

The Texas Natural Resource Conservation Commission (commission) proposes amendments to §285.10, Delegation to Authorized Agents, §285.12, Review of Locally Administered Programs, and §285.33, Criteria for Effluent Disposal Systems. The commission also proposes new §285.13, Revocation of Authorized Agent Delegation and §285.14, Charge-back Fee.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

Charge-back fee

Texas Health and Safety Code (THSC), §366.059(b), as amended by House Bill (HB) 2912, §3.09, 77th Legislature, 2001, provides the commission with the authority to charge local governmental entities a charge-back fee if the local governmental entity repeals its order, ordinance, or resolution that established the entity as an authorized agent (AA). Section 366.059(b) also provides the commission with the authority to charge a local governmental entity a charge-back fee if its authorization as an AA is revoked by the commission. House Bill 2912, §3.09, mandates that the charge-back fee be reasonable and appropriate and not exceed \$500. Finally, HB 2912, §3.09, does not allow the commission to assess a charge-back fee to local governmental entities that, due to a material change in the commission's rules under this chapter, have repealed their order, ordinance, or resolution or have lost their delegation as an AA.

The charge-back fee will cover some of the administrative costs that are not covered by the fees collected by the executive director and that are incurred by the agency when the executive director administers the on-site sewage facility (OSSF) program in a local governmental entity's area of jurisdiction. Until now, the commission has not defined its authority nor specified the situations under

which the agency will assess charge-back fees. The purpose of §366.059(b) is to ensure that the agency is able to recover the actual cost of implementing the program in areas that the agency does not currently manage. For communities that have not received delegation, the agency covers the cost of managing the program. Conversely, AAs must cover their own costs.

In many cases, local administration of the program is more efficient and more responsive than it is when the agency administers the program. Because local administration of the program requires less travel, it is more timely and cost-efficient. Texas Health and Safety Code, Chapter 366 provides for the delegation of the program to local governmental entities if they meet the requirements for implementing the program. This has been reinforced by legislative actions in the last several years. A legislative review of the program by the House of Representatives Committee on Natural Resources (Committee) in 1996 emphasized that the intent of the law is that the program be delegated to local governmental entities. In its Interim Report to the 75th Texas Legislature, Finding No. 2, the Committee determined that, barring significant appropriations increases, the commission does not have the ability to adequately administer the program in local areas. The Committee found that delegation of the OSSF program should not be compelled until the executive director has had an opportunity to encourage local entities to seek regional cooperative programs. In response to the recommendations, the executive director has visited 104 local governmental entities throughout the state to encourage local assumption of the program. The commission recognizes the financial burdens that come with implementing the program. As a result, the major focus of these meetings has been to explore the possibility of local governments working together to implement the OSSF program or to participate in interlocal agreements with regional authorities to implement the program. As a result of these efforts,

15 additional counties have become AAs since 1997. The executive director continues to work with local entities to develop fiscally sound options.

Since the committee report, the legislature has continued to limit appropriations to the commission for the implementation of the program, expecting the commission to oversee local programs, instead of administering local programs from the state level. The legislature's expectation that the OSSF program will be administered on the local level was also seen in a 1997 amendment to the OSSF law. In HB 1785 of the 75th Legislative Session, 1997, the legislature amended the law to require electric utilities to provide a weekly list of new service connections in unincorporated areas to the county judge.

Language has been included in proposed §285.14 limiting the fee to a maximum of \$500 that may be charged to local governments for each OSSF permit issued by the executive director. This fee is intended to help cover the difference between the permit fee charged by the executive director and the executive director's actual cost of issuing a permit. This fee will provide the executive director with the ability to cover the costs incurred for issuing permits where the local governmental entities have chosen to cease to administer a local program or the commission has revoked their delegation because of noncompliance with the rules. The rule specifies that the amount of the charge-back fee will be based on the type and number of OSSFs typically installed and inspected in the local governmental entity's jurisdiction, along with expected travel expenses for the executive director.

Texas Health and Safety Code, §366.059, provides in part that "The commission may assess a reasonable and appropriate charge-back fee, not to exceed \$500, to a local governmental entity for

which the commission issues permits for administrative costs relating to the permitting function that are not covered by the permit fees collected.” The executive director determined that it is necessary for the agency to recover the costs of implementing the OSSF program. Because the charge-back is simply a mechanism for the executive director to recover some administrative costs, there will be no additional full-time equivalents added to the OSSF program as a direct result of the charge-back fee. Therefore, the charge-back fee is not expected to have a substantial impact on the time it takes the executive director to process a permit. If the commission determines that a charge-back fee to local governmental entities is appropriate, the fee will not exceed \$500.

The billing process for these charge-back fees is provided.

