TITLE 16 ECONOMIC REGULATION
PART 1 RAILROAD COMMISSION OF TEXAS
CHAPTER 12 COAL MINING REGULATIONS

SUBCHAPTER A GENERAL
DIVISION 1 GENERAL

§12.1 Objective

The objective of these regulations is to fulfill the purposes of both the Texas and federal surface mining and reclamation acts relating to coal in a manner consistent with their language, legislative history, other applicable laws, and judicial interpretations. These purposes are delineated in §134.003 of the State Act and Section 102 of the Federal Act.

The provisions of this §12.1 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.2 Authority, Responsibility and Applicability

(a) The Commission has the authority and shall enforce state laws and regulations not inconsistent with the "Texas Surface Coal Mining and Reclamation Act" or the federal "Surface Mining Control and Reclamation Act of 1977" and the regulations lawfully promulgated thereunder.

(b) This Chapter applies to all coal exploration and surface coal mining and reclamation operations, except:

(1) the extraction of coal by a landowner for his or her own noncommercial use from land owned or leased by him or her. Noncommercial use does not include the extraction of coal by one unit of an integrated company or other business or nonprofit entity which uses the coal in its own manufacturing or power plants;

(2) the extraction of 250 tons of coal or less by a person conducting a surface mining and reclamation operation. A person who intends to remove more than 250 tons is not exempted;

(3) the extraction of coal as an incidental part of federal, state or local government-financed highway or other construction in accordance with the rules of the Commission and §§12.21 and 12.22 of this title (relating to Exemption for Coal Extraction Incident to Government-Financed Highway or Other Construction); and

(4) the extraction of coal incidental to the extraction of other minerals where coal does not exceed 16 2/3% of the total tonnage of coal and other minerals removed annually for commercial use or sale in accordance with §§12.25-12.33 of this title (relating to Exemption for Coal Extraction Incidental to the Extraction of Other Minerals); and

(5) coal exploration on lands subject to the requirements of 43 CFR Parts 3480-3487.

(c) The Commission is responsible for the regulation of surface coal mining and reclamation operations and coal exploration under the approved state program and the reclamation of abandoned mine lands under the approved state reclamation plan on non-federal and non-Indian lands.

(d) The Secretary of the U.S. Department of the Interior may delegate to a state through a cooperative agreement certain authority relating to the regulation of surface coal mining and reclamation operations on federal lands in accordance with 30 CFR Part 745.

(e) The Director, Office of Hearings and Appeals, U.S. Department of the Interior, is responsible for the administration of administrative hearings and appeals required or authorized by the Federal Act pursuant to the regulations in 43 CFR Part 4.

(f) The Commission may terminate its jurisdiction under the approved state program over the reclaimed site of a completed surface coal mining and reclamation operation, or increment thereof, when the Commission determines in writing that under the permanent program, all requirements imposed under the approved state program have been successfully completed, or, where a performance bond was required, the Commission has made a final decision in accordance with Subchapter J of this chapter (relating to Bond and Insurance Requirements for Surface Coal Mining and Reclamation Operations) to fully release the performance bond. Following a termination under this paragraph, the Commission shall reassert jurisdiction under the permanent regulatory program over a site if it is demonstrated that the bond release or written determination was based upon fraud, collusion, or misrepresentation of material fact.

The provisions of this §12.2 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640; amended to be effective December 29, 1998, 23 TexReg 13041.

§12.3 Definitions

The following words and terms, when used in this Chapter (relating to Coal Mining Regulations), shall have the following meanings unless the context clearly indicates otherwise:

(1) Acid drainage--Water with a pH of less than 6.0 and in which total acidity exceeds total alkalinity, discharged from an active, inactive or abandoned surface coal mine and reclamation operation or from an area affected by surface coal mining and reclamation operations.

(2) Acid-forming materials--Earth materials that contain sulfide minerals or other materials which, if exposed to air, water, or weathering processes, form acids that may create acid drainage.

(3) Act or State Act--The "Texas Surface Coal Mining and Reclamation Act" (Texas Natural Resources Code, Chapter 134).

(4) Adjacent area--Land located outside the affected area or permit area, depending on the context in which adjacent area is used, where air, surface or ground water, fish, wildlife, vegetation or other resources protected by the Act may be adversely impacted by surface coal mining and reclamation operations.

(5) Administratively complete application--An application for permit approval or approval for coal exploration where required, which the Commission determines to contain information addressing each application requirement of the regulatory program and to contain all information necessary to initiate processing and public review.

(6) Affected area--Any land or water surface which is used to facilitate, or which is physically altered by surface coal mining and reclamation operations. Affected area includes the disturbed area; any area upon which surface coal mining and reclamation operations are conducted; any adjacent lands the use of which is incidental to surface coal mining and reclamation operations; all areas covered by new or existing roads used to gain access to, or for hauling coal to or from surface coal mining and reclamation operations; any area covered by surface excavations, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, shipping areas; any areas which contain sited

structures, facilities, or other property material on the surface resulting from, or incident to, surface coal mining and reclamation operations; and the area located above underground workings.

(7) Agricultural activities--With respect to alluvial valley floors, the use of any tract of land for the production of animal or vegetable life, where the use is enhanced or facilitated by subirrigation or flood irrigation associated with alluvial valley floors. These uses include, but are not limited to, the pasturing, grazing or watering of livestock, and the cropping, cultivation or harvesting of plants whose production is aided by the availability of water from subirrigation or flood irrigation. Those uses do not include agricultural practices which do not benefit from the availability of water from subirrigation or flood irrigation.

(8) Agricultural use--The use of any tract of land for the production of animal or vegetable life. The uses include, but are not limited to, the pasturing, grazing, and watering of livestock, and the cropping, cultivation, and harvesting of plants.

(9) Airblast--An airborne shock wave resulting from the detonation of explosives and which may or may not be audible.

