

**SUBCHAPTER K: HAZARDOUS SUBSTANCE FACILITIES ASSESSMENT
AND REMEDIATION
§§335.341 - 335.351
Effective June 3, 2004**

§335.341. Purpose and Scope.

(a) The purpose of this subchapter is to establish an assessment and remediation program to identify and assess facilities that may constitute an imminent and substantial endangerment to public health and safety or the environment due to a release or threatened release of hazardous substances into the environment. The provisions of this subchapter supplement and therefore should be read in conjunction with the provisions of Texas Health and Safety Code, Chapter 361, Subchapter F, herein referred to as the Act.

(b) This subsection describes the procedures for identifying, proposing, listing, and delisting facilities on the State Registry.

(1) Prior to proposing a facility for inclusion on the State Registry, the executive director shall first determine whether any potential endangerment to public health and safety or the environment at a facility can be resolved by the present owner or operator under the federal Resource Conservation and Recovery Act, 42 United States Code Annotated §§6901 et seq. (1976), as amended.

(2) If the potential endangerment cannot be fully resolved by the present owner or operator, then the executive director shall determine whether the potential endangerment can be resolved by voluntary cooperation of some or all of the potentially responsible parties (PRPs) identified in the Act, §361.271 or §361.275(g) pursuant to an agreed administrative order issued by the commission or a Voluntary Cleanup Agreement pursuant to Chapter 333 of this title (relating to Voluntary Cleanup Programs). If a facility can be cleaned up pursuant to an agreed administrative order or an executed Voluntary Cleanup Agreement, then it shall not be proposed for listing.

(3) If, after reasonable efforts, the executive director determines that the potential endangerment to public health and safety or the environment cannot be resolved by either of these approaches, the executive director shall evaluate the facility to determine whether it is eligible for listing on the federal National Priorities List established pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act, 42 United States Code Annotated, §§9601 et seq. (1980), as amended.

(4) The executive director shall determine whether the facility is eligible for proposed listing on the State Registry only if, based on information available to the executive director, the facility is not eligible for inclusion on the federal National Priorities List.

(5) If the executive director determines that the potential endangerment to public health and safety or the environment can be resolved by any of the approaches described in paragraphs (1) -

(3) of this subsection, then the site will not be proposed for listing on the State Registry. Notice of the approach selected to resolve the apparent endangerment to public health and safety or the environment and the fact that such action is being taken in lieu of listing the facility on the State Registry shall be published in the *Texas Register*.

(c) A preliminary site investigation, removal action, remedial investigation, and remedial action shall comply with all requirements found in Texas Health and Safety Code, Chapter 361, Subchapter F (relating to Registry and Cleanup of Certain Hazardous Waste Facilities); the requirements of this subchapter; and the requirements of Chapter 350 of this title (relating to Texas Risk Reduction Program) for any release or threatened release of hazardous substances into the environment that may constitute an imminent and substantial endangerment to public health and safety or the environment. Where there is a conflict between the requirements of Chapter 350 of this title and the requirements of Texas Health and Safety Code, Chapter 361, Subchapter F and this subchapter, the requirements of Texas Health and Safety Code, Chapter 361, Subchapter F and of this subchapter shall apply.

Adopted October 24, 2001

Effective November 15, 2001

§335.342. Definitions.

Definitions set forth in the Act that are not specifically included in this section shall also apply. The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) **Agreed order or agreed administrative order** - An administrative order issued by the commission and agreed to by one or more PRPs for the purpose of settling potential liability for the remedial investigation and/or remedial action concerning a facility proposed for listing, or listed on, the State Registry.

(2) **Divisible** - Hazardous substance(s) released or threatened to be released at or from a facility that are capable of being managed separately under a remedial action plan.

(3) **Facility** - In accordance with the Act, §361.181(c), a facility means:

(A) Any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer, public-owned treatment works, well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft); or

(B) Any site or area where a hazardous substance has been deposited, stored, disposed of, or placed or otherwise come to be located, but does not include any consumer product in consumer use or any vessel.

(4) **Feasibility study (FS)** - A study which describes and evaluates a set of remedial action alternatives for effectively mitigating or minimizing damage to, and for providing adequate

protection of, the public health and safety and the environment in accordance with the requirements of §335.348 of this title (relating to General Requirements for Remedial Investigations).