Tire Chips

In 1992, the commission implemented the Waste Tire Program to address problem stockpiles of scrap tires that were creating health or safety hazards in Texas. Many of the tires that had been stockpiled were chipped or shredded tires. One of the end uses for the tire shreds or chips has been as media for OSSF systems. In February 1997, a set of OSSF rules became effective that allowed chipped tires to be used as media in standard absorptive drainfields. While §285.33(a)(1)(B) of the 1997 rules required the size of the media used in standard absorptive drainfields to range from 0.75 inches to 2.0 inches, §285.33(b)(1)(B)(i)(II) of the 1997 rules allowed tires chips larger than two inches as measured along their greatest dimension to be used on a case-by-case basis.

In May 2001, the commission adopted a new set of OSSF rules. In this rulemaking, the use of a tire chip larger than two inches as measured along its greatest dimension was dropped from the rule. As a result, no tire chips larger than two inches as measured as their greatest dimension can be used as media in standard absorptive drainfields. Currently, there are approximately 59 million waste tire units (WTUs) stored in stockpiles in Texas. A large percentage of these WTUs are three-inch by three-inch chips which could be used as an acceptable media in OSSF systems.

Therefore, to allow the larger tire chip to be used as media in standard absorptive drainfields, language has been included in this proposed rulemaking in §285.33(b)(1)(B) to allow use of a tire chip that does not exceed three inches as measured along its greatest dimension.

SECTION BY SECTION DISCUSSION

Section 285.10, Delegation to Authorized Agents, is proposed to be amended by adding the word, “written,” to subsection (b)(4)(B) to clarify that the executive director will review the draft order, ordinance, or resolution and will provide written comments to the local governmental entity within 30 days of receipt. Additionally, a new subsection (d)(5) is proposed to be added to incorporate the charge-back fee language from HB 2912, Article 3, which allows an AA to relinquish its OSSF authority due to a material change in Chapter 285. The existing language in subsection (e)(1) - (5) is proposed to be moved to new §285.13 for better organization of Subchapter B. Further, the commission defined the acronyms for “on-site sewage facility” and “Texas Health and Safety Code” the first time they are used in this section and deleted the word “the” in front of both “Texas Health and Safety Code” and “THSC” throughout this section to bring this section into agreement with the

remainder of Chapter 285. Finally, the commission made additional administrative changes in subsection (b) to bring the subsection into agreement with the remainder of Chapter 285.

Section 285.12, Review of Locally Administered Programs, is proposed to be amended by adding language to existing subsection (a) and adding new subsection (b) to outline the process the executive director will follow to perform a compliance review of an AA's program. This new language provides more detail to AAs about the process they can expect the executive director to follow. Subsection (a) proposes to provide that the executive director will review the AA's administrative, planning materials review, permitting, inspection and complaint resolution processes; will meet with the AA at the end of the review to discuss the findings; and will prepare a report of the findings and send a copy to the AA by certified mail within 60 days after completing the review. The commission also made an administrative change by deleting the word "the" from in front of "Texas Health and Safety Code" in subsection (a) to bring this subsection into agreement with the remainder of Chapter 285. Subsection (b) proposes to provide that the AA will have 45 days from the date of the executive director's letter to respond to the executive director on how the AA will address all deficiencies noted during the review. Additionally, the executive director will offer to assist the AA, including providing the AA an opportunity for training. Subsection (b) also proposes that if the executive director finds that the AA's program is deficient because it does not consistently provide required documentation of the permitting, inspection, and complaint processes and the AA's response to the executive director's findings is not adequate or if the AA fails to respond, the executive director will continue to work with the AA until the deficiencies are resolved. If the executive director finds that the AA's response to the executive director's findings is adequate, the executive director will take no further action. Further, subsection

(b) proposes to allow the executive director to begin the process of revoking an AA's delegation under §285.13 if the executive director finds that the AA's program does not consistently enforce the permitting, planning, construction, operation, and maintenance of OSSF systems and the authorized agent's response to the executive director's findings is not adequate to correct the deficiencies or is endangering human health or safety. Finally, subsection (b) proposes that the executive director will schedule another review of the AA's program one year after the first compliance review if the executive director finds that the response to the executive director's findings is adequate to correct the deficiencies.

New §285.13, Revocation of Authorized Agent Delegation, proposes to allow the commission to revoke an AA's delegated authority for failure to implement, administer, or enforce Chapter 285. This section also proposes the process the executive director will follow when revoking an AA's delegation. If the executive director determines that there is a reason to revoke an AA's delegation, the executive director will meet with the AA's mayor, county judge, general manager, chairman of the board, or other authorized person to discuss the executive director's findings, the AA's response, and possible revocation. The executive director will prepare a letter documenting the meeting and forward it to the AA within ten days after the meeting. The executive director will also provide the AA 60 days from the date of the letter documenting the meeting to allow other AAs to review the executive director's decision. The AA must respond to the executive director in writing within 90 days of the date of the letter documenting the meeting. If the executive director determines that the AA will take appropriate corrective action, the executive director will respond to the AA in writing that the revocation process will be discontinued and will schedule another review of the AA's program one year after the first

compliance review. If the executive director determines that the AA will not take appropriate corrective action, the executive director will file a petition with the commission seeking revocation of the AA's program and initiate the hearing process with the State Office of Administrative Hearings (SOAH). This subsection also outlines the details the executive director will follow for a hearing. After the hearing, the commission may either issue an order to revoke the delegation, issue an order requiring the AA to take certain action, or take no action. If the commission revokes the AA's delegation, the commission must determine, on a case-by-case basis, if a charge-back fee will be assessed. If the commission assesses a charge-back fee, the order must include the charge-back fee amount. If the commission revokes the AA delegation, the executive director will assume responsibility for the OSSF program in the AA's jurisdiction on the date of the revocation. In the event that an AA consents to revocation of its delegation in writing before the hearing, the executive director may revoke the delegation without a hearing.

