

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
AGENDA ITEM REQUEST
for Rulemaking Adoption

AGENDA REQUESTED: June 13, 2012

DATE OF REQUEST: May 25, 2012

INDIVIDUAL TO CONTACT REGARDING CHANGES TO THIS REQUEST, IF NEEDED: Bruce McAnally, (512) 239-2141

CAPTION: Docket No. 2011-1098-RUL. Consideration of the adoption of new 30 TAC Chapter 342, Regulation of Certain Aggregate Production Operations.

The adoption would establish a new chapter to implement House Bill 571 from the 82nd Legislature, 2011, Regular Session. The bill requires Aggregate Production Operations to register with the TCEQ annually and to pay an annual fee. Additional requirements include TCEQ to conduct an annual survey of aggregate production operations and conduct inspections of these operations at a minimum of once every three years. The proposed rules were published in the January 27, 2012, issue of the Texas Register (37 TexReg 306). (Laurie Fleet, Christine Angeletti) (Rule Project No. 2011-045-342-OW)

L'Oreal Stepney, P. E.

Deputy Director

David Galindo

Division Director

Bruce McAnally

Agenda Coordinator

Copy to CCC Secretary? NO YES X

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** May 25, 2012

Thru: Bridget C. Bohac, Chief Clerk
Zak Covar, Executive Director

From: L'Oreal W. Stepney, P.E., Deputy Director
Office of Water

Docket No.: 2011-1098-RUL

Subject: Commission Approval for Rulemaking Adoption
Chapter 342, Regulation of Certain Aggregate Production Operations
HB 571: Regulation of Certain Aggregate Production Operations
Rule Project No. 2011-045-342-OW

Background and reason(s) for the rulemaking:

Rulemaking is required to implement House Bill (HB) 571, which was passed by the 82nd Legislature (2011). The bill was authored by Representative Huberty and sponsored by Senator Williams.

HB 571 creates a new aggregates registration and inspection program. The bill requires the following:

- Aggregate production operations must register with TCEQ annually.
 - Initial registration is first required by all applicable aggregate production operations on September 1, 2012.
 - TCEQ must establish registration fees not to exceed \$1,000.
- TCEQ must survey the state annually for aggregate production facilities.
- TCEQ must conduct compliance inspections of each aggregate production operation once every three years.
 - For entities that submit a Notice of Audit for Compliance as outlined in Section 2(b) of the legislation, the three-year period for the agency to conduct routine inspections of the operation would not begin until September 1, 2015.
- TCEQ must establish penalties of no less than \$5,000 and no more than \$10,000 for every year in which an aggregate production facility operates without registration (total penalty no greater than \$25,000).

The effective date of HB 571 is September 1, 2011.

Scope of the rulemaking:

A.) Summary of what the rulemaking will do:

This rulemaking action will establish a new chapter, 30 TAC Chapter 342, Regulation of Certain Aggregate Production Operations to implement HB 571.

The Water Quality Division (WQD) will develop registration forms. The registration forms will be available on September 1, 2012, in order that the regulated community may submit the required registration forms on or before the October 30, 2012, deadline. WQD will also

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develop a means of tracking registration forms. Registrations must be renewed annually by all active aggregate production operations.

The Office of Compliance and Enforcement (OCE) will develop a strategy to conduct annual surveys, to begin in September 2012, to capture an accurate and timely universe prior to investigating these facilities. Facilities that have not registered or have registered but not submitted a Notice of Audit for Compliance will be inspected beginning September 1, 2012. Beginning September 1, 2015, OCE Regional Offices will initiate inspections of those registered facilities that submitted a Notice of Audit for Compliance, each facility will be investigated once every three years. The Enforcement Division will update the penalty policy to reflect the new statutorily authorized penalties.

The Chief Financial Officer's Division will be required to annually reassess fees for applicants based on previous year's revenue from the registrations and costs to implement the legislation. Revenue from this fee is deposited to the Water Resource Management Account 153, described in the Texas Water Code (TWC), §28A.101. Since the statute requires TCEQ to set the fees in an amount not to exceed the amount necessary to cover costs of administering the program, the TCEQ must adjust the fee rate on an ongoing basis as appropriate to comply with this statutory requirement. Fees will be established annually to secure sufficient revenue to support the current appropriations and other fund obligations, while allowing for the fee to be adjusted based on relevant factors such as anticipated future costs, appropriations, and fund obligations.

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

HB 571 requires the following:

- Establishing a method of assessing annual fees to be paid by the regulated community;
- Establishing registration requirements for the regulated community;
- TCEQ to conduct an annual survey to identify active aggregate production operations;
- TCEQ will conduct compliance inspections, to occur once every three years, of the regulated community; and,
- Requires enforcement fees the regulated community will be subject to for failure to comply.

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

The following clarifications from the bill are included in this rule:

The definition of aggregate production operations in the bill is such it can be inclusive of such activities as cut and fill for road construction projects, swimming pool installation, stock pond installation, septic tank installation, landscaping, etc. This rulemaking adds an additional exemption to the definition of aggregate production operations which exempts a

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site at which materials are being removed or extracted from the earth where the primary purpose of removal or extraction is not for commercial sale or processing of the materials.

Aggregate production operations include both extraction areas and aggregate processing plants. Many times these are co-located. This rulemaking clarifies that when an aggregate processing plant is located at the same site as the extraction area and both operations have the same responsible party these operations are not required to obtain separate registrations.

Statutory authority:

- TWC, §5.102, General Powers;
- TWC, §5.103, Rules; and
- TWC, §5.105, General Policy, which authorizes the commission to adopt rules necessary to carry out its powers and duties
- Texas Health and Safety Code, §382.002, concerning Policy and Purpose, which establishes the commission purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property;
- Texas Health and Safety Code, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air;
- Texas Health and Safety Code, §382.017, concerning Rules, authorizing the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act.

Effect on the:

A.) Regulated community:

The regulated community will be required to register each site, where aggregate production operations are occurring, annually with the TCEQ and pay a registration fee not to exceed \$1,000. Failure to register may result in penalties, of no less than \$5,000 and no more than \$10,000, for every year in which an aggregate production facility operates without registration (total penalty no greater than \$25,000). Additionally, registered entities will be subject to site inspections every three years.

B.) Public:

The public will benefit from increased awareness of the location and size of these types of facilities.

C.) Agency programs:

Initial implementation will impact the WQD by increased workload associated with this bill, developing the registration forms and a registration tracking database. The WQD will be impacted annually by the increased workload associated with reviewing and processing registration applications for each facility. Current estimates indicate there will be approximately 600 registration forms per year for processing.

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The OCE will be impacted by having to conduct annual surveys to identify un-registered aggregate production facilities and taking enforcement action on un-registered facilities. OCE will also be impacted by the increased workload associated with conducting investigations of aggregate production facilities every three years. Current estimates indicate there will be approximately 600 aggregate production operations sites registering per year, which amounts in an increase of approximately 200 annual site inspections. OCE intends to stagger the three-year compliance investigation cycles in order to effectively manage an increase of approximately 200 compliance investigations per year state wide.

The Financial Administration Division will be impacted by collecting and processing registration fees.

It is unclear at this point what the fiscal impact will be to the TCEQ programs, as an actual number of sites for aggregate production operations have not been determined. The current estimate is 600 entities.

Stakeholder meetings:

Stakeholder meetings were held on September 13, 2011 and December 6, 2011. Participation included representatives from the regulated community of aggregate operations and organizations related to aggregate production operations.