(5) **Good faith offer** - A written proposal by one or more PRPs which is not contingent on participation of other PRPs which, in the judgment of the executive director, will:

(A) In the case of a good faith offer to fund or perform a remedial investigation, fully and effectively determine the nature and extent of the release or threatened release of hazardous substances and its impact on air, soils, groundwater, and surface water, both within and beyond the boundaries of the facility. The executive director will not consider an offer a good faith offer unless it is an offer to fully fund or perform the remedial investigation except in a claim of divisibility; or

(B) In the case of a good faith offer to fund or perform a remedial action, fully and effectively mitigate or minimize damage to, and provide adequate protection of, the public health and safety and the environment. The executive director will not consider an offer a good faith offer unless it is an offer to fully fund or perform the remedial action except in a claim of divisibility.

(6) **Hazard ranking system** - The method used by the EPA and the agency to evaluate the relative potential of hazardous substance releases to cause health or safety problems, ecological or environmental damage. The scoring system was developed by the EPA as set out in 40 Code of Federal Regulations (CFR) Part 300, Appendix A, as amended.

(7) **Hazardous and Solid Waste Remediation Fee Account** - The fund as described in the Texas Health and Safety Code, §361.133.

(8) **Health and safety plan** - A document that addresses the protection of on-site personnel and the public from potential hazards associated with implementing the remedial investigation or remedial action at a particular facility. The plan shall conform to applicable Occupational Safety and Health Administrative Rules, including but not limited to relevant portions of 29 CFR §1910 and §1926.

(9) **Imminent and substantial endangerment** - A danger is imminent if, given the entire circumstances surrounding each case, exposure of persons or the environment to hazardous substances is more likely than not to occur in the absence of preventive action. A danger is substantial if, given the current state of scientific knowledge, the harm to public health and safety or the environment which would result from exposure could cause adverse environmental or health effects.

(10) **Implementation schedule** - A document describing the sequence, duration and interdependency of each activity to be conducted during a remedial investigation or remedial action.

(11) **Nonparticipating PRPs** - Potentially responsible parties who:

(A) Are unwilling or unable to join in the making of a good faith offer;

(B) Are unwilling or unable to become a party to an agreed order to perform an RI/FS, similar study, or remedial action; or

(C) Intentionally violate the terms of an agreed order so as to substantially interfere with the achievement of the purposes of the agreed order.

(12) **Operation and maintenance plan** - A document detailing the necessary operation and maintenance, inspection, and monitoring activities, including schedules, required to maintain the attainment of performance goals after completion of the implementation phase of the remedial action.

(13) **Oversight costs** - All administrative costs and costs for technical and legal services incurred by the agency, or agents or contractors for the agency, incurred in the determination of superfund eligibility, identification of PRPs, oversight of the remedial investigation and remedial action, plus all such costs incurred in verifying compliance by PRPs with the terms of any agreed order which may be issued and costs incurred by the agency for delisting a site from the State Registry and cost recovery costs.

(14) **Potentially responsible party (PRP)** - A person potentially responsible for solid waste as defined in Texas Health and Safety Code, §361.271 and §361.275(g).

(15) **Presumptive remedy** - A remedy in a commission document titled "Presumptive Remedies" which describes site specific remedial alternatives for a facility in lieu of a full feasibility study as required by §335.348 of this title.

(16) **Quality assurance project plan (QAPP)** - A document describing in comprehensive detail the necessary quality assurance, quality control, and other technical activities that must be implemented to meet the data quality objectives during a remedial investigation or remedial action.

(17) **Remedial action (RA)** - An action, including remedial design and post-closure care, consistent with a remedy taken instead of or in addition to a removal action in the event of a release or threatened release of hazardous substances into the environment to prevent or minimize the release of a hazardous substance so that the hazardous substance does not cause an imminent and substantial danger to present or future public health and safety or the environment. A remedial action shall be conducted in accordance with Chapter 350, Subchapter B of this title (relating to Remedy Standards).

(18) **Remedial action drawings and specifications** - Documents that include the drawings showing the scope, extent, and character of the work to be performed during the remedial action and the written technical descriptions of materials, equipment, remediation systems, standards and workmanship to be applied during the remedial action.

(19) **Remedial design (RD)** - A design consisting of the remedial action drawings and specifications and other documents developed for the remedial action in accordance with the requirements of §335.349(d) of this title (relating to General Requirements For Remedial Activities).

(20) **Remedial investigation (RI)** - An investigative study (i.e., an affected property assessment conducted in accordance with Chapter 350, Subchapter C of this title (relating to Affected Property Assessment) which may include removals and/or a feasibility study, in addition to the development of protective concentration levels in accordance with Chapter 350, Subchapter D of this title (relating to Development of Protective Concentration Levels) designed to adequately determine the nature and extent of a release or threatened release of hazardous substances and, as appropriate, its impact on air, soils, groundwater, and surface water, both within and beyond the boundaries of the facility in accordance with the requirements of §335.348 of this title.