New §285.14, Charge-back Fee, proposes that the commission may assess a charge-back fee, not to exceed \$500 per permit, to local governmental entities that either have repealed an OSSF order, ordinance, or resolution, or have their delegation revoked by the commission according to §285.13. The charge-back fee will be assessed for all OSSF permits issued within that entity's area of jurisdiction and will be based on the executive director's actual cost of issuing a permit in that jurisdiction and on the number and type of OSSF systems being installed and inspected, travel expenses, and time spent on the review of planning materials. This section proposes that if the local governmental entity repeals its OSSF order, ordinance, or resolution or the commission revokes a local governmental entity's delegation and the local governmental entity agrees to the amount of the charge-back fee, the executive

director will recommend the commission approve the charge-back fee. Further, this section proposes that if the local governmental entity repeals its OSSF order, ordinance, or resolution or the commission revokes a local governmental entity's delegation and the local governmental entity does not agree to the amount of the charge-back fee, the commission will refer the charge-back fee to SOAH for a contested case hearing. The charge-back fee will not exceed \$500. The charge-back fee is authorized under THSC, §366.059. The executive director will bill the local governmental entities for charge-back fees no more than quarterly and no less than annually. Payment of charge-back fees is due within 30 days after receipt of invoice. Late payments are subject to penalties and interest according to 30 TAC Chapter 12.

Section 285.33, Criteria for Effluent Disposal Systems, is proposed to be amended by adding new language to §285.33(b)(1)(B) and (B)(i)(II) that allows chipped tires that do not exceed three inches as measured along their greatest dimension to be used as media in a standard absorptive drainfield. Additionally, grammatical changes were made in §285.33(b)(1)(B) to accommodate the new language in this section.

FISCAL NOTE: COST TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, has determined that for the first five-year period the proposed rules are in effect, revenues to the commission could increase as a result of processing additional OSSF permits beginning after the effective date of these rules. There could be fiscal implications, which are not anticipated to be significant, for units of local government that have either repealed the order, ordinance, or resolution that established the entity as an OSSF AA

or had its authorization as an AA revoked by the commission. The executive director could assess a \$500 charge-back fee for each permit the commission has to process for units of local government that no longer have authority to administer OSSF permits locally after the proposed rules are implemented. The amount of increase in revenues is not anticipated to be significant, however, because the commission does not anticipate having to administer and process a significant increase in OSSF permits. No fiscal implications are anticipated for units of local government that continue to regulate the OSSF permitting program and process these type of permits locally.

In addition, no fiscal implications are anticipated for the state or units of local government resulting from the implementation of the proposed rules which increase the maximum allowable size of waste tire chips used in OSSF absorptive drainfields.

The proposed rules would clarify and update regulations regarding the OSSF charge-back fee in Texas. On-site sewage facilities are one or more systems, typically used at residential homes, schools, office buildings, restaurants, motels, and hospitals, that treat and dispose of 5,000 gallons of wastewater or less each day and that are only used for disposal of sewage where the system is located.

The proposed rules would clarify and incorporate charge-back fee provisions from HB 2912 (an act relating to the continuation and functions of the commission; providing penalties), 77th Texas Legislature, 2001. The bill authorizes the commission to assess a reasonable and appropriate charge-back fee, not to exceed \$500, to a local government for processing OSSF permits. The commission may assess this fee if the local governmental entity is an AA that has repealed the order, ordinance, or

resolution that established the entity as an AA or has had its authorization as an AA revoked by the commission. The commission may not assess a charge-back fee to a local government entity if, due to a material change in the commission's OSSF rules, the entity has repealed its order, ordinance, or resolution that established the entity as an AA or the local governmental entity has lost its authority.

The majority of OSSF permits are processed, managed, and enforced by local governmental entities that received delegation from the executive director to manage and enforce OSSF permitting within their jurisdictions. Approximately 48,000 OSSF permits annually are handled by 300 AAs in Texas. The commission processes approximately 800 OSSF permits annually from local governmental entities in the 77 counties that currently do not have delegation authority to process OSSF permits locally. The proposed rules would add a provision that would allow the executive director to assess a charge-back fee to counties and other local governmental entities that have either repealed the order, ordinance, or resolution that established the entity as an AA, or had their authorization as an AA revoked by the commission. This would not affect local governmental entities that currently rely on the commission to process OSSF permits, because the charge-back fee is not retroactive and can only be imposed on affected entities after the effective date of this rulemaking.