(10) Alluvial valley floors--The unconsolidated stream-laid deposits holding streams with water availability sufficient for subirrigation or flood irrigation agricultural activities but does not include upland areas which are generally overlain by a thin veneer of colluvial deposits composed chiefly of debris from sheet erosion, deposits formed by unconcentrated runoff or slope wash, together with talus, or other mass-movement accumulations, and windblown deposits.

(11) Anthracite--Coal classified as anthracite in the American Society for Testing and Materials (ASTM) Standard D 388-77. Coal classifications are published by the ASTM under the title, "Standard Specification for Classification of Coals by Rank", ASTM D 388-77. This ASTM Standard is on file and available for inspection at the Office of the Surface Mining and Reclamation Division, Railroad Commission of Texas, 1701 North Congress Avenue, Austin, Texas.

(12) APA--The "Administrative Procedure Act" (Texas Government Code, Chapter 2001).

(13) Applicant--Any person seeking a permit, permit revision, renewal, and transfer, assignment, or sale of permit rights from the Commission to conduct surface or underground coal mining and reclamation operations pursuant to the Act. With respect to Subchapter G of this chapter (relating to Surface Coal Mining and Reclamation Operations Permits and Coal Exploration Procedures Systems), this term includes a person who seeks to obtain exploration approval or a permit under that subchapter and the regulatory program. With respect to Subchapter M of this chapter (relating to Training), this term includes a person who submits an application to the Commission to request blaster training, examination or certification.

(14) Applicant/Violator System or AVS--An automated information system of applicant, permittee, operator, violation and related data that the Office maintains to assist in implementing the Federal Act.

(15) Application--The documents and other information filed with the Commission under this chapter (relating to Coal Mining Regulations) for the issuance of permits; revisions; renewals; and transfers, assignment, or sale of permit rights for surface coal mining and reclamation operations or, where required, for coal exploration. With respect to Subchapter M of this chapter, this term includes a request submitted to the Commission on a prescribed form, and including any required fee and any applicable supporting evidence or other attachments.

(16) Approximate original contour--That surface configuration achieved by backfilling and grading of the mined areas so that the reclaimed area, including any terracing or access roads, closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain, with all highwalls, spoil piles and coal refuse piles eliminated. Permanent water impoundments may be permitted where the Commission has determined that they comply with §134.092(a)(8) of the Act.

(17) Aquifer--A zone, stratum, or group of strata that can store and transmit water in sufficient quantities for a specific use.

(18) Arid or semiarid area--In the context of alluvial valley floors, an area west of the 100th meridian west longitude, experiencing water deficits, where water use by native vegetation equals or exceeds that supplied by precipitation. As an example, the Eagle Pass field in Texas is in an arid or semiarid area.

(19) Auger mining--A method of mining coal at a cliff or highwall by drilling holes into an exposed coal seam from the highwall and transporting the coal along an auger bit to the surface.

(20) Best Technology Currently Available (BTCA)--Equipment, devices, systems, methods, or techniques which will:

(A) prevent, to the extent possible, additional contributions of suspended solids to stream flow or runoff outside the permit area, but in no event result in contributions of suspended solids in excess of requirements set by applicable state or federal laws; and

(B) minimize, to the extent possible, disturbances and adverse impacts on fish, wildlife and related environmental values, and achieve enhancement of those resources where practicable. The term includes equipment, devices, systems, methods, or techniques which are currently available anywhere as determined by the Commission, even if they are not in routine use. The term includes, but is not limited to, construction practices, siting requirements, vegetative selection and planting requirements, animal stocking requirements, scheduling of activities and design of sedimentation ponds in accordance with §§12.330 - 12.403 and 12.500 - 12.572 of this title (relating to Permanent Program Performance Standards--Surface Mining Activities, and to Permanent Program Performance Standards--Underground Mining Activities). The Commission shall have the discretion to determine the best technology currently available on a case-by-case basis, as authorized by the Act and this chapter.

(21) Blaster--A person who is directly responsible for the use of explosives.

(22) Blaster certification--To issue to an applicant a Commission Blaster Certificate.

(23) Blasthole--A hole drilled for the placement of explosives in rock or other material to be blasted.

(24) Blasting crew--Persons whose function is to load explosive charges and assist blasters in the use of explosives.

(25) Cemetery--Any area of land where human bodies are interred.

(26) Certificate issuance--To grant to an applicant his or her first Commission blaster certificate.

(27) Certificate reissuance--To grant to an applicant, who has had a Commission blaster certificate that expired or was revoked, a subsequent certificate for which additional training and examination are required.

(28) Certificate renewal--To grant to an applicant, who holds a Commission blaster certificate that is currently valid and not expired or revoked, a subsequent certificate for which training and examination are not required.

(29) Certificate replacement--To grant to an applicant, who holds a Commission blaster certificate that is currently valid and not expired, suspended, or revoked, a duplicate certificate as a substitute for one that was lost or destroyed.

(30) Certified blaster--A person who has met the qualifications of Subchapter M of this chapter and who has been issued a Commission blaster certificate that is currently valid and not expired, suspended, or revoked.

(31) CFR--The federal Code of Federal Regulations.

(32) Close of public comment period--The close of a public hearing on a surface mining permit application. When no public hearing is held, this time shall be 30 days after the last publication of the newspaper notice required by §12.207(a) of this title (relating to Public Notices of Filing of Permit Applications).

(33) Coal--Combustible carbonaceous rock, classified as anthracite, bituminous, subbituminous, or lignite by ASTM Standard D 388-77.

(34) Coal exploration--The field gathering of:

(A) Surface or subsurface geologic, physical, or chemical data by mapping, trenching, drilling, geophysical, or other techniques necessary to determine the quality and quantity of overburden and coal of an area; or

(B) The gathering of environmental data to establish the conditions of an area before beginning surface coal mining and reclamation operations under the requirements of this chapter.