(21) **Responsible party (RP)** - A person responsible for solid waste as defined in Texas Health and Safety Code, §361.271 and §361.275(g).

(22) **Sampling and analysis plan (SAP)** - A document describing the specific sampling and analytical protocols to be implemented during a remedial investigation or remedial action.

(23) **Settlement offer** - A written offer by a potentially responsible party to fund or perform less than a full and complete remedial investigation and/or remedial action.

(24) **Spill/release contingency plan** - A document describing the sequences, procedures, and requirements to be implemented to protect both workers at the facility and the public from hazardous exposure to releases or spills resulting from the remedial action.

(25) **Substantial change in use** - A physical or functional alteration of a facility, the effect of which is to interfere significantly with a proposed or ongoing remedial investigation, proposed, ongoing, or completed remedial action or to expose public health and safety or the environment to a significantly increased threat of harm. The term includes, but is not limited to, actions such as the erection or razing of a building or other structure at the facility, the use of a facility for agricultural production, the paving over of a facility, the creation of a park or other public or private recreational use on the facility, and any other alteration of the site or activity which could interfere with the performance of a remedial investigation or remedial action.

Adopted October 24, 2001

Effective November 15, 2001

§335.343. Ranking of Facilities.

(a) The relative priority for action needed at a facility investigated by the executive director for possible listing on the State Registry may be based on the following relevant factors:

(1) A superfund hazard ranking system (HRS). The Superfund HRS is a methodology designed to determine a numerical score for a facility based on the judgment of the executive director concerning various factors which may impact the public health and safety or the environment.

(2) Other relevant factors including:

(A) community interests;

(B) simplicity;

(C) costs of investigation and remedial action;

(D) estimated time to complete the remedial action; or

(E) any other factor that the executive director determines is relevant and significant to the priority ranking of the facility.

(b) Upon appropriate investigation by the executive director, a facility will be assigned a Superfund HRS score. A facility may be proposed for listing on the State Superfund Registry if it is assigned a Superfund HRS score 5.0 or greater.

(c) The relative priority for action at facilities listed on the State Registry will be periodically reviewed and revised by the executive director as necessary to accurately reflect the need for action at the facilities.

(d) The commission shall annually publish an updated state registry identifying each facility and the relative priority for action at each listed facility.

(e) If a facility has been deleted in accordance with §335.344 of this title (relating to Delisting and Modifications) based, in whole or in part, on the facility being addressed pursuant to Chapter 333 of this title (relating to Voluntary Cleanup Programs), and the executive director determines that the facility is no longer being adequately addressed, the facility shall automatically revert to the status the facility had immediately before the facility was deleted from the Registry in accordance with the Act, §361.189. No public meeting is required under this subsection.

Adopted June 17, 1998

Effective July 22, 1998

§335.344. Delisting and Modifications.

(a) Any PRP of a facility listed or proposed for listing on the State Registry may request the executive director to delete such facility from the Registry, modify the facility's priority ranking within the Registry, or modify any information regarding such facility by submitting a written statement setting forth the grounds of the request. The PRP shall submit to the executive director any information as may be reasonably required to enable the executive director to further evaluate the facility including,

but not limited to, information on all factors used to develop a Superfund HRS score and to make a determination on the request. The executive director may initiate the delisting procedures described in this section.

(b) The executive director shall hold a public meeting to receive comment. This meeting is not a contested case hearing within the meaning of Texas Government Code, Chapter 2001. This meeting shall be held upon requests filed with or initiated by the executive director under subsection (a) of this section. At least 30 days prior to the date set forth for the meeting, notice shall be provided by first class mail to all other PRPs, and by publication in a newspaper of general circulation in the county where the facility is located. The person submitting the request, if any, shall bear the cost of publication of the notice.

(c) In making a determination under subsection (a) of this section, the executive director will consider the following:

(1) the extent to which the facility has been remediated under the terms of any removals and remedial action agreed to by the executive director;

(2) what further action, if any, is appropriate;

(3) whether the release no longer poses an imminent and substantial endangerment to public health and safety or the environment and, therefore, taking further action is not appropriate;

(4) whether, because of the nature of any removals and the remedial action implemented at the facility, it is not yet feasible to make a determination that the remedial action has effectively remediated the release or threatened release of hazardous substances;

(5) whether the site has been accepted under the voluntary cleanup program as set out in Chapter 333 of this title (relating to Voluntary Cleanup Programs); or

(6) whether the site has been deferred to a state or federal agency for further action.