All local governmental entities that currently handle OSSF permitting at the local level that either decide to no longer manage and enforce an OSSF program, or have their authority revoked by the commission, may be assessed a charge-back fee not to exceed \$500 per permit beginning on the effective date of the rules. Local governmental entities that continue to regulate the OSSF permitting program and process OSSF permits would not be assessed this charge-back fee. The overall fiscal

impact on counties that rely on the commission to process OSSF permits following adoption of these rules would depend upon the amount of charge-back fees the county would be required to pay to the commission for administration and processing.

The result of the charge-back fee is anticipated to increase commission revenues in an amount that is not anticipated to be significant following the adoption of these rules as proposed. The commission anticipates that most of the 300 local governmental entities that currently handle OSSF permitting will continue to do so. Although it is undetermined how many permits will originate from local governmental entities that may either repeal the order, ordinance, or resolution that established the entity as an AA, or have their authorizations as an AA revoked by the commission following adoption of these proposed rules, the commission does not anticipate that the number of permits will be significant.

Additionally, the proposed rules would more clearly define the process to be followed by the executive director when reviewing and revoking AA delegation authority. The commission does not anticipate any fiscal impacts due to implementation of the proposed rules regarding the reviewing and revoking of AA delegation authority.

The proposed rules would change requirements for the maximum size of waste tire chips used as media in OSSF absorptive drainfields from two inches to three inches. Current rules allow for the use of tire chips up to two inches in size as media in absorptive drainfields and larger chips can be used on a case-by-case basis. The proposed rules would clarify current rule language regarding the size of waste tire

chips that OSSF installers are allowed to use as media in absorptive drainfields. The proposed rules are not anticipated to impact current practices, due to the fact that if an installer chose to use waste tire chips as media, the three-inch chip size was probably all that was available. However, due to the large number of waste tire chips currently stockpiled in the state, three-inch chips may provide a more convenient, less expensive media alternative for some OSSF installers and owners, depending upon the site location in the state and the availability and prices of other alternatives. No fiscal implications are anticipated to the agency or other units of state and local government resulting from the implementation of these proposed rules, as the proposed rules provide clarification of the current rules and conform current practice to the rules.

PUBLIC BENEFIT AND COSTS

Mr. Davis also has determined that, for each year of the first five years the proposed rules are in effect, the public benefit anticipated from enforcement of and compliance with the proposed rules will be clarification of the process to be followed when reviewing and revoking AA delegation authority and clarification of the size of waste tire chips allowed to be used in absorptive drainfields.

The proposed rules would clarify and update regulations regarding the OSSF charge-back fee in Texas. On-site sewage facilities are one or more systems, typically used at residential homes, schools, office buildings, restaurants, motels, and hospitals, that treat and dispose of 5,000 gallons of wastewater or less each day and that are only used for disposal of sewage where the system is located.

The proposed rules would clarify and incorporate charge-back fee provisions from HB 2912 and would more clearly define the process to be followed by the executive director when reviewing and revoking AA delegation authority. The bill authorizes the commission to assess a reasonable and appropriate charge-back fee, not to exceed \$500, to a local government that has either repealed its order, ordinance, or resolution that established the entity as an AA or had its authorization as an AA revoked by the commission for processing OSSF permits. The commission can only require units of local government to pay the charge-back fee; therefore, significant fiscal implications are not anticipated for individuals and businesses.

The proposed rules would change requirements for the maximum size of waste tire chips used as media in OSSF absorptive drainfields from two inches to three inches. Current rules allow for the use of tire chips up to two inches in size as media in absorptive drainfields and larger chips can be used on a case-by-case basis. The proposed rules would clarify current rule language regarding the size of waste tire chips that OSSF installers are allowed to use as media in absorptive drainfields. The proposed rules are not anticipated to impact current practices, due to the fact that if an installer chose to use waste tire chips as media, the three-inch chip size was probably all that was available. However, due to the large number of waste tire chips currently stockpiled in the state, three-inch chips may provide a more convenient, less expensive media alternative for some OSSF installers and owners, depending upon the location in the state and the availability and prices of other alternatives. Various media are currently allowed to be used in the drainfields including washed and graded gravel, broken concrete, crushed stone, rock, and waste tire chips. It is anticipated that the proposed rules will not result in any significant cost savings for businesses that install OSSFs or consumers that own these facilities.

Businesses or individuals that sell used tire chips may benefit from an increase in the use of used tire chips, though the increase is not anticipated to be significant.

