microsoft.com/l/meetup->

<https://www6.tceq.texas.gov/rules/ecomments/40thread.v2/0?context=%7b%22tid%22%3a%22871a83a4-a1ce-4b7a-8156-3bcd93a08fba%22%2c%22oid%22%3a%22bf237360-1655-4724-96f6-ba9493e841ba%22%2c%22isBroadcastMeeting%22%3atrue%7d&btype=a&role=a>

Persons who have special communication or other accommodation needs who are planning to register to provide formal oral comments and/or attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

### **Submittal of Comments**

Written comments may be submitted to Ms. Lee Bellware, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to [fax4808@tceq.texas.gov](mailto:fax4808@tceq.texas.gov). Electronic comments may be submitted at: <https://www6.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2020-048-311-OW. Please choose one form of submittal when submitting *written* comments.

The comment period closes on July 27, 2021. Copies of the proposed rulemaking can be obtained from the commission's website at [https://www.tceq.texas.gov/rules/propose\\_adopt.html](https://www.tceq.texas.gov/rules/propose_adopt.html).

For further information, please contact Ms. Macayla Coleman, Wastewater Permitting,  
(512) 239-3925.

**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 proposed 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 proposed 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

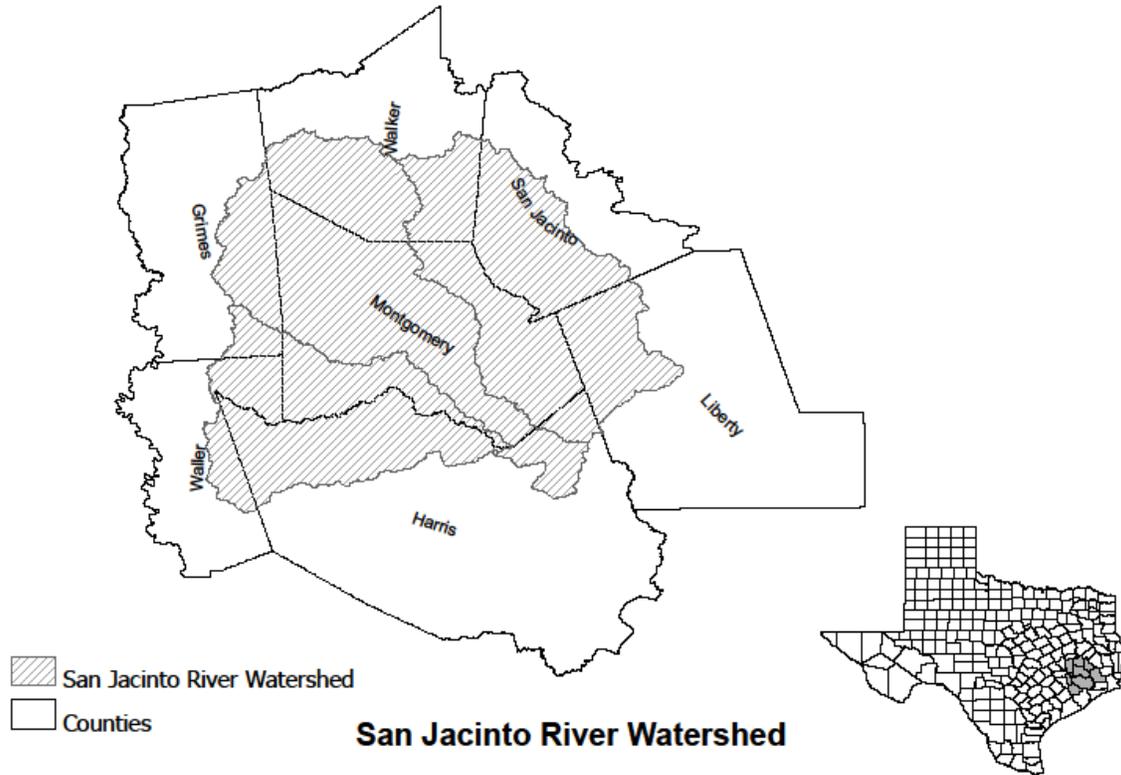
operational control of activities at a facility necessary to ensure compliance with this subchapter (e.g., the entity is authorized to direct workers at a facility to carry out activities required by this subchapter).

(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)



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

(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 determine that such measures have been used inappropriately, or incorrectly, or are not adequate.

(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.

(g) Final Stabilization Report.

(1) The operator shall submit to the executive director a Final Stabilization Report for review and approval prior to operations terminating at the site or portion(s) of the site. This report shall:

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

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

(C) receive executive director approval prior to implementation.

(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.

(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.

(i) 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.