

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts new §§333.31-333.43, concerning the certification of persons as innocent owner/operators who are immune from liability for contamination on their property from a source not located on or at the property. Section 333.40 is adopted with changes to the proposed text as published in the May 1, 1998, issue of the *Texas Register* (23 TexReg 4207). Sections 333.33-333.39, 333.41-333.43 are adopted without changes and will not be republished.

EXPLANATION OF THE ADOPTED RULES

The commission is adopting the new rules for the Innocent Owner/Operator Program (IOP) created by new Health and Safety Code, Chapter 361, Subchapter V (IOP statute), passed by the 75th Texas Legislature. The new statute, which took effect on September 1, 1997, was created to provide an immunity from liability and a certification process for owners/operators of property that has become contaminated as a result of a release or migration of contaminants from an off-site source. To qualify for the immunity from liability, innocent owner/operators must grant reasonable access for purposes of investigation or remediation to persons designated by the agency. An agreement for reasonable access may provide for, among other things, reasonable compensation for access to the property. The IOP, and this reference to reasonable compensation, is not intended to address such issues as permanent damages including damages due to remaining contamination after remediation, damages incurred due to deed notice or recordation, or any other damage caused by the contamination. To be eligible for certification as an innocent owner/operator, a person must apply to the agency. If the agency determines that the person is an innocent owner/operator, the agency will issue a certificate acknowledging such. The certificate evidences the person's immunity from liability under the Texas

Water Code and the Health and Safety Code for investigation, monitoring, remediation, or corrective or other response action regarding the contamination from the off-site source. Because the IOP statute took effect on September 1, the IOP is an operating program. The IOP application and draft certificate became available in September 1997. The commission is proposing these new rules to enhance the implementation of the IOP.

New §333.31 states that the authority to issue, deny or revoke a certificate under the IOP is delegated by the commission to the executive director pursuant to Texas Water Code, §5.122. The commission did not receive any comments on this section, and the section is adopted as proposed.

New §333.32 states that the requirements for the IOP are found in Subchapter B of this chapter and in the Texas Health and Safety Code, Chapter 361, Subchapter V. Two copies of all documents are required so that one copy may be on file in the agency's central records. The commission did not receive any comments on this section, and the section is adopted as proposed.

New §333.33 contains terms and definitions for the IOP. Four definitions were proposed in this section to add clarity to the program: "Innocent owner/operator certificate;" "Portion of a tract;" "Site;" and "Source of release of contamination." The commission did not receive any comments on this section, and the section is adopted as proposed.

New §333.34 sets forth the eligibility requirements for an Innocent Owner/Operator Certificate. Persons eligible for the IOP are innocent owners/operators under Texas Health and Safety Code,

§361.751 and §361.752(b). Section 361.751 defines innocent owners/operators as owners or operators of property that has become contaminated as a result of a release or migration of contaminants from a source or sources not located on or at the property and who did not cause or contribute to the source or sources of the contamination. Section 361.752(b) provides eligibility for a person that acquired a portion of a tract on which the source of a release of contaminants is located from the person that caused the release, if the person acquiring the portion of the tract did not know or have reason to know of the contamination after appropriate inquiry consistent with good commercial or customary practice. Under the new section, persons electing to participate in the IOP must submit an application and pay all agency costs associated with the review of the application and the issuance of an innocent owner/operator certificate. Persons are not required to be owners or operators of the site at the time they apply for a certificate; however, the executive director will not issue a certificate until proof of ownership or operation is provided. This will allow prospective owners/operators to participate in the IOP. The commission did not receive any comments on this section, and the section is adopted as proposed.

New §333.35 contains the requirements for the application. All applications must be accompanied by a \$1000 application fee. As noted earlier, the application form is currently available from the executive director. Along with the application form, applicants must submit general information concerning the owner/operator of the site, a site investigation report, a legal description of the site and the name of the site owner/operator, a statement affirming innocent owner/operator status, and other background information requested by the executive director. The section sets forth criteria for the site investigation, notably information that demonstrates that the applicant is an innocent owner/operator. Section 333.35

also contains requirements for applications in the event that the sale, transfer, or change in ownership/operation will occur during the application review period or in the event a certified innocent owner/operator will be selling, transferring, or changing operations to another person who desires to be certified as an innocent owner/operator (i.e., a future transaction). The section is adopted as proposed.