SMALL AND MICRO-BUSINESS ASSESSMENT

There will be no adverse fiscal implications to small or micro-businesses as a result of implementing the proposed rules. The proposed rules would clarify and incorporate charge-back fee provisions from HB 2912 and would more clearly define the process to be followed by the executive director when reviewing and revoking AA delegation authority. The bill authorizes the commission to assess a reasonable and appropriate charge-back fee, not to exceed \$500, to a local government that has either repealed the order, ordinance, or resolution that established the entity as an AA or had its authorization as an AA revoked by the commission. The commission can only require units of local government to pay the charge-back fee; therefore, significant fiscal implications are not anticipated for small and micro-businesses. Small or micro-businesses that install OSSFs or provide waste tire chips may benefit from the proposed rules relating to the change in requirements for the maximum size of waste tire chips used as media in absorptive drainfields from two inches to three inches, though the benefit is not considered significant. The proposed rules would clarify current rule language regarding the size of waste tire chips that OSSF installers are allowed to use as media in absorptive drainfields. The proposed rules are not anticipated to impact current practices, due to the fact that if an installer chose to use waste tire chips as media, the three-inch chip size was probably all that was available. However, due to the large number of waste tire chips currently stockpiled in the state, three-inch chips may provide a more convenient, less expensive media alternative for some OSSF installers, depending upon the location in the state and the availability and prices of other alternatives. For those small or micro-

businesses in the state that install OSSF systems, the proposed rules could potentially provide them with another, less expensive media alternative, though any cost savings for these facilities are not anticipated to be significant. Small or micro-businesses that sell used tire chips may benefit from an increase in the use of used tire chips, though the increase is not anticipated to be significant.

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 rule does 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 has reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a major environmental rule. "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 purpose of this rulemaking is to provide a mechanism for the commission to partially recover costs incurred when the commission assumes responsibility for administering a program that was previously administered by a local governmental entity. Protection of the environment may be a result of this rulemaking, but it is not the specific intent.

The proposed rules clarify and incorporate charge-back fee provisions from HB 2912, §3.09, 77th Legislature, 2001, into Subchapter B. These proposed rules are not a major environmental rule and do not meet any of the four applicability requirements that apply to a major environmental rule. Under Texas Government Code, §2001.0225, these rules do not exceed a standard set by federal law or a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program. The United States Environmental Protection Agency does not have a federal program for OSSFs and does not establish any requirements for states implementing their own OSSF program. The proposed rules do not exceed a standard set by federal law nor exceed the requirement of a delegation agreement because there is no federal authorization for OSSFs.

These proposed rules do not adopt a rule solely under the general powers of the commission and do not exceed an express requirement of state law. The requirements that would be implemented through these rules are expressly defined under THSC, Chapter 366, which requires the commission to enact rules governing the installation of OSSFs.

TAKINGS IMPACT STATEMENT ASSESSMENT

The commission has prepared a takings impact assessment for these rules pursuant to Texas Government Code, §2007.43. The purpose of these revisions is to delineate the commission's authority to impose a charge-back fee on local governmental entities that have either repealed their order, ordinance, or resolution or to local governmental entities that have had their delegation repealed by the commission.

The specific purpose of the proposed rules is to clarify and incorporate charge-back fee provisions from HB 2912, §3.09, 77th Legislature, 2001, into Subchapter B.

These rules are proposed in an effort to reasonably fulfill an obligation mandated by state law to implement the OSSF program and will substantially advance the implementation of the requirements under THSC, Chapter 366. Promulgation and enforcement of these proposed rules will not affect private real property. Therefore, the commission has determined that these proposed rules will not result in a takings.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission has reviewed the proposed rulemaking and found that the proposal is a rulemaking identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Texas Coastal Management Program (CMP). The Coastal Coordination Act requires that applicable goals and policies of the CMP be considered during the rulemaking process. The commission has prepared a consistency determination for the proposed rules pursuant to 31 TAC §505.22 and has found that the proposed rulemaking is consistent with the applicable CMP goals and policies.

The goals of the CMP are: to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas; to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone; to ensure and enhance planned public access to and enjoyment of the coastal zone in a manner

that is compatible with private property rights and other uses of the coastal zone; and to balance these competing interests.

The specific CMP goals applicable to these proposed rules require that rules governing OSSFs shall require those systems to be located, designed, operated, inspected, and maintained so as to prevent release of pollutants that may adversely affect coastal waters. Promulgation and enforcement of these proposed rules will not violate any standards identified in the applicable CMP goals because the proposed rules seek only to incorporate the charge-back fee provisions in HB 2912 and more clearly define the process the executive director would have to follow when reviewing and revoking an AA's delegated authority.

The commission seeks public comment on the consistency of the proposed rules with applicable CMP goals and policies.

ANNOUNCEMENT OF HEARING

A public hearing on this proposal will be held in Austin on April 23, 2002 at 10:00 a.m., Building C, Room 131E, at the Texas Natural Resource Conservation Commission complex, located at 12100 Park 35 Circle. Individuals may present oral or written statements when called upon in order of registration. There will be no open discussion during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs, who are planning to attend the hearing, should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Angela Slupe, MC 205, Office of Environmental Policy, Analysis, and Assessment, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. All comments should reference Rule Log Number 2001-101-285-WT. Comments must be received by 5:00 p.m., April 29, 2002. For further information, please contact Kathy Ramirez, Regulation Development Section, at (512) 239-6757.

