

SUBCHAPTER B : INNOCENT OWNER/OPERATOR CERTIFICATION

§§333.31 - 333.43

Effective August 31, 1998

§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.

Adopted July 29, 1998

Effective August 31, 1998

§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.

Adopted July 29, 1998

Effective August 31, 1998

§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.

Adopted July 29, 1998

Effective August 31, 1998

§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.

Adopted July 29, 1998

Effective August 31, 1998

§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.

Adopted July 29, 1998

Effective August 31, 1998

§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.

Adopted July 29, 1998

Effective August 31, 1998

§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.

Adopted July 29, 1998

Effective August 31, 1998

§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.

Adopted July 29, 1998

Effective August 31, 1998

§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.

Adopted July 29, 1998

Effective August 31, 1998

§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.

Adopted July 29, 1998

Effective August 31, 1998

§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.

Adopted July 29, 1998

Effective August 31, 1998

§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.

Adopted July 29, 1998

Effective August 31, 1998

§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.

Adopted July 29, 1998

Effective August 31, 1998