(35) Coal exploration operation--The substantial disturbance of the surface or subsurface for the purpose of coal exploration.

(36) Coal mine waste--Coal processing waste and underground development waste.

(37) Coal mining operation--The business of developing, producing, preparing or loading bituminous coal, subbituminous coal, anthracite, or lignite, or of reclaiming the areas upon which such activities occur.

(38) Coal preparation--Chemical or physical processing and the cleaning, concentrating, or other processing or preparation of coal.

(39) Coal processing plant or coal preparation plant--A facility where coal is subjected to chemical or physical processing or cleaning, concentrating, or other processing or preparation. It includes facilities associated with coal preparation activities, including, but not limited to, the following: loading facilities; storage and stockpile facilities; sheds, shops and other buildings; water treatment and water storage facilities; settling basins and impoundments; coal processing and other waste disposal areas; and, roads, railroads and other transport facilities. It does not include facilities operated by the final consumer of the coal, such as an electricity generating power plant, when, in the opinion of the Commission, the primary purpose of the facilities is to make the coal ready for conversion into a different energy form and the facilities are located at or near the electricity generating plant or other point of final consumption away from the mine site and outside of the approved mine permit area.

(40) Coal processing waste--Earth materials which are separated and wasted from the product coal during cleaning, concentrating, or other processing or preparation of coal.

(41) Combustible material--Organic material that is capable of burning, either by fire or through oxidation, accompanied by the evolution of heat and a significant temperature rise.

(42) Commission--The Railroad Commission of Texas.

(43) Commission Blaster Certificate--A certificate issued by the Commission to a person determined to be qualified under §§12.700 - 12.710 of this title (relating to Training, Examination, and Certification of Blasters) to be directly responsible for the use of explosives in mining operations regulated by the Commission.

(44) Commissioner--One of the elected or appointed members of the decision making body defined as the Commission.

(45) Community or institutional building--Any structure, other than a public building or an occupied dwelling, which is used primarily for meetings, gatherings or functions of local civic organizations or other community groups; functions as an educational, cultural, historic, religious, scientific, correctional, mental-health or physical health care facility; or is used for public services, including, but not limited to, water supply, power generation or sewage treatment.

(46) Compaction--Increasing the density of a material by reducing the voids between the particles and is generally accomplished by controlled placement and mechanical effort such as from repeated application of wheel, track, or roller loads from heavy equipment.

(47) Complete and accurate application--An application for permit approval or approval for coal exploration where required, which the Commission determines to contain all information required under the Act, this chapter, and the regulatory program that is necessary to make a decision on permit issuance.

(48) Control or controller--

(A) a permittee of a surface coal mining operation;

(B) an operator of a surface coal mining operation; or

(C) any person who has the ability to determine the manner in which a surface coal mining operation is conducted.

(49) Cropland--Land used for the production of adapted crops for harvest, alone or in a rotation with grasses and legumes, and includes row crops, small grain crops, hay crops, nursery crops, orchard crops, and other similar specialty crops, but does not include quick cover crops grown primarily for erosion control.

(50) Cumulative impact area--The area, including the permit area, within which impacts resulting from the proposed operation may interact with the impacts of all anticipated mining on surface-water and ground-water systems. Anticipated mining shall include, at a minimum, the entire projected lives through bond release of:

(A) the proposed operation;

(B) all existing operations;

(C) any operation for which a permit application has been submitted to the Commission; and

(D) all operations required to meet diligent development requirements for leased federal coal for which there is actual mine development information available.

(51) Cumulative measurement period--As used in §§12.25 - 12.33 of this title (relating to Exemption for Coal Extraction Incidental to the Extraction of Other Minerals), the period of time over which both cumulative production and cumulative revenue are measured.

(A) For purposes of determining the beginning of the cumulative measurement period, subject to Commission approval, the operator must select and consistently use one of the following:

(i) for mining areas where coal or other minerals were extracted prior to August 3, 1977, the date extraction of coal or other minerals commenced at that mining area or August 3, 1977; or

(ii) for mining areas where extraction of coal or other minerals commenced on or after August 3, 1977, the date extraction of coal or other minerals commenced at that mining area, whichever is earlier.

(B) For annual reporting purposes pursuant to §12.33 of this title (relating to Reporting Requirements), the end of the period for which cumulative production and revenue is calculated is either:

(i) for mining areas where coal or other minerals were extracted prior to the effective date of §§12.25 - 12.33 of this title, the first anniversary of that date, and each anniversary of that date thereafter; or

(ii) for mining areas where extraction of coal or other minerals commenced on or after the effective date of §§12.25 - 12.33 of this title, the last day of the calendar quarter during which coal extraction commenced, and each anniversary of that date thereafter.

(52) Cumulative production--As used in §§12.25 - 12.33 of this title, the total tonnage of coal or other minerals extracted from a mining area during the cumulative measurement period. The inclusion of stockpiled coal and other mineral tonnages in this total is governed by §12.31 of this title (relating to Stockpiling of Minerals).

(53) Cumulative revenue--As used in §§12.25 - 12.33 of this title, the total revenue derived from the sale of coal or other minerals and the fair market value of coal or other minerals transferred or used, but not sold, during the cumulative measurement period.

(54) Department--The U.S. Department of the Interior.

(55) Direct financial interest--Ownership or part ownership by an employee of lands, stocks, bonds, debentures, warrants, partnership shares, or other holdings and also means any other arrangement where the employee may benefit from his or her holding in or salary from coal mining operations. Direct financial interests include employment, pensions, creditor, real property and other financial relationships.

(56) Director--The Director or Acting Director, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, or the Director's representative.