STATUTORY AUTHORITY

The amendments and new sections are proposed under the authority granted to the commission by the Texas Legislature in THSC, §366.011. The new and amended sections implement THSC, §366.012(a)(1), which requires the commission to adopt rules consistent with the policy defined in THSC, §366.001. The commission has authority to adopt rules to implement the requirements of THSC, §366.053(b), which requires the adoption of rules for permitting; THSC, §366.059, which requires adoption of rules addressing permit fees; and THSC, §366.072, which provides for the adoption of rules for registration.

The amendments and new sections are also proposed under the general authority granted in Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission over other

areas of responsibility as assigned to the commission under TWC and other laws of the state; TWC, §5.103 and §5.105, which authorize the commission to adopt rules and policies necessary to carry out its responsibilities and duties under TWC, §5.013(15); TWC, §7.002, which authorizes the commission to enforce provisions of TWC and THSC; and TWC, §5.311, which authorizes the commission to delegate its hearing responsibilities to SOAH.

The proposed amendments and new sections implement THSC, Chapter 366, including the following sections: §366.001, relating to Policy and Purpose; §366.011, relating to General Supervision and Authority; §366.012, relating to Rules Concerning On-Site Sewage Disposal Systems; §366.053, relating to Permit Application; §366.059, relating to Permit Fee Paid to Department or Authorized Agent as amended by HB 2912, §3.09, 77th Legislature, 2001; §361.071, relating to Registration; and §366.072, relating to Registration Application. The proposed amendments and new sections also implement TWC, §5.103, relating to Rules; §5.105, relating to General Policy; and §7.002, relating to Enforcement Authority.

SUBCHAPTER B: LOCAL ADMINISTRATION OF THE OSSF PROGRAM

§§285.10, 285.12, 285.13, 285.14

§285.10. Delegation to Authorized Agents.

(a) Responsibility of the authorized agent. An authorized agent is responsible for the proper implementation of this chapter in its area of jurisdiction.

(1) An authorized agent shall administer its on-site sewage facility (OSSF) [OSSF] program according to the OSSF order, ordinance, or resolution approved by the executive director.

(2) An authorized agent shall enforce this chapter and [the] Texas Health and Safety Code (THSC), Chapter 366.

(b) Requirements and procedures [Requirements and Procedures].

(1) - (2) (No change.)

(3) To receive delegation as an authorized agent, a local governmental entity shall draft an order, ordinance, or resolution that meets the requirements of this chapter and THSC [the Texas Health and Safety Code, Chapter 366], §366.032. The local governmental entity shall use the model order, ordinance, or resolution as a guide for developing its order, ordinance, or resolution.

(4) If the local governmental entity proposes more stringent standards than those in this chapter, the local governmental entity shall submit the proposed order, ordinance, or resolution to the executive director for review and comment before publishing notice.

(A) (No change.)

(B) The executive director shall review the draft order, ordinance, or resolution and provide written comments to the local governmental entity within 30 days of receipt.

(C) - (D) (No change.)

(5) - (6) (No change.)

(7) Upon receiving the information listed in paragraph (6) of this subsection, the executive director shall have 30 days to review the materials to ensure the local governmental entity has complied with the requirements of this chapter and THSC [the Texas Health and Safety Code], Chapter 366.

(A) - (B) (No change.)

(8) (No change.)

(9) Any appeal of the executive director's decision shall be done according to [Chapter 50,] §50.39 of this title (relating to Motion for Reconsideration).

(c) (No change.)

(d) Relinquishment of delegated authority by authorized agent.

(1) - (4) (No change.)

(5) Authorized agents who relinquish their OSSF authority may be subject to fees according to §285.14 of this title (relating to Charge-back Fee) after the date that delegation has been relinquished, unless the authorized agent has relinquished its OSSF authority due to a material change in this chapter. A material change is a new requirement in this chapter that would make it impossible for the authorized agent to continue to comply with this chapter without obtaining significant additional financial or human resources.

[(e) Revocation of authorized agent delegation.]

[(1) An authorized agent's OSSF order, ordinance, or resolution may be revoked at any time by order of the commission for failure to implement, administer, or enforce this chapter.]

[(2) If the executive director determines that cause exists for revocation, the executive director will:]

[(A) file a petition with the commission according to Chapter 70 of this title (relating to Enforcement) seeking revocation;]

[(B) initiate the hearing process with the State Office of Administrative Hearings according to Chapter 80 of this title (relating to Contested Case Hearings); and]

[(i) The executive director shall publish notice of a public hearing that will be held to discuss the commission's possible revocation of the delegated authority. The notice must be published in a regularly published newspaper of general circulation in the entity's area of jurisdiction;]

[(ii) The public notice shall include the time, date, and location of the public hearing; and]

[(iii) The public notice shall be published at least 72 hours before the public hearing, but not more than 30 days before the hearing.]

[(C) hold a public hearing to discuss its possible revocation of the delegated authority.]

[(3) After an opportunity for a hearing, the commission may:]

[(A) issue an order revoking the authorized agent's delegation;]

[(B) issue an order requiring the authorized agent to take certain action or actions in order to retain delegation; or]

[(C) take no action.]

[(4) If the authorized agent's delegation is revoked, the executive director shall assume responsibility for the OSSF program in the former authorized agent's jurisdiction.]

