

The Texas Commission on Environmental Quality (TCEQ or commission) adopts new §§37.9160, 37.9165, 37.9170, 37.9175, 37.9180, 37.9185, 37.9190, 37.9195, 37.9200, 37.9205, 37.9210, 37.9215, 37.9220, 37.9225, 37.9230, 37.9235, and 37.9240. Section 37.9215 is adopted *with changes* to the proposed text as published in the March 24, 2006, issue of the *Texas Register* (31 TexReg 2395). Sections 37.9160, 37.9165, 37.9170, 37.9175, 37.9180, 37.9185, 37.9190, 37.9195, 37.9200, 37.9205, 37.9210, 37.9220, 37.9225, 37.9230, 37.9235, and 37.9240 are adopted *without changes* and the text will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

Senate Bill (SB) 1354, 79th Legislature, 2005, amended Texas Water Code (TWC), Chapter 26, by adding new Subchapter M, Water Quality Protection Areas; specifically §§26.551 - 26.562. The statute addresses permitting, financial responsibility, inspections, water quality sampling, enforcement, cost recovery, and interagency cooperation with regard to quarry operations. The requirements of the statute are applicable to a pilot program in the John Graves Scenic Riverway, a stretch of the Brazos River watershed downstream of the Morris Shepard Dam on the Possum Kingdom Reservoir, and extending to the county line between Parker and Hood Counties.

Chapter 37, new Subchapter W, implements §26.553(f)(2) and §26.554. Subchapter W establishes financial assurance requirements for the John Graves Scenic Riverway pilot program. The purpose of the financial assurance requirements is to assure that adequate funds will be readily available to cover the costs of reclamation and restoration associated with quarries. Financial assurance is important for two reasons. First, it assures environmental needs related to quarries and the John Graves Scenic

Riverway will be addressed using funds arranged by the responsible party. Second, it prevents delays in addressing environmental needs by assuring funds that are readily available.

A corresponding rulemaking is published in this issue of the *Texas Register* that includes the addition of new Subchapter H, Regulation of Quarries in the John Graves Scenic Riverway to 30 TAC Chapter 311, Watershed Protection.

SECTION BY SECTION DISCUSSION

New Subchapter W is adopted to be added to Chapter 37 to provide financial assurance requirements relating to reclamation and restoration related to quarries in the John Graves Scenic Riverway. The new subchapter also outlines the administrative procedures and requirements relating to these types of financial assurance. It is intended to be used in coordination with provisions of Chapter 311 and with certain provisions of Chapter 37, Subchapters A and B.

Adopted new §37.9160, Applicability, identifies who is subject to this subchapter and those entities that are exempt.

Adopted new §37.9165, Definitions, defines terms that are used throughout this subchapter.

Adopted new §37.9170, Financial Assurance Requirements for Reclamation and Restoration, indicates that owners and operators required to demonstrate financial assurance for reclamation or restoration must comply with certain general financial assurance requirements in Chapter 37, Subchapters A and

B. Subsection (a)(1) - (4) outlines portions of Chapter 37, Subchapter B, that will not apply to owners and operators of quarries. Subsection (a)(4) specifies that §37.161 applies to quarry owners and operators, except that mechanism and wording requirements of a standby trust fund are found in this subchapter rather than Chapter 37, Subchapter B. Subsection (b) indicates that the amount of financial assurance must at least equal the current cost estimate. Required financial assurance amounts are further described in Chapter 311, Subchapter H. These amounts are reflective of the cost estimates referred to in this subchapter. Subsection (c) requires certain wordings for mechanisms and provides that the executive director will determine the acceptability of any mechanism submitted. The timing for providing the mechanism is described in subsection (d). For ease of administration and cost to the owner or operator, subsection (e) allows the use of a single financial assurance mechanism for both reclamation and restoration as long as the total mechanism amount is not less than the total required for each purpose. Continuous financial assurance until release by the executive director is provided for in subsection (f). Subsection (g) describes the conditions under which financial assurance mechanisms would be called upon. Finally, subsection (h) sets out the requirements for the standby trust agreement that must be established in conjunction with surety bonds and irrevocable letters of credit.

Adopted new §37.9175, Financial Assurance Mechanisms for Reclamation, allows the use of a trust agreement, a surety bond guaranteeing payment, an irrevocable standby letter of credit, insurance, a financial test, or a corporate guarantee as mechanisms for meeting financial assurance requirements for reclamation.

Adopted new §37.9180, Financial Assurance Mechanisms for Restoration, allows the use of a trust agreement, a surety bond guaranteeing payment, an irrevocable standby letter of credit, insurance, a financial test, or a corporate guarantee as mechanisms for meeting financial assurance requirements for restoration.

Adopted new §37.9185, Trust Fund Requirements, describes the requirements for a trust fund used to demonstrate financial assurance for reclamation or restoration.

Adopted new §37.9190, Trust Agreement Wording, describes the wording required for a trust agreement evidencing establishment of a trust fund.

Adopted new §37.9195, Surety Bond Guaranteeing Payment Requirements, describes the requirements for a payment surety bond used to demonstrate financial assurance for reclamation or restoration.

Adopted new §37.9200, Payment Bond Wording, describes the wording required for a payment surety bond used to demonstrate financial assurance for reclamation or restoration.

Adopted new §37.9205, Irrevocable Standby Letter of Credit Requirements, describes the requirements for a letter of credit used to demonstrate financial assurance for reclamation or restoration.

Adopted new §37.9210, Irrevocable Standby Letter of Credit Wording, describes the wording required for a letter of credit used to demonstrate financial assurance for reclamation or restoration.

Adopted new §37.9215, Insurance Requirements, describes the requirements for insurance used to demonstrate financial assurance for reclamation or restoration. Subsection (b) is adopted with changes to the proposed text to require an insurer be either licensed in Texas or eligible as an excess and surplus lines carrier in Texas rather than in one or more states.

Adopted new §37.9220, Certificate of Insurance Wording, describes the wording required for a certificate of insurance used to demonstrate financial assurance for reclamation or restoration.

Adopted new §37.9225, Financial Test Requirements, describes the financial and reporting requirements for entities choosing to self-insure by using a financial test as a means of demonstrating financial assurance for reclamation or restoration.

Adopted new §37.9230, Financial Test Wording, describes the wording of the document that must be submitted by the chief financial officer of an entity choosing to use the financial test to demonstrate financial assurance for reclamation or restoration.

Adopted new §37.9235, Corporate Guarantee Requirements, describes the requirements for a higher tiered parent corporation choosing to use a corporate guarantee on behalf of a quarry owner or operator to demonstrate financial assurance for reclamation or restoration.

Adopted new §37.9240, Corporate Guarantee Wording, describes the wording required of a corporate guarantee used to demonstrate financial assurance for reclamation or restoration.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that 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. The adopted rules are intended to implement SB 1354, relating to the regulation of ongoing mining and quarrying within the newly created John Graves Scenic Riverway. The adopted rules in Chapter 37 clarify financial assurance requirements for quarries located in the John Graves Scenic Riverway. The adopted rules do not adversely affect, in a material way, the economy, a section of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state, because the rules simply clarify financial assurance requirements for quarries located in the John Graves Scenic Riverway. The adopted rules do not meet the definition of a major environmental rule as defined in the Texas Government Code.

Furthermore, the adopted rulemaking action does not meet any of the four applicable requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225(a), only applies to a major environmental rule adopted by an agency, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed 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) adopt a rule solely under the general powers of the agency instead of under a specific state law.

In this case, the adopted rules do not meet any of these applicability requirements. First, the adopted rules are specifically required to implement SB 1354. Second, the adopted rules do not exceed a requirement of state law, because they are being adopted to implement SB 1354. Third, the rules do not exceed an express 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. Fourth, the commission does not adopt these rules solely under the general powers of the agency, but rather under the authority of SB 1354, which directs the commission to implement rules under TWC, Chapter 26. These rules do not meet the criteria for a major environmental rule as defined by Texas Government Code, §2001.0225.

The commission solicited public comment on the draft regulatory impact analysis in the March 24, 2006, issue of the *Texas Register* (31 TexReg 2395). No comments were received on the draft regulatory impact analysis.

TAKINGS IMPACT ASSESSMENT

The commission evaluated this rulemaking action and performed an analysis of whether this action would constitute a takings under Texas Government Code, Chapter 2007. The adopted new rules in Chapter 37 clarify financial assurance requirements for quarries located in the John Graves Scenic Riverway. The promulgation and enforcement of the rules will not affect private real property in a

manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The adopted rules also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Consequently, this rulemaking does not meet the definition of a takings under Texas Government Code, §2007.002(5). Therefore, the adopted rules will not constitute a takings under Texas Government Code, Chapter 2007.

