

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

Re: Docket No. 2011-1098-RUL

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

Re: Docket No. 2011-1098-RUL

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.

Re: Docket No. 2011-1098-RUL

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

Re: Docket No. 2011-1098-RUL

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.

Commissioners

Page 6

May 25, 2012

Re: Docket No. 2011-1098-RUL

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