

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the amendments to §285.11 and §285.21; and adopts new §285.38.

Sections 285.11 and 285.21 are adopted *without changes* to the proposed text as published in the February 24, 2012, issue of the *Texas Register* (37 TexReg 1174) and will not be republished. Section 285.38 is adopted *with change* to the proposed text and will be republished.

Background and Summary of the Factual Basis for the Proposed Rules

In 2011, the 82nd Legislature passed House Bill (HB) 2694, relating to the continuation and functions of the TCEQ. The changes in law became effective September 1, 2011. HB 2694, Article 8, abolished the Texas On-Site Wastewater Treatment Research Council (Council) and transferred the Council's research responsibilities to the commission. The 82nd Legislature also passed HB 240, which requires that all on-site sewage facilities (OSSFs), including risers and covers, installed after September 1, 2012, be designed to prevent access to the OSSF by anyone other than the owner of the OSSF, licensed OSSF installers, or licensed OSSF maintenance providers.

This rulemaking removes references to the Council and provides that the fee previously assessed for the Council will be used for commission OSSF research grants. It requires that OSSFs, including risers and covers, installed after September 1, 2012, be designed

to prevent access to the OSSF by anyone other than the owner of the OSSF, licensed OSSF installers, or licensed OSSF maintenance providers. The purpose of the requirement is to prevent the accidental or unintentional removal of an OSSF lid that may contribute to harmful or fatal accidents involving individuals accessing and falling into OSSFs.

Section by Section Discussion

The commission adopts administrative changes throughout these sections to be consistent with *Texas Register* requirements and other agency rules and guidelines, and to conform to the drafting standards in the *Texas Legislative Council Drafting Manual*, February 2011.

The commission adopts the amendments to §285.11 and §285.21; and new §285.38, which remove references to the Council and provide that the fee previously assessed for the Council will be used for commission OSSF research grants and requires that OSSFs, including risers and covers, installed after September 1, 2012, be designed to prevent access to the OSSF by anyone other than the owner of the OSSF, licensed OSSF installers, or licensed OSSF maintenance providers.

§285.11, General Requirements

Adopted §285.11(b) replaces the reference to the Council with commission. The Council

was abolished by Article 8 of HB 2694. The commission is now responsible for the research function previously performed by the Council. The adopted change in the rule language is legislatively mandated.

§285.21, Fees

Adopted §285.21(b) replaces the reference to the Council with commission. The Council was abolished by Article 8 of HB 2694. The commission is now responsible for the research function previously performed by the Council. The adopted change in the rule language is legislatively mandated.

§285.38, Prevention of Unauthorized Access to OSSFs

Adopted new §285.38 incorporates the language in HB 240 that requires all OSSFs, including risers and covers, installed after September 1, 2012, to be designed to prevent accidental or unintentional access to the OSSF by anyone other than the owner of the OSSF, licensed OSSF installers, or licensed OSSF maintenance providers. The adopted rule is based on the NSF International (formerly known as the National Sanitation Foundation) standards for residential wastewater treatment systems. At the request of stakeholders, several items were added to the standards such as: including a mechanism for the executive director to approve innovative technologies that meet the standards; addressing the Texas climate by requiring materials to be ultraviolet light resistant; and including construction standards for risers and for connecting risers to tanks. The

adopted rule clarifies that all installations of risers or caps on an OSSF system must be performed by a licensed installer. Although septic tank pumpers were not specifically recognized in HB 240 as needing access to OSSFs, the executive director recognizes that septic tank pumpers need access to OSSFs. This adopted rule does not prohibit access to OSSFs by septic tank pumpers. Since proposal, the commission added that the repair or replacement of risers or caps on an OSSF system must be performed by a licensed installer or technician. Based on a comment received, the commission changed the language requiring specialized tools to allow commonly available tools to make it easier for pumpers and OSSF owners to maintain the integrity of the system. In response to a comment that a person could easily push a cap off of a raised surface, the language was changed to allow heavy lids only if they are recessed. Based on a comment received, language was added that if an OSSF owner refused to have a repair made, the information would be included on the inspection report submitted to the Authorized Agent.

Final Regulatory Impact Analysis Determination

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined the rules do not meet the definition of a "major environmental rule." Under Texas Government Code, §2001.0225, "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.

Furthermore, the rules do not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 applies only to a major environmental rule which: 1) exceeds a standard set by federal law, unless the rule is specifically required by state law; 2) exceeds an express requirement of state law, unless the rule is specifically required by federal law; 3) exceeds 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; or 4) adopts a rule solely under the general powers of the agency instead of under a specific state law.

