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OPINION COMMITTEE

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July 6, 2001

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Ms. Susan Gusky, Chair
Opinion Committee
Office of the Attorney General, State of Texas
P.O. Box 12548
Austin, Texas 78711-2548

RQ-0400-JC

RE: 30 TAC 285.7

Dear Ms. Gusky:

This is to request an Attorney General opinion, pursuant to Government Code §402.043, concerning the legality of certain offenses ostensibly formulated under Chapter 366 of the Health & Safety Code, §7.173 of the Water Code, and 30 Texas Administrative Code 285.7. This letter contains our brief on the matter.

I.

Question Proposed

Does the Texas Natural Resource Conservation Commission have authority to issue a rule requiring perpetual maintenance contracts for certain on-site sewage facilities, subjecting citizens to criminal sanctions for its violation?

If the questioned rule is authorized, is the authorization a valid exercise of the State's police power?

II.

Relevant Facts

Approximately 1,200 Harrison County citizens have received notices from the Harrison County Health Department, acting as the Authorized Agent, (AA), of the Texas Natural Resource Conservation Commission, (TNRCC), threatening them with criminal charges for failure to have on file maintenance contracts covering their on site sewage facilities, (OSSF), as required under

the rule stated at 30 TAC 285.7. This office is charged with the prosecution of criminal offenses in Harrison County.

III. The Applicable Law

Rule 285.7 was promulgated by TNRCC as being authorized under Chapter 366, Health & Safety Code. Under §7.173, Texas Water Code, conviction for violation of a rule promulgated under Chapter 366, Health & Safety Code, is a Class “C” misdemeanor. A second conviction of such a rule is punishable under §§7.187(1)(A), and 7.187(2)(A), of the Water Code, raising the punishment range to a fine of up to \$1,000.00 and 30 days in jail.

Rule 285.7 requires owners of certain OSSFs to have perpetual maintenance contracts. The contract must be in existence and filed with TNRCC or its Authorized Agent prior to a permit being approved for the OSSF. If terminated for any reason, the owner must supply the permitting authority with a replacement contract within 30 days.

The policy and purpose of Chapter 366, Health & Safety Code as stated in §366.001 reads in pertinent part as follows:

[T]o eliminate and prevent health hazards by regulating and properly planning the location, design, construction, installation, operation, and maintenance of on-site sewage disposal systems; ... authorize the commission or authorized agent to impose a penalty for a violation of this chapter or a rule adopted under this chapter; ... and allow the individual owner of a disposal system to install and repair the system in accordance with this chapter.

Under §366.011 of the Health Code, TNRCC or its Authorized Agents, “have general authority over the location, design, construction, installation, and proper functioning of on-site sewage disposal systems...”. TNRCC may adopt rules under §366.012:

- (a) (1) ... governing the installation of on-site sewage disposal systems, including rules concerning the:
 - (A) review and approval of on-site sewage disposal systems;
 - (B) registration of installers; and
 - (C) temporary waiver of a permit for an emergency repair; and
- (2) adopt rules under this chapter that encourage the use of economically feasible alternative techniques and technologies for on-site sewage disposal systems that can be used in soils not suitable for conventional on-site sewage disposal.
- (b) In rules adopted under this chapter, the commission shall include definitions and detailed descriptions of good management practices and procedures for the construction of on-site sewage disposal systems that;
 - (1) justify variation in field size or in other standard requirements;

(2) promote the use of good management practices or procedures in the construction of on-site sewage disposal systems;

(3) require the use of one or more specific management practices or procedures as a condition of approval of a standard on-site sewage disposal system if, in the opinion of the commission or authorized agent, site conditions or other problems require the use of additional management practices or procedures to ensure the proper operation of an on-site sewage disposal system; and

(4) make available general, operational information to the public.

IV.

The Rule is Not Authorized by the Statute

Nowhere in §366.012 is the commission or its authorized agents given authority to require perpetual maintenance contracts with private companies. A previous Attorney General's Opinion, (JC-0020, March 10, 1999), affirmed that, "[A]n agency can adopt only such rules as are authorized by and consistent with its statutory authority", citing Railroad Comm'n. v. Arco Oil & Gas, 876 S.W.2d 473 (Tex.App.-Austin 1994, writ denied).

Under §366.0515, Health & Safety Code, and except in counties with a population of less than 40,000, issuance of a permit may be conditioned upon the existence of a maintenance contract. Under the statute, if the owner enters into a new maintenance contract or revises the original one, it must be submitted to the permitting authority, but there is no obligation to renew an expired contract, and the installer is required to provide the owner with information regarding maintenance of the system at the time of its installation.

Rule 285.7 requires owners of OSSFs to file with the TNRCC or its Authorized Agent a two year maintenance contract with a "valid maintenance company" as a part of the initial permitting process for the OSSF. In addition, the land owner is required to keep such a contract in force so long as the OSSF is in operation under penalty of the criminal sanctions described above.

The penalty for allowing raw sewage to be released on the ground, with the resultant threat to the health and safety of the water supply, presumably the very conduct sought to be curtailed by the legislative and administrative scheme, is punishable by injunctive relief under §366.092, and administrative relief under §366.0922. Civil or administrative penalties under Chapter 7 of the Water Code are provided for failure to repair after notice under §366.017. Criminal sanctions for this conduct would seem to be reasonably related to the goal of the law.