(d) With the exception of subsection (c)(5) and (c)(6) of this section, no requests for the delisting of a facility from the State Registry or requests to modify information about a facility eligible for listing on the Registry will be granted unless, at a minimum, the facility has been investigated under the terms of a remedial investigation approved by the executive director.

Adopted September 2, 1999

Effective September 23, 1999

§335.345. Requests for Information or Production of Documents.

(a) The executive director may submit requests for information and requests for production of documents as authorized by the Act, §361.182 to any person who has information or documents which in the executive director's opinion are necessary for the adequate investigation or remediation of a

facility listed on the Registry that the executive director has reason to believe should be listed on the State Registry. The requested information or documents shall be produced within forty-five days from the date of request. If the requested information or documents are not produced within forty-five days, the executive director may petition the commission to issue an order directing compliance with the requests for information or production of documents. The executive director shall serve a copy of the petition on the person to whom the request for information or production of documents was directed at least 20 days prior to the scheduled date of commission action on the petition. The person to whom the request for information or production of documents was directed may appear before the commission and present evidence and argument on the petition or in support of a claim asserted under subsection (b), or the commission may refer the matter to the office of hearings examiners for the taking of evidence.

(b) Information or documents provided to the executive director in accordance with this section are subject to the Public Information Act and its exceptions.

Adopted June 17, 1998

Effective July 22, 1998

§335.346. Removals and Preliminary Site Investigations.

(a) For facilities listed on the Registry or proposed for listing on the Registry, no person may perform any partial or total removals at such facility or conduct preliminary investigations of any type at such facility until written authorization of the executive director has been received and notice and opportunity for comment has been provided to all other potentially responsible parties.

(b) To expedite the executive director's consideration of a proposal to conduct removals or preliminary investigations at a facility, the person proposing such actions shall submit to the executive director:

- (1) a workplan describing the removal and/or investigation activities proposed;
- (2) a health and safety plan;
- (3) a quality assurance project plan; and
- (4) an implementation schedule for completing various subtasks identified in the

workplan.

(c) Any authorization by the executive director to perform preliminary investigations, investigation activities, or partial or total removals at a facility does not constitute a finding or determination by the executive director that such preliminary investigation constitutes an approved remedial investigation or that the removal constitutes the final remedial action. An authorization by the executive director to perform any partial or total removals or investigation activities also does not constitute a determination or finding by the executive director that any release or threatened release attributed to the removed materials is divisible as defined in Texas Health and Safety Code, §361.276.

(d) Pursuant to Texas Health and Safety Code, §361.133(c)(1) - (4) and (g), the executive director may perform necessary and appropriate removal and remedial action at sites at which solid waste or hazardous substances have been disposed if funds from a liable party, independent third party, or the federal government are not sufficient for the removal or remedial action. The executive director may also perform removals under Texas Health and Safety Code, §361.133(c)(5) to protect human health and the environment.

Adopted October 24, 2001

Effective November 15, 2001

§335.347. Financial Capability, Liens, and Cost Recovery Actions.

(a) Financial capability – general. The executive director may make a determination of whether any potentially responsible party (PRP) is financially capable of participating in any facility investigation or remediation. Such a determination may be based on some or all of the following financial information:

- (1) a PRP's audited financial statements;
- (2) a PRP's federal or state income tax returns;
- (3) a PRP's gross and net income for each of the preceding three years;
- (4) a PRP's net worth for each of the preceding three years;
- (5) a PRP's current cash flow position;
- (6) a PRP's long-term liabilities;
- (7) the liquidity of a PRP's assets; and

(8) any other data requested under §335.345 of this title (relating to Requests for Information or Production of Documents), which in the opinion of the executive director is relevant to a determination of the ability of the PRP to participate in a facility investigation or remediation.

(b) Homesteads. The executive director shall determine whether a PRP is financially capable of conducting any necessary remediation studies or remedial action if the PRP is an individual whose homestead includes the facility subject to, or affected by, a remedial action. The value of an individual's homestead may not be included in the total amount of the individual's assets if:

- (1) the individual is occupying the homestead as a home; and
- (2) the fair market value of the homestead is \$250,000 or less.

(c) Liens under Texas Health and Safety Code, §361.194.

(1) Filing of lien. If the executive director files a lien on property, the executive director shall send a copy of the filed lien to the last known address of the owner of the property.

(2) Financial ability to satisfy lien. In making a determination whether to prepare an affidavit for lien or whether a lien is satisfied, the executive director may take into account a landowner's financial ability to satisfy the lien, including consideration of whether the landowner received financial compensation for the disposal of any substance addressed by the remedial action and whether the real property that is the subject of the lien:

- (A) is a homestead and is being occupied as a home by the landowner; and
- (B) has a fair market value of \$250,000 or less.