This rulemaking removes references to the Council, and requires that all OSSFs, including risers and covers, installed after September 1, 2012, be designed to prevent access to the OSSF by anyone other than the owner of the OSSF, licensed OSSF installers, or licensed OSSF maintenance providers; therefore, this rulemaking is not a major environmental rule and does not meet any of the four applicability requirements. The adopted rules should not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs because they reflect only a statement of policy and do not result in any new rights and regulations.

The commission solicited public comment regarding the draft regulatory impact analysis determination. No comments were received on the draft regulatory impact analysis determination.

Takings Impact Assessment

The commission completed a takings impact assessment for the rulemaking action under Texas Government Code, Chapter 2007, and determined that this does not apply to the adopted rulemaking because the rulemaking is not a taking as defined in Chapter 2007, nor is it a constitutional taking of private real property. The purpose of the rules is to remove references to the Council and require that all OSSFs, including risers and covers, installed after September 1, 2012, be designed to prevent access to the OSSF by anyone other than the owner of the OSSF, licensed installers or licensed maintenance providers.

Promulgation and enforcement of the adopted rules will not affect private real property, which is the subject of the rules, because the rulemaking will neither restrict or limit the owner's right to the property, nor cause a reduction of 25% or more in the market value of the property. The rules only apply to the participation of the public interest counsel in commission proceedings. Property values will not be decreased, because the adopted rulemaking will not limit the use of real property. Thus, the adopted rulemaking will not

constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the rulemaking and found the adopted rulemaking was identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(4), concerning rules subject to the Texas Coastal Management Program (CMP), and will, therefore, require that goals and policies of the CMP be considered during the rulemaking process. The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the rulemaking is editorial and procedural in nature and will have no substantive effect on commission actions subject to the CMP, and is, therefore, consistent with CMP goals and policies.

The commission solicited public comment on the consistency of this rulemaking. No comments were received on the consistency with the CMP.

Public Comment

A public hearing on this proposal was held in Austin on March 21, 2012. The comment period closed March 26, 2012. The commission received comments from the Kerr County Environmental Health Department (KCEH), B & J Wakefield Services, Inc. (B&J), Aerobic System Inspection & Maintenance (ASIM), and one individual.

Response to Comments

KCEH requested clarification of §285.32(b)(1)(D) which requires septic tanks buried more than 12 inches below the ground surface to have risers over the port openings and proposed §285.38(b) which would require risers over the port openings which extend to the ground service.

The commission agrees that the language is confusing and has clarified the language in response to the comment. Section 285.38(d) now addresses inspection and cleanout ports on septic tanks buried more than 12 inches below the ground.

B&J commented that the requirement to report that a riser was secured was excessive.

The intent of the provision to report that a riser was secured is to allow an authorized person to report that the riser is not secure and that the owner of the system refused to repair or replace the riser to make it secure. The report is then sent to an authorized agent, who can then take appropriate actions. The language in the rule has been clarified to address the concern.

B&J stated that pumpers needed to be trained.

Pumpers are not required to be licensed to perform pump-out services. No changes were made to the rules in response to this comment.

B&J and an individual commented that it is not always possible to install a riser pan, net, or secondary plug if piping or electrical conduit and wire protrude into the riser or riser cavity.

The language in §285.38(b) contains the wording "other suitable restraint system" to allow the use of any technology that is available. No changes were made to the rules in response to this comment.

AIM and an individual expressed concern that a padlock exposed to the ground, chlorine, and wastewater would not last long.

The rule does not require that a padlock be used, but allows multiple options to address the requirement. No changes were made to the rules in response to this comment.

AIM and an individual stated that anyone could purchase a specialized or non-standard

tool at many stores or on-line, thus, the specialized tool would not deter unauthorized access to the OSSF.

The commission agrees and has changed the language to remove the word "specialized" from the rule.

An individual stated that the 65-pound cover be recessed because, the lid could be slid off with less effort, leaving a security recess.

The commission agrees and has changed the rule language to include the word "recessed."

An individual stated that the installation of a riser is considered construction and should be performed by a licensed individual; but repairs to a riser could be performed by a maintenance technician. The individual stated that it would be less costly to the OSSF owner to allow a technician to perform repairs and would mean that the OSSF would be secured more quickly.

The commission agrees and has made changes to the language that would allow a technician to perform repairs.

An individual stated that most OSSF owners leave risers unsecured, because securing risers makes it more difficult to add chlorine to the system. The commenter suggested that all chlorinators and chlorine reservoir access points to be accessible without removing the cap or lid to the riser.

This suggestion is beyond the scope of this rulemaking, but may be considered in future rulemaking. No changes were made in response to this comment.

An individual stated that owners can refuse to have repairs made to an OSSF riser or other component and as written the rule places the responsibility of securing the riser or other component on the licensed installer or technician. The individual also commented that the condition of the risers and other safety components be documented before any work is done.