The overall sentiment regarding the implementation of HB 571 was positive. The majority of comments and concerns expressed centered on how the fee structure will be established. For instance, will the size of the operation impact fee structure? Does each site have to register and pay a separate fee? During these meetings stakeholders asked TCEQ to consider a tiered fee structure, primarily to lessen the fee burden for small business. Additionally, there was significant discussion on how and when TCEQ will conduct the required annual surveys and methods of identifying un-registered operations.

It was during these meetings that stakeholders asked TCEQ to consider a tiered fee structure, primarily to lessen the fee burden for small business. To consider a tiered fee structure, additional information from APOs was necessary.

The TCEQ developed outreach materials that include a questionnaire related to registration fees. This questionnaire collected information about type of operation, type of material extracted, and stakeholder preferences related to fee structure. TCEQ mailed 1,998 questionnaires, of which 495 were returned as undeliverable. A total of 157 responses were received. Upon evaluation of the responses and input from stakeholders at the stakeholder meetings, a tiered fee structure will be implemented using the size of the operation as the basis for the tiers.

Public comment:

Commenters were concerned public works projects can take many months to complete and that there may be more than one public works project going on at once using the same site

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which could extend the length of time needed for the site. Commenters recommended that the exemption for temporary public works projects should extend the life of the project by removing the word "temporary" from §342.1(1)(B). This change was incorporated into the rule.

Commenters recommended that the definitions be clarified to ensure landowners have the flexibility to extract, process, and utilize their aggregates on their own land as necessary, even when their land is not contiguous to the land and site where the aggregate is being removed, extracted, or processed. The Response to Comments noted that landowners and non-commercial aggregate operations that are extracting or processing material where the primary purpose is not for commercial sale are already exempted in §342.1(1)(E). This exemption allows these persons or operations to use the extracted material anywhere, regardless of location or ownership, so long as it's not used for commercial sale or processing. Because the commenter's concerns are already accounted for in the rule, no additional changes were made to the rule in response to this comment.

Commenters recommended that the definitions be clarified so that processing, in addition to removal and extraction, for non-commercial use would also be exempt from regulation under this rule. The rule was amended to make the suggested change.

Commenters recommended TCEQ clarify that gypsum operations should not be regulated under this rule. The Response to Comments notes that the rule language of mirrors the language in HB571 and that inclusion of gypsum as an "Aggregate" and a "commonly recognized construction material," is consistent with other TCEQ rules. No change was made to the rule in response to this comment.

Significant changes from proposal:

Section 342.1(1)(B) was revised by removing the word "temporary" so that the exemption for public works projects was extended for the life of the project.

Section 342.1(1)(E) was revised to clarify that processing, in addition to removal and extraction, for non-commercial use would also be exempt from regulation.

Section 342.25(a) was revised to provide a 60-day registration period beginning September 1, 2012. This change is necessary to ensure that adequate funding will be available for the program in fiscal year 2013 in light of Legislative Budget Board funding requirement set forth in Article 9, Section 18.40 of the General Appropriation Act of the 82nd Legislature, 2011.

Potential controversial concerns and legislative interest:

HB 571 specifies the amount of the annual registration fee assessed may not exceed \$1,000 per year; however, TCEQ must establish the fee. Staff anticipates potential concerns from the regulated community regarding the specific amount of the annual registration fee.

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HB 571 defines who is subject to the bill and does identify exclusions regarding applicability. However, staff anticipates potential concerns from the regulated community regarding the applicability of the rules to certain industries.

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

No current policies will be affected nor will new policies need developing as a result of the implementation of this legislation.

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

This rulemaking action is required to implement new legislation; no alternatives have been identified.

Key points in the adoption rulemaking schedule:

Texas Register proposal publication date: January 27, 2012

Anticipated Texas Register publication date: June 29, 2012

Anticipated effective date: July 5, 2012

Six-month Texas Register filing deadline: July 27, 2012

Agency contacts:

Laurie Fleet, Rule Project Manager, 239-5445, Water Quality Division

Christine Angeletti, Staff Attorney, 239-1204

Bruce McAnally, Texas Register Coordinator, 239-2141

Attachments

House Bill 571

cc: Chief Clerk, 2 copies
Executive Director's Office
Susana M. Hildebrand, P.E.
Anne Idsal
Curtis Seaton
Office of General Counsel
Laurie Fleet
Bruce McAnally

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts new §§342.1, 342.25, and 342.26.

Sections 342.1 and 342.25 are adopted *with changes* to the proposed text as published in the January 27, 2012, issue of the *Texas Register* (37 TexReg 304). Section 342.26 is adopted *without change* to the proposed text and will not be republished.

Background and Summary of the Factual Basis for the Adopted Rules

House Bill (HB) 571 passed in the 82nd Legislature, 2011 and was codified in Texas Water Code (TWC), Chapter 28A. HB 571 was authored by Representative Dan Huberty and sponsored by Senator Tommy Williams.

The statute exempts certain aggregate production operations (APOs) from the requirements. The statute requires active APOs to register and pay a fee annually. The statute does not contain any additional technical requirements for APOs beyond those required in other applicable rules and regulations. The statute also contains requirements for the TCEQ. These include conducting an annual survey, beginning September 2012, to facilitate locating active APOs; conducting compliance investigations of each active APO once every three years; and, providing specified information on APOs as part of the annual enforcement report. Additionally, the statute gives the commission the authority to assess penalties in accordance with the TCEQ

penalty policy and within the conditions outlined in the statute, and establish an annual registration fee in an amount sufficient to maintain a registry of active APOs but not to exceed \$1,000. For APOs submitting a Notice of Audit in conjunction with initial registration, as outlined in TWC, §28A, Section 2(b), compliance investigations of these APOs will not begin before September 2015.

Section by Section Discussion

Section 342.1 is adopted with changes to the proposed text. New §342.1, Definitions, is adopted to define terms pertinent to and defined in TWC, §28A.

Section 342.1(1)(B) is amended by removing the word "temporary" since public works projects can be lengthy and the same site can be used for multiple public works projects.

Section 342.1(1)(E) is amended to read: "a site at which aggregates are being removed or extracted or processed where the primary purpose of removal or extraction or processing is not for commercial sale." This clarifies that non-commercial processing of aggregates is also exempt from this rulemaking.

Section 342.25 is adopted with change to the proposed text. New §342.25, Registration, is adopted to address requirements for the annual registration of all APOs. As stipulated in TWC, §28A, annual registration for each APO is required provided regulated activities

continue. Upon cessation of regulated activities, the APO shall notify the TCEQ in writing. Registration will be facilitated by submission of required forms either electronically or via hard copy. All sites will be required to register annually.

Adopted §342.25(a) is amended to read: "The responsible party for an aggregate production operation, in operation on or before September 1, 2012, shall register each operation with the commission within the 60-day period beginning September 1, 2012."

This change is necessary to ensure that adequate funding will be available for the program in fiscal year 2013 in light of Legislative Budget Board funding requirement set forth in Article 9, Section 18.40 of the General Appropriation Act of the 82nd Legislature, 2011.

Initial registration begins on September 1, 2012, and must be completed no later than October 30, 2012.

Section 342.26 is adopted without changes to the proposed text. New §342.26, Registration Fees, is adopted to address required annual registration fees for all APOs. Each site is required to submit an annual registration fee. TWC, §28A requires the TCEQ to set fees in the amount necessary to cover the costs of administering the program, not to exceed \$1,000 per year. The adopted rule states that the maximum fee shall not exceed \$1,000.