(d) Cost recovery actions.

(1) Homesteads. The executive director may not file a cost recovery action under Texas Health and Safety Code, §361.197, against an individual if the individual's only significant asset is a homestead that:

- (A) includes the facility subject to, or affected by, a remedial action;
- (B) is occupied by the individual as a home; and
- (C) has a fair market value of \$250,000 or less.

(2) Limitation on filing. A cost recovery action against the responsible parties that have not complied with the terms of an administrative order under Texas Health and Safety Code, §361.188, may be filed by the agency no later than one year after all remedial action has been completed.

(e) Fair market value. For the purposes of this section, the fair market value of a homestead is the market value ascribed to a property by the tax appraisal authority of the county or counties in which the property is located, exclusive of any downward adjustment related to contamination. If this information is unavailable, the executive director may determine the fair market value of the property, which excludes any downward adjustment related to contamination, from information available at the time.

(f) PRP information.

(1) The PRP shall provide the following information within 90 days after receipt of a written request by the executive director so that the executive director may conduct the determinations under subsections (b) - (d) of this section:

- (A) information listed in subsection (a) of this section;

(B) evidence that the subject property is the individual's homestead; and

(C) evidence that the individual is occupying the property as a home.

(2) The PRP may request an extension of the required time frame for providing documents if the extension is requested by the PRP within the initial 90-day time frame.

(3) For the purposes of this section, the executive director may determine that the property is not a homestead that is occupied by the individual as a home if the PRP does not provide the information requested in paragraph (1) of this subsection within the required time frame, including any extensions granted by the executive director. The executive director shall provide any such determination in writing to the PRP. The executive director's determination that the property is not a homestead that is occupied by the individual as a home is final and appealable under Texas Health and Safety Code, §361.321.

Adopted May 12, 2004

Effective June 3, 2004

§335.348. General Requirements for Remedial Investigations.

(a) Unless otherwise directed by the commission, a remedial investigation as approved by the executive director shall be completed before the executive director's selection of the remedial action, except for removals and preliminary site investigations in accordance with §335.346 of this title (relating to Removals and Preliminary Site Investigations).

(b) A similar study may be approved by the executive director as an appropriate alternative to the performance of a full remedial investigation when necessary to avoid delay, to make more effective use of resources or when such similar study is sufficient to adequately characterize a site.

(c) The contents of the remedial investigation as approved by the executive director, will depend on the particular circumstances of each specific facility. Under any remedial investigation, however, sufficient information must be collected and evaluated to allow the executive director to select an appropriate remedial action.

(d) A remedial investigation may include the following, as appropriate to a particular facility, for the purpose of allowing the executive director to select an appropriate remedial action:

(1) investigations of surface water and sediments necessary to characterize hydrologic features such as surface drainage patterns, areas of erosion and sediment deposition, surface waters, floodplains, and actual or potential hazardous substance migration routes within these areas. Properties of surface and subsurface sediments, which would influence the type and rate of hazardous substance migration or affect the ability to implement alternative remedial actions, shall be characterized;

(2) investigations to adequately characterize the nature and extent of hazardous substances in the soils encompassing the facility. Properties associated with the soils, which would

influence the type and rate of hazardous substance migration or affect the ability to implement alternative remedial actions, shall be characterized;

(3) investigations of hydrogeology and geology to adequately characterize the nature and extent of hazardous substances in the groundwater and the features which affect the fate and transport of those hazardous substances. This should include, but is not limited to, the physical properties and distribution of bedrock and unconsolidated materials, groundwater flow rate and gradient for contaminated and potentially contaminated aquifers, groundwater divides, areas of groundwater recharge and discharge, and location of public and private groundwater wells;

(4) information regarding local climatological characteristics which are likely to affect the hazardous substance migration such as: rainfall patterns; frequency of storm events; temperature variations; prevailing wind direction; and wind velocity;

(5) an ecological risk assessment;

(6) descriptions of the location, quantity, horizontal and vertical extent, concentrations and sources of hazardous substances. Information on the physical and chemical characteristics and the toxicological effects of hazardous substances shall be provided, if available; and

(7) a feasibility study.

(e) Protective concentration levels shall be developed in accordance with Chapter 350, Subchapter D of this title (relating to Development of Protective Concentration Levels).