The commission solicited public comment on the takings impact assessment in the March 24, 2006, issue of the *Texas Register* (31 TexReg 2397). No comments were received on the takings impact assessment.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rulemaking and found that the rules are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the adopted rules are not subject to the Texas Coastal Management Program.

PUBLIC COMMENT

A public hearing on the proposed rules was held in Mineral Wells on April 6, 2006, at 6:30 p.m. at the Mineral Wells City Hall Annex, Council Chambers, 115 Southwest First Street. Written comments were received from the Brazos River Conservation Coalition (BRCC) and Jackson Sjoberg, McCarthy

& Wilson, L.L.P. (McCarthy) on behalf of multiple parties including one individual, the Rocking “W” Ranch, and the BRCC. The comments generally concerned technical issues.

RESPONSE TO COMMENTS

BRCC commented that the insurance company providing coverage for financial assurance per §37.9215(b) should be licensed in Texas rather than in one or more states as the proposal indicated.

The commission agrees that requiring the insurer to be either licensed in Texas or eligible to provide insurance as an excess or surplus lines insurer in Texas would improve the rule by making the insurer subject to Texas regulations rather than the rules of another state, which may have unfamiliar requirements. To affect this change, the commission, at adoption, deleted the phrase “in one or more states” and replaced it with “in Texas” in subsection (b) of §37.9215.

BRCC also expressed concern about the financial test proposed in §37.9225 and the corporate guarantee proposed in §37.9235 since these “self-insuring” mechanisms represent the greatest risk that private funds would not be available to fund any necessary cleanup and/or restoration. Specifically, it urged the commission to require available assets of the owner/operator at least exceed the current cost estimates, review whether a \$10 million tangible net worth was sufficient, and look at the historical success/failure of these mechanisms in other agency programs. McCarthy further stated that the commission should abandon financial test and corporate guarantee options in favor of letters of credit and insurance.

The commission disagrees that the financial test needs to be amended or abandoned. The structure of the financial test adopted under these rules is based upon the financial test developed and adopted by the United States Environmental Protection Agency in 1982 for the industrial hazardous waste program. Along with other financial ratios, the test requires the owner/operator to have audited financial statements reflecting a tangible net worth exceeding both \$10 million and at least six times the amount of environmental liabilities assured through use of the financial test. The test is designed to be a predictor of the likelihood of bankruptcy and allow the owner/operator to obtain another financial assurance mechanism prior to bankruptcy. While it has been used most extensively in the industrial hazardous waste program, it is an available mechanism in an additional seven programs at TCEQ. To date, no failures of the test have been noted at TCEQ. Accordingly, the commission has made no changes to the proposed rules in response to these comments.

SUBCHAPTER W: FINANCIAL ASSURANCE FOR QUARRIES

**§§37.9160, 37.9165, 37.9170, 37.9175, 37.9180, 37.9185, 37.9190, 37.9195, 37.9200, 37.9205,
37.9210, 37.9215, 37.9220, 37.9225, 37.9230, 37.9235, 37.9240**

STATUTORY AUTHORITY

The new sections are adopted under TWC, §5.013, which establishes the general jurisdiction of the commission over other areas of responsibility as assigned to the commission under the TWC and other laws of the state; §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction; §5.103 and §5.105, which authorize the commission to adopt rules and policies necessary to carry out its responsibilities and duties under TWC, §5.013; §5.120, which states that the commission shall administer the law so as to promote the judicious use and maximum conservation and protection of the quality of the environment and the natural resources of the state; §26.011, which provides the commission with authority to adopt any rules necessary to carry out its powers, duties, and policies and to protect water quality in the state; and §26.027, which authorizes the commission to issue permits and amendments to permits for the discharge of waste or pollutants into or adjacent to water in the state. Rulemaking authority is expressly granted to the commission to adopt rules under TWC, Chapter 26, as amended by SB 1354, §2.

The adopted new rules implement SB 1354, which creates TWC, Chapter 26, new Subchapter M. SB 1354, §2, expressly requires the commission to adopt rules adequate to protect the water resources in a water quality protection area for inclusion in any authorization, including an individual or general permit.

§37.9160. Applicability.

This subchapter applies to an owner or operator required to provide financial assurance under Chapter 311 of this title (relating to Watershed Protection). This subchapter does not apply to state or federal governmental entities whose debts and liabilities are the debts and liabilities of a state or the United States. This subchapter establishes requirements and mechanisms for demonstrating financial assurance for reclamation and restoration.

§37.9165. Definitions.

Definitions for terms that appear throughout this subchapter may be found in this section, in Subchapter A of this chapter (relating to General Financial Assurance Requirements), as well as Chapter 311, Subchapter H of this title (relating to Regulation of Quarries in the John Graves Scenic Riverway), except where the following terms are used in this subchapter, the following definition applies: **Current cost estimate**--The amount of financial assurance required under Chapter 311, Subchapter H of this title.

§37.9170. Financial Assurance Requirements for Reclamation and Restoration.

(a) In addition to the requirements of this subchapter, owners and operators required to demonstrate financial assurance for reclamation or restoration must comply with §§37.141, 37.151, and 37.161 of this title (relating to Increase in Current Cost Estimate, Decrease in Current Cost

Estimate, and Establishment of a Standby Trust) and Subchapter A of this chapter (relating to General Financial Assurance Requirements), except:

(1) §37.21 of this title (relating to Wording and Approval of Mechanisms);

(2) §37.31 of this title (relating to Submission of Documents);

(3) §37.52 of this title (relating to Use of a Universal Financial Assurance Mechanism for Multiple Facilities and Program Areas); and

(4) §37.161 of this title.

(b) The owner or operator of each facility required by this chapter to provide financial assurance for reclamation or restoration must establish financial assurance in an amount no less than the current cost estimate.

(c) The mechanisms submitted for compliance with this subchapter must be worded as they appear in this subchapter. The executive director shall determine the acceptability of the mechanisms submitted.

(d) An owner or operator required by this subchapter to provide financial assurance must submit an originally signed financial assurance mechanism with the application for a general or

individual permit required under Chapter 311 of this title (relating to Watershed Protection). The signed financial assurance mechanism must be effective at the time it is submitted.

(e) Owners or operators may use a single financial assurance mechanism as specified in this subchapter for both reclamation and restoration. The amount of the funds available through the mechanism must be no less than the sum of funds that would be available if a separate mechanism had been established and maintained for each individual purpose.

(f) The owner or operator of a facility required by this subchapter to provide financial assurance for reclamation or restoration shall provide continuous financial assurance until the executive director provides written consent to terminate in accordance with §37.61 of this title (relating to Termination of Mechanisms).

(g) The executive director may call on the financial assurance mechanism(s) when an owner or operator who is required to comply with this chapter has:

- (1) failed to perform reclamation or restoration when required;
- (2) failed to provide an alternate financial assurance mechanism, when required; or
- (3) failed to provide continuous financial assurance coverage.

(h) An owner or operator who uses a surety bond or an irrevocable letter of credit to satisfy the requirements of this subchapter shall establish a standby trust. The standby trust must meet the requirements of §37.161 of this title except that the wording of a standby trust agreement must follow §37.9190 of this title (relating to Trust Fund Wording) and the requirements indicated in §37.9185 of this title (relating to Trust Fund Requirements) rather than the citations reflected in §37.161 of this title.

§37.9175. Financial Assurance Mechanisms for Reclamation.

Owners and operators subject to this subchapter may use any of the following financial assurance mechanisms to demonstrate financial assurance for reclamation:

- (1) a trust agreement as specified in §37.9185 of this title (relating to Trust Fund Requirements);
- (2) a surety bond guaranteeing payment as specified in §37.9195 of this title (relating to Surety Bond Guaranteeing Payment Requirements);
- (3) an irrevocable standby letter of credit as specified in §37.9205 of this title (relating to Irrevocable Standby Letter of Credit Requirements);

(4) insurance as specified in §37.9215 of this title (relating to Insurance Requirements);

(5) a financial test as specified in §37.9225 of this title (relating to Financial Test Requirements); or

(6) a corporate guarantee as specified in §37.9235 of this title (relating to Corporate Guarantee Requirements).

§37.9180. Financial Assurance Requirements for Restoration.

Owners and operators subject to this subchapter may use any of the following financial assurance mechanisms to demonstrate financial assurance for restoration:

(1) a trust agreement as specified in §37.9185 of this title (relating to Trust Fund Requirements);

(2) a surety bond guaranteeing payment as specified in §37.9195 of this title (relating to Surety Bond Guaranteeing Payment Requirements);

(3) an irrevocable standby letter of credit as specified in §37.9205 of this title (relating to Irrevocable Standby Letter of Credit Requirements);

(4) insurance as specified in §37.9215 of this title (relating to Insurance Requirements);

(5) a financial test as specified in §37.9225 of this title (relating to Financial Test Requirements); or

(6) a corporate guarantee as specified in §37.9235 of this title (relating to Corporate Guarantee Requirements).