The adopted rule does not specify the actual fees, but allows the TCEQ to establish fees that do not exceed the maximum fee of \$1,000. Specifying the maximum fee in the rule allows the TCEQ flexibility to adjust fees as needed to support the program. Structuring the rule pertaining to the fee in this manner also allows the TCEQ to examine fee structures, such as a tiered fee structure, that may prove more desirable to stakeholders.

Stakeholder meetings were held on September 13, 2011 and December 6, 2011, to support both the development of these rules and other implementation activities, including fee development. It was during these meetings that stakeholders asked the TCEQ to consider a tiered fee structure, primarily to lessen the fee burden for small business. To consider a tiered fee structure, additional information from APOs was necessary.

The TCEQ developed outreach materials that include a questionnaire related to registration fees. This questionnaire collected information about type of operation, type of material extracted, and stakeholder preferences related to fee structure. TCEQ mailed 1,998 questionnaires, of which 495 were returned as undeliverable. A total of 157 responses were received. Upon evaluation of the responses and input from stakeholders at the stakeholder meetings, a tiered fee structure will be implemented using the size of the operation as the basis for the tiers.

Final Regulatory Impact Analysis Determination

The commission adopts the rulemaking under the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rules do not meet the definition of a "major environmental rule." Under Texas Government Code, §2001.0225, a "major environmental rule" means 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 of the state.

The primary purpose of the adopted rulemaking is to implement HB 571, 82nd Legislature, 2011, by adding Chapter 342, Regulation of Certain Aggregate Production Operations. The adopted rulemaking creates a new aggregates registration and inspection program which includes the establishment of an annual registration fee. Certain aspects of this rulemaking are intended to protect the environment or reduce risks to human health from environmental exposure. The adopted rulemaking would not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs; nor would 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."

Under Texas Government Code, §2001.0225, only a major environmental rule requires a regulatory impact analysis. Because this rulemaking does not constitute a major environmental rule, a regulatory impact analysis was not required. 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

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 commission prepared a takings impact assessment for these rules under Texas Government Code, §2007.043. The commission determined that the promulgation and enforcement of the rules will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The adopted rules also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. The adopted rules are administrative and do not impose any new regulatory requirements. The primary purpose of the adopted rules is to implement HB 571 by adding Chapter 342, Regulation of Certain Aggregate Production Operations. 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 rulemaking and found that the rulemaking was subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq.*, and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the adopted rules in accordance with Coastal

Coordination Act Implementation Rules, 31 TAC §505.22 and found the adopted rulemaking is consistent with the applicable CMP goals and policies.

CMP goals applicable to the adopted rules include to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas and to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone.

There are no CMP policies applicable to the adopted rules.

The adopted rules are consistent with the CMP goals and policies because the adopted rule does not authorize the storage, emission, or discharge of any pollutant. The adopted rules only require Aggregate Production Operations to register and pay a fee annually.

Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because the adopted rules are consistent with these CMP goals and policies and because these rules do not create or have a direct or significant adverse effect on any coastal natural resource areas.

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

on the CMP.

Public Comment

A public hearing on the proposed rules was held in Austin on February 9, 2012. The public comment period ended on February 27, 2012. Comments were received from Georgia-Pacific Gypsum LLC, Texas Aggregates and Concrete Association (TACA), Texas and Southwestern Cattle Raisers Association (TSCRA), Texas Cattle Feeders Association (TCFA), Texas Department of Agriculture (TDA), Texas Forestry Association (TFA), Texas Mining and Reclamation Association (TMRA), and Westward Environmental, Inc.

TACA generally supported the proposal. The remaining commenters expressed concern with specific issues on the proposed rules as outlined in the RESPONSE TO COMMENTS section of this preamble.

RESPONSE TO COMMENTS

General Comments

TACA generally supported the proposed rules.

The commission acknowledges this comment.

Westward Environmental, Inc. requested that the commission include a de minimis section in the rules that would exempt small operations that do not need air or stormwater authorizations.

HB 571 does not create an exclusion for small operations. The rule complies with HB 571. No changes were made to the rules in response to this comment.

Westward Environmental, Inc. requested that TCEQ give a courtesy phone call prior to site inspections.

Notification prior to investigations will be conducted in accordance with statutes, rules, and agency policy. No changes were made to the rules in response to this comment.

Westward Environmental, Inc. asked if concrete batch plants, hot mix plants, and pulp mills that are co-located at quarry sites, but have different responsible parties, will be inspected under the requirements of HB 571. Westward Environmental, Inc. is concerned that if this occurs, violations may be issued to the wrong entity due to paperwork issues related to the Regulatory Entity Reference Number (RN Number).

The rules do not address inspections or issuance of violations. However, during the inspection process investigators may determine the responsible party for each facility and if each facility is subject to this rulemaking. Facilities that meet the definition of APO in the rules are subject to the inspection requirements under HB 571. Violations are issued in accordance with statute, rules, and agency policy. No changes were made to the rules in response to this comment.

Westward Environmental, Inc. asked if an APO could submit a Notice to Conduct a Compliance Audit "now" and register prior to September 1, 2012, and still be eligible for the inspection cycle starting September 1, 2015.

The rules do not address the notice of intent to conduct an audit. However, HB 571 does allow APOs that submit this notice, in conjunction with registering, to postpone initial inspections until September 2015. This notice may be submitted before the registration provided that both are submitted before the deadline of October 30, 2012. No changes were made in response to this comment.

Notices of intent to conduct an audit may be submitted to: Deputy Director, Office of Compliance and Enforcement, Texas Commission on

Environmental Quality, MC-172, P.O. Box 13087, Austin, Texas 78711-3087.

Georgia-Pacific Gypsum LLC states that the gypsum industry is already under significant regulatory requirements and inspections. Additional regulation will be duplicative of existing regulations and will cause unnecessary burden on the regulated entity and the TCEQ.

The commission respectfully disagrees with this comment. This rulemaking implements HB 571 which was duly enacted by the 82nd Legislature, 2011. The commission does not view HB 571 as a duplicative regulation. The rulemaking process is not the proper forum to challenge enacted legislation. No change was made to the rules in response to this comment.

Section 342.1 Definitions

Westward Environmental, Inc. requested clarification on whether the definition of APO would include a site where clean fill material is being added to an area that was previously mined in order to reclaim the site.

The definition of APO includes a site at which aggregates are "removed or extracted." A site where fill material is added to an area is not an APO. No

changes were made to the rule in response to this comment.

TCFA, TFA, and TSCRA recommend striking the word "temporary" from §342.1(1)(B) or define the term. TCFA and TSCRA state that public works projects can take many months to complete. Additionally, there may be more than one public works project going on at once using the same site which could extend the length of time needed for the site. TDA recommends that the exemption for temporary public works projects should extend the life of the project.

The commission agrees with these comments and has amended §342.1(1)(B) by removing the word "temporary."

TDA and TFA recommend that the definitions be clarified to ensure landowners have the flexibility to extract, process, and utilize their aggregates on their own land as necessary. TCFA and TSCRA state that non-commercial aggregate operations sometimes use aggregates on land that they own or lease that is not contiguous to the land and site where the aggregate is being removed, extracted, or processed. TCFA and TSCRA recommend revising §342.1(1)(C) to read: "an extraction area from which raw material is extracted for use as fill or for other construction uses on that same property or on another property owned or leased by the same person or entity."

