

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** January 6, 2012
(Amended)

Thru: Bridget Bohac, Chief Clerk
Mark R. Vickery, P.G., Executive Director

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

Docket No.: 2011-1098-RUL

Subject: Commission Approval for Proposed Rulemaking
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 passed 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 required by all applicable aggregate production operations by 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 in July 2012, in order that the regulated community may submit the

required registration forms on or before the September 1, 2012, deadline. WQD will also 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. 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. ~~TCEQ intends to implement a tiered fee structure, based on the acres of the operation that are actively being used for extraction or storage of aggregates. A tiered fee structure would reduce the financial impact to small and micro-businesses.~~ 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:

Staff recommends the following clarifications:

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 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.

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 A stakeholder meeting was 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.

~~A second stakeholder meeting is scheduled for December 6, 2011. The meeting is primarily to address fee structure and fee calculations for next fiscal year; registration requirements; and follow up on survey issues raised at the first stakeholder meeting.~~

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 and legislative interest 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, the rule team will need to assess the statute and legislative intent to ensure the rulemaking clearly implements the legislation accordingly regarding applicability.

Will this rulemaking affect any current policies or require development of new policies? No current policies will be affecting 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 proposal rulemaking schedule:

Second stakeholder meeting: December 6, 2011

Anticipated proposal date: January 11, 2012

Anticipated *Texas Register* publication date: January 27, 2012

Public hearing date (if any): February 9, 2012

Public comment period: January 27, 2012 to February 27, 2012

Anticipated adoption date: June 27, 2012

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Attachments

House Bill 571

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