§37.9185. Trust Fund Requirements.

(a) An owner or operator may satisfy the requirements of financial assurance by establishing a fully funded trust that conforms to the requirements of this subchapter and by submitting an originally signed duplicate of the executed trust agreement to the executive director.

(b) The trustee must be an entity that has the authority to act as a trustee and whose trust operations are regulated and examined by a federal or state agency.

(c) The wording of the trust agreement must be identical to the wording specified in §37.9190(a) of this title (relating to Trust Agreement Wording), including a formal certification of acknowledgment as specified in §37.9190(b) of this title.

(d) Schedule A of the trust agreement as specified in §37.9190(a) of this title must be updated within 60 days after an approved change in the amount of the current cost estimate.

(e) A fully funded trust requires that the initial payment into the trust fund be at least equal to the current cost estimate, or when a combination of mechanisms are used in accordance with §37.41 of this title (relating to Use of Multiple Financial Assurance Mechanisms), the initial payment plus the amount of the combined mechanism(s) must be at least equal to the current cost estimate. A receipt from the trustee for the initial payment must be submitted by the owner or operator to the executive director with the originally signed duplicate of the trust agreement.

(f) After the initial payment for a fully funded trust, whenever the current cost estimate changes, the owner or operator must compare the new estimate with the trustee's most recent annual valuation of the trust fund. If the value of the fund is less than the amount of the new estimate, the owner or operator, within 30 days after the change in the current cost estimate, must either deposit an amount into the fund so that its value after this deposit at least equals the amount of the current cost estimate, or obtain an additional financial assurance mechanism as specified in this subchapter to cover the difference.

(g) If the value of the trust fund is greater than the total amount of the current cost estimate, the owner or operator may submit a written request to the executive director for release of the amount in excess of the current cost estimate.

(h) Within 60 days after receiving a request from the owner or operator for release of funds as specified in subsection (g) of this section, the executive director shall instruct the trustee to release to the owner or operator such funds as the executive director specifies in writing.

(i) An owner or operator or any other person authorized by the executive director to perform reclamation at the quarry or restoration related to the quarry, may request reimbursement expenditures for reclamation at the quarry or restoration related to the quarry by submitting itemized bills to the executive director. The request shall include an explanation of the expenses and all applicable itemized bills. The owner or operator may request reimbursements for partial reclamation or restoration only if sufficient funds are remaining in the trust fund to cover the maximum remaining costs for reclamation at the quarry or restoration related to the quarry. After receiving bills for reclamation or restoration activities, the executive director shall instruct the trustee to make reimbursement in such amounts as the executive director specifies in writing, if the executive director determines that the partial or final reclamation or restoration expenditures are in accordance with the approved reclamation or restoration plan activities, or are otherwise justified. If the executive director has reason to believe that the cost of reclamation at the quarry or restoration related to the quarry will be greater than the value of the trust fund, the executive director may withhold reimbursement of such amounts as deemed prudent until it is determined, in accordance with Subchapters A and B of this chapter (relating to General Financial Assurance Requirements and Financial Assurance Requirements for Closure, Post Closure, and Corrective Action) that the owner or operator is no longer required to maintain financial assurance for reclamation or restoration.

(j) If an owner or operator substitutes other financial assurance as specified in this section for all or part of the trust fund, the owner or operator may submit a written request to the executive director for release of the amount in excess of the current cost estimate covered by the trust fund.

§37.9190. Trust Agreement Wording.

(a) A trust agreement for reclamation or restoration, as specified in §37.9185 of this title (relating to Trust Fund Requirements), must be worded as specified in the Trust Agreement in this subsection, except that the instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.

Figure: 30 TAC §37.9190(a)

TRUST AGREEMENT

TRUST AGREEMENT, the "Agreement," entered into as of (date) by and between (name of the owner or operator), a (name of State) (insert "corporation," "partnership," "association," or "proprietorship"), the "Grantor," and (name of corporate trustee), (insert "incorporated in the State of _____" or "a national bank"), the "Trustee."

Whereas, the Texas Commission on Environmental Quality, "TCEQ," an agency of the State of Texas, has established certain regulations applicable to the Grantor, requiring that an owner or operator of a quarry(ies) shall provide assurance that funds will be available when needed for reclamation at the quarry or restoration related to the quarry.

Whereas, the Grantor has elected to establish a trust to provide all or part of such financial assurance for the quarry(ies) identified herein,

Whereas, the Grantor, acting through its duly authorized officers, has selected the Trustee to be the trustee under this agreement, and the Trustee is willing to act as trustee,

Now, therefore, the Grantor and the Trustee agree as follows:

Section 1. Definitions. As used in this Agreement:

(a) The term "Grantor" means the owner or operator who enters into this Agreement and any successors or assigns of the Grantor.

(b) The term "Trustee" means the Trustee who enters into this Agreement and any successor Trustee.

Section 2. Identification of Quarries and Cost Estimates. This Agreement pertains to the facilities and cost estimates identified on attached Schedule A (on Schedule A, for each quarry list the permit number, name, physical and mailing addresses, and the current cost estimate, or portions thereof, for which financial assurance is demonstrated by this Agreement. Identify for each current cost estimate the amount designated for reclamation at the quarry or restoration related to the quarry).

Section 3. Establishment of Fund. The Grantor and the Trustee hereby establish a trust fund, the "Fund," for the benefit of TCEQ. The Grantor and the Trustee intend that no third party have access to the Fund except as herein provided. The Fund is established initially as consisting of the property, which is acceptable to the Trustee, described in Schedule B attached hereto. Such property and any other property subsequently transferred to the Trustee is referred to as the Fund, together with all earnings and profits thereon, less any payments or distributions made by the Trustee pursuant to this Agreement. The Fund shall be held by the Trustee, IN TRUST, as hereinafter provided. The Trustee shall not be responsible nor shall it undertake any responsibility for the amount or adequacy of, nor any duty to collect from the Grantor, any payments necessary to discharge any liabilities of the Grantor established by TCEQ.

Section 4. Payment from the Fund. The Trustee shall make payments from the Fund as the TCEQ executive director shall direct, in writing, to provide for the payment of the costs of reclamation at the quarry or restoration related to the quarry(ies) covered by this Agreement. The Trustee shall reimburse the Grantor or other persons as specified by the TCEQ executive director from the Fund for expenditures for reclamation at the quarry or restoration related to the quarry in such amounts as the TCEQ executive director shall direct in writing. In addition, the Trustee shall refund to the Grantor such amounts as the TCEQ executive director specifies in writing. Upon refund, such funds shall no longer constitute part of the Fund as defined herein.

Section 5. Payments Comprising the Fund. Payments made to the Trustee for the Fund shall consist of cash or securities acceptable to the Trustee.

Section 6. Trustee Management. The Trustee shall invest and reinvest the principal and income of the Fund and keep the Fund invested as a single fund, without distinction between principal and income, in accordance with general investment policies and guidelines which the Grantor may communicate in writing to the Trustee from time to time, subject, however, to the provisions of this Section. In investing, reinvesting, exchanging, selling, and managing the Fund, the Trustee shall

discharge his duties with respect to the trust fund solely in the interest of the beneficiary and with the care, skill, prudence, and diligence under the circumstances then prevailing which persons of prudence, acting in a like capacity and familiar with such matters, would use in the conduct of an enterprise of a like character and with like aims; except that:

(i) Securities or other obligations of the Grantor, or any other owner or operator of the facilities, or any of their affiliates as defined in the Investment Company Act of 1940, as amended, 15 U.S.C. 80a-2(a), shall not be acquired or held unless they are securities or other obligations of the Federal or a State government;

(ii) The Trustee is authorized to invest the Fund in time or demand deposits of the Trustee, to the extent insured by an agency of the Federal or State government; and

(iii) The Trustee is authorized to hold cash awaiting investment or distribution uninvested for a reasonable time and without liability for the payment of interest thereon.

Section 7. Commingling and Investment. The Trustee is expressly authorized in its discretion:

(a) To transfer from time to time any or all of the assets of the Fund to any common, commingled, or collective trust fund created by the Trustee in which the Fund is eligible to participate, subject to all of the provisions thereof, to be commingled with the assets of other trusts participating therein; and

(b) To purchase shares in any investment company registered under the Investment Company Act of 1940, 15 U.S.C. 80a-1 et seq., including one which may be created, managed, underwritten, or to which investment advice is rendered or the shares of which are sold by the Trustee. The Trustee may vote shares in its discretion.