The commission fully appreciates this concern. In fact, landowners and non-commercial aggregate operations that are extracting or processing material where the primary purpose is not for commercial sale are already exempted in §342.1(1)(E). This exemption allows these persons or operations to use the extracted material anywhere, regardless of location or ownership, so long as it's not used for commercial sale or processing. TCEQ intends to develop guidance regarding implementation of the rule. Because the commenter's concerns are already accounted for in the rule, no additional changes were made to the rule in response to these comments.

TCFA and TSCRA recommend revising §342.1(1)(E) to read: "a site at which aggregates are being removed or extracted or processed where the primary purpose of removal or extraction or processing is not for commercial sale." TCFA, TFA, and TSCRA state that this revision would clarify that processing, in addition to removal and extraction, for non-commercial use would also be exempt from regulation under this rule.

The commission agrees with these comments and has amended §342.1(1)(E) as suggested.

Georgia-Pacific Gypsum LLC recommends TCEQ clarify that gypsum operations should not be regulated under this rule by revising the last sentence of §342.1(2) as follows:

"For purposes of this chapter, the term aggregates does not include clay or shale mined for use in manufacturing structural clay products or gypsum or other extracted material consumed or incorporated into manufactured construction materials such as drywall."

Georgia-Pacific Gypsum LLC notes that the definition of aggregates applies to "commonly recognized construction materials." Georgia-Pacific Gypsum LLC notes that materials that are not themselves a "commonly recognized construction material" but rather are consumed and incorporated into a commonly recognized construction product through subsequent manufacturing and processes after extraction should not be subject to this rule.

The commission respectfully disagrees with this comment. The language of §342.1(2) mirrors the language in HB 571. Inclusion of gypsum as an "aggregate" and a "commonly recognized construction material," is consistent with other TCEQ rules, specifically 30 TAC §311.71(2) which defines "aggregates" as, "any commonly recognized construction material originating from a quarry or pit by the disturbance of the surface, including . . . gypsum . . ." HB 571 does not create a specific exclusion or exception for gypsum. Accordingly, the rules being promulgated do not have an exclusion or exception for gypsum. No change was made in response to this comment.

Section 342.26, Registration Fees

Westward Environmental, Inc. commented that within a given year a site may be used by multiple operators. Each operator would have to register, pay the registration fee, and terminate their registration when their use of the site ends. This process would be repeated for each operator. This scenario results in TCEQ getting multiple registration fees for the same site within a year.

HB 571 requires that a person who is authorized to operate an APO shall pay a registration fee annually. The rule complies with HB 571. No changes were made to the rule in response to this comment.

TMRA recommends that a single fee should apply to all registrants. TMRA states that larger operations will avail themselves of the Notice of Intent to Conduct a Compliance Audit, which postpones investigations until September 1, 2015. This will minimize TCEQ staff time and resources during this period. It would not be equitable to establish a higher registration fee for larger facilities since the facility would not require an equally higher level of inspection work for the agency.

In accordance with HB 571, the rule requires that the fee shall not exceed \$1,000. Neither the bill nor the rules establish a fee structure. The fee structure will be established with input from stakeholders. No changes

were made to the rule in response to this comment.

SUBCHAPTER A: GENERAL PROVISIONS

§342.1

Statutory Authority

The new rule is adopted under the authority of Texas Government Code, under Texas Water Code (TWC), §5.102, General Powers; TWC, §5.103, Rules; and TWC, §5.105, General Policy, which provide the commission with the general powers to carry out its duties and authorize the commission to adopt rulemaking necessary to carry out its powers and duties under the TWC; and TWC, §5.013, General Jurisdiction of Commission, which states the commission's authority over various statutory programs. The new rule is also adopted under Texas Health and Safety Code (THSC), §382.017, Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of THSC, Chapter 382 (the Texas Clean Air Act), and to adopt rules that differentiate among particular conditions, particular sources, and particular areas of the state. The new rule is also adopted under THSC, §382.002, Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.003, concerning Definitions; and THSC, §382.011, General Powers and Duties, which authorizes the commission to control the quality of the state's air.

The adopted new rule implements HB 571, 82nd Legislature, 2011, by adding Chapter 342, Regulation of Certain Aggregate Production Operations.

§342.1. Definitions.

The following words and terms, when used in this chapter shall have the following meanings, unless the context clearly indicates otherwise.

(1) **Aggregate production operation**--A site from which aggregates are being or have been removed or extracted from the earth, including the entire areas of extraction, stripped areas, haulage ramps, and the land on which the plant processing the raw materials is located, exclusive of any land owned or leased by the responsible party not being currently used in the production of aggregates. For the purposes of this chapter, the term aggregate production operation does not include:

(A) a site at which aggregates that are being removed or extracted from the earth are used or processed at the same site or at a related site under the control of the same responsible party for the primary purpose of production of cement or lightweight aggregates, or in a lime kiln;

(B) a ~~temporary~~ site that is being used solely to provide aggregate products for use in a public works project involving the Texas Department of Transportation, any other state agency, or a local governmental entity;

(C) an extraction area from which all raw material is extracted for use as fill or for other construction uses at the same or a contiguous site;

(D) a site at which the aggregates that are being removed or extracted from the earth are used or processed for use in the construction, modification, or expansion of a solid waste facility at the site or another location; or

(E) a site at which aggregates are being removed, or extracted, or processed where the primary purpose of removal, extraction, or processing is not for commercial sale ~~from the earth where the primary purpose of removal or extraction is not for commercial sale or processing of the aggregates.~~

(2) **Aggregates**--Any commonly recognized construction material originating from an aggregate production operation from which an operator extracts dimension stone, crushed and broken limestone, crushed and broken granite, crushed and broken stone not elsewhere classified, construction sand and gravel, industrial sand, dirt, soil, or caliche. For purposes of this chapter, the term aggregates does not include clay or shale mined for use in manufacturing structural clay products.

(3) **Commission**--The Texas Commission on Environmental Quality.

(4) **Operator**--Any person engaged in and responsible for the physical operation and control of the extraction of aggregates.

(5) **Owner**--Any person having title, wholly or partly, to the land on which an aggregate production operation exists or has existed.

(6) **Regulated Activity**--Any activity that is regulated by the Texas Commission on Environmental Quality.

(7) **Responsible party**--The operator, lessor, or owner who is responsible for the overall function and operation of an aggregate production operation.

(8) **Site**--one or more contiguous or adjacent properties under common control by the same responsible party.

SUBCHAPTER B. REGISTRATION AND FEES

§342.25, §342.26

Statutory Authority

The new rules are adopted under the authority of Texas Government Code, under Texas Water Code (TWC), §5.102, General Powers; TWC, §5.103, Rules; and TWC, §5.105, General Policy, which provide the commission with the general powers to carry out its duties and authorize the commission to adopt rulemaking necessary to carry out its powers and duties under the TWC; and TWC, §5.013, General Jurisdiction of Commission, which states the commission's authority over various statutory programs. This new rules are also adopted under Texas Health and Safety Code (THSC), §382.017, Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of THSC, Chapter 382 (the Texas Clean Air Act), and to adopt rules that differentiate among particular conditions, particular sources, and particular areas of the state. This new rules are also adopted under THSC, §382.002, Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.003, concerning Definitions; and THSC, §382.011, General Powers and Duties, which authorizes the commission to control the quality of the state's air.