[(5) An authorized agent may consent to the revocation of its OSSF delegation in writing prior to the hearing. If the authorized agent consents to the revocation, the executive director may revoke the authorized agent's delegated authority without a hearing.]

§285.12. Review of Locally Administered Programs.

(a) Not more than once a year, the executive director shall review an authorized agent's program for compliance with requirements established by [the] Texas Health and Safety Code, Chapter 366; this chapter; and the order, ordinance, or resolution adopted by the authorized agent. [If the executive director's review determines that an authorized agent is not properly implementing,

administering, or enforcing the requirements of this chapter, the Texas Health and Safety Code, or the requirements in the authorized agent's order, ordinance, or resolution, the commission may hold a hearing to determine whether to revoke the authorized agent's delegated authority under §285.10(e) of this title (relating to Delegation to Authorized Agents).]

(1) During the review the executive director shall:

(A) evaluate the authorized agent's:

(i) administrative processes;

(ii) planning material review processes;

(iii) permitting processes;

(iv) inspection processes; and

(v) complaint resolution processes;

(B) conduct an interview with the authorized agent's representative, to present the results of the executive director's review.

(2) After the executive director completes the review, the executive director shall:

(A) prepare a written report of the executive director's findings; and

(B) forward a copy of the report to the authorized agent by certified mail within 60 days after completing the review.

(b) If as a result of the executive director's review the executive director determines that the authorized agent's program is deficient, the authorized agent must respond in writing to the executive director within 45 days of the executive director's report with a plan to address all deficiencies noted during the review. The executive director shall offer assistance to the authorized agent including providing training to the authorized agent's designated representative. Additionally, if the authorized agent's program is:

(1) deficient because it does not consistently provide required documentation of the permitting, inspection, and compliance investigation processes the executive director shall review the authorized agent's response and determine if the response is adequate. If the response is adequate, the executive director shall not take further action. If the authorized agent's response is not adequate, or the authorized agent fails to respond, the executive director shall continue to work with the authorized agent until the deficiencies are resolved;

(2) deficient because it does not consistently enforce the permitting, planning, construction, operation, and maintenance of on-site sewage facility systems, the executive director shall review the authorized agent's response and determine if adequate measures will be taken to correct the deficiencies. If the response is adequate, the executive director will schedule another review of the authorized agent's program after one year of the first review to verify that the deficiencies have been corrected. If the authorized agent's response is not adequate, the authorized agent fails to respond, or the executive director's follow-up review determines that the authorized agent's program has the same deficiencies as noted during the first review, the executive director will begin the process of revoking the authorized agent's delegated authority under §285.13 of this title (relating to Revocation of Authorized Agent Delegation); or

(3) endangering human health or safety, the executive director will begin the process of revoking the authorized agent's delegated authority under §285.13 of this title.

§285.13. Revocation of Authorized Agent Delegation.

(a) An authorized agent's on-site sewage facility (OSSF) order, ordinance, or resolution may be revoked by order of the commission, after notice and an opportunity for a hearing, for failure to implement, administer, or enforce Texas Health and Safety Code, this chapter, or its order, ordinance, or resolution.

(b) If the executive director determines that cause exists for revocation, the executive director shall:

(1) meet with the authorized agent's county judge, mayor, general manager, or chairman of the board, or other authorized individual, to discuss the report of the executive director's findings, the authorized agent's response to the findings, and the possible revocation; and

(2) prepare a letter documenting the meeting in paragraph (1) of this subsection and forward it to the authorized agent within ten days after the meeting; and

(3) provide the authorized agent 60 days after the date of the letter in paragraph (2) of this subsection to allow other authorized agents to review the executive director's findings if requested by the authorized agent.

(c) The authorized agent shall respond to the executive director's letter in subsection (b)(2) of this section in writing within 90 days of the date of the executive director's letter.

(d) If the executive director determines from the authorized agent's response that sufficient action will be taken to consistently enforce the OSSF program, the executive director will:

(1) respond to the authorized agent that the revocation process will be discontinued;
and

(2) schedule another review of the authorized agent's program after one year of the first review to verify that the authorized agent is consistently enforcing the OSSF program.

(e) If the executive director determines from the authorized agent's response that insufficient action will be taken, the executive director will:

(1) file a petition with the commission according to Chapter 70 of this title (relating to Enforcement) seeking revocation;

(2) initiate the hearing process with SOAH according to Chapter 80 of this title (relating to Contested Case Hearings);

(3) publish notice of a public hearing that will be held to review the commission's possible revocation of the delegated authority. The notice must be published in a regularly published newspaper of general circulation in the entity's area of jurisdiction and shall:

(A) include the time, date, and location of the public hearing; and

(B) be published at least 20 days before the public hearing; and

(4) hold a public hearing to review its possible revocation of the delegated authority.

(f) An authorized agent may consent to the revocation of its OSSF delegation in writing before the public hearing. If the authorized agent consents to the revocation, the commission may revoke the authorized agent's delegated authority without a public hearing.