New §333.36 requires the applicant to notify adjacent property owners within 14 days of the submittal of the application. The notice will identify the applicant and will announce the availability of reports relating to the site. Adjacent property owners will have 14 days after receipt of the notice to submit additional information to assist the executive director in reviewing the application. Prior to reviewing any information supplied by adjacent owners, the executive director will notify the applicant and will give the applicant the opportunity to review the information. The applicant will be responsible for paying the costs incurred for agency review of the information unless the applicant notifies the executive director within 14 days of receiving the notice that it intends to withdraw the application.

The commission did not receive any comments on this section, and the section is adopted as proposed.

New §333.37 allows the applicant to withdraw the application by giving advance written notice to the executive director. Application fees for expenses not already incurred or obligated will be refunded.

The commission did not receive any comments on this section, and the section is adopted as proposed.

New §333.38 sets forth the standards for issuance of the Innocent Owner/Operator Certificate. Prior to issuance of the certificate, the applicant and any coapplicant must submit an affidavit affirming that they are innocent owners/operators. If the executive director determines that the applicant and/or

coapplicants are innocent owners/operators, then the executive director will issue an innocent owner/operator certificate that acknowledges protection from liability provided by Texas Health and Safety Code, §361.752. The certificate shall specify the contaminants and environmental media for which the executive director has confirmed the person's innocent owner/operator status. If a prospective owner or operator applies for the certificate, the rule provides that the certificate will not be issued until the person submits written evidence of ownership or operation. If control measures are required, proposed §333.38(g) requires control measures to be described in a restrictive covenant to be filed with the real property records in the county in which the site is located. The executive director will issue a certificate only after receiving proof that the restrictive covenant has been filed.

Section 333.38 also allows subsequent owners and operators to apply for a certificate in the event of a sale, transfer, or change in ownership or operation. The applicant and any co-applicant in such a case must demonstrate to the commission that the current certificate holder, since the issuance of the certificate, has not caused or contributed to the source of the off-site contamination and has not discharged or released to the site any contaminants covered by the certificate. This demonstration may be made either by affidavit from the current certificate holder or by other documentation if an affidavit cannot be obtained. The executive director, in its discretion, may require a site investigation report as part of this demonstration. Section 333.38 is adopted as proposed.

New §333.39 sets forth the procedures for the executive director's denial of a certificate. The executive director may deny an Innocent Owner/Operator Certificate if the application is not complete;

the applicant does not provide sufficient information for the executive director to determine that the person is an innocent owner/operator; information obtained since the application was filed, including information submitted by adjacent property owners, demonstrates that the applicant is not an innocent owner/operator; or the owner/operator does not provide reasonable access. If a certificate is denied, the executive director will state the reasons for denial. The commission did not receive any comments on this section, and the section is adopted as proposed.

New §333.40 provides that the executive director may revoke the innocent owner/operator certificate if the person holding the certificate: acquired the certificate by fraud, misrepresentation, or knowing failure to disclose material; does not properly maintain institutional and/or engineering controls where placement of such controls was required for certificate issuance; or does not pay all commission costs within 180 days of certificate issuance. Additionally, the certificate may be revoked by the executive director if new information demonstrates that the certificate holder is not an innocent owner/operator. However, the commission, rather than the executive director, may revoke a certificate if reasonable access is denied. The commission did not receive any comments on this section, but did make a change to the section based on a comment regarding proposed §333.38. The final rule states that the certificate remains valid until revoked by the executive director or, when reasonable access is denied, by the commission. In addition, the section clarifies which circumstances may lead to revocation by the executive director and which circumstances may lead to revocation by the commission.