Licensed installers or technicians should notate on all reports that the owner refused to repair or replace a riser or other component. The report should identify the person that was notified that the OSSF was not secured and the date of the notification (if different than the date of the report). The report is then submitted to the Authorized Agent for appropriate follow-up action. TCEQ encourages, but does not require, documenting the status of

the components when maintenance work is performed. The rule language was changed to allow a statement that the OSSF system owner refused to pay for repairs needed to secure the OSSF.

An individual commented that pumpers access OSSF systems and perform maintenance activities. The individual stated that TCEQ should license and regulate the industry.

The licensing and regulating of the OSSF maintenance activities are beyond the scope of this rulemaking. This suggestion may be considered in future rulemaking. No changes were made in response to this comment.

AIM stated that the expected material cost for the homeowner is \$25 to \$100 per tank opening, with a minimum of four openings. AIM stated the cost information could have been stated more clearly and did not include labor or sales tax.

The commission agrees that the language could have been clearer. The commission's assumption was that most OSSFs will only need one additional set of risers to meet the rule requirement, resulting in a cost of \$25 to \$100 to comply with the new rule requirements. No changes were made to the rule language.

An individual commented that requiring that the securing of the riser to be reported was excessive.

The requirement to note on inspection reports that the cleanout ports were secured offers Authorized Agents, Regional Offices, and homeowners the knowledge that the selected equipment is operating properly. This is an effective method of enforcement. No changes to the rule were made as a result of this comment.

SUBCHAPTER B: LOCAL ADMINISTRATION OF THE OSSF PROGRAM

§285.11

Statutory Authority

The amendment is adopted under the authority granted to the commission by the legislature in Texas Health and Safety Code (THSC), §366.001, which provides the commission with the authority to regulate On-site Sewage Facilities (OSSF) and collect fees and penalties for OSSFs; THSC, §366.011, which provides the commission or authorized agents general authority over OSSFs; THSC, §366.012, which provides the commission with authority to adopt rules governing OSSFs; THSC, §367.008, which authorizes the commission to award competitive grants for OSSF research; THSC, §367.009, which requires certain fees be used for competitive grants for OSSF research; and THSC, §367.010, which provides that fees from OSSF permit applications shall be deposited to the credit of the water resources management account.

The amendment is also adopted 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; and TWC, §5.103 and §5.105, which authorize the commission to adopt rules and policies necessary to carry out its responsibilities and duties.

The adopted amendment implements House Bill 2694 (Article 8), 82nd Legislature, 2011; and THSC, §§285.11, 367.001, 367.007, 367.008, 367.009, and 367.010.

§285.11. General Requirements.

(a) General Administrative Requirements for Authorized Agents. On-site sewage facility (OSSF) permitting, construction, and inspection requirements are in §285.3 of this title (relating to General Requirements).

(b) Fees. The OSSF permit and inspection fees will be set by the authorized agent. Additionally, a fee of \$10 shall be assessed for each OSSF permit for the commission as required in the Texas Health and Safety Code, Chapter 367.

(c) Complaints. The authorized agent shall investigate all complaints within 30 days after receipt. After completing the investigation, the authorized agent shall take appropriate and timely action according to §285.71 of this title (relating to Authorized Agent Enforcement of OSSFs).

(d) Appeals. Appeals of an authorized agent's decision will be made through the appeal procedures stated in the authorized agent's order, ordinance, or resolution.

(e) Authorized Agents Reporting Requirements.

(1) The authorized agent shall notify the executive director, in writing, of any change of the designated representative within 30 days after the date of the change.

(2) Each authorized agent shall provide to the executive director an OSSF monthly activity report on the form provided by the executive director, within ten days after the end of the month.

**SUBCHAPTER C: COMMISSION ADMINISTRATION OF THE OSSF
PROGRAM IN AREAS WHERE NO AUTHORIZED AGENT EXITS**

§285.21

Statutory Authority

The amendment is adopted under the authority granted to the commission by the legislature in Texas Health and Safety Code (THSC), §366.001, which provides the commission with the authority to regulate On-site Sewage Facilities (OSSF) and collect fees and penalties for OSSFs; THSC, §366.011, which provides the commission or authorized agents general authority over OSSFs; THSC, §366.012, which provides the commission with authority to adopt rules governing OSSFs; THSC, §367.008, which authorizes the commission to award competitive grants for OSSF research; THSC, §367.009, which requires certain fees be used for complete grants for OSSF research; and THSC, §367.010, which provides that fees from OSSF permit applications shall be deposited to the credit of the water resources management account.

The amendment is also adopted 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; and TWC, §5.103 and §5.105, which authorize the commission to adopt rules and policies necessary to carry out its responsibilities and duties.