Under §7.173 of the Water Code, violation of any rule adopted under Chapter 366 of the Health & Safety Code is a Class "C" misdemeanor, with subsequent convictions carrying criminal penalties of up to 30 days in jail and a fine of up to \$1,000.00.

No perpetual contract requirement applies to “cluster systems”. Cluster systems are defined as those on-site systems designed to serve two or more sewage-generating units where the total combined flow from all units does not exceed 5,000 gallons per day. 30 TAC 285.2. The definition for an on-site sewage disposal system, (an OSSF), is essentially the same, the difference being that a cluster system may serve more than one generator. Each single family dwelling on a cluster system must be individually permitted by the permitting authority. 30 TAC 285.6 (2). Each permittee on a cluster system is required to enter into a legally binding agreement with all other owners on the system to maintain the system, but they are not required to contract with private concerns for the maintenance. 30 TAC 285.6 (3).

The only justification for the different treatment of owners under a cluster system is found in the comments required under Government Code §2001.033, at the public hearing published January 31, 1997, in Texas Register, Volume 22, #8. A registered sanitarian questioned why cluster systems were not required to have maintenance contracts. TNRCC’s reply was,

The commission believes the performance requirements for a cluster system are the same as any other OSSF described under this chapter and therefore subject to the same enforcement provisions as any other OSSF. The commission feels the provisions of this section are correct in requiring on-going maintenance of the facilities and not to require a perpetual contract. Circumstances are such that a perpetual contract would be unrealistic. (emphasis added).

TNRCC fails to state any rational distinction between single unit OSSFs and cluster systems that would justify the maintenance contract for the former but not the later. Under §2001.033, (a)(1)(B), Government Code, an agency is required to publish the, “factual basis for the rule as adopted which demonstrates a rational connection between the factual basis for the rule and the rule as adopted...”

The writer has found no reference in the proposed TNRCC rules from 1991 forward addressing the factual basis for the questioned rule.

Where an agency fails to provide adequate reasons for adoption of a rule, the rule is invalid. National Association of Independent Insurers, et al v. Texas Department of Insurance, et al, 925 S.W.2d 667, (Tex. 1996).

V.

If the Statute Authorizes the Rule, the Statute is Invalid as Applied by TNRCC

V.

A.

**The Statute as Applied violates the due process clause of the
Fourteenth Amendment of the U.S. Constitution**

Any exercise of the State's police power must bear a rational relation to a legitimate state end, and if it does, it should be upheld unless it is so arbitrary and unreasonable as to be unconstitutional. Harper v. Lindsay, 616 F.2d 849, (C.A.5 (Tex) 1980).

The signing of a contract does not ensure that raw sewage will not be released into the water supply. Under the current rules, a citizen with a state of the art, perfectly performing OSSF, is subject to criminal proceedings, while a person refusing to repair a malfunctioning system would be subject to civil penalties. A person with a valid maintenance contract on file with the permitting authority could well have a malfunctioning system which, unless and until discovered, creates harm. Discovery, under the current scheme, is dependent upon the maintenance company making the required inspections of not less than three per year, [30 TAC 285.91(4)]. A complying person could be discharging raw sewage for as many as three months prior to being subject to any sanctions. A non-complying citizen is immediately subject to criminal penalty.

This situation is not analogous to the financial responsibility law, which is the only other instance this writer can find where citizens are required under penalty of criminal sanctions to have a contract with a private concern. Texas Transportation Code §601.051. The requirements under the financial responsibility law ensure a solvent entity for the payment of damages caused by negligent operation of motor vehicles. The scheme bears directly on the problem sought to be remedied by the law, and is mandated by statute. The existence of a contract, however, does not bear a rational relationship to the goals of the statute.

V.

B.

**As Applied, the Statute Violates the Equal Protection Clause of the
Fourteenth Amendment of the U.S. Constitution**

In the exercise of their discretionary police power, states may make classifications as to persons amenable to punishment as long as the classifications are reasonable and the statute bears equally on all in the same class. Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 91 L.Ed. 422, (1947), rehearing den. 330 U.S. 853, 91 L.Ed. 1295 (1947).

As stated above, Rule 285.7 requires perpetual maintenance contracts for single family OSSFs, but exempts single family owners involved in cluster systems from the requirement. At

the same time, TNRCC admits that, “[T]he performance requirements for a cluster system are the same as any other OSSF described under this chapter and therefore subject to the same enforcement provisions as any other OSSF”, but, “[C]ircumstances are such that a perpetual contract would be unrealistic.” January 31, 1997, in Texas Register, Volume 22, #8, supra. No explanation is given as to the identity of the, “circumstances”, which are the basis for the distinction for differential treatment.

IN SUMMARY, we do not believe TNRCC is statutorily authorized to promulgate that portion of Rule 285.7 requiring perpetual maintenance contracts. Even if such authorization can be implied, we feel such an application of Chapter 366 of the Health & Safety Code is a denial of due process and equal protection to the citizens of Texas.

Please let me know if there is any further information you may require in making a determination upon this request.

Sincerely,



Rick Berry
Criminal District Attorney
Harrison County, Texas

RB/ps