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February 11, 1998

The Honorable Dan Morales  
Texas Attorney General  
P. O. Box 12548  
Austin, TX 78711-2548  
ATTN: Opinion Committee

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RECEIVED

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Opinion Committee

RE: Opinion Request on Regulation of On-Site Sewage Disposal Systems

Dear Attorney General Morales:

Pursuant to Article IV, Section 22, of the Texas Constitution and Chapter 402 of the Texas Government Code, TEX. GOV'T ANN. §402.042(A), this is to request your opinion on issues affecting the public interest and concerning the proper division of official duties between the Texas Board of Professional Engineers ("TBPE") under the Texas Engineering Practice Act (Act), TEX.REV.CIV.STAT.ANN. Art. 3271a (Vernon Supp. 1998), and the Texas Natural Resource Conservation Commission ("TNRCC") under Chapter 366 of the Health & Safety Code. There is an apparent conflict between rules passed by the TNRCC under Chapter 366 of the Texas Health & Safety Code, which governs the regulation of on-site sewage disposal systems, and the statutes that already permit licensed professional engineers to design, analyze, and oversee the installation of on-site sewage disposal systems under the Act.

The design, analysis, and oversight of construction for wastewater treatment facilities is and always has been -- the practice of engineering. These acts are taught as an integral part of engineering education (in the civil and environmental fields especially) for wastewater systems of all sizes including these relatively small on-site systems. While exemptions from *licensing* for some smaller engineering activities are found in the Act, the Act still clearly defines those activities as engineering, albeit engineering that might be performed without a license under certain circumstances. The on-site sewage systems in the following discussion are generally smaller systems, but as a category do not fall under any exemption in the Act.

The adequate design of an on-site sewage system will include several specific elements at a minimum: an evaluation of the site and conditions under which the system is to be constructed or re-constructed, a selection of the type of treatment technology to be used, an evaluation of the cost-effectiveness of that choice for that situation, measurements or estimates of effluent to be treated, predictive modeling of the system, an optimized design of the construction details, and an operations plan. Each of these elements are an integral part of the engineering design process. More complex projects, regardless of size, may require additional elements of engineering to complete the design. The designs, analyses, recommendations, judgements, and determinations made during this design process are critical to the success of the project. When this design is performed by licensed engineers, Board rules require the activities to be personally performed by engineers or under an engineer's direct supervision -- a stringent level of control.

### HEALTH & SAFETY CODE CHAPTER 366

Chapter 366 authorizes the TNRCC to regulate the location, design, construction, installation, operation, and maintenance of on-site sewage disposal systems. HEALTH & SAFETY CODE ANN. §§366.001 et seq. The TNRCC has the authority to adopt rules governing the installation of on-site sewage disposal systems and the registration of on-site sewage disposal system installers. HEALTH & SAFETY CODE ANN. §366.012(A)(1). Although the primary thrust of Chapter 366 is to regulate systems rather than individuals who deal with systems, Chapter 366 authorizes the TNRCC to "require an on-site sewage disposal system installer to register with the commission." HEALTH & SAFETY CODE ANN. §366.001.(4).

A person may not operate as an installer of on-site sewage disposal systems unless the person is registered with the TNRCC. HEALTH & SAFETY CODE ANN. §366.071. As part of its authority to register installers, the TNRCC has the authority to establish a training program. HEALTH & SAFETY CODE ANN. §366.013. The Health & Safety Code requires that the TNRCC register an installer if the installer completes an application form that is consistent with Chapter 366 and completes the TNRCC's training program. HEALTH & SAFETY CODE ANN. §366.073.

The Health & Safety Code directs the TNRCC to delegate to local governmental entities the authority to implement and enforce rules enacted by the TNRCC under Chapter 366. HEALTH & SAFETY CODE ANN. §§366.031, 366.033. Local governmental entities must first, however, comply with the procedural requirements Chapter 366, which include incorporating the TNRCC's rules, preparing an enforcement plan, holding a public hearing, and adopting an order or resolution formalizing the delegation. HEALTH & SAFETY CODE ANN. §366.032. A local governmental entity to whom authority has been delegated may adopt more stringent standards, but it may not adopt less stringent standards. HEALTH & SAFETY CODE ANN. §366.032(B); Texas Attorney General Opinion No. DM-343 (1995). A local governmental entity to which authority has been delegated under these sections is known as an "authorized agent." HEALTH & SAFETY CODE ANN. §366.002(1).