(57) Disturbed area--An area where vegetation, topsoil, or overburden is removed or upon which topsoil, spoil, coal processing waste, underground development waste, or noncoal waste is placed by surface coal mining operations. Those areas are classified as disturbed until reclamation is complete and the performance bond or other assurance of performance required by Subchapter J of this chapter (relating to Bond and Insurance Requirements for Surface Coal Mining and Reclamation Operations) is released.

(58) Diversion--A channel, embankment, or other manmade structure constructed to divert water from one area to another.

(59) Division--The Surface Mining and Reclamation Division of the Railroad Commission of Texas.

(60) Downslope--The land surface between the projected outcrop of the lowest coal bed being mined along each highwall and a valley floor.

(61) Embankment--An artificial deposit of material that is raised above the natural surface of the land and used to contain, divert, or store water, support roads or railways, or for other similar purposes.

(62) Employee--Shall include:

(A) any person employed by the Commission who performs any function or duty under the Act, including the Commissioners; and

(B) Advisory board or Commission members and consultants who perform any function or duty under the Act, if they perform decision making functions for the Commission under the authority of state law or regulations. However, members of advisory boards or commissions established in accordance with state law or regulations to represent multiple interests are not considered to be employees.

(63) Ephemeral stream--A stream which flows only in direct response to precipitation in the immediate watershed or in response to the melting of a cover of snow and ice, and which has a channel bottom that is always above the local water table.

(64) Essential hydrologic functions--The role of an alluvial valley floor in collecting, storing, regulating, and making the natural flow of surface or ground water, or both, usefully available for agricultural activities by reason of the valley floor's topographic position, the landscape and the physical properties of its underlying materials. A combination of these functions provides a water supply during extended periods of low precipitation.

(A) The role of the valley floor in collecting water includes accumulating runoff and discharge from aquifers in sufficient amounts to make the water available at the alluvial valley floor greater than the amount available from direct precipitation.

(B) The role of the alluvial valley floor in storing water involves limiting the rate of discharge of surface water, holding moisture in soils, and holding ground water in porous materials.

(C) The role of the alluvial valley floor in regulating:

(i) the natural flow of surface water results from the characteristic configuration of the channel flood plain and adjacent low terraces; and

(ii) the natural flow of ground water results from the properties of the aquifers which control inflow and outflow.

(D) The role of the alluvial valley floor in making water usefully available for agricultural activities results from the existence of flood plains and terraces where surface and ground water can be provided in sufficient quantities to support the growth of agriculturally useful plants, from the presence of earth materials suitable for the

growth of agriculturally useful plants, from the temporal and physical distribution of water making it accessible to plants throughout the critical phases of the growth cycle either by flood irrigation or by subirrigation, from the natural control of alluvial valley floors in limiting destructive extremes of stream discharge, and from the erosional stability of earth materials suitable for the growth of agriculturally useful plants.

(65) Existing structure--A structure or facility used in connection with or to facilitate surface coal mining and reclamation operations for which construction began prior to approval of the state program.

(66) Experimental practice--The use of alternative surface coal mining and reclamation operation practices for experimental or research purposes.

(67) Explosives--Any chemical compound, mixture, or device by whose decomposition or combustion gas is generated with such rapidity that it can be used for blasting.

(68) Extraction of coal as an incidental part--The extraction of coal which is necessary to enable the construction to be accomplished. For purposes of §12.21 and §12.22 of this title (relating to Applicability, and to Information to be Maintained On Site), only that coal extracted from within the right-of-way, in the case of a road, railroad, utility line or other such construction, or within the boundaries of the area directly affected by other types of government-financed construction, may be considered incidental to that construction. Extraction of coal outside the right-of-way or boundary of the area directly affected by the construction shall be subject to the requirements of the Act and this chapter.

(69) Federal Act--The "Surface Mining Control and Reclamation Act of 1977" (Pub. L. 95-87).

(70) Federal lands--Any land, including mineral interests, owned by the United States, without regard to how the United States acquired ownership of the lands or which agency manages the lands. It does not include Indian lands.

(71) Federal lands program--A program established by the Secretary, pursuant to Section 523 of the Federal Act, to regulate surface coal mining and reclamation operations on federal lands.

(72) Flood irrigation--With respect to alluvial valley floors, supplying water to plants by natural overflow or the diversion of flows, so that the irrigated surface is largely covered by a sheet of water.

(73) Flyrock--Rock or other blasted material that is propelled from a blast through the air or along the ground.

(74) Fragile lands--Areas containing natural, ecologic, scientific or esthetic resources that could be significantly damaged by surface coal mining operations. Examples of fragile lands include valuable habitats for fish or wildlife, critical habitats for endangered or threatened species of animals or plants, uncommon geologic formations, paleontological sites, National Natural Landmarks, areas where mining may result in flooding, environmental corridors containing a concentration of ecologic and esthetic features, and areas of recreational value due to high environmental quality.

(75) Fugitive dust--That particulate matter not emitted from a duct or stack which becomes airborne due to the forces of wind or surface coal mining and reclamation operations or both. During surface coal mining and reclamation operations, it may include emissions from haul roads; wind erosion of exposed surfaces, storage piles, and spoil piles; reclamation operations; and other activities in which material is either removed, stored, transported, or redistributed.

(76) Fund--The Abandoned Mine Reclamation Fund established pursuant to Section 401 of the Federal Act.

(77) General area--With respect to hydrology, the topographic and ground-water basin surrounding a permit area which is of sufficient size, including areal extent and depth, to include one or more watersheds containing perennial streams and ground-water zones and to allow assessment of the probable cumulative impacts on the quality and quantity of surface- and ground-water systems in the basins.

(78) Government financing agency--A federal, state, county, municipal, or local unit of government, or a department, bureau, agency or office of the unit which, directly or through another unit of government, finances construction.