(f) A workplan for a remedial investigation shall be submitted to the executive director for final review and possible modifications and shall include the following:

(1) a sampling and analysis plan covering all sampling activities to be undertaken in accordance with the remedial investigation;

(2) a quality assurance project plan to ensure the integrity of all samples taken in accordance with the remedial investigation;

(3) a health and safety plan to describe steps to be taken to assure the health and safety of all personnel engaged in implementing the remedial investigation; and

(4) an implementation schedule for all aspects of the remedial investigation.

(g) Treatability studies may be required as necessary to provide information to evaluate remedial action alternatives.

(h) In evaluating the acceptability of a remedial investigation, the executive director may require the utilization of published agency and EPA technical guidance documents.

(i) A health and safety plan shall be prepared that addresses the protection of on-site personnel and the public from potential hazards associated with implementing the remedial investigation at a particular facility.

(j) A report shall be prepared at the completion of the remedial investigation and submitted to the executive director for review, possible modification, and final approval.

(k) The selection of the remedial alternative shall be made according to the process outlined in the guidance document "Presumptive Remedies for Soils at Texas State Superfund Sites" or other applicable presumptive remedy documents, unless the executive director determines that a feasibility study must be conducted.

(l) The remedial action for a particular facility shall be selected based on the remedial alternative that the executive director determines to be the lowest cost alternative which is technologically feasible and reliable, effectively mitigates and minimizes damage to the environment, and provides adequate protection of the public health and safety and the environment.

(m) All engineering evaluations, plans, and specifications included in the feasibility study or similar study must be prepared and submitted in accordance with the Texas Engineering Practice Act.

(n) All engineering and geoscientific information submitted to the agency shall be prepared by, or under the supervision of, a licensed professional engineer or licensed professional geoscientist, and shall be signed, sealed, and dated by qualified professionals as required by the Texas Engineering Practice Act and the Texas Geoscience Practice Act and the licensing and registration boards under these acts.

Adopted August 6, 2003

Effective September 1, 2003

§335.349. General Requirements For Remedial Activities.

(a) Based on the proposals set forth in the feasibility study, the presumptive remedy, or other similar study, elements from different remedial action alternatives as proposed in a remedial investigation as well as any other information available to the executive director, the executive director shall select a proposed remedial action. After the selection of the proposed remedial action, the executive director shall hold a public meeting to discuss the proposed action, as required by the Act, §361.187. This meeting is not a contested case hearing within the meaning of Texas Government Code, Chapter 2001. Persons desiring to submit comments are encouraged to do so prior to the public meeting. Written comments should be submitted to the executive director at least 5 days prior to the date set for public meeting. All other comments shall be presented in the public meeting.

(b) This subsection describes the administrative procedures for modifying the proposed remedial action after the date of the initial public meeting to discuss the remedial action for the site.

(1) A minor change in the proposed remedial action is one that does not significantly affect the scope, performance, or cost of the proposed remedial action. The executive director will document minor changes in the project records without the necessity of another public meeting.

(2) A significant change in the proposed remedial action is one that materially affects the scope, performance, or cost of the proposed remedial action, but uses the same approach and results in a remedial action as least as protective as originally proposed. For significant changes, the executive director shall notify the PRPs by certified mail of the changes and issue a public notice in the *Texas Register* and in a newspaper of general circulation in the county in which the facility is located. The notice shall provide information regarding the significant changes in the proposed remedial action; however, a public meeting or opportunity for public comment is not required. If the commission has not entered into an administrative order to perform the remedial action, a significant change will extend the schedules provided in the Act, §361.187(d).

(3) A fundamental change in the proposed remedial action is one that uses a different approach to achieve the remedial action goals, or one that uses the same approach, but results in a remedial action that is less protective than that originally proposed. A major change in technology to address the contamination is a fundamental change. For fundamental changes, the executive director shall hold another public meeting to discuss the proposed changes in accordance with the Act, §361.187, and as described in subsection (a) of this section. This newly proposed remedial action shall supersede the remedial action originally proposed in the initial public meeting.

(c) Engineering documents submitted in connection with the remedial action must be approved by the executive director and must demonstrate compliance with relevant cleanup standards, except as provided in the Act, §361.193. The scope of these documents will depend on the nature and complexity of the proposed remedial action and may vary from facility to facility.

(d) The executive director shall establish the minimum requirements for the remedial design, based on the specific characteristics of the facility and the remedial action. If appropriate, the executive director may waive any of the requirements in this subsection for a particular facility. Typical remedial design requirements include, but are not limited to:

- (1) remedial action drawings and specifications;
- (2) quality assurance project plan;
- (3) sampling and analysis plan;
- (4) spill/release contingency plan;
- (5) implementation schedule; and
- (6) an operations and maintenance plan.