Section 8. Express Powers of Trustee. Without in any way limiting the powers and discretion conferred upon the Trustee by the other provisions of this Agreement or by law, the Trustee is expressly authorized and empowered:

(a) To sell, exchange, convey, transfer, or otherwise dispose of any property held by it, by public or private sale. No person dealing with the Trustee shall be bound to see to the application of the purchase money or to inquire into the validity or expediency of any such sale or other disposition;

(b) To make, execute, acknowledge, and deliver any and all documents of transfer and conveyance and any and all other instruments that may be necessary or appropriate to carry out the powers herein granted;

(c) To register any securities held in the Fund in its own name or in the name of a nominee and to hold any security in bearer form or in book entry, or to combine certificates representing such securities with certificates of the same issue held by the Trustee in other fiduciary capacities, or to deposit or arrange for the deposit of such securities in a qualified central depository even though, when

so deposited, such securities may be merged and held in bulk in the name of the nominee of such depository with other securities deposited therein by another person, or to deposit or arrange for the deposit of any securities issued by the United States Government, or any agency or instrumentality thereof, with a Federal Reserve bank, but the books and records of the Trustee shall at all times show that all such securities are part of the Fund;

(d) To deposit any cash in the Fund in interest-bearing accounts maintained or savings certificates issued by the Trustee, in its separate corporate capacity, or in any other banking institution affiliated with the Trustee, to the extent insured by an agency of the Federal or State government; and

(e) To compromise or otherwise adjust all claims in favor of or against the Fund.

Section 9. Taxes and Expenses. All taxes of any kind that may be assessed or levied against or in respect of the Fund and all brokerage commissions incurred by the Fund shall be paid from the Fund. All other expenses incurred by the Trustee in connection with the administration of this Trust, including fees for legal services rendered to the Trustee, the compensation of the Trustee to the extent not paid directly by the Grantor, and all proper charges and disbursements of the Trustee shall be paid from the Fund.

Section 10. Annual Valuations. The Trustee shall annually, at least 30 days prior to the anniversary date of establishment of the Fund, furnish to the Grantor and to the TCEQ executive director a statement confirming the value of the Trust. Any securities in the Fund shall be valued at market value as of no more than 60 days prior to the anniversary date of establishment of the Fund. The failure of the Grantor to object in writing to the Trustee within 90 days after the statement has been furnished to the Grantor and the TCEQ executive director shall constitute a conclusively binding assent by the Grantor, barring the Grantor from asserting any claim or liability against the Trustee with respect to matters disclosed in the statement.

Section 11. Advice of Counsel. The Trustee may from time to time consult with counsel, who may be counsel to the Grantor, with respect to any question arising as to the construction of this Agreement or any action to be taken hereunder. The Trustee shall be fully protected, to the extent permitted by law, in acting upon the advice of counsel.

Section 12. Trustee Compensation. The Trustee shall be entitled to reasonable compensation for its services as agreed upon in writing from time to time with the Grantor.

Section 13. Successor Trustee. The Trustee may resign or the Grantor may replace the Trustee, but such resignation or replacement shall not be effective until the Grantor has appointed a successor trustee and this successor accepts the appointment. The successor trustee shall have the same powers and duties as those conferred upon the Trustee hereunder. Upon the successor trustee's acceptance of the appointment, the Trustee shall assign, transfer, and pay over to the successor trustee the funds and properties then constituting the Fund. If for any reason the Grantor cannot or does not act in the event of the resignation of the Trustee, the Trustee may apply to a court of competent jurisdiction for the appointment of a successor trustee or for instructions. The successor trustee shall

specify the date on which it assumes administration of the trust in a writing sent to the Grantor, the TCEQ executive director, and the present Trustee by certified mail ten days before such change becomes effective. Any expenses incurred by the Trustee as a result of any of the acts contemplated by this Section shall be paid as provided in Section 9.

Section 14. Instructions to the Trustee. All orders, requests, and instructions by the Grantor to the Trustee shall be in writing, signed by such persons as are designated in the attached Exhibit A or such other designees as the Grantor may designate by amendment to Exhibit A. The Trustee shall be fully protected in acting without inquiry in accordance with the Grantor's orders, requests, and instructions. All orders, requests, and instructions by the TCEQ executive director to the Trustee shall be in writing, signed by the executive director or the executive director's designee, and the Trustee shall act and shall be fully protected in acting in accordance with such orders, requests, and instructions. The Trustee shall have the right to assume, in the absence of written notice to the contrary, that no event constituting a change or a termination of the authority of any person to act on behalf of the Grantor or TCEQ hereunder has occurred. The Trustee shall have no duty to act in the absence of such orders, requests, and instructions from the Grantor and/or TCEQ, except as provided for herein.

Section 15. Amendment of Agreement. This Agreement may be amended by an instrument in writing executed by the Grantor, the Trustee, and the TCEQ executive director, or by the Trustee and the TCEQ executive director if the Grantor ceases to exist.

Section 16. Irrevocability and Termination. Subject to the right of the parties to amend this Agreement as provided in Section 15, this Trust shall be irrevocable and shall continue until terminated at the written agreement of the Grantor, the Trustee, and the TCEQ executive director, or by the Trustee and the TCEQ executive director if the Grantor ceases to exist. Upon termination of the Trust, all remaining trust property, less final trust administration expenses, shall be delivered to the Grantor.

Section 17. Immunity and Indemnification. The Trustee shall not incur personal liability of any nature in connection with any act or omission, made in good faith, in the administration of this Trust, or in carrying out any directions by the Grantor or the TCEQ executive director issued in accordance with this Agreement. The Trustee shall be indemnified and saved harmless by the Grantor or from the Trust Fund, or both, from and against any personal liability to which the Trustee may be subjected by reason of any act or conduct in its official capacity, including all expenses reasonably incurred in its defense in the event the Grantor fails to provide such defense.

Section 18. Choice of Law. This Agreement shall be administered, construed, and enforced according to the laws of the State of Texas.

Section 19. Interpretation. As used in this Agreement, words in the singular include the plural and words in the plural include the singular. The descriptive headings for each Section of this Agreement shall not affect the interpretation or the legal efficacy of this Agreement.

In Witness Whereof the parties have caused this Agreement to be executed by their respective officers duly authorized and their corporate seals to be hereunto affixed and attested as of the date first above written. The parties below certify that the wording of this Agreement is identical to the wording specified in 30 Texas Administrative Code §37.9190(a) as such regulations were constituted on the date first above written.

(Signature of Grantor)

By (Title)

Attest:

(Title)

(Seal)

(Signature of Trustee)

By (Title)

Attest:

(Title)

(Seal)

(b) The Certification of Acknowledgment in this subsection is the certification of acknowledgment that must accompany the trust agreement for a trust fund as specified in §37.9185 of this title.

Figure: 30 TAC §37.9190(b)

CERTIFICATION OF ACKNOWLEDGMENT

State of _____
County of _____

On this (date), before me personally came (owner or operator) to me known, who, being by me duly sworn, did depose and say that she/he resides at (address), that she/he is (title) of (corporation), the corporation described in and which executed the above instrument; that she/he knows the seal of said corporation; that the seal affixed to such instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that she/he signed her/his name thereto by like order.

(signature of Notary Public)

§37.9195. Surety Bond Guaranteeing Payment Requirements.

(a) An owner or operator may satisfy the requirements of financial assurance by obtaining a surety bond that conforms to the requirements of this subchapter and by submitting an originally signed surety bond to the executive director.

(b) The surety company issuing the bond must, at a minimum, be among those listed as acceptable sureties on federal bonds in Circular 570 of the United States Department of the Treasury.

(c) The wording of the surety bond must be identical to the wording specified in §37.9200 of this title (relating to Payment Bond Wording).

(d) The bond must guarantee that the owner or operator shall:

(1) fund the standby trust fund as required in §37.161 of this title (relating to Establishment of a Standby Trust) in an amount equal to the penal sum of the bond before the beginning of final reclamation at the quarry or restoration related to the quarry;

(2) fund the standby trust fund as required in §37.161 of this title in an amount equal to the penal sum within 15 days after a written directive by the executive director or commission to begin reclamation or restoration, or within 15 days after an order to begin final reclamation or restoration is issued by the United States district court or other court of competent jurisdiction; or

(3) provide alternate financial assurance as specified in this subchapter, and obtain the executive director's written approval of the assurance provided, within 90 days after receipt by both the owner or operator and the executive director of a notice of cancellation of the bond from the surety.

(e) Under the terms of the bond, the surety shall become liable on the bond obligation when the owner or operator fails to perform as guaranteed by the bond.

(f) The penal sum of the bond must be in an amount at least equal to the current cost estimate, except as provided in §§37.41, 37.51, or 37.9170 of this title (relating to Use of Multiple Financial Assurance Mechanisms, Use of a Financial Assurance Mechanism for Multiple Facilities, and Financial Assurance Requirements for Reclamation and Restoration).