The adopted new rules implement HB 571, 82nd Legislature, 2011, by adding Chapter 342, Regulation of Certain Aggregate Production Operations.

§342.25. Registration.

(a) The responsible party for an aggregate production operation, in operation on or before September 1, 2012, shall register each operation with the commission within the 60-day period beginning by September 1, 2012.

(b) The responsible party for an aggregate production operation that begins operations after September 1, 2012 shall register each operation with the commission not later than the 10th business day before the beginning date of regulated activities.

(c) An aggregate processing plant that has the same responsible party and is located at the same site from which aggregates are being or have been removed or extracted from the earth is not required to obtain a separate registration.

(d) The responsible party for an aggregate production operation shall renew the registration annually as regulated activities continue.

(e) Within 30 days after all regulated activities at an aggregate production

operation have ceased, the responsible party shall submit a registration cancellation request to the commission.

(f) Applications for registration or cancellation of a registration shall be made on forms prescribed by the executive director.

§342.26. Registration Fees.

(a) Any person who submits a registration for an aggregate production operation shall remit, at the time of registration, a fee to the commission.

(b) The executive director shall determine the costs to administer this chapter and the requirements in Texas Water Code, §28A, and establish fees annually to recover the executive director's actual costs. The fees established by the executive director shall not exceed \$1,000. The executive director may implement a tier-based registration fee structure.

Texas Commission on Environmental Quality



ORDER ADOPTING NEW RULES

Docket No. 2011-1098-RUL

On June 13, 2012, the Texas Commission on Environmental Quality (Commission) adopted new §§ 342.1, 342.25, and 342.26 in 30 TAC Chapter 342, concerning Regulation of Certain Aggregate Production Operations. The proposed new rules were published for comment in the January 27, 2012, issue of the *Texas Register* (37 TexReg 304).

IT IS THEREFORE ORDERED BY THE COMMISSION that the new rules are hereby adopted. The Commission further authorizes staff to make any non-substantive revisions to the rules necessary to comply with *Texas Register* requirements. The adopted rules and the preamble to the adopted rules are incorporated by reference in this Order as if set forth at length verbatim in this Order.

This Order constitutes the Order of the Commission required by the Administrative Procedure Act, Government Code, § 2001.033.

If any portion of this Order is for any reason held to be invalid by a court of competent jurisdiction, the invalidity of any portion shall not affect the validity of the remaining portions.

Issued date:

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Bryan W. Shaw, Ph.D., Chairman

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 12, 2012.

TRD-201200132

Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

Earliest possible date of adoption: February 26, 2012

For further information, please call: (512) 239-2141



CHAPTER 342. REGULATION OF CERTAIN AGGREGATE PRODUCTION OPERATIONS

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes new §§342.1, 342.25, and 342.26.

Background and Summary of the Factual Basis for the Proposed Rules

House Bill (HB) 571 passed in the 82nd Legislature, 2011 and was codified in Texas Water Code (TWC), Chapter 28A. HB 571 was authored by Representative Dan Huberty and sponsored by Senator Tommy Williams.

The statute exempts certain aggregate production operations (APOs) from the requirements. The statute requires active APOs to register and pay a fee annually. The statute does not contain any additional technical requirements for APOs beyond those required in other applicable rules and regulations. The statute also contains requirements for the TCEQ. These include conducting an annual survey, beginning September 2012, to facilitate locating active APOs; conducting compliance investigations of each active APO once every three years; and, providing specified information on APOs as part of the annual enforcement report. Additionally, the statute gives the commission the authority to assess penalties in accordance with the TCEQ penalty policy and within the conditions outlined in the statute, and establish an annual registration fee in an amount sufficient to maintain a registry of active aggregate production operations but not to exceed \$1,000. For APOs submitting a Notice of Audit in conjunction with initial registration, as outlined in TWC, §28A, Section 2(b), compliance investigations of these APOs will not begin before September 2015.

Section by Section Discussion

New §342.1, Definitions, is proposed to define terms pertinent to and defined in TWC, §28A.

New §342.25, Registration, is proposed to address requirements for the annual registration of all APOs. As stipulated in TWC, §28A, annual registration for each APO is required provided regulated activities continue. Upon cessation of regulated activities, the APO shall notify the TCEQ in writing. Registration will be facilitated by submission of required forms either electronically or via hard copy. All sites will be required to register annually. Initial registration may begin on July 1, 2012 but must be completed no later than September 1, 2012.

New §342.26, Registration Fees, is proposed to address required annual registration fees for all APOs. Each site is re-

quired to submit an annual registration fee. TWC, Chapter 28A requires the TCEQ to set fees in the amount necessary to cover the costs of administering the program, not to exceed \$1,000 per year. The proposed rule states that the maximum fee shall not exceed \$1,000.

The proposed rule does not specify the actual fees, but allows the TCEQ to establish fees that do not exceed the maximum fee of \$1,000. Specifying the maximum fee in the rule allows the TCEQ flexibility to adjust fees as needed to support the program. Structuring the rule pertaining to the fee in this manner also allows the TCEQ to examine fee structures, such as a tiered fee structure, that may prove more desirable to stakeholders.

Stakeholder meetings were held on September 13, 2011 and December 6, 2011 to support both the development of these proposed rules and other implementation activities, including fee development. It was during these meetings that stakeholders asked TCEQ to consider a tiered fee structure, primarily to lessen the fee burden for small business. To consider a tiered fee structure, additional information from APOs is necessary.

The TCEQ has developed outreach materials that include a questionnaire related to registration fees. This questionnaire collects information about type of operation, type of material extracted, and stakeholder preferences related to fee structure. TCEQ intends to use the information from this questionnaire to develop the fees and fee structure for Fiscal Year 2013 registrations. Future fee adjustments would be supported by information submitted with the registration and stakeholder communication. In accordance with TWC, Chapter 28A and the proposed rules, individual fees assessed will not exceed \$1,000 per year and total fee revenue will not exceed the costs of administering the program.

The public meeting for these proposed rules is scheduled for February 9, 2012. During that public meeting, program staff will also separately discuss and take comment on other implementation activities, including fee development. Program staff anticipates holding additional stakeholder meetings on implementation activities, including fees, as necessary to ensure that the regulated community is well informed of these new requirements and has an opportunity to provide input on program development.

Fiscal Note: Costs to State and Local Government

Jeffrey Horvath, Analyst in the Strategic Planning and Assessment Section, has determined that for the first five-year period the proposed rules are in effect, there will be fiscal implications for the agency to implement a new registration and investigation program for facilities who extract or process aggregates used for construction material. No significant fiscal implications are anticipated for other units of state or local government as a result of administration or enforcement of the proposed rules. According to TWC, §28A.001(1)(B), state agencies, including the Texas Department of Transportation, as well as cities or other units of local government that provide aggregate products for use in public works projects are not defined as APOs and would not be required to register and pay the annual application fees.

The proposed rulemaking implements TWC, §28A and would require an active APO to register annually with the TCEQ, no later than September 1, 2012. The statute requires the TCEQ to establish an annual registration fee in an amount not to exceed \$1,000, and to survey the state each year to locate unregistered APOs. The statute requires each APO to be investigated every three years, but would allow entities that submit a Notice of Au-

dit to postpone the three-year investigation cycle until September 1, 2015. According to the statute however, the three-year delay does not apply to operations that begin after September 1, 2012 or for active operations that fail to register by September 1, 2012. The TCEQ will administer penalties in accordance with the TCEQ penalty policy and within the conditions outlined in TWC, §28A.102.