The TNRCC or its authorized agent may also "designate a person to make percolation tests, systems designs, and inspections subject to the approval of the commission." HEALTH & SAFETY CODE ANN. §366.014. To qualify as such a "designated representative," the individual must:

1. demonstrate to the commission's satisfaction the person's competency to make percolation tests, designs, and inspections for on-site sewage disposal systems in accordance with [Chapter 366] and rules adopted under [Chapter 366];
2. successfully complete the training program provided by the commission;
3. successfully pass an examination provided by the commission;
4. receive written certification from the commission; and
5. pay a reasonable fee to the commission for administration of this training and certification.

**HEALTH & SAFETY CODE ANN. §366.014(B).**

The TNRCC's authority to impose its training requirements is limited to "installers" and "designated representatives." In fact, Chapter 366 does not authorize the TNRCC to regulate, with training, registration, or other requirements, any class of individuals *other* than "installers" and "designated representatives." Despite that lack of express or implied authority, the TNRCC has passed rules that purport to impose additional burdens on engineers licensed by the TBPE and that purport to create whole classes of regulated individuals not mentioned in Chapter 366 who, under TNRCC rules, may engage in activities that constitute the practice of engineering without a license.

**TNRCC RULES: 30 T.A.C. CHAPTER 285**

The TNRCC enacted 30 T.A.C. Chapter 285 pursuant to Chapter 366. There are a number of inconsistencies between Chapter 366 and the TNRCC's rules. The list is too long for discussion here. A sample of the inconsistencies, however, follows.

Section 366.002 indicates that the *commission* may delegate certain powers to local governmental entities, whereas throughout Chapter 285, the TNRCC purports to confer regulatory authority on the commission or its executive director. It is a fundamental principal under the Texas Constitution that delegated powers cannot be delegated. The TNRCC cannot effectively amend Chapter 366 to allow such delegation. See Texas Attorney General Opinion Nos. JM-366; H-884.

Sections 366.002(3) AND 366.014(a) indicate that a "designated representative" may "make percolation tests, systems designs, and inspections *subject to the approval of the commission.*" HEALTH & SAFETY CODE ANN. §§366.002(3) and 366.014(a)(emphasis added). TNRCC rules indicate that only the approval of the authorized agent is required. 30 T.A.C. §285.2. Again, as a general rule, delegated powers cannot be delegated. In addition, delegations must be accompanied by standards.

More troubling, however, is the TNRCC's creation by rule of entirely new categories of regulated individuals. The TNRCC rules authorize certified "site evaluators," who may perform "soil analysis, a site survey, and other criteria necessary to determine the suitability of a site for a specific OSSF." 30 T.A.C. §285.2;<sup>1</sup> see also 30 T.A.C. §§285.30, 285.50. Because licensed professional engineers perform site evaluation, among other things related to the design analysis or oversight of construction of on-site sewage disposal systems, the TNRCC rules either purport to regulate licensed engineers or to authorize those *not* licensed as engineers to practice engineering without a license, or both. The TNRCC lacks the authority to do either thing.

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<sup>1</sup> In addition, the TNRCC rules authorize installers to use registered "apprentices" and even define how much supervision is required of such apprentices. 30 T.A.C. §285.2; see also 30 T.A.C. §§285.30, 285.50. Chapter 366 does not replace the laws governing professional sanitarians, who are registered and regulated by the Texas Department of Health ("TDH") under the Professional Sanitarians Act. TEX.REV.CIV.STAT.ANN. Art. 4477-3 (Vernon 1976 and Vernon Supp. 1998).