New §333.41 discusses access. The certificate holder must grant reasonable access to persons designated by the executive director for purposes of investigation and remediation of the site as provided by Texas Health and Safety Code, §361.752(c). In addition, the proposed section clarifies

that the commission, its employees, contractors, and agents may access the site. This section is adopted as proposed.

New §333.42 states that the attorney general will bring an action to recover the state's cost associated with reviewing the application if the person has not paid the amount due within 31 days after the date that the person receives notice that the costs are due. The commission did not receive any comments on this section, and the section is adopted as proposed.

New §333.43 states that the executive director will annually calculate the agency's costs to administer the IOP and determine a rate for cost recovery. The commission will publish the notice of the rate in the *Texas Register* on an annual basis. The commission did not receive any comments on this section, and the section is adopted as proposed.

FINAL REGULATORY IMPACT ANALYSIS

The commission has reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code §2001.0225 and has determined that the rulemaking is not subject to §2001.0225 because: 1) it does not meet the definition of a "major environmental rule" as defined in the act, and 2) additionally, it does not meet any of the four applicability requirements listed in §2001.0225(a). While the rule does seek to protect the environment and reduce risks to human health from environmental exposure through the possible placement of institutional and other control measures, the specific intent of the rule is to exclude from liability owners and operators of property that has become contaminated from sources not located on the property. Any such placement will only be undertaken in conjunction

with certification of immunity from liability issued at the request of the owner/operator. Accordingly, the rulemaking will not have a material, adverse effect on the economy. Moreover, the IOP removes liability for innocent owners/operators, which in turn encourages and expedites real estate transactions, and may also lead to brownfields redevelopment, which likewise could provide economic benefits.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these rules pursuant to Texas Government Code Annotated §2007.043. The specific purpose of the rules is to enhance the implementation of new Texas Health and Safety Code, Chapter 361, Subchapter V, which relates to the immunity from liability under the Texas Water Code and the Texas Health and Safety Code of innocent owners/operators. The rules will substantially advance this specific purpose by providing more detail for certain requirements and by establishing a clear administrative process for the preparation, submittal, and review of an Innocent Owner/Operator Application and issuance of an Innocent Owner/Operator Certificate. Promulgation and enforcement of these rules will not burden private real property which is the subject of the rules because the IOP will benefit owners/operators of private real property by providing immunity from liability under the Texas Water Code and the Texas Health and Safety Code for property contaminated by off-site sources.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

Title 31 Texas Administrative Code §505.11, relating to Actions and Rules Subject to the Coastal Management Program (CMP), requires the commission to evaluate proposed rules to ensure consistency with the CMP. The commission has reviewed this rulemaking for consistency with the CMP goals and

policies. The rulemaking does not consist of actions or rules subject to the CMP identified in §505.11(a)(6) and §505.11(b)(2) for the TNRCC; therefore, the proposed rule is not subject to the CMP.

HEARINGS AND COMMENTERS

The commission held a public hearing on the proposed rules on May 22, 1998 at 10:00 a.m. in TNRCC Building F, 2nd floor, Room 2210. No persons submitted comment on the proposed rules at the public hearing. The comment period for the proposed rules closed at 5:00 p.m. on June 1, 1998, and written comments were submitted by three commenters: Lloyd, Gosselink, Blevins, Rochelle, Baldwin, & Townsend, P.C. (Lloyd, Gosselink); Thompson & Knight; and the commission's Public Interest Counsel (PIC).

ANALYSIS OF TESTIMONY

GENERAL COMMENTS

Lloyd, Gosselink and Thompson & Knight generally supported the proposed rules, and the commenters further noted that rules should enhance the commission's continued efforts to accomplish the goals of State and Federal Brownfields initiatives. Lloyd, Gosselink specifically commented that the rules are sensible and straightforward regulations.

Concerning the concepts of "reasonable access" and "reasonable compensation," the PIC commented that it supports the statement in the preamble to the proposed rule that compensation for reasonable access is separate and distinct from such issues as permanent damages.