(79) Government-financed construction--Construction funded 50% or more by funds appropriated from a government financing agency's budget or obtained from general revenue bonds, but shall not mean government financing agency guarantees, insurance, loans, funds obtained through industrial revenue bonds or their equivalent, or in-kind payments.

(80) Ground cover--The area of ground covered by the combined aerial parts of vegetation and the litter that is produced naturally onsite, expressed as a percentage of the total area of measurement.

(81) Ground water--Subsurface water that fills available openings in rock or soil materials to the extent that they are considered water saturated.

(82) Half-shrub--A perennial plant with a woody base whose annually produced stems die back each year.

(83) Head-of-hollow fill--A fill structure consisting of any material, other than coal processing waste and organic material, placed in the uppermost reaches of a hollow where side slopes of the existing hollow measured at the steepest point are greater than 20 degrees or the average slope of the profile of the hollow from the toe of the fill to the top of the fill is greater than 10 degrees. In fills with less than 250,000 cubic yards of material, associated with contour mining, the top surface of the fill will be at the elevation of the coal seam. In all other head-of-hollow fills, the top surface of the fill, when completed, is at approximately the same elevation as the adjacent ridge line, and no significant area of natural drainage occurs above the fill draining into the fill area.

(84) Highwall--The face of exposed overburden and coal in an open cut of a surface coal mining activity or for entry to underground mining activities.

(85) Historically used for cropland--Refers to:

(A) lands that have been used for cropland for any 5 years or more out of the 10 years immediately preceding the acquisition, including purchase, lease, or option, of the land for the purpose of conducting or allowing through resale, lease or option the conduct of surface coal mining and reclamation operations;

(B) lands that the Commission determines, on the basis of additional cropland history of the surrounding lands and the lands under consideration, that the permit area is clearly cropland but falls outside the specific 5-years-in-10 criterion, in which case the regulations for prime farmland may be applied to include more years of cropland history only to increase the prime farmland acreage to be preserved; or

(C) lands that would likely have been used as

cropland for any 5 out of the last 10 years, immediately preceding such acquisition but for some fact of ownership or control of the land unrelated to the productivity of the land.

(86) Historic lands--Historic, cultural, or scientific resources. Examples of historic lands include archeological sites, National Historic Landmarks, properties listed on or eligible for listing on a state or National Register of Historic Places, properties having religious or cultural significance to Native Americans or religious groups, and properties for which historic designation is pending.

(87) Hydrologic balance--The relationship between the quality and quantity of water inflow to, water outflow from, and water storage in a hydrologic unit such as a drainage basin, aquifer, soil zone, lake, or reservoir. It encompasses the dynamic relationships among precipitation, runoff, evaporation, and changes in ground and surface water storage.

(88) Hydrologic regime--The entire state of water movement in a given area. It is a function of the climate and includes the phenomena by which water first occurs as atmospheric water vapor, passes into a liquid or solid form, falls as precipitation, moves along or into the ground surface, and returns to the atmosphere as vapor by means of evaporation and transpiration.

(89) Imminent danger to the health and safety of the public--The existence of any condition or practice, or any violation of a permit or other requirements of the Act in a surface coal mining and reclamation operation, which condition, practice, or violation could reasonably be expected to cause substantial physical harm to persons outside the permit area before such condition, practice, or violation can be abated. A reasonable expectation of death or serious injury before abatement exists if a rational person, subjected to the same condition or practices giving rise to the peril, would not expose himself to the danger during the time necessary for abatement.

(90) Impoundment--A closed basin, naturally formed or artificially built, which is dammed or excavated for the retention of water, sediment, or waste.

(91) Indian lands--All lands, including mineral interests, within the exterior boundaries of any federal Indian reservation, notwithstanding the issuance of any patent, and including rights-of-way, and all lands including mineral interests held in trust for or supervised by an Indian tribe.

(92) Indian tribe--Any Indian tribe, band, group, or community having a governing body recognized by the Secretary.

(93) Indirect financial interest--The same financial relationships as for direct ownership, but where the employee reaps the benefits of such interests, including interests held by his or her spouse, minor child and other relatives, including in-laws, residing in the employee's home. The employee will not be deemed to have an indirect financial interest if there is no relationship between the employee's functions or duties and the coal mining operation in which the spouse, minor children or other resident relatives hold a financial interest.

(94) In situ processes--Activities conducted on the surface or underground in connection with in-place distillation, retorting, leaching, or other chemical or physical processing of coal. The term includes, but is not limited to, in situ gasification, in situ leaching, slurry mining, solution mining, borehole mining, and fluid recovery mining.

(95) Intermittent stream--A stream or reach of a stream that:

(A) drains a watershed of at least one square mile; or

(B) is below the local water table for at least some part of the year, and obtains its flow from both surface runoff and ground-water discharge.

(96) Irreparable damage to the environment--Any damage to the environment that cannot be or has not been corrected by actions of the applicant.

(97) Knowing or knowingly--With respect to §§12.696 - 12.699 of this title (relating to Individual Civil Penalties), that a person who authorized, ordered, or carried out an act or omission knew or had reason to know that the act or omission would result in either a violation or a failure to abate or correct a violation.

(98) Lands eligible for remining--Previously mined areas that would otherwise be eligible for expenditures under §134.142 of the Act.

(99) Land use--Specific uses or management-related activities, rather than the vegetation or cover of the land. Land uses may be identified in combination when joint or seasonal uses occur. Changes of land use or uses from one of the following categories to another shall be considered as a change to an alternative land use which is subject to approval by the Commission.

(A) Cropland. Land used for the production of adapted crops for harvest, alone or in a rotation with grasses and legumes, and includes row crops, small grain crops, hay crops, nursery crops, orchard crops, and other similar specialty crops. Land used for facilities in support of cropland farming operations which is adjacent to or an integral part of these operations is also included for purposes of these land use categories.