Chapter 366 is narrow and specific in its grant of regulatory authority. Chapter 366 authorizes the TNRCC to license, register, or certify "installers," who may *only* "construct, install, alter, or repair" an on-site sewage disposal system. HEALTH & SAFETY CODE ANN. §366.002(4). In addition, the TNRCC or a governmental entity properly delegated authority by the TNRCC as an authorized agent may "designate" a "designated representative" of the TNRCC or the governmental entity, respectively, who may *only* "make percolation tests, systems designs, and inspections subject to the approval of the commission." HEALTH & SAFETY CODE ANN. §366.014. Nothing in Chapter 366 authorizes the TNRCC to license, register, or certify any category of individual other than "installers" and "designated representatives." Nothing in Chapter 366 authorizes the TNRCC to impose additional burdens, such as registration, training, and/or examinations, on engineers' licenses. In fact, nothing at all in Chapter 366 authorizes the TNRCC to regulate those who design on-site sewage disposal facilities and who perform site evaluation, much less to relieve such individuals from being licensed as professional engineers when design and site evaluation activities constitute the practice of engineering.

Moreover, nothing in Chapter 366 repeals or replaces any other statute governing the professionals who may be involved in the location, design, construction, installation, operation, and maintenance of on-site sewage disposal systems. Individuals involved in the location, design, construction, installation, operation, and maintenance of on-site sewage disposal systems, whether they are certified "installers" or "designated representatives" or not, must comply with those other statutes and avoid practicing a profession, such as engineering, without a license. For example, professional engineers who are involved in the location, design, construction, installation, operation, and maintenance of on-site sewage disposal systems must still comply with the Texas Engineering Practice Act and TBPE rules enacted under the Act.

Chapter 366 recognizes the professional limits on installers by defining an installer as one who may "construct, install, alter, or repair" an on-site sewage disposal system. HEALTH & SAFETY CODE ANN. §366.002(4). Chapter 366 recognizes the professional limits on "designated representatives" by defining a "designated representative" as one that "makes percolation tests, systems designs, and inspections subject to the approval of the commission." Chapter 366 contains no authorization for an installer to perform any site evaluation or design and no authorization for a designated representative to perform any site evaluation, which ordinarily falls within the scope of the practice of engineering. The TBPE is the state agency with the expertise and the statutory authority to determine what design and site evaluation activities constitute the practice of engineering.

### **THE TEXAS ENGINEERING PRACTICE ACT**

It is the exclusive province of the TBPE to regulate the licensing of engineers and the practice of engineering under the Texas Engineering Practice Act, TEX.REV.CIV.STAT.ANN. Art. 2371a. The TNRCC has no express or implied authority to add to the licenses standards set forth in that Act. In addition, no person in Texas may practice engineering without a license from the TBPE. Art. 3271a, §§1.2(1), 23(a). If the TBPE believes that an individual or entity is engaged in the unauthorized practice of engineering, the TBPE may refer the violation to the appropriate county or criminal district attorney and/or may seek relief in court through the Office of the Attorney General to enjoin the violation. See Art. 3271a, §23(a). The TNRCC has no

express or implied authority to authorize unlicensed individuals to practice engineering without a license.

The Act defines the practice of engineering broadly as "any service or creative work, either public or private, the adequate performance of which requires engineering education, training and experience in the application of special knowledge or judgment of the mathematical, physical, or engineering sciences to such services or creative work," including "the design or analysis of works or systems for the use or alteration of law and water" and "services, designs, analyses, or other work performed for a public or private entity in connection with utilities, structures, buildings, machines, equipment, processes, systems, works, projects, and industrial or consumer products or equipment of a mechanical, electrical, electronic, chemical, hydraulic, pneumatic, geotechnical, or thermal nature." Art. 3271a, §2(4).

The TBPE has consistently pursued those who provide design, evaluation, or other engineering services in connection with specific public construction projects. The TBPE has recognized a difference between providing or selling pre-designed products and construction materials, accompanied by general installation instructions, and the evaluation of the suitability of the product or material for a particular site. Consistent with that practice, depending on the facts, designing or manufacturing or merely offering for sale pre-designed systems, such as proprietary on-site sewage systems, might not in all circumstances constitute the unauthorized practice of engineering, [so long as a variation on the terms "engineer" or "engineered" did not accompany the system]. The establishment of suitability of that system to a particular site, however, would involve the practice of engineering. Those are fact questions to be resolved by the TBPE in deciding whether to pursue in court those who practice without a license.