Thompson & Knight commented that a statutory change should be made to harmonize the Voluntary Cleanup Program (VCP) with the IOP so that a party be allowed to address liability issues related to on-site and off-site contamination using both programs at once.

The commission considers the programs to be harmonized so that on-site and off-site liability issues can be addressed simultaneously through both the VCP and the IOP. For example, the executive director has already issued certificates in several instances where the contamination to the source property and adjacent properties was addressed through the VCP while the responsible party assisted off-site affected innocent owner/operators with their IOP applications. This has resulted in cases where the source property and affected adjacent properties receive a VCP certificate releasing future buyers and lenders from liability while the adjacent landowners receive IOP certificates.

§333.35. APPLICATION.

Proposed §333.35(d) and (e) established requirements for the application in the event of a sale, transfer, or change in operation. The commission proposed allowing prospective owners or operators to be coapplicants in the event the sale, transfer or change occurs during the application review period. If the sale, transfer, or change in operation occurs after the issuance of the certificate, the commission proposed that the prospective owner or operator submit an updated application. Thompson & Knight suggested that the certificate "run with the land" rather than be limited to an individual owner or operator so that the program is more attractive to potential applicants. In addition, this would reduce the administrative burden on the agency.

The commission disagrees with the commenter. The statute on which the IOP is based, Health and Safety Code, Chapter 361, Subchapter V, relates to "persons" rather than "properties" or "sites" as the VCP statute does. Specifically, §361.751 states that an "Innocent owner or operator" means a person that is an owner or operator of property that has become contaminated as a result of a release or migration of contaminants from a source or sources not located on or at the property and did not cause or contribute to the source or sources of the contamination. Further, §361.753(a) states that, "a person may apply to the commission for a certificate confirming that the person is an innocent owner or operator." By contrast, certification under the VCP, Health and Safety Code §361.610(a)(2), is a certificate of completion confirming cleanup of the area of the site covered by the certificate. However, to the extent possible, the commission has attempted to address the issue of transferability of IOP certificates while ensuring that adequate information is available for the executive director to certify the innocence of a future owner or operator. This is done by allowing for coapplicants in §333.35(d) and providing for updated applications for subsequent owners or operators in §333.35(e).

§333.38. INNOCENT OWNER/OPERATOR CERTIFICATE.

In the preamble to the proposed rule, the commission requested comment on whether the rule should state that a certificate is valid until revoked. Both the PIC and Thompson & Knight submitted comment agreeing with the concept that the certificate is valid until revoked; however, the PIC does not agree that it needs to be stated in rule while Thompson & Knight argued that it should be in the rule to add certainty to the program.

The commission agrees that adding language to the proposed rule will add certainty and has added the statement to the adopted rule. However, the commission considers the change to be more appropriate in the section addressing revocation of the certificate, proposed §333.40. The certificate may be revoked by the commission with regard to denial of reasonable access or by the executive director in the circumstances listed in proposed §333.40(a); therefore, the change to the proposed rule addresses revocation by both the commission and the executive director.

Concerning proposed §333.38(g), Thompson & Knight commented that the rule should not require the filing of deed restrictions until after the IOP certificate has been issued. Rather, like the VCP, a certificate holder would be required to file the deed restrictions after the certificate is issued.

The commission disagrees with the commenter because the commission is concerned that it would be difficult to ensure that the necessary restrictions are placed in the deed records subsequent to the issuance of a certificate. However, the commission understands the commenter's concern that the owner could place a deed restriction on the property and then discover that the agency denied the certificate. To address this concern, for sites that will receive a IOP certificate, the executive director, at the applicant's request, will prepare a letter stating the agency's intent to issue an IOP certificate to the applicant upon the placement of the restrictions on the deed record.

§333.41. ACCESS.

Proposed §333.41(a) required an owner or operator to grant reasonable access to the site for purposes of investigation and remediation to persons designated by the executive director. The PIC noted that

although not specifically stated, it appears that revocation of certificate for denial of reasonable access would be sought in the context of an enforcement action initiated by the executive director. Therefore, the rules appear to allow the executive director and the commission flexibility in determining on a case-by-case basis whether a landowner is acting reasonably with respect to granting access. The PIC seeks assurances that when negotiations between a responsible party and an innocent owner or operator are at an impasse, the innocent owner or operator will not automatically be deemed the "unreasonable" party.