(g) After an opportunity for a hearing, the commission may:

(1) issue an order revoking the authorized agent's delegation, which may include a charge-back fee;

(2) issue an order requiring the authorized agent to take certain action or actions in order to retain delegation; or

(3) take no action.

(h) If the authorized agent's delegation is revoked, the executive director shall assume responsibility for the OSSF program in the former authorized agent's jurisdiction.

(i) An authorized agent that has had its OSSF authority revoked may be subject to charge-back fees according to §285.14 of this title (relating to Charge-back Fee).

§285.14. Charge-back Fee.

(a) Under Texas Health and Safety Code, §366.059, the commission may assess a charge-back fee, not to exceed \$500 per permit, to local governmental entities that either have repealed an on-site sewage facility (OSSF) order, ordinance, or resolution, or have had their delegation revoked by the commission according to §285.13 of this title (relating to Revocation of Authorized Agent Delegation). The charge-back fee will be assessed for each OSSF permit issued within that entity's area of jurisdiction. The amount of the charge-back fee will be based on the executive director's actual cost of issuing an OSSF permit in that jurisdiction. The executive director's actual cost will be based on the type and number of OSSFs typically installed and inspected in the local governmental entity's jurisdiction, along with expected travel expenses for the executive director.

(1) If a local governmental entity repeals its OSSF order, ordinance, or resolution or the commission revokes a local governmental entity's delegation and the local governmental entity agrees to the amount of the charge-back fee, the executive director will recommend the commission approve the charge-back fee. In order to have legal effect as an order of the commission, the charge-back fee must be approved and ordered by the commission. The commission order must include:

(A) the type of OSSF typically installed and inspected in the local governmental entity's jurisdiction;

(B) the number of OSSFs installed in the local governmental entity's jurisdiction over the preceding five years;

(C) the distance the county courthouse or city hall is from the nearest agency regional office;

(D) the current mileage rate set by the Comptroller of the State of Texas; and

(E) the amount of the charge-back fee.

(2) If a local governmental entity repeals its OSSF order, ordinance, or resolution or the commission revokes a local governmental entity's delegation and the local governmental entity does not agree to the amount of the charge-back fee, the commission will refer the matter to SOAH for a contested case hearing to determine the charge-back fee, according to Chapter 80 of this title (relating to Contested Case Hearings).

(b) The executive director will bill the local governmental entities for charge-back fees no more frequently than quarterly and no less than annually. Payment of charge-back fees is due within 30 days after receipt of invoice. Late payments are subject to penalties and interest according to Chapter 12 of this title (relating to Payment of Fees).

**SUBCHAPTER D: PLANNING, CONSTRUCTION, AND
INSTALLATION STANDARDS FOR OSSFS**

§285.33

STATUTORY AUTHORITY

The amendment is proposed under the authority granted to the commission by the Texas Legislature in THSC, §366.011. The amendment implements THSC, §366.012(a)(1), which requires the commission to adopt rules consistent with the policy defined in THSC, §366.001. The commission has authority to adopt rules to implement the requirements of THSC, §366.053(b), which requires the adoption of rules for permitting.

The amendment is also proposed under the general authority granted in Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission over other areas of responsibility as assigned to the commission under TWC and other laws of the state; TWC, §5.103 and §5.105, which authorize the commission to adopt rules and policies necessary to carry out its responsibilities and duties under TWC, §5.013(15); and TWC, §7.002, which authorizes the commission to enforce provisions of TWC and THSC.

The proposed amendment implements THSC, Chapter 366, including the following sections: §366.001, relating to Policy and Purpose; §366.011, relating to General Supervision and Authority; §366.012; relating to Rules Concerning On-Site Sewage Disposal Systems; and §366.053, relating to Permit Application. The proposed amendment also implements TWC, §5.103, relating to Rules; §5.105,

relating to General Policy; and §7.002, relating to Enforcement Authority.

§285.33. Criteria for Effluent Disposal Systems.

(a) (No change.)

(b) Standard disposal systems. Acceptable standard disposal methods shall consist of a drainfield to disperse the effluent either into adjacent soil (absorptive) or into the surrounding air through evapotranspiration (evaporation and transpiration).

(1) Absorptive drainfield. An absorptive drainfield shall only be used in suitable soil. There shall be two feet of suitable soil from the bottom of the excavation to either a restrictive horizon or to groundwater.

(A) (No change.)

(B) Media. The media shall consist of clean, washed and graded gravel, broken concrete, rock, crushed stone, chipped tires, or similar aggregate that is generally one uniform size and approved by the executive director. The size of the media must range from 0.75 - 2.0 inches as measured along its greatest dimension except as noted in clause (i) of this subparagraph.

(i) If chipped tires are used: [,]

(I) a geotextile fabric heavier than specified in subparagraph
(E) of this paragraph must be used; and

(II) the size of the chipped tires must not exceed three inches
as measured along their greatest dimension.

(ii) (No change.)

(C) - (H) (No change.)

(2) - (3) (No change.)

(c) - (d) (No change.)