



Texas Environmental Health Association

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April 25, 2007

Glenn Shankle, Executive Director
Texas Commission on Environmental Quality
Mail Code 109
P. O. Box 13087
Austin, TX 78711-3087

RE: Petition for Adoption of Rules

Dear Mr. Shankle:

Please consider this letter as a petition for rulemaking, actually for amendment, in accordance with Title 30, Texas Administrative Code Part 1, Chapter 20, Rule §20.15.

Rule:

The rule in question is part of the On-Site Sewage Facility rules. Specifically, it is Title 30 TAC, Chapter 285, Rule §285.62, Duties and Responsibilities of Designated Representatives.

30TAC285.62 states in part, "A designated representative shall:

(19) while employed by, appointed to, or contracted by the authorized agent, refrain from performing any of the following activities within the authorized agent's area of jurisdiction:

- (A) working as an apprentice to an OSSF installer;
- (B) working as an OSSF installer;
- (C) working for an OSSF maintenance company;
- (D) working as a site evaluator; or
- (E) performing any other OSSF-related activities which fall under the authorized agent's regulatory jurisdiction, except those activities directly related to the individual's duties as a designated representative for the authorized agent;"

Concern:

Designated Representatives (DR) are employees of Authorized Agents (AA) for the Texas Commission on Environmental Quality (TCEQ). They are responsible for enforcing the rules of the On Site Sewage Facility (OSSF) program within their jurisdictional area. Using the above rule as their defense, these same employees are working in, and competing with, and developing

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Mr. Glenn Shankle
April 25, 2007

Page 2 of 4

dependent relationships with the same industry and with the same people that they are charged with regulating. The rule is being interpreted as giving express permission to perform such activities in areas outside the authorized agent's area of jurisdiction. This creates a conflict of interest, or at the minimum, an appearance of a conflict, by Designated Representatives (DRs). By the very nature of this industry a DR working in the industry must work with the same people the DR regulates or puts the DR in direct competition with the same people the DR regulates - often both. Further, even if the DR works exclusively for a home owner in an area outside the DR's jurisdiction, and if the boundaries of their employer should expand, as they do with Cities and can with River Authorities, the system and homeowner now come under the regulation of the Designated Representative that designed and installed it. This is clearly a conflict of interest.

This rule should be amended to prohibit DR's from working in the same industry as that person regulates. Most governmental entities and professional licensing groups consider any financial gain from regulated industry as conflict of interest and strictly prohibited. The current rule appears to set aside such restrictions and endorse such behavior as long as it is not in the same jurisdiction. However, the opportunity for abuse is clearly evident.

Recommended Amendment:

The amendment would be accomplished very simply as follows:

(19) while employed by, appointed to, or contracted by the authorized agent, refrain from performing any of the following activities ~~within the authorized agent's area of jurisdiction:~~

- (A) working as an apprentice to an OSSF installer;
- (B) working as an OSSF installer;
- (C) working for an OSSF maintenance company;
- (D) working as a site evaluator; or
- (E) performing any other OSSF-related activities ~~which fall under the authorized agent's regulatory jurisdiction,~~ except those activities directly related to the individual's duties as a designated representative for the authorized agent;"

Consequences of No Action:

Failure to adopt this proposed amendment would continue to allow the inspection and regulatory functions of the rules to be compromised, thus allowing substandard systems to be designed and/or installed.

Specific factual examples are as follows:

- On a work day during work hours, a DR was witnessed performing design consultation on a site that is more than an hour's one-way drive from the DR's agency office. While it is possible the DR took time off to perform this work, it has been widely accepted in the local community that the DR was using agency resources to conduct the DR's side business. Regardless the facts, the appearance of impropriety could be avoided by adopting this amendment.
- A DR has had a yellow page ad running for years in the City phone book where he lives, and that phone book covers a five county area which includes his employer's jurisdiction.