Through an interoffice memorandum, the commission has established a process to address claims that reasonable access has been denied. Under the first step, the person denied access must submit to the executive director a copy of the certified letter mailed to the owner or operator requesting access for purposes of investigation and/or remediation. In Step 2, the executive director will contact the owner or operator and attempt to persuade that person to allow access. If access is still denied, the executive director will notify the parties of the opportunity to use Alternative Dispute Resolution (ADR). At this point, the agency is attempting alternatives other than enforcement to encourage access, and the person denying access is not presumed to be the unreasonable party. If the owner or operator continues to deny access following discussions with the executive director and the parties refuse mediation or mediation has failed, the executive director will initiate Step 3 issuing a Notice of Violation (NOV) of Texas Water Code, §26.121. The NOV will require access within 30 days. If access is still denied after 30 days, the executive director will initiate an enforcement action under Step 4. With the issuance of the NOV, the agency is presuming that the owner or operator denying access is the unreasonable party. The owner or operator is considered the unreasonable party because the party seeking access is willing to remediate the contamination while the owner or operator is obstructing the remediation. Thus,

the owner or operator is presumed to be "cause, suffering, or allowing" contamination. However, the commission wishes to emphasize that the owner or operator has the opportunity during the executive director's preparation of the enforcement case to argue the merits of their position that they have been reasonable, and the executive director retains the discretion to not pursue an enforcement action against the party denying access and instead bring an enforcement action against the responsible party. If the enforcement action is pursued in the form of an enforcement order before the commission, the commission retains discretion in determining whether the owner or operator is allowing reasonable access. Finally, the commission notes this process is set forth in a memorandum which is subject to amendment. As the agency gains experience implementing the IOP, it may become necessary to alter the process or the assumptions in the process.

STATUTORY AUTHORITY

The new rules are adopted under the Texas Water Code, §5.103 and §26.011, which provide 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. The new rules are also adopted under the Texas Solid Waste Disposal Act, Texas Health and Safety Code, §361.017, and §361.024, which provide the commission the authority to regulate industrial solid waste and municipal hazardous wastes and all other powers necessary or convenient to carry out its responsibilities. The Texas Solid Waste Disposal Act, Texas Health and Safety Code, Subchapter V, sets forth statutory requirements specific to the immunity from liability of innocent owners and operators.

The new rules affect Texas Health and Safety Code, Chapter 361.

SUBCHAPTER B : INNOCENT OWNER/OPERATOR CERTIFICATION

§§333.31 - 333.43

§333.31. Delegation.

The authority to issue, deny or revoke a certificate under Chapter 361, Subchapter V, of the Texas Health and Safety Code is delegated by the commission to the executive director pursuant to Texas Water Code, Section 5.122.

§333.32. Requirements.

(a) The requirements of the innocent owner/operator certification are found in this Subchapter and in the Texas Health and Safety Code, Chapter 361, Subchapter V.

(b) The applicant shall submit two copies of all documents, one of which will be filed in the agency central records.

§333.33. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) **Innocent owner/operator certificate** - A certificate issued by the executive director or their designee which confirms that the person is an innocent owner/operator as defined in Texas Health and Safety Code, §361.751, or that the person is eligible for immunity under §361.752(b).

(2) **Portion of the tract** - A site which does not contain the source of the release of contamination but which is a subdivided section of a tract which contains the source of the release of contamination.

(3) **Site** - The property as described in the legal description provided in the innocent owner/operator application.

(4) **Source of release of contamination** - The property from which a release of contaminants originated.

§333.34. Eligibility for Innocent Owner/operator Certificate.

