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 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, extracted, or processed where the primary purpose of removal, extraction, or processing is not for commercial sale .

(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 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.