

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

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 would remove references to the Council and provide that the fee previously assessed for the Council will be used for commission OSSF research grants. It would require 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

§285.11, General Requirements

The proposal would amend §285.11(b) by replacing 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 proposed change in the rule language is legislatively mandated.

§285.21, Fees

The proposal would amend §285.21(b) by replacing 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 proposed change in the rule language is legislatively mandated.

§285.38, Prevention of Unauthorized Access to OSSFs

Proposed new §285.38 would incorporate 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 proposed 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 proposed rule requires routine maintenance reports to include the security status of the access port. The proposed 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 proposed rule does not prohibit access to OSSFs by septic tank pumpers. The proposed rule requires any person that accesses an OSSF to secure the OSSF when access is complete.

Fiscal Note: Costs to State and Local Government

Jeffrey Horvath, Strategic Planning and Assessment Section Analyst, has determined that for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency or for other units of state or local government as a result of administration or enforcement of the proposed rules.

The proposed rules remove references to the Council because HB 2694 abolished the Council and transferred the Council's research responsibilities to the commission. The proposed rules also implement HB 240, which 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.

As of September 1, 2011, the commission assumed all administrative responsibilities previously held by the Council, including all rights and obligations under existing grant agreements and contracts. The proposed rules would provide that OSSF permit fee revenue provided to the Council for research activities will now be collected for use by the commission, as required by statute. OSSF locally authorized agents are currently required to collect a \$10 fee for each OSSF permit. This fee was deposited to the General Revenue Account, to be utilized for the administration of the Council and its responsibilities under statute. Per HB 2694, local authorized agents would continue to collect this fee; however, the fee revenue would now be deposited to the Water Resource Management Account 153 for use by the commission.

Based on the 2011 Comptroller Biennial Revenue Estimate, \$325,000 in 2012 and \$335,000 in 2013 would now be deposited into the Water Resource Management Account instead of the General Revenue Account. This fee revenue must be appropriated to the TCEQ by the legislature before the funds can be used for administration of the former council's duties and responsibilities, including grant awards. The legislature did not appropriate funds in 2012 and 2013 for new grants for on-site sewage research.

The proposed rules implement HB 240, which requires that all OSSF systems, including risers and covers, installed after September 1, 2012, be designed to prevent access to the OSSF by anyone other than the system's owner and licensed OSSF installers or maintenance providers. The purpose of the requirement is to prevent accidental or unintentional access to a septic tank which could result in harmful or fatal accidents.

The proposed rules may increase the agency's workload with regard to the review of proposed systems and may also increase some enforcement activities relating to OSSF systems. However, any additional costs would be absorbed using existing resources. Likewise, local governments such as counties, municipalities, or river authorities who are authorized agents for the OSSF program may see an increase in workload with regard to the review of proposed systems and enforcement activities relating to OSSF systems, but any additional costs are not expected to be significant.

Public Benefits and Costs

Mr. Horvath has also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be compliance with state law and enhanced public safety with regard to the operation of OSSF systems.

Fiscal implications are anticipated for businesses and individuals if they design, own, or install a new OSSF system after September 1, 2012. However, these fiscal implications are expected to be minimal.

It is expected that OSSF system owners will have an additional one-time cost of between \$25 and \$100 (for the tank risers and/or covers including the padlock or weighted lid) for new OSSF systems designed and installed after September 1, 2012.

There are approximately 405 OSSF manufacturers and 3,081 OSSF licensed individuals that will be impacted by the proposed rules. Manufacturers will be required to provide OSSFs that meet the minimum requirements. However, according to agency staff, most manufacturers are already producing systems that meet the minimum proposed requirements so fiscal implications are not anticipated for them. Maintenance providers will be required to report the status of the secured access on routine maintenance reports. This additional reporting requirement is not expected to result in significant costs, if any. Maintenance providers and installers may also be required to purchase specialized tools to remove access ports to OSSFs, but again these costs are not anticipated to be significant.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of

the proposed rules. Most OSSF manufacturers and OSSF licensed individuals are anticipated to be small or micro-businesses. In addition, new reporting requirements for routine maintenance or any new special equipment necessary to access ports for maintenance providers or installers is not expected to result in significant costs, if any. Any small or micro-business that designs, owns, or installs a new OSSF system after September 1, 2012 will have an additional one-time cost of between \$25 and \$100 (for the tank risers and/or covers including the padlock or weighted lid) for the new OSSF system.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules are required by statute and do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined 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 proposed 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 would remove references to the Council, and would 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 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 proposed 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 invites public comment regarding this draft regulatory impact analysis determination.

Takings Impact Assessment

The commission's preliminary assessment indicates that Texas Government Code, Chapter 2007, does not apply to the proposed rulemaking because the proposed 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 proposed rules will not affect private real

property, which is the subject of the rules, because the proposed 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 proposed rules only apply to the participation of the public interest counsel in commission proceedings. Property values will not be decreased, because the proposed rulemaking will not limit the use of real property. Thus, the proposed rulemaking will not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found the proposal is a rulemaking 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.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this

preamble.

Announcement of Hearing

A public hearing on this proposal will be held in Austin on March 21, 2012, at 2:00 p.m. at the Texas Commission on Environmental Quality complex located at 12100 Park 35 Circle in Building B, Room 201A. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral 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.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services, at (512) 239-1802. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Bruce McAnally, MC 205, Office of Legal Services, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808.

Electronic comments may be submitted at

<http://www5.tceq.state.tx.us/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference

Rule Project Number 2011-040-285-CE. The comment period closes March 26, 2012.

Copies of the proposed rule can be obtained from the commission's Web site at

http://www.tceq.state.tx.us/nav/rules/propose_adopt.html. For further information,

please contact Candy Garrett, Field Operations Support Division, (512) 239-1457.

SUBCHAPTER B: LOCAL ADMINISTRATION OF THE OSSF PROGRAM

§285.11

Statutory Authority

The amendment is proposed 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 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; 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 proposed 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) [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 [On-Site Wastewater Treatment Research Council] 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 EXISTS**

§285.21

Statutory Authority

The amendment is proposed 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 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; 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 proposed 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) [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 [On-Site Wastewater Treatment Research Council] 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 proposed 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 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; 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 proposed 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); and

(E) holding tanks referenced in §285.34(e) 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. Inspection and cleanout ports shall have risers over the port openings which extend to the ground surface. When a riser is installed, 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.

(c) 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 only with specialized tools;

(C) a cover having a minimum net weight of 29.5 kilograms (65 pounds); 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.

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

(e) Installation of risers for OSSF components installed on or prior to September 1, 2012, are considered an emergency repair as described in §285.35 of this title (relating to Emergency Repairs).

(f) 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.

(g) 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.