(a) The following persons are eligible to receive an innocent owner/operator certificate:

(1) a person defined as an innocent owner/operator in the Texas Health and Safety Code, §361.751(2); and

(2) a person that acquired a portion of the tract on which the source of a release of contaminants is located from the person that caused the release who meets the provisions of the Texas Health and Safety Code, §361.752(b).

(b) A person electing to participate in the innocent owner/operator program shall:

(1) complete an innocent owner/operator application as provided by Texas Health and Safety Code, §361.753;

(2) pay all agency costs associated with the review of the application and the issuance of the innocent owner/operator certificate; and

(3) agree to grant reasonable access to the site for purposes of investigation or remediation to a person designated by the executive director.

(c) A person is not required to be a current owner or operator of the site in order to apply for an innocent owner/operator certificate, but must provide proof of ownership or operation before a certificate can be issued.

§333.35. Application.

(a) A person who desires to obtain an innocent owner/operator certificate shall submit to the executive director an application and an application fee as prescribed by this section.

(b) An application submitted under this section shall:

(1) be on a form provided by the executive director;

(2) contain:

(A) general information concerning the owner/operator and the site;

(B) a site investigation report;

(C) a legal description of the site and the name of the site owner and/or operator, as appropriate, at the time of application submittal;

(D) a statement that the owner or operator has not caused or contributed to the off-site source or sources of contamination that have released or migrated onto the site and is otherwise eligible for an innocent owner/operator certificate; and

(E) other background information requested by the executive director.

(3) be accompanied by an application fee of \$1,000 payable to the Texas Natural Resource Conservation Commission.

(c) The site investigation report shall include the following:

(1) relevant information concerning the potential for human exposure to the release or migration of contaminants at the site;

(2) information concerning site contamination which demonstrates:

(A) that the site has become contaminated as a result of a release or migration of contaminants from a source or sources not located on or at the site, and

(B) that the person has not caused or contributed to the off-site source or sources of contamination which have released or migrated onto the site;

(3) a summary of all known historical and current site uses, including a description of areas and activities where potential on-site contaminant sources may be located;

(4) if a portion of the tract was acquired from the person that caused the release, then the person applying for the certification shall also provide information which demonstrates the following:

(A) the person acquired the portion of the tract after appropriate inquiry consistent with good commercial or customary practice, and

(B) after conducting this inquiry, the person did not know or have reason to know of the contamination at the time the person acquired the site;

(5) previously completed site investigation reports for the site within the possession or control of the applicant;

(6) a schedule for conducting any additional site investigation activities and/or the submittal of additional information that is necessary to complete the requirements of this subsection; and

(7) a description of any placement of institutional or engineering controls on the use of the site, proposed by the applicant, that are necessary to protect the public health.

(8) In those instances where there exists on the site an actual or potential source or sources of the same or similar contaminants to those that have been released or migrated from an off-

site source or sources, the applicant or other party at its option may conduct an investigation, remediation, or other response action with respect to the on-site source or sources and seek approval of that action through this section from the executive director.

(d) If a sale, transfer, or change in ownership or operation of the site will occur during the application review period for an innocent owner/operator certificate, the prospective owner or operator may be added to the application as a coapplicant with the current owner or operator. The following information regarding the coapplicant shall be included in the application:

(1) general information regarding the prospective owner or operator;

(2) a statement that the prospective owner or operator has not caused or contributed to the off-site source or sources of contamination that have been released or migrated onto the site and is otherwise eligible for an innocent owner/operator certificate; and

(3) other background information requested by the executive director.

(e) If an innocent owner/operator certificate holder contemplates a sale, transfer, or change in operation of the site and the prospective owner or operator desires receipt of an innocent owner/operator certificate, the certificate holder and/or the prospective owner or operator shall submit an updated application with the executive director. The updated application shall be accompanied by an application fee and shall:

(1) be on a form provided by the executive director;

(2) contain:

(A) a copy of the most recent innocent owner/operator certificate issued for the site;

(B) general information regarding the prospective owner or operator:

(C) a statement that the prospective owner or operator has not caused or contributed to the off-site source or sources of contamination that have been released or have migrated onto the site and is otherwise eligible for an innocent owner/operator certificate;