Mr. Glenn Shankle
April 25, 2007

Page 3 of 4

- A DR works as a subcontractor to a few installers. This DR has been paid for by an installer for services rendered on about the same day as inspecting that installer's work in an adjacent jurisdiction.
- A DR works as a subcontractor to a few designers. This DR's jurisdiction is a small area inside another agency's jurisdiction. The DR reviews those designer's designs when submitted to the DR's agency for permitting.
- A DR initiated an enforcement action against a homeowner for a noncompliant system. Shortly thereafter, the Agency received a maintenance agreement signed by the DR's spouse, a maintenance provider, thereby resolving the noncompliance.
- A DR performs design work and, in the course of that business, hires an installer to perform the excavations for the site evaluations. The same installer performs installations in the DR's jurisdiction, and the local community feels that this installer receives preferential treatment in inspections and referrals.
- A DR worked extensively with an installer outside of the DR's agency jurisdiction. The two designed, sold and installed ATU systems outside the DR's agency jurisdiction. When that installer sold and installed that same ATU inside the DR's jurisdiction the DR has a very apparent conflict of interest when inspecting that installer's work.
- A DR works as a site evaluator and designer for an installer that he routinely regulates in his jurisdiction. The installer stopped using the services of another local site evaluator and began using the DR. When asked why, the installer stated " Since I started using the DR for my site evaluations and designs, I no longer have any problems getting my systems approved in that (the DR's) county."

The following are examples, not actual cases, of how conflicts of interest can occur:

- A DR does designs for/with an installer in an adjacent jurisdiction. The DR will develop a beneficial business relationship with that installer and perhaps even his maintenance provider. That same installer, or that same maintenance provider, comes under the DR's regulation in the DR's jurisdiction thereby creating the conflict of interest. The DR is receiving money from the same individual(s) he inspects and, therefore, regulates.
- A DR, or a DR's spouse, practices in the OSSF industry. Even if that DR or spouse does not do any work inside the DR's jurisdiction, they are in natural competition, or have a beneficial business relationship with people or companies that the DR regulates inside their jurisdiction.
- A DR designs a system on a property outside the DR's jurisdiction. The property is later annexed by the agency (example: City of Austin, Houston, Dallas, etc.) which brings the system and its owner into the DR's jurisdiction. Alternatively, the system might be, or later come, under purview of the agency as a utility customer thereby creating a conflict of interest in the event the system has any form or malfunction or trouble, or needs a renewal of the permit, maintenance agreement, and the like.
- An Authorized Agent performs septic inspection/certifications for real estate transfers in their jurisdiction, and at a rate that is less than the current market rate for independent businesses. The presence, or insistence, of the Agency establishes AA as the only source

Mr. Glenn Shankle
April 25, 2007

Page 4 of 4

for such services, yet if the service is performed poorly or incorrectly the consumer has no recourse against the Agency as they would with a private provider.

- A DR performs real estate inspections on OSSF's within his jurisdiction, as that is an area not regulated by TCEQ. Pumping, maintenance, and/or repairs may be necessary. The DR then is in the position of recommending OSSF professionals he may regulate for these services. Even if the DR performs these inspections outside his own jurisdiction, he is still in the position of recommending OSSF professionals he may regulate within his own jurisdiction.

Impact:

The only direct negative impact this amendment would create is that the DR's that have private businesses in, or are otherwise "moonlighting" in, the OSSF industry would have to choose whether to remain a government employee or to go into private practice. In fact, several DR's have chosen to leave and go into private practice, as well as vice versa.

The positive impact this amendment would create is the elimination of existing and future conflicts of interest in this industry. This behavior of these individuals reflects poorly on the industry and all who participate in it. In many cases, it actually results in system owners receiving lower quality products or services.

This rule amendment is only being requested for the on-site sewage facility industry, and as such, only affects the OSSF licensing rules, and therefore the actual OSSF rules.

Summary:

The Texas Environmental Health Association believes that adoption of the recommended rule changes to 30 TAC 285.62 is imperative in order to protect the citizens of Texas as well as to ensure the continued integrity of environmental health professionals. Your consideration is greatly appreciated. If we can be of any assistance or provide any additional information, please do not hesitate to contact us at (903) 572-7278.