(e) A health and safety plan shall be prepared that addresses the protection of on-site personnel and the public from potential hazards particular to a facility while implementing the remedial action.

(f) All engineering plans and specifications prepared for remedial activities must be prepared and submitted in accordance with the Texas Engineering Practice Act.

Adopted June 17, 1998

Effective July 22, 1998

§335.350. Defense to Liability and Claims of Divisibility.

(a) The burden of establishing that a PRP qualifies for any defenses to liability set forth in the Act, §361.275 or that a release is divisible as set forth in the Act, §361.276 lies with the PRP asserting such claim.

(b) A PRP must demonstrate to the executive director its entitlement to a defense or claim under the Act, §361.275 or §361.276. The determination by the executive director of a PRP's request for limitation of liability under these sections of the Act is a discretionary act which does not entitle the PRP to an appeal to the commission or an adjudicatory hearing on such determination.

(c) The executive director will not consider claims of divisibility until a site has been adequately characterized by a remedial investigation.

(d) A determination by the executive director on a defense or claim asserted under the Act, §361.275 or §361.276 shall have no res judicata or collateral estoppel effect on a PRP's ultimate liability for remediation of a facility as determined in subsequent commission proceedings or in district court.

Adopted June 17, 1998

Effective July 22, 1998

§335.351. Settlement Agreements.

(a) General purpose. The commission encourages PRPs to enter into negotiated settlement agreements which shall include an agreed administrative order with the commission so that an effective remedial investigation and remedial action of a facility can be quickly implemented while at the same time resolving PRP's apparent liability for the facility. The goal of the executive director in negotiating PRP settlements is to obtain a complete remedial investigation and remedial action of the facility by PRPs, or to collect from PRPs 100% of the agency's cost of performing a complete remedial investigation and remedial action of the facility. PRPs shall have 60 days after the end of the good faith offer period to negotiate a settlement/final administrative order. Settlement negotiations shall run concurrently with agreed order negotiations. Settlements may also be made after an order is issued.

(b) Settlement.

(1) In the case of an offer which is less than a good faith offer to fund or perform a remedial investigation or remedial action, the executive director's consideration of the offer may be based on:

(A) the relationship between the parties' actions in storing, processing, and disposing of hazardous substances and the remedial action required to eliminate the release or threatened release;

(B) the volume of hazardous substances each party is responsible for at the site to the extent that the costs of the remedial action are based on the volume of waste present;

(C) consideration of toxicity or other waste characteristics if those characteristics affect the cost to eliminate the release or threatened release;

(D) a party's cooperation with state agencies, its cooperation or non-cooperation with the pending efforts to eliminate the release or threatened release, or a party's actions concerning storing, processing, or disposing of hazardous substances, as well as the degree of care that the party exercised; and

(E) a party's ability to pay.

(2) The commission may consider a settlement proposal for remedial investigation and/or remedial action of less than 100% of a facility's remedial investigation and/or remedial action costs. Upon settling with cooperative parties, the commission will vigorously seek all remaining relief, including full cost recovery of monies expended from the Hazardous and Solid Waste Remediation Fee Account, including penalties, damages, and interest where appropriate, as well as the agency's oversight costs, from parties whose non-cooperation prevented the achievement of a complete settlement.

(c) Mixed funding. Mixed Funding means use of funds from federal, state, and private party sources, or any combination of those sources, to fund a timely remedial action. Mixed funding may be used in the following circumstances.

(1) In order to achieve an expeditious remedial action of a facility listed on the Registry, the commission may agree to reimburse parties to a settlement agreement from the Hazardous and Solid Waste Remediation Fee Account with interest, for certain costs incurred as a result of the timely implementation of the remedial action that the parties agree to perform but which the commission agrees to finance in whole or in part. The commission may agree to utilize funds from whatever other federal or state sources are available to the commission for the funding of a facility remediation.

(2) Mixed funding shall be provided only to PRPs whom the commission has found to be eligible and who have entered into an agreed administrative order with the commission. The agreed

administrative order shall identify remedial action tasks to be addressed by the mixed funding, costs to be borne by the Hazardous and Solid Waste Remediation Fee Account and the terms of agreement.

(3) A PRP must submit sufficient documentation, as requested by the executive director, to support its request for mixed funding.

(4) The commission's granting of a request for mixed funding does not diminish or alter the standard and scope of liability as set out in the Act. The commission will not approve mixed funding based solely on the grounds that a share of wastes at a site may be attributable to an unknown or financially nonviable party. In addition, the availability or the amount of any fund-financing for a particular site will not be dependent on consistency with any volumetric allocation.