(D) a statement or other documentation which demonstrates that the certificate holder:

(i) has not, during the period since issuance of the most recent certificate, caused or contributed to the source or sources of off-site contamination that have been released or migrated onto the site;

(ii) has not, during the period since issuance of the most recent certificate, discharged or released on the site any contaminants covered by a prior certificate; and

(iii) remains otherwise eligible for an innocent owner/operator certificate;

(E) a legal description of the site and the name of the site's owner and/or operator, as appropriate, at the time of the updated application submittal;

(F) a summary of all known historical and current site uses since the most recent certificate was issued, including a description of areas and activities where potential on-site contaminant sources may be located;

(G) other background information requested by the executive director; and

(H) additional site investigation activities and additional information necessary to complete the requirements of this subsection when activities or land use since the most recent certificate was issued may have caused the discharge or release of contaminants covered by a prior certificate.

(f) By signing an application, the applicant agrees:

(1) pursuant to Texas Water Code, §5.122, that the executive director has the authority to issue, deny, or revoke a certificate; and

(2) to pay the agency all reasonable costs incurred in reviewing the applicant's innocent owner/operator application and in issuing the innocent owner/operator certificate.

(g) Any portion of the application fee not incurred or obligated in the review of the application and in the issuance of the innocent owner/operator certificate will be refunded.

(h) If an application is not complete, the executive director will provide the applicant with a list of all information needed to make the application complete and will allow the applicant an opportunity to submit the additional information.

§333.36. Information Provided by Adjacent Landowners/Operators.

(a) The applicant shall mail notice of the application by certified mail, return receipt requested, to property owners adjacent to the site within 14 days of application submittal on a form provided by the executive director. The notice will include the names of the person(s) who are seeking an innocent owner/operator certificate, and will explain that information and reports regarding the site are available for inspection and copying in the agency's files. The notice will also request that within 14 days of receipt of the notice, adjacent property owners submit to the executive director additional information which may assist the executive director in reviewing the innocent owner/operator application. The applicant shall submit copies of the delivered notice letter and the signed receipts to the executive director within 7 days of applicant's receipt of the signed receipts from the adjacent land owners. Notice to governmental entities shall be delivered to the chief clerk or city secretary.

(b) Prior to reviewing any information submitted by adjacent owners, the executive director will notify the applicant that information has been received and will provide the applicant an opportunity to review the information. Unless the applicant notifies the executive director within 14 days of receipt of this notice of applicants' intent to withdraw its application, the executive director will review the information submitted by adjacent owners, and the applicant will be responsible for paying the costs incurred by this review.

§333.37. Withdrawal of Application.

(a) The applicant may withdraw the application by giving advance written notice to the executive director. The remainder of the application fee not incurred or obligated in the review of the application will be refunded.

(b) Withdrawal of the application does not affect any right the executive director has under other law to recover costs.

§333.38. Innocent Owner/Operator Certificate.

(a) Prior to certificate issuance, the applicant and any coapplicant shall submit to the executive director an affidavit affirming that neither the applicant nor any coapplicant caused or contributed to the off-site source or sources of contamination that have been released or have migrated onto the site and is otherwise eligible for an innocent owner/operator certificate.

(b) In the case of a sale, transfer, or other change in the ownership or operation of the site, the applicant and any coapplicant shall submit to the executive director an affidavit from the certificate holder or, if an affidavit is unobtainable, other documentation prior to certificate issuance. The affidavit or other documentation shall affirm that the current certificate holder has not, during the period since issuance of the most recent certificate, caused or contributed to the source or sources of off-site contamination that have released or migrated onto the site; and during the period since issuance of the most recent certificate, has not discharged or released on the site any contaminants covered by a prior certificate; and is otherwise eligible for an innocent owner/operator certificate. The executive director, in its discretion, may require a site investigation report.