(g) Under the terms of the bond, the surety may cancel the bond by sending notice of cancellation by certified mail to the owner or operator and to the executive director. Cancellation may not occur, however, during the 120 days beginning on the date of receipt of the notice of cancellation by both the owner or operator and the executive director, as evidenced by the return receipts.

§37.9200. Payment Bond Wording.

A surety bond guaranteeing payment for reclamation or restoration, as specified in §37.9195 of this title (relating to Surety Bond Guaranteeing Payment Requirements), must be worded as specified in the Payment Bond in this section, except that the instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.

Figure: 30 TAC §37.9200

PAYMENT BOND

Date bond executed: _____.

Effective Date: _____.

Principal: (legal name and business address of owner and operator)_____.

Type of Organization: (insert "individual," "joint venture," "partnership," or "corporation,")_____.

State of Incorporation:_____.

Surety(ies): (name(s) and business address(es))_____.

Permit number, name, physical and mailing addresses, and reclamation or restoration amount(s) for each quarry guaranteed by this bond (indicate reclamation or restoration amounts separately for each quarry): _____.

Total penal sum of bond: \$ _____.

Surety's bond number: _____.

Know All Persons By These Presents, That we, the Principal and Surety(ies) hereto are firmly bound to the Texas Commission on Environmental Quality, hereinafter called TCEQ, in the above penal sum for the payment of which we bind ourselves, our heirs, executors, administrators, successors, and assigns jointly and severally; provided that, where the Surety(ies) are corporations acting as co-sureties, we, the Sureties, bind ourselves in such sum "jointly and severally" only for the purpose of allowing a joint action or actions against any or all of us, and for all other purposes each Surety binds itself, jointly and severally with the Principal, for the payment of such sum only as is set forth opposite the name of such Surety, but if no limit of liability is indicated, the limit of liability shall be the full amount of the penal sum.

Whereas said Principal is required, under the appropriate program area, to comply with permit requirements in order to own or operate each quarry identified above, and

Whereas said Principal is required to provide financial assurance for reclamation at the quarry or restoration related to the quarry, as a condition of the permit or other applicable requirements, and

Whereas said Principal shall establish a standby trust fund as is required when a surety bond is used to provide such financial assurance;

Now, therefore, the conditions of the obligation are such that if the Principal shall faithfully, before the beginning of reclamation or restoration at or related to each quarry identified above, fund into the standby trust fund the amount(s) identified above for the quarry,

Or, if the Principal shall fund into the standby trust fund in such amount(s) within 15 days after a written directive is issued by the executive director or commission to begin reclamation or restoration or or within 15 days after an order to begin final reclamation or restoration is issued by the United States district court or other court of competent jurisdiction,

Or, if the Principal shall provide alternate financial assurance, as specified in 30 Texas Administrative Code, Chapter 37 (relating to Financial Assurance) and obtain the TCEQ executive director's written approval of such assurance, within 90 days after the date notice of cancellation is received by both the Principal and the TCEQ executive director from the Surety(ies), then this obligation shall be null and void; otherwise it is to remain in full force and effect.

The Surety(ies) shall become liable on this bond obligation only when the Principal has failed to fulfill the conditions described above. Upon notification by the TCEQ executive director that the Principal has failed to perform as guaranteed by this bond, the Surety(ies) shall place funds in the

amount guaranteed for the quarry(ies) into the standby trust fund as directed by the TCEQ executive director.

The liability of the Surety(ies) shall not be discharged by any payment or succession of payments hereunder, unless and until such payment or payments shall amount in the aggregate to the penal sum of the bond, but in no event shall the obligation of the Surety(ies) hereunder exceed the amount of said penal sum.

The Surety(ies) may cancel the bond by sending notice of cancellation by certified mail to the Principal and to the TCEQ executive director provided, however, that cancellation shall not occur during the 120 days beginning on the date of receipt of the notice of cancellation by both the Principal and the TCEQ executive director, as evidenced by the return receipts.

The Principal may terminate this bond by sending written notice to the Surety(ies), provided, however, that no such notice shall become effective until the Surety(ies) receive(s) written authorization for termination of the bond by the TCEQ executive director.

(The following paragraph is an optional rider that may be included but is not required.)

Principal and Surety(ies) hereby agree to adjust the penal sum of the bond yearly so that it guarantees a new reclamation or restoration amount, provided that the penal sum does not increase by more than 20 percent in any one year, and no decrease in the penal sum takes place without the written permission of the TCEQ executive director.

In Witness Whereof, the Principal and Surety(ies) have executed this Payment Bond and have affixed their seals on the date set forth above.

The persons whose signatures appear below hereby certify that they are authorized to execute this surety bond on behalf of the Principal and Surety(ies) and that the wording of this surety bond is identical to the wording specified in 30 Texas Administrative Code §37.9200 as such regulations were constituted on the date this bond was executed.

Principal

(Signature(s)) _____

(Name(s)) _____

(Title(s)) _____

(Corporate seal)

Corporate Surety(ies)

(Name and address) _____

State of Incorporation: _____
Liability limit: \$ _____

(Signature(s)) _____

(Name(s) and title(s)) _____

(Corporate Seal)

(For every co-surety, provide signature(s), corporate seal, and other information in the same manner as for Surety above.)

Bond premium: \$ _____

§37.9205. Irrevocable Standby Letter of Credit Requirements.

(a) An owner or operator may satisfy the requirements of financial assurance by obtaining an irrevocable standby letter of credit that conforms to the requirements of this subchapter and submit an originally signed irrevocable standby letter of credit to the executive director.

(b) The financial institution issuing the irrevocable standby letter of credit shall be an entity that has the authority to issue irrevocable standby letters of credit and whose operations are regulated and examined by a federal or state agency.

(c) The wording of the irrevocable standby letter of credit must be identical to the wording specified in §37.9210 of this title (relating to Irrevocable Standby Letter of Credit Wording).

(d) The originally signed irrevocable standby letter of credit must be accompanied by a letter from the owner or operator referring to the irrevocable standby letter of credit by number, issuing institution, and date, and providing the following information for each quarry:

(1) the permit number;

(2) name and physical and mailing addresses of the quarry; and

(3) the amount of funds assured for reclamation or restoration by the irrevocable standby letter of credit.

(e) The letter of credit must be irrevocable and issued for a period of at least one year. The irrevocable standby letter of credit must provide that the expiration date shall be automatically extended for a period of at least one year unless, at least 120 days before the current expiration date, the issuing institution notifies both the owner or operator and the executive director by certified mail of a decision not to extend the expiration date. Under the terms of the irrevocable standby letter of credit, the 120 days shall begin on the date when both the owner or operator and the executive director have received the notice, as evidenced by the return receipts.

(f) The irrevocable standby letter of credit must be issued in an amount at least equal to the current cost estimate, except as provided in §§37.41, 37.51, or 37.9170 of this title (relating to Use of

Multiple Financial Assurance Mechanisms, Use of a Financial Assurance Mechanism for Multiple Facilities, and Financial Assurance Requirements for Reclamation and Restoration).

(g) Following a determination that the owner or operator has failed to perform reclamation or restoration in accordance with the reclamation or restoration plan, other applicable requirements of the permit(s), or written directive by the executive director or commission or that the owner or operator has failed to perform reclamation at the quarry or restoration related to the quarry in accordance with the permit, other applicable requirements, or written directive by the executive director or commission, the executive director may draw on the irrevocable standby letter of credit.

(h) If the owner or operator does not establish alternate financial assurance as specified in this subchapter and obtain written approval of such alternate assurance from the executive director within 90 days after receipt by both the owner or operator and the executive director of a notice from the issuing institution that it has decided not to extend the irrevocable standby letter of credit beyond the current expiration date, the executive director shall draw on the irrevocable standby letter of credit. The executive director may delay the drawing if the issuing institution grants an extension of the term of the letter of credit. During the last 30 days of any such extension, the executive director shall draw on the irrevocable standby letter of credit if the owner or operator has failed to provide alternate financial assurance as specified in this subchapter and obtain written approval of such assurance from the executive director.

(i) Upon termination, in accordance with §37.61 of this title (relating to Termination of Mechanisms), the executive director shall return the irrevocable standby letter of credit to the issuing institution.

§37.9210. Irrevocable Standby Letter of Credit Wording.

An irrevocable standby letter of credit for reclamation or restoration, as specified in §37.9205 of this title (relating to Irrevocable Standby Letter of Credit Requirements), must be worded as specified in the Irrevocable Standby Letter of Credit in this section, except that the instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.