The implementation of TWC, §28A will require the agency to develop registration forms, review and process registration applications for each APO, and to develop a registration tracking database. Agency staff would conduct annual surveys to identify any unregistered APO, conduct investigations on a three-year cycle, and take any necessary enforcement action.

The agency would establish procedures to collect, process, and deposit registration fees. At this time, agency staff is not able to determine the actual number of APOs that would be subject to the registration requirements, but according to the best estimates available, staff assumes that there may be approximately 600 registrants.

The legislature appropriated the agency an amount not to exceed \$308,349 in fiscal year 2012 and an amount not to exceed \$227,019 in fiscal year 2013 out of the Water Resource Management Account 153 in order to implement the legislation. This appropriation included an additional four full-time employees. The appropriation is contingent upon fee revenues from registration fees authorized by the statute to be sufficient to generate revenue to cover the costs for administering the program including indirect costs which were estimated to be \$64,000 in fiscal year 2012 and \$64,000 in fiscal year 2013.

Public Benefits and Costs

Mr. Horvath has also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be compliance with state law and the protection of air and water quality through the proper authorization of APOs.

The proposed rulemaking is not expected to have fiscal implications for any individuals. No significant fiscal implications are anticipated for businesses that own or operate APOs as a result of administration or enforcement of the proposed rules. APOs would be required to register annually and pay the registration fees. Failure to register may result in enforcement penalties of no less than \$5,000 and no more than \$10,000 for every year in which an APO operates without registration (total penalty no greater than \$25,000).

Registered APOs would be investigated every three years to ensure that they are in compliance with applicable regulatory requirements including requirements related to: 1) individual water quality permits; 2) a general water quality permits; 3) applicable air quality permits; and, 4) any other regulatory requirements applicable to active APOs under the jurisdiction of the commission. This fiscal note assumes that APOs subject to the proposed registration requirements would be in compliance with all other regulatory requirements under the commission's jurisdiction.

Small Business and Micro-Business Assessment

No significant adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. Small or micro-businesses who extract or process aggregates used for construction material will have to register with the commission and pay a statutorily required registration fee. It

is assumed that APOs subject to the proposed registration requirements would be in compliance with all other regulatory requirements under the commission's jurisdiction. It is not known how many of the affected sites would be owned or operated by small or micro-businesses. TCEQ is considering a tier-based registration fee structure. A tier-based fee structure would avoid undue financial burden for small businesses, while recovering sufficient revenue to operate the new program.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules are required to comply with state law and do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rules do not meet the definition of a "major environmental rule." Under Texas Government Code, §2001.0225, a "major environmental rule" means 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 of the state.

The primary purpose of the proposed rulemaking is to implement HB 571, 82nd Legislature, by adding Chapter 342, Regulation of Certain Aggregate Production Operations. The proposed rulemaking creates a new aggregates registration and inspection program which includes the establishment of an annual registration fee. Certain aspects of this rulemaking are intended to protect the environment or reduce risks to human health from environmental exposure. However, as discussed previously in the Fiscal Note, Public Benefits and Costs, Small Business Regulatory Flexibility Analysis, and the Local Employment Impact Statement sections of this preamble, 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."

Under Texas Government Code, §2001.0225, only a major environmental rule requires a regulatory impact analysis. Because this proposal does not constitute a major environmental rule, a regulatory impact analysis is not required. Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

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 commission has prepared a takings impact assessment for these rules under Texas Government Code, §2007.043. The commission has determined that the promulgation and enforcement of the rules will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The proposed rules also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. The proposed rules are administrative and do not impose any new regulatory requirements. The primary purpose of the proposed rules is to implement HB 571 by adding Chapter 342, Regulation of Certain Aggregate Production Operations. The proposed rulemaking is reasonably taken to fulfill requirements of state law. Therefore, the proposed rulemaking will not cause a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found that the proposal is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 et seq., and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the proposed rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22 and found the proposed rulemaking is consistent with the applicable CMP goals and policies.

CMP goals applicable to the proposed rules include to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas and to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone.

There are no CMP policies applicable to the proposed rules.

The proposed rules are consistent with the CMP goals and policies because the proposed rule does not authorize the storage, emission, or discharge of any pollutant. The proposed rules only require Aggregate Production Operations to register and pay a fee annually.

Promulgation and enforcement of these rules will not violate or exceed any standards identified in the applicable CMP goals and policies because the proposed rules are consistent with these CMP goals and policies and because these rules do not create or have a direct or significant adverse effect on any coastal natural resource areas.

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 Hearing

The commission will hold a public hearing on this proposal in Austin on February 9, 2012 at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The 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, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Mr. Bruce McNally, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www5.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 2011-045-342-OW. The comment period closes February 27, 2012. Copies of the proposed rulemaking can be obtained from the commission's Web site at http://www.tceq.texas.gov/nav/rules/propose_adopt.html. For further information, please contact Ms. Laurie Fleet, Water Quality Assessment Section, (512) 239-5445.

SUBCHAPTER A. GENERAL PROVISIONS

30 TAC §342.1

Statutory Authority

The new rule is proposed under the authority of Texas Government Code, under Texas Water Code (TWC), §5.102, General Powers; TWC, §5.103, Rules; and TWC, §5.105, General Policy, which provide the commission with the general powers to carry out its duties and authorize the commission to propose rulemaking necessary to carry out its powers and duties under the TWC; and TWC, §5.013, General Jurisdiction of Commission, which states the commission's authority over various statutory programs. The new rule is also proposed under Texas Health and Safety Code (THSC), §382.017, Rules, which authorizes the commission to propose rules consistent with the policy and purposes of THSC, Chapter 382 (the Texas Clean Air Act), and to propose rules that differentiate among particular conditions, particular sources, and particular areas of the state. The new rule is also proposed under THSC, §382.002, Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.003, concerning Definitions; and THSC, §382.011, General Powers and Duties, which authorizes the commission to control the quality of the state's air.

The proposed new rule implements HB 571, 82nd Legislature, 2011, by adding Chapter 342, Regulation of Certain Aggregate Production Operations.

§342.1. Definitions.

The following words and terms, when used in this chapter shall have the following meanings, unless the context clearly indicates otherwise.

(1) Aggregate production operation--A site from which aggregates are being or have been removed or extracted from the earth, including the entire areas of extraction, stripped areas, haulage ramps, and the land on which the plant processing the raw materials is located, exclusive of any land owned or leased by the responsible party not being currently used in the production of aggregates. For the purposes of this chapter, the term aggregate production operation does not include:

(A) a site at which aggregates that are being removed or extracted from the earth are used or processed at the same site or at a related site under the control of the same responsible party for the primary purpose of production of cement or lightweight aggregates, or in a lime kiln;

(B) a temporary site that is being used solely to provide aggregate products for use in a public works project involving the Texas Department of Transportation, any other state agency, or a local governmental entity;

(C) an extraction area from which all raw material is extracted for use as fill or for other construction uses at the same or a contiguous site;

(D) a site at which the aggregates that are being removed or extracted from the earth are used or processed for use in the construction, modification, or expansion of a solid waste facility at the site or another location, or

(E) a site at which aggregates are being removed or extracted from the earth where the primary purpose of removal or extraction is not for commercial sale or processing of the aggregates.

(2) Aggregates--Any commonly recognized construction material originating from an aggregate production operation from which an operator extracts dimension stone, crushed and broken limestone, crushed and broken granite, crushed and broken stone not elsewhere classified, construction sand and gravel, industrial sand, dirt, soil, or caliche. For purposes of this chapter, the term aggregates does not include clay or shale mined for use in manufacturing structural clay products.

