

The Texas Natural Resource Conservation Commission (commission) proposes 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.

EXPLANATION OF PROPOSED RULES

The commission is proposing the new rules for the Innocent Owner/Operator Program (IOP) created by new Health & 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 & 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.

Proposed 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.

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. The commission is also proposing to require two copies of all documents so that one copy may be on file in the agency's central records.

Proposed new §333.33 contains terms and definitions for the IOP. Four definitions are proposed in this section to add clarity to the program. Those definitions are: "Innocent owner/operator certificate;" "Portion of a tract;" "Site;" and "Source of release of contamination."

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 proposed 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.

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 proposed section sets forth criteria for the site investigation, notably information that demonstrates that the applicant is an innocent owner/operator. The proposed section 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). Proposed §333.35 also provides that the applicant, by signing an application, agrees to pay all agency oversight costs and that the executive director has the authority to issue, deny, or revoke a certificate.

Other procedural requirements proposed in the section note that any portion of the application fee not incurred or obligated will be refunded to the applicant, and that the executive director will give the applicant an opportunity to submit additional information in the case of an incomplete application.

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.

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.

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 proposed rule provides that the certificate will not be issued until the person submits written evidence of ownership or operation. Under Texas Health and Safety Code, §361.753(g), the commission may condition the issuance of a certificate on the placement of restrictions on the use of the property to protect public health. If control measures are required, proposed §333.38(g) requires any 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.

Proposed new §333.38 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

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.

Proposed new §333.40 provides for revocation of 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 if new information demonstrates that the certificate holder is not an innocent owner/operator.

The certificate remains valid until revoked by the executive director pursuant to §333.40. In a case in which access is unreasonably denied by an innocent owner or operator, the certificate remains valid until revoked by decision of the Commission or a court which finds that the denial of access is unreasonable. This is consistent with internal agency procedures that have been developed to address access disputes, should they arise. The commission seeks comments on whether the rules should include a specific statement that the certificate remains valid until revoked

Proposed 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.

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.

Proposed new §330.43 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.

FISCAL NOTE

Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period the sections as proposed are in effect, there will be fiscal implications as a result of administration or enforcement of the sections. The effect on state government will be an increase in cost of approximately \$245,000 in fiscal year 1998 and \$204,000 in each of the fiscal years 1999-2002. These costs are preliminary estimates based on the anticipated number of applications and the average costs of processing for applications. It is the intent of the enabling legislation and these proposed rules that the application fees and cost recovery provisions provide for the recovery of the costs to the agency of the innocent owner/operator certification program. As these rules are implemented, these costs may increase or decrease based on the actual number of applications received and the projected demand for services. If all costs are recovered from applicants, revenues to the commission should increase to

offset any costs incurred. Costs to local governments subject to these rules will be similar to those costs to any owner or operator of contaminated property seeking certification as an innocent owner/operator for immunity from certain liabilities. In addition, local governments, and particularly local taxing entities, will benefit generally from the effects of these proposed rules to the extent that waiver of liabilities will establish incentives for remediation and re-development of property and the eventual enhancement of local tax bases and economies.

PUBLIC BENEFIT

Mr. Minick has also determined that, for the first five years the sections as proposed are in effect, the public benefit anticipated as a result of enforcement of and compliance with the sections will be the more efficient and cost-effective investigation, assessment and remediation of contaminated properties, potential reductions in risks to the public of exposure to hazardous constituents, reductions in financial liabilities for property owners or facility operators who are not parties responsible for site contamination and potential enhancement to property values and local tax bases. The economic costs to any person to whom these rules are applicable will be limited to the actual, recoverable costs of the commission in the review and processing of applications for certificates. The costs to small businesses will be similar to those costs for any size business concern. These costs will vary with the size, location, and site-specific characteristics of each property and will not directly relate to the size of the business. There are no other economic costs anticipated for any person required to comply with these sections as proposed.

DRAFT REGULATORY IMPACT ANALYSIS

The commission has reviewed the proposed 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 proposed 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 proposed 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 Innocent Owner/Operator Program (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 following is a summary of that Assessment. 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 Coastal Management Program (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 Texas Natural Resource Conservation Commission; therefore, the proposed rule is not subject to the CMP.

SUBMITTAL OF COMMENTS

The commission will hold a public hearing. A public hearing on the proposal will be held on May 22, 1998 at 10:00 a.m in Building F, 2nd floor, Room 2210. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon or by order of registration. Open discussion within the audience will not occur during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing and answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

Written comments may be mailed to Bettie Bell, Texas Natural Resource Conservation Commission, Pollution Cleanup Division, MC 203, P.O. Box 13087, Austin, Texas 78711-3087. All comments should reference Rules Tracking Log Number 97156-333-WS. Comments must be received by 5:00 p.m., on May 26, 1998. For further information, please contact Charles Epperson, Pollution Cleanup Division, (512) 239-2498, Patricia Hershey, Legal Division, (512) 239-0587, Lara Nehman, Legal Division, (512) 239-1121, or Clark Talkington, Waste Policy & Regulations Division, (512) 239-6731.

STATUTORY AUTHORITY

The new rules are proposed 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 proposed 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 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.

(b) Prior to revocation of a certificate, 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.

§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.