(5) Good faith negotiations and early cooperation of settlers will be considered in mixed funding requests. The executive director shall only consider mixed funding for remedial action if the PRP meets the following conditions:

(A) the PRP participated in the remedial investigation; or

(B) the PRP did not participate in the remedial investigation and the PRP agreed to reimburse all agency expenses associated with the remedial investigation.

(6) If a PRP is found to be eligible for mixed funding, the executive director shall make an initial determination regarding the amount of funding to be provided. This determination is solely within the discretion of the executive director and is not subject to adjudication in an administrative hearing or appeal to the commission. A determination of eligibility is not a funding commitment as actual funding will depend on availability of funds and approval of the commission

(7) Where a remedial action has been completed at a facility pursuant to a mixed funding agreement, the Hazardous and Solid Waste Remediation Fee Account shall be subject to an obligation for subsequent remedial actions at the same facility only to the extent that such subsequent actions are necessary by reason of failure of the original remedial action. Such obligation shall be in a proportion equal to, but not exceeding, the proportion contributed by the fund for the original remedial action. The fund's obligation for such future remedial action may be met through fund expenditures, or through payment by parties who were not signatories to the original agreement.

(d) De minimis settlements. The commission may reach a final settlement with a PRP for only a minor portion of the response costs at a facility if the conditions in either of the following subparagraphs (1) or (2) of this subsection are met.

(1) A PRP can demonstrate the following:

(A) the amount of the hazardous substances contributed by a particular PRP is minimal in comparison to the amounts of other hazardous substances at the facility; or

(B) the toxicity or other hazardous effects of the hazardous substances contributed by a particular PRP are minimal in comparison to the toxicity or other hazardous effects of other hazardous substances at the facility.

(2) The PRP can demonstrate that it:

(A) is the owner of the real property on or in which the facility is located;

(B) did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substance at the facility; and

(C) did not contribute to the release or threatened release of a hazardous substance at the facility through any action or omission.

(3) Paragraph (2) of this subsection does not apply if the PRP purchased the real property with actual or constructive knowledge that the property was used for the generation, transportation, storage, treatment, or disposal of any hazardous substance.

(e) Covenants not to sue.

(1) The commission may, in its discretion, provide any PRP with a covenant not to sue concerning any existing or future liability resulting from a release or threatened release of a hazardous substance addressed by a remedial action if each of the following conditions is met:

(A) the covenant not to sue is in the public interest as determined by criteria set forth in paragraph (2) of this subsection;

(B) the granting of the covenant not to sue would expedite a remedial action approved by the commission; and

(C) the PRP is in full compliance with the terms of any order issued by the commission for response to the release or threatened release for the facility concerned.

(2) In assessing the appropriateness of granting a covenant not to sue and in determining the appropriate legal scope of such a covenant, the commission shall consider whether the covenant is in the public interest on the basis of such factors as the following:

(A) the effectiveness and reliability of the remedial action, in light of other alternative remedies considered for the facility concerned;

(B) the nature of the environmental risks remaining at the facility;

(C) the extent to which performance standards are included in the order or decree;

(D) the extent to which the response provides a complete remedial action for the facility, including a reduction in the hazardous nature of the substances at the facility;

(E) the extent to which the technology used in the remedial action is demonstrated to be effective;

(F) whether the Hazardous and Solid Waste Remediation Fee Account or other sources of funding would be available for any additional remedial actions that might eventually be necessary at the facility; and

(G) whether the remedial action will be carried out, in whole or in significant part, by the PRPs themselves.

(3) A covenant not to sue shall be subject to the satisfactory performance by the PRP of its obligations under any order issued by the commission for remedial actions to address the release or threatened release of a hazardous substance at the facility. A covenant not to sue concerning future liability for remediation of the facility shall not take effect until the executive director certifies that the remedial action has been completed or the ordered action has been performed in accordance with any such order issued by the commission.

(4) A covenant not to sue a PRP concerning future liability for remediation of a facility may include an exception to the covenant that allows the commission to sue such person where such liability arises out of conditions which are unknown to the executive director at the time he certifies under paragraph (3) of this subsection that the remedial action has been completed at the facility. A covenant not to sue may provide that such future liability may be limited to the same proportion as that established in the original settlement agreement or order issued by the commission.

(f) Discharge of liability for other PRPs. Any settlement agreement with the commission which resolves a PRP's liability for remediation of a facility does not discharge the liability of any other PRP unless its terms so provide, but it reduces the potential liability of the other PRPs by the amount of the settlement. A PRP will be afforded the opportunity to comment on any settlement agreement with the commission to which it is not a party.

Adopted June 17, 1998

Effective July 22, 1998