Figure: 30 TAC §37.9210

IRREVOCABLE STANDBY LETTER OF CREDIT

Executive Director

Texas Commission on Environmental Quality

Dear Sir or Madam:

We hereby establish our Irrevocable Standby Letter of Credit No. _____ in your favor, at the request and for the account of (owner's or operator's name and address) up to the aggregate amount of (in words) U.S. dollars \$ _____, available upon presentation of

(1) Your sight draft, bearing reference to this letter of credit No. _____, and

(2) Your signed statement reading as follows: "I certify that the amount of the draft is payable pursuant to regulations issued under authority of 30 Texas Administrative Code Chapter 37."

This letter of credit is effective as of (date) and shall expire on (date at least 1 year later), but such expiration date shall be automatically extended for a period of (at least 1 year) on (date) and on each successive expiration date, unless, at least 120 days before the current expiration date, we notify both you and (owner's or operator's name) by certified mail that we have decided not to extend this letter of credit beyond the current expiration date. In the event you are so notified, any unused portion of the credit shall be available upon presentation of your sight draft for 120 days after the date of receipt by both you and (owner's or operator's name), as shown on the signed return receipts.

Whenever this letter of credit is drawn on under and in compliance with the terms of this credit, we shall duly honor such draft upon presentation to us.

We certify that the wording of this letter of credit is identical to the wording specified in 30 Texas Administrative Code §37.9210 as such regulations were constituted on the date shown immediately below.

(Signature(s) and title(s) of official(s) of issuing institution) _____

(Date) _____

This credit is subject to (insert "the most recent edition of the Uniform Customs and Practice for Documentary Credits, published by the International Chamber of Commerce," or "the Uniform Commercial Code").

§37.9215. Insurance Requirements.

(a) An owner or operator may satisfy the requirements of financial assurance by obtaining insurance that conforms to the requirements of this subchapter and submitting an originally signed certificate to the executive director.

(b) At a minimum, the insurer must be licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in Texas.

(c) The wording of the certificate of insurance must be identical to the wording specified in §37.9220 of this title (relating to Certificate of Insurance Wording).

(d) The insurance policy must be issued for a face amount at least equal to the current cost estimate for reclamation or restoration, except when a combination of mechanisms are used in accordance with §37.41 and §37.9170 of this title (relating to Use of Multiple Financial Assurance Mechanisms and Financial Assurance Requirements for Reclamation and Restoration). Actual payments by the insurer shall not change the face amount, although the insurer's future liability shall be lowered by the amount of the payments.

(e) The insurance policy must guarantee that funds shall be available to provide for reclamation at the quarry or restoration related to the quarry. The policy shall also guarantee that once reclamation at the quarry or restoration related to the quarry begins, the issuer shall be responsible for paying out funds, up to an amount equal to the face amount of the policy, upon the direction of the executive director, to such party or parties as the executive director specifies.

(f) An owner or operator or any other person authorized to perform reclamation or restoration may request reimbursement for expenditures for reclamation at the quarry or restoration related to the quarry by submitting itemized bills to the executive director. The request shall include an explanation of the expenses and all applicable itemized bills. The owner or operator may request reimbursement for partial reclamation at the quarry or restoration related to the quarry only if the remaining value of the policy is sufficient to cover the maximum remaining costs of reclamation at the quarry or

restoration related to the quarry. Within 60 days after receiving bills for reclamation at the quarry or restoration related to the quarry, the executive director shall determine whether the reclamation or restoration expenditures are in accordance with the approved reclamation or restoration activities or are otherwise justified, and if so, shall instruct the insurer to make reimbursement in such amounts as the executive director specifies in writing. If the executive director has reason to believe that the maximum cost of reclamation or restoration will be greater than the face amount of the policy, the executive director may withhold reimbursement of such amounts as deemed prudent until the executive director determines, in accordance with this subchapter, that the owner or operator is no longer required to maintain financial assurance requirements for reclamation at the quarry or restoration related to the quarry of the facility. If the executive director does not instruct the insurer to make such reimbursements, the executive director shall provide the owner or operator with a detailed written statement of reasons.

(g) The owner or operator shall maintain the policy in full force and effect until the executive director consents to termination of the policy. Failure to pay the premium, without substitution of alternate financial assurance as specified in this subchapter, shall constitute a violation of these regulations, warranting such remedy as the executive director deems necessary. Such violation shall be deemed to begin upon receipt by the executive director of a notice of future cancellation, termination, or failure to renew due to nonpayment of the premium, rather than upon the date of expiration of the policy.

(h) The policy must provide that the insurer may not cancel, terminate, or fail to renew the policy except for failure to pay the premium. The automatic renewal of the policy shall, at a minimum, provide the insured with the option of renewal at the face amount of the expiring policy. If there is a failure to pay the premium, the insurer may elect to cancel, terminate, or fail to renew the policy by sending notice by certified mail to the owner or operator and the executive director. Cancellation, termination, or failure to renew may not occur, however, during 120 days beginning with the date of receipt of the notice by both the executive director and the owner or operator, as evidenced by the return receipts.

(i) Cancellation, termination, or failure to renew may not occur and the policy shall remain in full force and effect in the event that on or before the date of expiration:

(1) the executive director deems the quarry abandoned;

(2) the permit expires, is terminated, is revoked, or a new or renewal permit is denied;

(3) reclamation or restoration is ordered by the executive director of the commission or by a United States district court or other court of competent jurisdiction;

(4) the owner or operator is named as debtor in a voluntary or involuntary proceeding under Title 11 (Bankruptcy), United States Code; or

(5) the premium due is paid.

(j) Each policy must contain a provision allowing assignment of the policy to a successor owner or operator. Such assignment may be conditional upon consent of the insurer, provided such consent is not unreasonably refused.

§37.9220. Certificate of Insurance Wording.

A certificate of insurance for reclamation or restoration, as specified in §37.9215 of this title (relating to Insurance Requirements), must be worded as specified in the Certificate of Insurance in this section, except that the instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.

Figure: 30 TAC §37.9220

CERTIFICATE OF INSURANCE

Name and Address of Insurer (herein called the "insurer"): _____
_____.

Name and Physical and Mailing Addresses of Insured (herein called the "insured"): _____
_____.

Quarries covered: (list for each quarry: The permit number, name, physical and mailing addresses, and the amount of insurance for reclamation or restoration, (these amounts for all quarries covered must total the face amount shown below).) _____.

Face Amount: _____

Policy Number: _____

Effective Date: _____

The insurer hereby certifies that it has issued to the Insured the policy of insurance identified above to provide financial assurance for reclamation at the quarry(ies) or restoration related to the quarry(ies), identified above. The Insurer further warrants that such policy conforms in all respects with the requirements of 30 Texas Administrative Code §37.9215 (relating to Insurance Requirements), as applicable and as such regulations were constituted on the date shown immediately below. It is agreed that any provision of the policy inconsistent with such regulations is hereby amended to eliminate such inconsistency.

Whenever requested by the executive director of the Texas Commission on Environmental Quality, the Insurer agrees to furnish to the executive director a duplicate original of the policy listed above, including all endorsements thereon.

I hereby certify that the wording of this certificate is identical to the wording specified in 30 Texas Administrative Code §37.9220 as such regulations were constituted on the date shown immediately below.

(Authorized signature of Insurer) _____

(Name of person signing) _____

(Title of person signing) _____

(Signature of witness or notary:) _____

(Date) _____

§37.9225. Financial Test Requirements.

(a) An owner or operator may satisfy the requirements of financial assurance by establishing a financial test that conforms to the requirements of this subchapter.

(b) To pass this test, the owner or operator must meet the criteria of either paragraph (1) or (2) of this subsection.

(1) The owner or operator shall have:

(A) two of the following three ratios: a ratio of total liabilities to net worth less than 2.0; a ratio of the sum of net income plus depreciation, depletion, and amortization to total liabilities greater than 0.1; and a ratio of current assets to current liabilities greater than 1.5;

(B) net working capital and tangible net worth each at least six times the sum of the current cost estimates, liability coverage requirements, and any other financial assurance obligations under the Texas Commission on Environmental Quality (TCEQ) or other federal or state environmental regulations assured by a financial test;

(C) tangible net worth of at least \$10 million; and

(D) assets located in the United States amounting to at least 90% of the owner's or operator's total assets or at least six times the sum of the current cost estimates, liability coverage requirements, and any other financial assurance obligations under the TCEQ or other federal or state environmental regulations assured by a financial test.

(2) The owner or operator shall have:

(A) a current rating for his most recent bond issuance of AAA, AA, A, or BBB as issued by Standard and Poor's or Aaa, Aa, A, or Baa as issued by Moody's;

(B) tangible net worth at least six times the sum of the current cost estimates, liability coverage requirements, and any other financial assurance obligations under the TCEQ or other federal or state environmental regulations assured by a financial test;

(C) tangible net worth of at least \$10 million; and

(D) assets located in the United States amounting to at least 90% of the owner's or operator's total assets or at least six times the sum of the current cost estimates, liability coverage requirements, and any other financial assurance obligations under the TCEQ or other federal or state environmental regulations assured by a financial test.