The Texas Engineering Practice Act contains very specific, narrow exemptions. Art. 3271a, §20. Installers of on-site sewage disposal systems are not among those exemptions. The closest exemption for installers is subsection (d), which exempts the construction of certain buildings. Art. 3271a, §20(d). That exemption, however, by its terms is limited to the actual erection of a building. The closest exemption for designated representatives is subsection (f) of section 20, which exempts regular full time employees of a private or public utility, *provided* that "such employee does not have responsibility for engineering designs, plans, or specifications to be incorporated into fixed works, systems, or facilities on the property of others." Art. 3271a, §20(f). Subsection (k) of section 20 also expressly exempts licensed architects, landscape architects, and interior designers from the Act to the extent that they practice within the scope of their license. Art. 3271a, §20(k). No similar provision exempts installers of on-site sewage disposal systems and TNRCC designated representatives. If the Texas Legislature has intended to exempt them from the Texas Engineering Practice Act, it could have and would have done so expressly.

#### **EFFECT OF LIMITS ON STATUTORY AUTHORITY**

The TNRCC, like the TBPE, is a creature of the Texas Legislature that has no inherent authority and that, as a result, may exercise only those powers granted in clear and express language or by *necessary implication from express powers*. See *Public Utility Commission v. GTE-Southwest, Inc.*, 901 S.W.2d 401, 406-407 (Tex. 1995). The theory of necessary implication does not authorize an agency to exercise what amounts to a new and additional

power. 901 S.W.2d at 407. For example, in *Public Utility Commission v. GTE-Southwest, Inc.*, the Texas Supreme Court held that the Public Utility commission's general ratemaking authority did not necessarily imply the authority to impose rates retroactively. In *Tarrant Appraisal Review Board v. Martinez Brothers Investments, Inc.*, 946 S.W.2d 914(Tex.App. -- Fort Worth 1997, no writ), the court of appeals held that a Tax Code provision authorizing a property owner to formally designate an agent to act on the property owner's behalf did not authorize the Appraisal Review Board to require that the designation be filed before or at the time a protest is filed with the board. In *Kelly v. Industrial Accident Board*, 358 S.W.2d 874 (Tex. Civ. App. -- Austin 1963, writ ref'd), the court of appeals held that the Industrial Accident Board lacked authority to promulgate a rule that required a claimant to submit to an examination by a physician or chiropractor at the claimant's expense because this constituted an additional burden not authorized by statute.

The TNRCC rules at issue here impose additional burdens on engineers that are not authorized under Chapter 366, the Texas Engineering Practice Act, or any other statute. Not only does the TNRCC purport to impose training, examination, and certification requirements on engineers who perform site evaluation, the TNRCC does so with no expertise or knowledge of the engineering required in any specific design and site evaluation of on-site sewage disposal systems or of the education, experience, and training engineers have completed already.

### CONCLUSION

The TNRCC rules at issue here exceed the TNRCC's authority and improperly interfere with the authority of the TBPE. The Texas Legislature recognized the authority already delegated to the TBPE and the limits on those who are not licensed as engineers when, in Chapter 366, it omitted authorization for an installer to perform site evaluation or design and omitted authorization for a designated representative to perform site evaluation. The overall purpose of Chapter 366 is to protect the health, safety, and welfare, in particular, through the protection of the environment. To allow the TNRCC to enforce the rules at issue would lessen rather than increase the standards governing on-site sewage disposal systems. In addition to any other questions raised through discussion, we ask:

1. Does the TNRCC have the authority to license site evaluators or other persons to perform engineering as authorized by the Texas Engineering Practice Act?
2. Does an agency or political subdivision of the state have the authority to interfere with the authority of the TBPE by imposing additional requirements upon licensed engineers to practice activities already authorized by their licenses?
3. Do such agencies or political subdivisions have the authority to prohibit or otherwise impede licensed engineers from performing activities already authorized under their engineering license?

The Honorable Dan Morales  
February 11, 1998  
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Thank you for your assistance in this matter. If you have any questions, please do not hesitate to contact me at (512) 440-7723.

Sincerely,



John R. Speed, P.E.  
Executive Director

JRS:blm