The adopted amendment implements House Bill 2694 (Article 8), 82nd Legislature, 2011; and THSC, §§285.21, 367.001, 367.007, 367.008, 367.009, and 367.010.

§285.21. Fees.

(a) The application fee for an on-site sewage facility (OSSF) permit is:

(1) \$200 for an OSSF serving a single family dwelling; or

(2) \$400 for all other types of OSSFs.

(b) A fee of \$10 shall also be collected for each OSSF permit for the commission as required by the Texas Health and Safety Code, Chapter 367.

(c) The fees are payable when the owner, or owner's agent, applies to the executive director for an OSSF permit. The fee shall be submitted to the appropriate regional office and shall be paid by a money order or check. Payments shall be made payable to the Texas Commission on Environmental Quality.

(d) The re-inspection fee shall be equal to one-half of the permit fee that was in effect at the time the original application was submitted to the regional office.

(e) Refunds of the application fee shall not be granted.

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

§285.38

Statutory Authority

The new section is adopted under the authority granted to the commission by the legislature in Texas Health and Safety Code (THSC), §366.001, which provides the commission with the authority to regulate On-site Sewage Facilities (OSSF) and collect fees and penalties for OSSFs; THSC, §366.011, which provides the commission or authorized agents general authority over OSSFs; and THSC, §366.012, which provides the commission with authority to adopt rules governing OSSFs.

The new section is also adopted 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; and TWC, §5.103 and §5.105, which authorize the commission to adopt rules and policies necessary to carry out its responsibilities and duties.

The adopted new section implements House Bill 240, 82nd Legislature, 2011; and THSC, §§366.001, 366.011, and 366.012.

§285.38. Prevention of Unauthorized Access to On-Site Sewage Facilities (OSSFs).

(a) Applicability.

(1) The construction criteria under this subsection applies to:

(A) pretreatment (trash) tanks referenced in §285.32(b)(1)(G) of this title (relating to Criteria for Sewage Treatment Systems);

(B) proprietary treatment units referenced in §285.32(c) of this title;

(C) non-standard treatment units referenced in §285.32(d) of this title;

(D) pump tanks referenced in §285.34(b) of this title (relating to Other Requirements);

(E) holding tanks referenced in §285.34(e) of this title; and

(F) septic tanks referenced in §285.32(b)(1) of this title.

(2) The construction criteria found in this subsection is in addition to the construction criteria in §285.32 of this title.

(b) All tanks must have inspection or cleanout ports located on the tank top over all inlet and outlet devices. Each inspection or cleanout port must be offset to allow for pumping of the tank. The ports may be configured in any manner as long as the smallest dimension of the opening is at least 12 inches, and is large enough to provide for maintenance and equipment removal.

(c) With the exception of septic tanks, all inspection and cleanout ports shall have risers over the port openings which extend to the ground surface. A secondary plug, cap, or other suitable restraint system shall be provided below the riser cap to prevent tank entry if the cap is unknowingly damaged or removed.

(d) All septic tanks buried more than 12 inches below the ground shall have risers over the port openings. The risers shall extend from the tank surface to no more than six inches below the ground. A secondary plug, cap, or other suitable restraint system shall be provided below the riser cap to prevent tank entry if the cap is unknowingly damaged or removed.

(e) Risers.

(1) The risers shall have inside diameters which are equal to or larger than the inspection or cleanout ports.

(2) Risers must be permanently fastened to the tank lid or cast into the tank. The connection between the riser and the tank lid must be watertight.

(3) Risers must be fitted with removable watertight caps and protected against unauthorized intrusions. Acceptable protective measures include:

(A) a padlock;

(B) a cover that can be removed with tools;

(C) a cover having a minimum net weight of 29.5 kilograms (65 pounds) set into a recess of the tank lid; or

(D) any other means approved by the executive director.

(4) Risers and riser caps exposed to sunlight must have ultraviolet light protection.

(5) Risers must be able to withstand the pressures created by the surrounding soil.

(f) Installation of a riser to any component of a new OSSF is considered construction under this chapter and must be performed by a licensed installer.

(g) Installation of risers for OSSF components installed on or after September 1, 2012, are considered an emergency repair as described in §285.35 of this title (relating to Emergency Repairs) and may be performed by either a licensed Installer, licensed maintenance provider, or registered maintenance technician.

(h) Any person who accesses any secured lid(s) or cover(s) on an OSSF shall secure the lid(s) or cover(s) when access is complete.

(i) All inspection reports sent to Authorized Agents, Regional Offices, and homeowners must document that the access to the OSSF inspection and cleanout ports was secured after the maintenance or inspection activities were completed or that the OSSF system owner refused to pay for repairs that were needed to secure the OSSF

inspection and cleanout ports.