(3) Commission--The Texas Commission on Environmental Quality.

(4) Operator--Any person engaged in and responsible for the physical operation and control of the extraction of aggregates.

(5) Owner--Any person having title, wholly or partly, to the land on which an aggregate production operation exists or has existed.

(6) Regulated Activity--Any activity that is regulated by the Texas Commission on Environmental Quality.

(7) Responsible party--The operator, lessor, or owner who is responsible for the overall function and operation of an aggregate production operation.

(8) Site--One or more contiguous or adjacent properties under common control by the same responsible party.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 12, 2012.

TRD-201200134

Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

Earliest possible date of adoption: February 26, 2012

For further information, please call: (512) 239-2141



SUBCHAPTER B. REGISTRATION AND FEES

30 TAC §342.25, §342.26

Statutory Authority

The new rules are proposed under the authority of Texas Government Code, under Texas Water Code (TWC), §5.102, General Powers; TWC, §5.103, Rules; and TWC, §5.105, General Policy, which provide the commission with the general powers to carry out its duties and authorize the commission to propose rulemaking necessary to carry out its powers and duties under the TWC; and TWC, §5.013, General Jurisdiction of Commission, which states the commission's authority over various statutory programs. These new rules are also proposed under Texas Health and Safety Code (THSC), §382.017, Rules, which authorizes the commission to propose rules consistent with the policy and purposes of THSC, Chapter 382 (the Texas Clean Air Act), and to propose rules that differentiate among particular conditions, particular sources, and particular areas of the state. This new rules are also proposed under THSC, §382.002, Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.003, concerning Definitions; and THSC, §382.011, General Powers and Duties, which authorizes the commission to control the quality of the state's air.

The proposed new rules implement HB 571, 82nd Legislature, 2011, by adding Chapter 342, Regulation of Certain Aggregate Production Operations.

§342.25. Registration.

(a) The responsible party for an aggregate production operation, in operation on or before September 1, 2012, shall register each operation with the commission by September 1, 2012.

(b) The responsible party for an aggregate production operation that begins operations after September 1, 2012 shall register each operation with the commission not later than the 10th business day before the beginning date of regulated activities.

(c) An aggregate processing plant that has the same responsible party and is located at the same site from which aggregates are being or have been removed or extracted from the earth is not required to obtain a separate registration.

(d) The responsible party for an aggregate production operation shall renew the registration annually as regulated activities continue.

(e) Within 30 days after all regulated activities at an aggregate production operation have ceased, the responsible party shall submit a registration cancellation request to the commission.

(f) Applications for registration or cancellation of a registration shall be made on forms prescribed by the executive director.

§342.26. Registration Fees.

(a) Any person who submits a registration for an aggregate production operation shall remit, at the time of registration, a fee to the commission.

(b) The executive director shall determine the costs to administer this chapter and the requirements in Texas Water Code, §28A, and establish fees annually to recover the executive director's actual costs. The fees established by the executive director shall not exceed \$1,000. The executive director may implement a tier-based registration fee structure.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 12, 2012.

TRD-201200135

Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

Earliest possible date of adoption: February 26, 2012

For further information, please call: (512) 239-2141

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 7. PREPAID HIGHER EDUCATION TUITION PROGRAM

SUBCHAPTER K. HIGHER EDUCATION SAVINGS PLAN

34 TAC §7.101

The Comptroller of Public Accounts proposes to amend §7.101, concerning definitions. The changes are proposed to clarify the rule and to reflect current federal securities and tax law.

New paragraph (6), definition of promotional material and savings plan information, is added to clarify that certain materials exempt from lengthy disclosure requirements by federal securities regulation are likewise exempt from lengthy state disclosure requirements. For example, federal securities regulations do not require brief internet banner ads to contain lengthy disclosures so long as they link to a home page that contains the required disclosures. The proposed definition would clarify that disclosures required by state law would likewise not apply to brief internet banner ads. Items that will be exempt from lengthy state disclosure requirements will continue to be subject to other state requirements, such as the prohibition against misleading representations and the requirement that all promotion of the plan is consistent with applicable state and federal law.

The definition of special needs beneficiary is deleted to ensure that families with special needs beneficiaries may use their 529 plan savings for qualified special needs services. The current definition limits the category to beneficiaries who need additional time to complete courses or degree requirements. Some special needs beneficiaries may complete college within the typical time frame and may still require special needs services. The deletion will eliminate an unnecessary limitation.

John Heleman, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will

be no significant revenue impact on the state or units of local government.

Mr. Heleman also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be by clarifying the rules, insuring the rules reflect current federal securities and tax laws, and allowing certain governmental and nonprofit scholarship organizations to more easily use the program and plan. The proposed amendment would have no fiscal impact on small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposed rule may be submitted to Linda Fernandez, Acting Director, Educational Opportunities and Investment Division, Post Office Box 13407, Austin, Texas 78711-3407, or transmitted electronically to linda.fernandez@cpa.state.tx.us.

This rule amendment is proposed under Texas Education Code, §54.702(a) and §54.708(b) which authorize the Board to adopt rules to implement the program.

The proposed amendment implements Texas Education Code, §54.708(b) and §54.713.

§7.101. Definitions.

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

(1) **Beneficiary**--The designated individual whose qualified higher education expenses are expected to be paid from a savings trust account.

(2) **Financial institution**--A bank, trust company, savings and loan association, credit union, broker-dealer, mutual fund, insurance company, or other similar financial institution that is authorized to transact business in this state.

(3) **Nonqualified withdrawal**--A withdrawal from a savings trust account other than:

(A) a qualified withdrawal;

(B) a withdrawal that is made as the result of the death or disability of the beneficiary of the account; or

(C) a withdrawal that is made as a result of the receipt of a scholarship or an allowance or payment that is described in Internal Revenue Code of 1986, §135(d)(1)(B) or (C), as amended, and that the beneficiary has received, to the extent that the amount of the withdrawal does not exceed the amount of the scholarship, allowance, or payment, in accordance with federal law.

(4) **Owner**--The individual, trust, estate, Uniform Gift to Minors Act (UGMA) custodian or Uniform Transfer to Minors Act (UTMA) custodian, guardian, corporation, non-profit entity, or other legal entity, or any combination thereof that results from transfers by operation of law, that owns a savings trust account under a savings trust agreement between the board and that individual, trust, estate, UGMA or UTMA custodian, guardian, corporation, non-profit entity, or other legal entity, or any combination thereof.

(5) **Plan manager**--A financial institution that is under contract with the board to serve as a plan administrator.