(B) Pastureland or land occasionally cut for hay. Land used primarily for the long-term production of adapted, domesticated forage plants to be grazed by livestock or occasionally cut and cured for livestock feed. Land used for facilities in support of pastureland or land occasionally cut for hay which is adjacent to or an integral part of these operations is also included.

(C) Grazingland. Includes both grasslands and forest lands where the indigenous vegetation is actively managed for grazing, browsing, or occasional hay production. Land used for facilities in support of ranching operations which are adjacent to or an integral part of these operations is also included.

(D) Forestry. Land used or managed for the long-term production of wood, wood fiber, or wood derived products. Land used for facilities in support of forest harvest and management operations which is adjacent to or an integral part of these operations is also included.

(E) Residential. Includes single- and multiple-family housing, mobile home parks, and other residential lodgings. Land used for facilities in support of residential operations which is adjacent to or an integral part of these operations is also included. Support facilities include, but are not limited to, vehicle parking and open space that directly relate to the residential use.

(F) Industrial/Commercial. Land used for:

(i) extraction or transformation of materials for fabrication of products, wholesaling of products, or for long-term storage of products. This includes all heavy and light manufacturing facilities, such as lumber and wood processing, chemical manufacturing, petroleum refining, and fabricated metal products manufacturing. Land used for facilities in support of these operations which is

adjacent to or an integral part of that operation is also included. Support facilities include, but are not limited to, all rail, road, and other transportation facilities; or

(ii) retail or trade of goods or services, including hotels, motels, stores, restaurants, and other commercial establishments. Land used for facilities in support of commercial operations which is adjacent to or an integral part of these operations is also included. Support facilities include, but are not limited to, parking, storage or shipping facilities.

(G) Recreation. Land used for public or private leisure-time use, including developed recreation facilities such as parks, camps, and amusement areas, as well as areas for less intensive uses such as hiking, canoeing, and other undeveloped recreational uses.

(H) Fish and wildlife habitat. Land dedicated wholly or partially to the production, protection or management of species of fish or wildlife.

(I) Developed water resources. Includes land used for storing water for beneficial uses, such as stockponds, irrigation, fire protection, flood control, and water supply.

(J) Undeveloped land or no current use or land management. Land that is undeveloped or, if previously developed, land that has been allowed to return naturally to an undeveloped state or has been allowed to return to forest through natural succession.

(100) Materially damage the quantity or quality of water--With respect to alluvial valley floors, changes in the quality or quantity of the water supply to any portion of an alluvial valley floor where such changes are caused by surface coal mining and reclamation operations and result in changes that significantly and adversely affect the composition, diversity, or productivity of vegetation dependent on subirrigation, or which result in changes that would limit the adequacy of the water for flood irrigation of the irrigable land acreage existing prior to mining.

(101) Mining area--As used in §§12.25 - 12.33 of this title, an individual excavation site or pit from which coal, other minerals, and overburden are removed.

(102) Moist bulk density--The weight of soil (oven dry) per unit volume. Volume is measured when the soil is at field moisture capacity (1/3 bar moisture tension). Weight is determined after drying the soil at 105 degrees C.

(103) Monitoring--The collection of environmental data by either continuous or periodic sampling methods.

(104) Mulch--Vegetation residues or other suitable materials that aid in soil stabilization and soil moisture conservation, thus providing micro-climatic conditions suitable for germination and growth.

(105) Natural hazard lands--Geographic areas in which natural conditions exist which pose or, as a result of surface coal mining operations, may pose a threat to the health, safety or welfare of people, property or the environment, including areas subject to landslides, cave-ins, large or encroaching sand dunes, severe wind or soil erosion, frequent flooding, avalanches and areas of unstable geology.

(106) Noxious plants--Species that have been included on official Texas list of noxious plants.

(107) Occupied dwelling--Any building that is currently being used on a regular or temporary basis for human habitation.

(108) Office--The Office of Surface Mining Reclamation and Enforcement, within the U.S. Department of the Interior, established under Title II of the Federal Act.

(109) Operator--Any person engaged in coal mining who removes or intends to remove more than 250 tons of coal from the earth or from coal refuse piles by mining within 12 consecutive calendar months in any one location.

(110) Other minerals--As used in §§12.25 - 12.33 of this title, any commercially valuable substance mined for its mineral value, excluding coal, topsoil, waste, and fill material.

(111) Other treatment facility--Any chemical treatments, such as flocculation or neutralization, or mechanical structures, such as clarifiers or precipitators, that have a point source discharge and are utilized:

(A) to prevent additional contributions of dissolved or suspended solids to streamflow or runoff outside the permit area; or

(B) to comply with all applicable state and federal water-quality laws and regulations.

(112) Outslope--The face of the spoil or embankment sloping downward from the highest elevation to the toe.

(113) Overburden--Material of any nature, consolidated or unconsolidated, that overlies a coal deposit, excluding topsoil.

(114) Own, owner, or ownership--A sole proprietor or owner of record in excess of 50 percent of the voting securities or other instruments of ownership of an entity. Does not apply in context of ownership of real property.

(115) Owner of record or ownership interest of record--The owner and address as shown in the tax records of the Texas Assessor-Collector of taxes for the county where the property is located.

(116) Perennial stream--A stream or part of a stream that flows continuously during all of the calendar year as a result of ground-water discharge or surface runoff. The term does not include intermittent stream or ephemeral stream.

(117) Performance bond--A surety bond, collateral bond or self-bond or a combination thereof, by which a permittee assures faithful performance of all the requirements of the Act, this chapter, and the requirements of the permit and reclamation plan.

(118) Performing any function or duty under this Act--Those decisions or actions, which if performed or not performed by an employee, affect the programs under the Act.

(119) Permanent diversion--A diversion remaining after surface coal mining and reclamation operations are completed which has been approved for retention by the Commission and other appropriate state and federal agencies.