(c) If the executive director determines that a person is an innocent owner/operator based upon the application submitted pursuant to §333.35 of this title (relating to Application), and upon the affidavit(s) submitted by applicant(s) and/or the certificate holder, the executive director will issue the person an innocent owner/operator certificate.

(d) The innocent owner/operator certificate shall specify the contaminant(s) and the media for which the executive director has confirmed the applicant's innocent owner/operator status.

(e) The innocent owner/operator certificate will acknowledge the protection from liability provided by Texas Health and Safety Code, §361.752.

(f) If the application of a prospective owner or operator satisfies the requirements of §333.35 of this title, the executive director will issue an innocent owner/operator certificate to the prospective owner or operator only after the executive director has received proof of ownership or operation.

(g) Institutional or engineering controls for a site shall be described in a restrictive covenant in favor of the agency and the State of Texas to be filed in the real property records in the county in which the site is located. The executive director will issue an innocent owner/operator certificate only after the executive director has received proof of the filing of the restrictive covenant. In the event the applicant is an operator, the applicant must obtain written concurrence from the owner of the property before a restrictive covenant is filed in the real property records for that property.

§333.39. Denial of Certificate.

(a) The executive director may deny the issuance of a certificate under Texas Health and Safety Code, §361.753:

(1) if the application is not complete;

(2) the applicant does not provide sufficient information from which the executive director can determine the applicant's eligibility to receive an innocent owner/operator certificate under Texas Health and Safety Code, §361.753;

(3) information obtained since the application was filed demonstrates that the applicant is not an innocent owner or operator; or

(4) the owner/operator does not grant reasonable access as required by Texas Health and Safety Code, §361.752(c).

(b) If the executive director denies the certificate, the executive director will notify the person of the reasons for denial.

§333.40. Revocation of Certificate.

(a) The certificate shall remain valid until revoked.

(b) The executive director may revoke the innocent owner/operator certificate if

(1) the certificate holder:

(A) acquired the innocent owner/operator certificate by fraud, misrepresentation, or knowing failure to disclose material information;

(B) does not properly maintain institutional and/or engineering controls where the placement of such controls were required for certificate issuance; or

(C) does not pay all the agency costs described in §333.34(b)(2) of this title (relating to Eligibility for Innocent Owner/Operator Certificate) within 180 days of certificate issuance;
or

(2) new information demonstrates that the certificate holder is not an innocent owner or operator.

(c) Prior to revocation of a certificate by the executive director, the executive director will provide the certificate holder with a notice in writing of the facts alleged to warrant revocation. The certificate holder shall have 30 days after receipt of notice to demonstrate to the executive director that they are in compliance with all requirements of law for the retention of the certificate. The executive director will make a determination whether to revoke the certificate and will provide such determination in writing to the certificate holder. A decision of the executive director to revoke a certificate is final and appealable under Chapter 361, Subchapter K, of the Texas Health and Safety Code.

(d) The commission may revoke a certificate if the certificate holder unreasonably denies access as required by §333.41 of this title (relating to Access). The decision to revoke a certificate shall be made following a finding by the commission that reasonable access has been denied. Such finding shall be based on facts and/or evidence presented to the commission through an enforcement action.

§333.41. Access.

(a) An owner or operator must grant reasonable access to the site for purposes of investigation and remediation to persons designated by the executive director.

(b) The commission, its employees, contractors, and agents may access the site pursuant to §361.752(d) or any other relevant provision of the Texas Health and Safety Code, or the Texas Water Code.

§333.42. Cost Recovery.

If the person does not pay the agency's costs incurred in reviewing the application and the issuance of the innocent owner/operator certificate before the 31st day after the date the person receives notice that the costs are due and owing, the attorney general, at the request of the executive director, may bring an action in the name of the State of Texas in Travis County to recover the amount owed and reasonable legal expenses, including attorney's fees, witness costs, court costs, and deposition costs.

§333.43. Cost Report.

The executive director will annually calculate the agency's costs to administer the innocent owner/operator program and will publish in the Texas Register the rates established for the purposes of identifying the costs recoverable by the agency under Texas Health and Safety Code, Subchapter V.