(6) **Promotional material, or savings plan information**--Any material published or used in any written, electronic, or other public media. For the purpose of §7.102(e)(2) and (3) of this title (relating to General Provisions) the term does not include:

1 AN ACT

2 relating to the regulation of certain aggregate production
3 operations by the Texas Commission on Environmental Quality;
4 providing penalties.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

6 SECTION 1. Subtitle D, Title 2, Water Code, is amended by
7 adding Chapter 28A to read as follows:

8 CHAPTER 28A. REGISTRATION AND INSPECTION OF CERTAIN AGGREGATE

9 PRODUCTION OPERATIONS

10 SUBCHAPTER A. GENERAL PROVISIONS

11 Sec. 28A.001. DEFINITIONS. In this chapter:

12 (1) "Aggregate production operation" means the site
13 from which aggregates are being or have been removed or extracted
14 from the earth, including the entire areas of extraction, stripped
15 areas, haulage ramps, and the land on which the plant processing the
16 raw materials is located, exclusive of any land owned or leased by
17 the responsible party not being currently used in the production of
18 aggregates. For the purposes of this chapter, the term "aggregate
19 production operation" does not include:

20 (A) a site at which the materials that are being
21 removed or extracted from the earth are used or processed at the
22 same site or at a related site under the control of the same
23 responsible party for the production of cement or lightweight
24 aggregates, or in a lime kiln;

1 (B) a temporary site that is being used solely to
2 provide aggregate products for use in a public works project
3 involving the Texas Department of Transportation or a local
4 governmental entity;

5 (C) an extraction area from which all raw
6 material is extracted for use as fill or for other construction uses
7 at the same or a contiguous site; or

8 (D) a site at which the materials that are being
9 removed or extracted from the earth are used or processed for use in
10 the construction, modification, or expansion of a solid waste
11 facility at the site or another location.

12 (2) "Aggregates" means any commonly recognized
13 construction material originating from an aggregate production
14 operation from which an operator extracts dimension stone, crushed
15 and broken limestone, crushed and broken granite, crushed and
16 broken stone not elsewhere classified, construction sand and
17 gravel, industrial sand, dirt, soil, or caliche. For purposes of
18 this section, the term "aggregates" does not include clay or shale
19 mined for use in manufacturing structural clay products.

20 (3) "Commission" means the Texas Commission on
21 Environmental Quality.

22 (4) "Operator" means any person engaged in and
23 responsible for the physical operation and control of the
24 extraction of aggregates.

25 (5) "Owner" means any person having title, wholly or
26 partly, to the land on which an aggregate production operation
27 exists or has existed.

1 (6) "Responsible party" means the operator, lessor, or
2 owner who is responsible for the overall function and operation of
3 an aggregate production operation.

4 [Sections 28A.002-28A.050 reserved for expansion]

5 SUBCHAPTER B. REGISTRATION AND INSPECTION

6 Sec. 28A.051. REGISTRATION. (a) The responsible party for
7 an aggregate production operation shall register the operation with
8 the commission not later than the 10th business day before the
9 beginning date of extraction activities and shall renew the
10 registration annually as extraction activities continue.

11 (b) After extraction activities at an aggregate production
12 operation have ceased and the operator has notified the commission
13 in writing that the operations have ceased, the requirements of
14 this chapter are not applicable to the aggregate production
15 operation.

16 Sec. 28A.052. SURVEY. (a) The commission annually shall
17 conduct a physical survey of the state to:

18 (1) identify all active aggregate production
19 operations in this state; and

20 (2) ensure that each active aggregate production
21 operation in this state is registered with the commission.

22 (b) The commission may contract with or seek assistance from
23 a governmental entity or other person to conduct the annual survey
24 required by Subsection (a) to identify active aggregate production
25 operations that are not registered under this chapter.

26 Sec. 28A.053. INSPECTION. (a) The commission shall
27 inspect each active aggregate production operation in this state

1 for compliance with applicable environmental laws and rules under
2 the jurisdiction of the commission at least once every three years.

3 (b) The commission may conduct an inspection only after
4 providing notice to the responsible party in accordance with
5 commission policy.

6 (c) Except as provided by Subsection (d), an inspection must
7 be conducted by one or more inspectors trained in the regulatory
8 requirements under the jurisdiction of the commission that are
9 applicable to an active aggregate production operation. If the
10 inspection is conducted by more than one inspector, each inspector
11 is not required to be trained in each of the applicable regulatory
12 requirements, but the combined training of the inspectors must
13 include each of the applicable regulatory requirements. The
14 applicable regulatory requirements include requirements related
15 to:

16 (1) individual water quality permits issued under
17 Section 26.027;

18 (2) a general water quality permit issued under
19 Section 26.040;

20 (3) air quality permits issued under Section 382.051,
21 Health and Safety Code; and

22 (4) other regulatory requirements applicable to
23 active aggregate production operations under the jurisdiction of
24 the commission.

25 (d) An investigation in response to a complaint satisfies
26 the requirement of an inspection under this section if a potential
27 noncompliance issue not related to the complaint is observed and

1 is:

2 (1) not within an area of expertise of the
3 investigator but is referred by the investigator to the commission
4 for further investigation; or

5 (2) within an area of expertise of the inspector and is
6 appropriately investigated and appropriately addressed in the
7 investigation report.

8 Sec. 28A.054. REPORT. The commission shall provide a
9 specific section in the annual enforcement report under Section
10 5.126 with information regarding the implementation of this
11 chapter, including:

12 (1) the results of the survey to locate unregistered
13 active aggregate production operations under Section 28A.052;

14 (2) the number and general location of the registered
15 aggregate production operations;

16 (3) the number of inspectors trained in multiple areas
17 related to the inspection of aggregate production operations;

18 (4) the number of inspections conducted; and

19 (5) the results of the inspections.

20 [Sections 28A.055-28A.100 reserved for expansion]

21 SUBCHAPTER C. FEES AND ENFORCEMENT

22 Sec. 28A.101. FEES. (a) A person who, under laws in the
23 commission's jurisdiction and rules adopted under those laws, is
24 authorized to operate an aggregate production operation shall pay
25 annually an aggregate production operation registration fee to the
26 commission in an amount established by commission rule.

27 (b) The commission shall set the annual registration fee in

1 an amount sufficient to maintain a registry of active aggregate
2 production operations in this state and implement this chapter, not
3 to exceed \$1,000.

4 (c) Registration fees collected under this section shall be
5 deposited in the water resource management account and may be used
6 only to implement this chapter.

7 Sec. 28A.102. PENALTY. The commission may assess a penalty
8 of not less than \$5,000 and not more than \$10,000 for each year in
9 which an aggregate production operation operates without being
10 registered under this chapter. The total penalty under this
11 section may not exceed \$25,000 for an aggregate production
12 operation that is operated in three or more years without being
13 registered.

14 SECTION 2. (a) A responsible party operating an aggregate
15 production operation, as those terms are defined by Section
16 28A.001, Water Code, as added by this Act, is first required to
17 register with the Texas Commission on Environmental Quality under
18 Section 28A.051, Water Code, as added by this Act, on September 1,
19 2012.

20 (b) If, in conjunction with initially registering with the
21 Texas Commission on Environmental Quality as required by Subsection
22 (a) of this section, a responsible party operating an aggregate
23 production operation also submits a notice of intent to conduct an
24 audit for compliance with all applicable laws, rules, and
25 regulations under the jurisdiction of the Texas Commission on
26 Environmental Quality under the Texas Environmental, Health, and
27 Safety Audit Privilege Act (Article 4447cc, Vernon's Texas Civil

1 Statutes), the three-year period to conduct an inspection of the
2 operation under Section 28A.053, Water Code, as added by this Act,
3 begins September 1, 2015.

4 SECTION 3. This Act takes effect September 1, 2011.

President of the Senate

Speaker of the House

I certify that H.B. No. 571 was passed by the House on April 6, 2011, by the following vote: Yeas 139, Nays 5, 1 present, not voting.

Chief Clerk of the House

I certify that H.B. No. 571 was passed by the Senate on May 9, 2011, by the following vote: Yeas 30, Nays 1.

Secretary of the Senate

APPROVED: _____

Date

Governor