(120) Permanent impoundment--An impoundment which is approved by the Commission and, if required, by other state and federal agencies for retention as part of the postmining land use.

(121) Permit--A permit to conduct surface coal mining and reclamation operations issued by the Commission.

(122) Permit area--The area of land and water indicated on the map submitted by the operator with his application, as approved by the Commission, which area shall be covered by the operator's bond as required by §§134.121 - 134.127 of the Act and shall be readily identifiable by appropriate markers on the site. This area shall include, at a minimum, all areas which are or will be affected by the surface coal mining and reclamation operations during the term of the permit.

(123) Permittee--A person holding or required by

the Act or this chapter to hold a permit to conduct surface or underground coal mining and reclamation operations issued by the Commission.

(124) Person--An individual, partnership, society, joint stock company, firm, company, corporation, business organization, governmental agency, or any organization or association of citizens.

(125) Person having an interest which is or may be adversely affected or person with a valid legal interest--Shall include any person:

(A) who uses any resources of economic, recreational, esthetic, or environmental value that may be adversely affected by coal exploration or surface coal mining and reclamation operations or any related action of the Commission; or

(B) whose property is or may be adversely affected by coal exploration or surface coal mining and reclamation operations or any related action of the Commission.

(126) Precipitation event--A quantity of water resulting from drizzle, rain, snow, sleet, or hail in a limited period of time. It may be expressed in terms of recurrence interval. As used in these regulations, precipitation event also includes that quantity of water emanating from snow cover as snowmelt in a limited period of time.

(127) Previously mined area--Land affected by surface coal mining operations prior to August 3, 1977, that has not been reclaimed to the standards of this Chapter.

(128) Prime farmland--Those lands which are defined by the Secretary of Agriculture in 7 CFR 657 and which have been historically used for cropland.

(129) Principal shareholder--Any person who is the record or beneficial owner of 10% or more of any class of voting stock.

(130) Probable cumulative impacts--The expected total qualitative, and quantitative, direct and indirect effects of mining and reclamation activities on the hydrologic regime.

(131) Probable hydrologic consequences--The projected result of proposed surface coal mining and reclamation operations which may reasonably be expected to change the quantity or quality of the surface- or ground-water flow, timing and pattern; the stream-channel conditions; and the aquatic habitat on the permit area and other affected areas.

(132) Professional specialist--A person whose training, experience, and professional certification or licensing are acceptable to the Commission for the limited purpose of performing certain specified duties under this chapter.

(133) Prohibited financial interest--Any direct or indirect financial interest in any coal mining operation.

(134) Property to be mined--Both the surface estates and mineral estates within the permit area and the area covered by underground workings.

(135) Public building--Any structure that is owned or leased, and principally used by a governmental agency for public business or meetings.

(136) Publicly-owned park--A public park that is owned by a federal, state or local governmental entity.

(137) Public office--A facility under the direction and control of a governmental entity which is open to public access on a regular basis during reasonable business hours.

(138) Public park--An area or portion of an area dedicated or designated by any federal, state, or local agency primarily for public recreational use, whether or not such use is limited to certain times or days, including any land leased, reserved, or held open to the public because of that use.

(139) Public road--Any thoroughfare open to the public for passage of vehicles.

(140) Qualified jurisdiction--A state or federal mining regulatory authority that has a blaster certification program approved by the U.S. Department of the Interior, Office of Surface Mining Reclamation and Enforcement, in accordance with the Federal Act.

(141) Qualified laboratory--A designated public agency, private firm, institution, or analytical laboratory that can provide the required determination of probable hydrologic consequences or statement of results of test borings or core samplings or other services as specified at §12.236 and §12.240 of this title (relating to Program Services, and Data Requirements), and that meets the standards of §12.241 of this title (relating to Qualified Laboratories).

(142) Rangeland--Land on which the natural potential (climax) plant cover is principally native grasses, forbs, and shrubs valuable for forage. This land includes natural grass lands and savannahs, such as prairies, and juniper savannahs, such as brushlands. Except for brush control, management is primarily achieved by regulating the intensity of grazing and season of use.

(143) Recharge capacity--The ability of the soils and underlying materials to allow precipitation and runoff to infiltrate and reach the zone of saturation.

(144) Reciprocity--The conditional recognition by the Commission of a blaster certificate issued by another qualified jurisdiction.

(145) Reclamation--Those actions taken to restore mined land as required by this chapter to a postmining land use approved by the Commission.

(146) Recurrence interval--The interval of time in which a precipitation event is expected to occur once, on the average. For example, the 10-year, 24-hour precipitation event would be that 24-hour precipitation event expected to occur on the average once in 10 years.

(147) Reference area--A land unit maintained under appropriate management for the purpose of measuring vegetation ground cover, productivity and plant species diversity that are produced naturally or by crop production methods approved by the Commission. Reference areas must be representative of geology, soil, slope, and vegetation in the permit area.

(148) Regional Director--A Regional Director of the Office or a Regional Director's representative.

(149) Registered professional engineer--A person who is duly licensed by the Texas State Board of Registration for Professional Engineers to engage in the practice of engineering in this state.

(150) Remining--Surface coal mining and reclamation operations that affect previously mined areas.

(151) Renewable resource lands--Aquifers and areas for the recharge of aquifers and other underground waters, areas for agricultural or silvicultural production of food and fiber, and grazing lands. With respect to Subchapter F of this chapter (relating to Lands Unsuitable for Mining), geographic areas which contribute significantly to the long-range productivity of water supply or of food or fiber products, such lands to include aquifers and aquifer recharge areas.

(152) Replacement of water supply--With respect to

protected water supplies contaminated, diminished, or interrupted by coal mining operations, provision of water supply on both a temporary and permanent basis equivalent to premining quantity and quality. Replacement includes provision of an equivalent water-delivery system and payment of operation and maintenance costs in excess of customary and reasonable delivery costs for premining water supplies.

