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 required 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.

~~New §342.26, Registration Fees, is proposed to address required annual registration fees for all APOs. Each site is required to submit an annual registration fee. The amount of the annual registration fee will be such that the revenue collected will fund implementation of TWC, §28A, but not exceed $1,000.~~

~~TCEQ intends to implement a tier-based registration fee structure based on the number of acres that are actively being used by an aggregate extraction site or an aggregate processing site. Currently there is insufficient information about the number of facilities and their acreage to establish tiers or their associated fees. TCEQ is attempting to collect data to establish the tiers and the fees for each tier. A tier-based fee structure would provide the agency flexibility in assessing fees and to avoid undue financial burden for smaller sites, while recovering sufficient revenue to operate the new program.~~

~~Since the statute requires the 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 as appropriate to comply with this statutory requirement. Establishing a tier-based registration fee structure would allow for adjustment of the fee in future years without a full rulemaking process by the TCEQ. TCEQ will annually determine the fee for each tier, if a tier-based fee structure is implemented, or a single fee if a tier-based fee structure is not implemented. TCEQ will update registration forms annually to identify the fees. Additionally, a monetary incentive for registering electronically may be instituted.~~

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 Audit 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. ~~TCEQ is attempting to collect data about the number of facilities and their acreage.~~

~~TCEQ intends to implement a tier-based registration fee structure based upon the number of acres that are actively being used by an aggregate extraction site or an aggregate processing site. The tier-based fee structure would provide the agency flexibility in assessing fees particularly for smaller sites, while recovering sufficient revenue to operate the new program. The fees will not exceed $1,000. TCEQ estimates that there may be 600 sites that would be affected by the proposed registration requirements. TCEQ is attempting to collect data about the number of facilities and their acreage to establish the tiers and the fees for each tier. A tier-based fee structure would provide the agency enough flexibility to collect sufficient revenue to administer the program.~~

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).

~~TCEQ intends to implement a tier-based registration fee structure based upon the acreage of an aggregate extraction site or an aggregate processing site. A tier-based fee structure would provide the agency flexibility in assessing fees particularly for smaller sites, while recovering sufficient revenue to operate the new program. TCEQ estimates~~

~~that there may be 600 sites that would be affected by the proposed registration requirements. TCEQ is attempting to collect data about the number of facilities and their acreage to establish the tiers and the fees for each tier. Until more information is available, staff is not able to estimate the total amount of registration fee revenue that would be assessed to businesses engaged in aggregate extraction or processing. If a tier-based registration fee structure is implemented, each regulated business will pay a registration fee that will fall within the appropriate fee tier level, but the amount of the fee will depend upon how much revenue the agency will need to collect to cover the appropriation and to administer the program.~~

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. ~~TCEQ intends to implement a tier-based registration fee structure based upon the number of acres that are actively being used for aggregate extraction or processing. A tier-based fee structure would provide the agency flexibility in assessing fees particularly for smaller sites, 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 AM 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 McAnally, 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

§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.

SUBCHAPTER B. REGISTRATION AND FEES

§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. This 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.