(c) To demonstrate that the requirements of the test are being met, the owner or operator shall submit the following items to the executive director:

(1) a letter signed by the owner's or operator's chief financial officer worded identically to the wording specified in §37.9230 of this title (relating to Financial Test Wording);

(2) a copy of the owner's or operator's independently audited year-end financial statements for the latest fiscal year including the "unqualified opinion" of the auditor;

(3) a special report from the owner's or operator's independent certified public accountant to the owner or operator stating that:

(A) the accountant has compared the data that the letter from the chief financial officer specifies as having been derived from the independently audited, year-end financial statements for the latest fiscal year with the amounts in such financial statements; and

(B) in connection with that procedure:

(i) such amounts were found to be in agreement; or

(ii) no matters came to the attention of the accountant that caused the accountant to believe that the specified data should be adjusted;

(4) a written verification of the current bond rating from the applicable bond rating agency, if the owner or operator is using Alternative II of the letter signed by the owner's or operator's chief financial officer specified in §37.9230 of this title; and

(5) a schedule identifying intangible assets used to calculate tangible net worth.

(d) After the initial submission of items specified in subsection (c) of this section, the owner or operator shall send updated information to the executive director within 90 days after the close of each

succeeding fiscal year. This information shall consist of all items specified in subsection (c) of this section.

(e) If the owner or operator no longer meets the requirements of subsection (b) of this section, a notice shall be sent to the executive director of intent to establish alternate financial assurance as specified in this subchapter. The notice must be sent by certified mail within 90 days after the end of the fiscal year for which the year-end financial data shows that the owner or operator no longer meets the requirements. The owner or operator shall provide the alternate financial assurance within 120 days after the end of such fiscal year.

(f) The executive director may, based on a reasonable belief that the owner or operator may no longer meet the requirements of subsection (b) of this section, require reports of financial condition at any time from the owner or operator in addition to those specified in subsection (c) of this section. If the executive director finds, on the basis of such reports or other information, that the owner or operator no longer meets the requirements of subsection (b) of this section, the owner or operator shall provide alternate financial assurance as specified in this subchapter within 30 days after notification of such a finding.

(g) The executive director may disallow use of this test on the basis of qualifications in the opinion expressed in the independent certified public accountant's report on examination of the owner's or operator's financial statements. An adverse opinion or disclaimer of opinion shall be cause for disallowance. The executive director shall evaluate other qualifications on an individual basis. The

owner or operator shall provide alternate financial assurance as specified in this subchapter within 30 days after notification of the disallowance.

(h) Owners and operators choosing to meet the financial assurance requirement by using a financial test agree to fund the amount demonstrated for restoration within 60 days of written notification by the executive director to any party or parties specified by the executive director.

§37.9230. Financial Test Wording.

A letter from the chief financial officer for restoration or reclamation, as specified in §37.9225 of this title (relating to Financial Test Requirements), must be worded as specified in the Financial Test in this section, except that the instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.

Figure: 30 TAC §37.9230

FINANCIAL TEST
LETTER FROM CHIEF FINANCIAL OFFICER

(Address to TCEQ executive director)

I am the Chief Financial Officer of (name and address of firm.) This letter is in support of this firm's use of the financial test to demonstrate financial assurance for closure, post closure, corrective action, restoration or reclamation as specified in 30 Texas Administrative Code (TAC) Chapter 37 (relating to Financial Assurance). (Fill out the following five paragraphs. For each facility or quarry include: the name, permit number, program area (hazardous waste, municipal solid waste, quarry etc.), physical and mailing addresses, and current cost estimate. Identify for each current cost estimate the amount

designated for closure, post closure, corrective action, restoration, or reclamation. If your firm has no facilities that belong in a particular paragraph, write "None" in the space indicated.)

1. This firm is the owner or operator of the following facilities in Texas for which financial assurance for closure, post closure, corrective action, restoration, or reclamation costs is being demonstrated through a financial test specified in 30 TAC Chapter 37. The current cost estimate covered by the test is shown for each facility or quarry: _____.
2. This firm guarantees, through a corporate guarantee specified in 30 TAC Chapter 37, the cost for closure, post closure, corrective action, restoration, or reclamation costs of the following facilities owned or operated by the guaranteed party. The current cost estimates so guaranteed are shown for each facility or quarry: _____. The firm identified above is (the direct or higher-tier parent corporation of the owner or operator, or engaged in a substantial business relationship with the owner or operator).
3. In States where TCEQ is not administering the financial requirements of 30 TAC Chapter 37, this firm, as owner, operator, or guarantor, is demonstrating financial assurance for the closure, post closure, corrective action or restoration, or reclamation costs of the following facilities through the use of a test equivalent to a financial test specified in 30 TAC Chapter 37. The current cost estimates covered by such a test are shown for each facility or quarry: _____.
4. The firm identified above owns or operates the following facilities for which financial assurance for closure, post closure, corrective action, restoration, or reclamation costs, is not demonstrated through the financial test or any other financial assurance mechanisms specified in 30 TAC Chapter 37 or equivalent State mechanisms to TCEQ, a federal agency, or another state. The current cost estimates not covered by such financial assurance are shown for each facility or quarry: _____.
5. This firm is the owner or operator or guarantor of the following facilities for which financial assurance is being demonstrated under other EPA regulations or state programs authorized by EPA through a financial test or guarantee. The following amounts have not been included in Paragraphs 1- 4. (For each program area identify: the facility or quarry name, physical and mailing address, federal or state equivalent regulations, permit number, and current cost estimate. Identify for each current cost estimate the amount designated for closure, post closure, corrective action, restoration, or reclamation costs).
 - (a) Municipal solid waste management facilities under 30 TAC Chapter 330, 40 CFR Part 258 or equivalent \$ _____
 - (b) Underground injection control facilities under 30 TAC Chapter 331, 40 CFR Part 144 or equivalent \$ _____
 - (c) Petroleum underground storage tank facilities under 30 TAC Chapter 334, and 40 CFR Part 280 or equivalent \$ _____

- (d) PCB storage facilities under 40 CFR Part 761 or equivalent \$ _____
 - (e) Hazardous waste treatment, storage, and disposal facilities under 30 TAC Chapter 335, 40 CFR Parts 264 and 265 or equivalent \$ _____
 - (f) Quarry facilities under 30 TAC Chapter 311 \$ _____
 - (g) Additional environmental obligations not shown above \$ _____
- Total (a)-(f) \$ _____

This (owner, operator, or guarantor) (has or has not) received an adverse opinion, a disclaimer of opinion, or a "going concern" qualification from an independent auditor on its financial statements for the latest completed fiscal year.

This firm (is required or is not required) to file a Form 10K with the Securities and Exchange Commission (SEC) for the latest fiscal year. The fiscal year of this firm ends on (month, day). The figures for the following items marked with an asterisk are derived from this firm's independently audited, year-end financial statements for the latest completed fiscal year, ended (date).

(Fill in Alternative I if the criteria of 30 TAC §37.9225(b)(1) are used. Fill in Alternative II if the criteria of 30 Texas Administrative Code §37.9225(b)(2) are used.)

ALTERNATIVE I

- (1) (a) Sum of current closure, post closure, corrective action, reclamation and restoration costs
(total of all cost estimates shown in the five paragraphs above) \$ _____
- (b) Amount of annual aggregate liability coverage to be demonstrated by a financial test or corporate guarantee \$ _____
- (c) Total of lines (a) and (b) \$ _____
- *2. Total liabilities (if any portion of the closure, post closure, corrective action, restoration, or reclamation costs(s), is included in total liabilities, you may deduct the amount of that portion from this line and add that amount to lines 3 and 4) \$ _____
- *3. Tangible net worth \$ _____
- *4. Net Worth \$ _____
- *5. Current assets \$ _____
- *6. Current liabilities \$ _____

- *7. Net working capital (line 5 minus line 6) \$ _____
- *8. The sum of net income plus depreciation, depletion and amortization \$ _____
- *9. Total assets in U. S. (required only if less than 90% of firm's assets are located in U.S.)
\$ _____

Indicate either "yes" or "no" to the following questions.