Yours truly,



Margie Earl, RS
President
Texas Environmental Health Association

Attachment

cc: Joe Strouse, PE, TCEQ OSSF Program

Examples of Governmental Codes and Policies Regarding Conflict of Interest

LCRA Board Policy. 206 -- Ethics:

<http://www.lcra.org/about/docs/rfps/ethics.pdf>

206.20.POLICY

206.201 Ethical Standards of Conduct. LCRA directors and employees must conduct themselves so as to bring continuing respect to LCRA, and avoid any questionable conduct that could bring discredit to LCRA. In accordance with state law, no director or employee should:

A. Accept or solicit any gift, favor, or service that might reasonably tend to influence him in the discharge of his official duties, or that he knows or should know is being offered to him with the intent to influence his official conduct;

B. Accept or solicit employment or engage in any business or professional activity which he might reasonably expect would require or induce him to disclose confidential information acquired by reason of his official position;

C. Accept or solicit other employment or compensation which could reasonably be expected to impair his independence of judgment in the performance of his official duties;

D. Make personal investments which could reasonably be expected to create substantial conflicts between his private interest and the public interest;

E. Intentionally or knowingly solicit, accept, or agree to accept any benefit for having exercised his official powers or performed his official duties in favor of another; or

F. Misapply or misuse LCRA property, services, or personnel for personal benefit.

Statutes:

Texas Local Government Code, Chapter 171

www.capitol.state.tx.us/statutes/lg.toc.htm

Texas Government Code, Chapter 572

<http://www.capitol.state.tx.us/statutes/docs/GV/content/htm/gv.005.00.000572.00.htm>

§ 572.001. POLICY; LEGISLATIVE INTENT.

(a) It is the policy of this state that a state officer or state employee may not have a direct or indirect interest, including financial and other interests, or engage in a business transaction or professional activity, or incur any obligation of any nature that is in substantial conflict with the proper discharge of the officer's or employee's duties in the public interest.

(b) To implement this policy and to strengthen the faith and confidence of the people of this state in state government, this chapter provides standards of conduct and disclosure requirements to be observed by persons owing a responsibility to the people and government of this state in the performance of their official duties.

(c) It is the intent of the legislature that this chapter serve not only as a guide for official conduct of those persons but also as a basis for discipline of those who refuse to abide by its terms.

Attachment A

Page 2 of 2

30 Texas Administrative Code, Chapter 292

<u>TITLE 30</u>	ENVIRONMENTAL QUALITY
<u>PART 1</u>	TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
<u>CHAPTER 292</u>	SPECIAL REQUIREMENTS FOR CERTAIN DISTRICTS AND AUTHORITIES
<u>SUBCHAPTER B</u>	ADMINISTRATIVE POLICIES
<u>RULE §292.13</u>	Minimum Provisions

The following provisions shall be incorporated into the administrative policies adopted by the authorities subject to these rules.

(1) Code of Ethics. The administrative policies shall mandate compliance with the following standards:

(A) the Local Government Code, Chapter 171, relating to conflicts of interests with a business entity in which the official has a substantial interest.

(B) Texas Government Code, Chapter 573, relating to nepotism.

(C) for River Authorities, Texas Government Code, Chapter 572, relating to standards of conduct, personal financial disclosure, and conflict of interest.

(D) Article III, Section 52, of the Texas Constitution, relating to the prohibition on granting public money or things of value to any individual, association or corporation.

Texas Penal Code, Chapter 36 & 39

<http://www.capitol.state.tx.us/statutes/petoc.html>

§ 36.08. GIFT TO PUBLIC SERVANT BY PERSON SUBJECT TO HIS JURISDICTION. (a) A public servant in an agency performing regulatory functions or conducting inspections or investigations commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows to be subject to regulation, inspection, or investigation by the public servant or his agency.

§ 39.02. ABUSE OF OFFICIAL CAPACITY. (a) A public servant commits an offense if, with intent to obtain a benefit or with intent to harm or defraud another, he intentionally or knowingly:

(1) violates a law relating to the public servant's office or employment; or

(2) misuses government property, services, personnel, or any other thing of value belonging to the government that has come into the public servant's custody or possession by virtue of the public servant's office or employment.

Below is an excerpt from the Texas Board of Professional Engineer's enforcement pages.

Mr. Justin Jay Loucks, P.E., Carrollton, Texas - File D-27735 - It was alleged that Mr. Loucks, an employee of a city in Texas responsible for reviewing and approving plans for fire protection systems submitted to the city, also had an employment relationship with a private firm that submits fire protection plans to the city for approval. Mr. Loucks failed to provide written notification to the city or to the private firm of the potential for a conflict of interest due to his employment with both entities. The Board accepted a Consent Order signed by Mr. Loucks for a one year probated suspension of this Texas engineer license contingent upon his payment of a \$1,200.00 administrative penalty.