- 10. Is line 3 at least \$10 million? (yes/no)
- 11. Is line 3 at least 6 times line 1(c)? (yes/no)
- 12. Is line 7 at least 6 times line 1(c)? (yes/no)
- *13. Are at least 90% of firm's assets located in the U.S.?
If not, complete line 14 (yes/no)
- 14. Is line 9 at least 6 times line 1(c)? (yes/no)
- 15. Is line 2 divided by line 4 less than 2.0? (yes/no)
- 16. Is line 8 divided by line 2 greater than 0.1? (yes/no)
- 17. Is line 5 divided by line 6 greater than 1.5? (yes/no)

ALTERNATIVE II

- 1. (a) Sum of current closure, post closure, corrective action, restoration, and reclamation costs
(total of all cost estimates shown in the five paragraphs above) \$ _____
- (b) Amount of annual aggregate liability coverage to be demonstrated by a financial test or corporate guarantee \$ _____
- (c) Total of lines (a) and (b) \$ _____
- 2. Current bond rating of most recent issuance of this firm and name of rating service

- 3. Date of issuance of bond _____
- 4. Date of maturity of bond _____

- *5. Tangible net worth (if any portion of the closure, post closure care, corrective action, reclamation or restoration cost estimate(s), is included in "total liabilities" on your firm's financial statements, you may add the amount of that portion to this line) \$ _____
- *6. Total assets in U.S. (required only if less than 90% of firm's assets are located in U.S.)

Indicate either "yes" or "no" to the following questions.

- 7. Is line 5 at least \$10 million? (yes/no)
- 8. Is line 5 at least 6 times line 1(c)? (yes/no)
- *9. Are at least 90% of the firm's assets located in the U.S.?
If not, complete line 10 (yes/no)
- 10. Is line 6 at least 6 times line 1(c)? (yes/no)

I hereby certify that the wording of this letter is identical to the wording specified in 30 Texas Administrative Code §37.9230 as such regulations were constituted on the date shown immediately below.

(Signature) _____

(Name) _____

(Title) _____

(Date) _____

§37.9235. Corporate Guarantee Requirements.

(a) An owner or operator may satisfy the requirements of financial assurance for reclamation or restoration by obtaining a written guarantee, hereafter referred to as "corporate guarantee," which conforms to the requirements of this subchapter.

(b) The guarantor shall be the direct or higher-tier parent corporation of the owner or operator or a corporation with a substantial business relationship with the owner or operator. The guarantor must meet the requirements for owners or operators as specified in §37.9225 of this title (relating to Financial Test Requirements). The guarantor must comply with the terms of the corporate guarantee.

(c) The wording of the corporate guarantee must be identical to the wording specified in §37.9240 of this title (relating to Corporate Guarantee Wording). The corporate guarantee shall accompany the items sent to the executive director as specified in §37.9225(c) of this title.

(d) If the guarantor has a substantial business relationship with the owner or operator, in addition to the requirements specified in this chapter for the financial test and corporate guarantee, the guarantor will submit a description of the substantial business relationship and the value received in consideration of the guarantee; an original or certified original copy of the Resolution by the Board of Directors or a certified letter from the chief financial officer, authorizing the corporate guarantee on behalf of the entity; an original or certified original copy of the Resolution by the Board of Directors authorizing the formation or acquisition of the guaranteed entity; an organizational chart that shows the relationship between the two entities; and the partnership agreement or other agreements, articles, or bylaws that set out the formation, structure, and operation of the guaranteed entity. After the initial submission of these items to demonstrate a substantial business relationship, if there has been no change in the substantial business relationship, the chief financial officer may submit a letter attesting that there has been no change.

(e) The terms of the corporate guarantee shall provide that:

(1) if the owner or operator fails to perform reclamation at the quarry or restoration related to the quarry covered by the corporate guarantee in accordance with the permits and other applicable requirements or written directive by the executive director or commission whenever required to perform such reclamation or restoration, the guarantor shall do so or establish a trust fund as specified in §37.9185 of this title (relating to Trust Fund Requirements) in the name of the owner or operator in the amount of the current cost estimate;

(2) the corporate guarantee will remain in force unless the guarantor sends notice of termination by certified mail to the owner or operator and the executive director and the owner or operator has obtained, and the executive director has approved, alternative financial assurance; and

(3) if the owner or operator fails to provide alternate financial assurance as specified in this subchapter and obtain the written approval of such alternate assurance from the executive director within 90 days after receipt by both the owner or operator and the executive director of a notice of termination of the corporate guarantee from the guarantor, the guarantor will provide such alternate financial assurance in the name of the owner or operator.

§37.9240. Corporate Guarantee Wording.

A corporate guarantee for reclamation or restoration, as specified in §37.9235 of this title (relating to Corporate Guarantee Requirements), must be worded as specified in the Corporate Guarantee in this section, except that the instructions in parenthesis are to be replaced with the relevant information and the parenthesis deleted.

Figure: 30 TAC §37.9240

CORPORATE GUARANTEE

Guarantee made this (date) by (name of guaranteeing entity), a business corporation organized under the laws of the State of (insert name of State), herein referred to as guarantor. This guarantee is made to the Texas Commission on Environmental Quality (TCEQ) on behalf of (owner or operator) of (business address), which is (one of the following: "our subsidiary;" or "an entity with which guarantor has a substantial business relationship, as defined in 30 TAC §37.11 (relating to Definitions)."

RECITALS

1. Guarantor meets or exceeds the financial test criteria and agrees to comply with the reporting requirements for guarantors as specified in 30 Texas Administrative Code (TAC) §37.9225 (relating to Financial Test Requirements) and §37.9235 (relating to Corporate Guarantee Requirements).
2. (Owner or operator) owns or operates the following quarry(ies) covered by this guarantee: (List for each quarry: permit number, name, and physical and mailing addresses. Indicate for each whether guarantee is for reclamation or restoration).
3. "Reclamation or Restoration plans" as used below refer to the plans maintained as required for the reclamation at or restoration related to the quarries as identified above.
4. For value received from (owner or operator), (describe consideration and dollar amount), guarantor guarantees to TCEQ that in the event that (owner or operator) fails to perform (reclamation at the above quarries or restoration related to the above quarries in accordance with the reclamation or restoration plans, permits, other applicable requirements and written directive by the executive director or commission whenever required to do so, the guarantor shall do so or establish a trust fund as specified in 30 TAC §37.9185 (relating to Trust Fund Requirements), in the name of (owner or operator) in the amount of the current cost estimate.

5. Guarantor agrees that if, at the end of any fiscal year before termination of this guarantee, the guarantor fails to meet the financial test criteria, guarantor shall send within 90 days, by certified mail, notice to the TCEQ executive director and to (owner or operator) that the guarantor intends to provide alternate financial assurance as specified in 30 TAC Chapter 37 (relating to Financial Assurance), as applicable, in the name of (owner or operator). Within 120 days after the end of such fiscal year, the guarantor shall establish such financial assurance unless (owner or operator) has done so.
6. The guarantor agrees to notify the TCEQ executive director by certified mail, of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), United States Code, naming guarantor as debtor, within 10 days after commencement of the proceeding.
7. Guarantor agrees that within 30 days after being notified by the TCEQ executive director of a determination that guarantor no longer meets the financial test criteria or is disallowed from continuing as a guarantor of (reclamation or restoration), guarantor shall establish alternate financial assurance as specified in 30 TAC Chapter 37, Subchapter W (relating to Financial Assurance Mechanisms for Closure, Post Closure, and Corrective Action), in the name of (owner or operator) unless (owner or operator) has done so.
8. Guarantor agrees to remain bound under this guarantee notwithstanding any or all of the following: amendment or modification of the reclamation or restoration plans, or restoration requirements, amendment or modification of the permit, the extension or reduction of the time of performance, or any other modification or alteration of an obligation of the owner or operator.
9. Guarantor agrees to remain bound under this guarantee for so long as (owner or operator) must comply with the applicable financial assurance requirements of 30 TAC Chapter 37 for the above-listed facilities, except as provided in paragraph 10 of this agreement.
10. Guarantor may terminate this guarantee by sending notice by certified mail to the TCEQ executive director and to (owner or operator), provided that this guarantee may not be terminated unless and until (the owner or operator) obtains, and the TCEQ executive director approves, alternate financial assurance.
11. Guarantor agrees that if (owner or operator) fails to provide alternate financial assurance as specified in 30 TAC Chapter 37, as applicable, and obtain written approval of such assurance from the TCEQ executive director within 90 days after a notice of termination by the guarantor is received by the TCEQ executive director from guarantor, guarantor shall provide such alternate financial assurance in the name of the (owner or operator).
12. Guarantor expressly waives notice of acceptance of this guarantee by the TCEQ or by (owner or operator). Guarantor also expressly waives notice of amendments or modifications of the reclamation plans, restoration plans, or restoration requirements, and of amendments or modifications of the permit(s).

I hereby certify that the wording of this guarantee is identical to the wording specified in 30 Texas Administrative Code §37.9240 as such regulations were constituted on the date first above written.

Effective date: _____

(Name of guarantor) _____

(Authorized signature for guarantor) _____

(Type name of person signing) _____

(Title of person signing) _____

Signature of witness or notary: _____