(A) Upon agreement by the permittee and the water-supply owner, the obligation to pay such operation and maintenance costs may be satisfied by a one-time payment in an amount which covers the present worth of the increased annual operation and maintenance costs for a period agreed to by the permittee and the water-supply owner.

(B) If the affected water supply was not needed for the land use in existence at the time of loss, contamination, or diminution, and if the supply is not needed to achieve the postmining land use, replacement requirements may be satisfied by demonstrating that a suitable alternative water source is available and could feasibly be developed. If the latter approach is selected, written concurrence must be obtained from the water-supply owner.

(153) Road--A surface right-of-way for purposes of travel by land vehicles used in surface coal mining and reclamation operations or coal exploration. A road consists of the entire area within the right-of-way, including the roadbed, shoulders, parking and side areas, approaches, structures, ditches, and surface. The term includes access and haulroads constructed, used, reconstructed, improved, or maintained for use in surface coal mining and reclamation operations or coal exploration, including use by coal-hauling vehicles to and from transfer, processing, or storage areas. The term does not include ramps and routes of travel within the immediate mining area or within spoil or coal mine waste disposal areas.

(154) Safety factor--The ratio of the available shear strength to the developed shear stress, or the ratio of the sum of the resisting forces to the sum of the loading or driving forces, as determined by accepted engineering practices.

(155) Secretary--The Secretary of the U.S. Department of the Interior, or the Secretary's representative.

(156) Sedimentation pond--A primary sediment control structure designed, constructed and maintained in accordance with §12.344 or §12.514 of this title (relating to Hydrologic Balance: Siltation Structures) and including but not limited to a barrier, dam, or excavated depression which slows down water runoff to allow sediment to settle out. A sedimentation pond shall not include secondary sedimentation control structures, such as straw dikes, riprap, check dams, mulches, dugouts and other measures that reduce overland flow velocity, reduce runoff volume or trap sediment to the extent that such secondary sedimentation structures drain to a sedimentation pond.

(157) Significant forest cover--An existing plant community consisting predominantly of trees and other woody vegetation.

(158) Significant, imminent environmental harm to land, air or water resources--Determined in the following context:

(A) An environmental harm is an adverse impact on land, air, or water resources, which resources include, but are not limited to, plant and animal life.

(B) An environmental harm is imminent, if a condition, practice, or violation exists which:

(i) is causing such harm; or

(ii) may reasonably be expected to cause such harm at any time before the end of the reasonable abatement time that would be set under §134.162 of the Act.

(C) An environmental harm is significant if that harm is appreciable and not immediately reparable.

(159) Significant recreational, timber, economic, or other values incompatible with surface coal mining operations--Those significant values which could be damaged by, and are not capable of existing together with, surface coal mining operations because of the undesirable effects mining would have on those values, either on the area included in the permit application or on other affected areas. Those values to be evaluated for their significance include:

(A) recreation, including hiking, boating, camping, skiing or other related outdoor activities;

(B) timber management and silviculture;

(C) agriculture, aquaculture or production of other natural, processed or manufactured products which enter commerce; and

(D) scenic, historic, archaeologic, esthetic, fish, wildlife, plants or cultural interests.

(160) Siltation structure--A sedimentation pond, a series of sedimentation ponds, or other treatment facility.

(161) Slope--Average inclination of a surface, measured from the horizontal, generally expressed as the ratio of a unit of horizontal distance to a given number of units of vertical distance (e.g., 5h:1v). It may also be expressed as a percent or in degrees.

(162) Soil horizons--Contrasting layers of soil parallel or nearly parallel to the land surface. Soil horizons are differentiated on the basis of field characteristics and laboratory data. The four master soil horizons are:

(A) A horizon. The uppermost mineral layer, often called the surface soil. It is the part of the soil in which organic matter is most abundant, and leaching of soluble or suspended particles is typically the greatest;

(B) E horizon. The layer commonly near the surface below an A horizon and above a B horizon. An E horizon is most commonly differentiated from an overlying A horizon by lighter color and generally has measurably less organic matter than the A horizon. An E horizon is most commonly differentiated from an underlying B horizon in the same sequum by color of higher value or lower chroma, by coarser texture, or by a combination of these properties;

(C) B horizon. The layer that typically is immediately beneath the E horizon and often called the subsoil. This middle layer commonly contains more clay, iron, or aluminum than the A, E, or C horizons; and

(D) C horizon. The deepest layer of soil profile. It consists of loose material or weathered rock that is relatively unaffected by biologic activity.

(163) Soil survey--A field and other investigation, resulting in a map showing the geographic distribution of different kinds of soils and an accompanying report that describes, classifies, and interprets such soils for use. Soil surveys must meet the standards of the National Cooperative Soil Survey.

(164) Spoil--Overburden that has been removed during surface coal mining operations.

(165) Stabilize--To control movement of soil, spoil piles, or areas of disturbed earth by modifying the geometry of the mass, or by otherwise modifying physical or chemical properties, such as by providing a protective surface coating.

(166) Steep slope--Any slope of more than 20

degrees or such lesser slope as may be designated by the Commission after consideration of soil, climate, and other characteristics of a region or state.

(167) Subirrigation--With respect to alluvial valley floors, the supplying of water to plants from underneath or from a semi-saturated or saturated subsurface zone where water is available for use by vegetation. Subirrigation may be identified by:

(A) diurnal fluctuation of the water table, due to the differences in nighttime and daytime evapotranspiration rates;

(B) increasing soil moisture from a portion of the root zone down to the saturated zone, due to capillary action;

(C) mottling of the soils in the root zones;

(D) existence of an important part of the root zone within the capillary fringe or water table of an alluvial aquifer; or

(E) an increase in streamflow or a rise in ground-water levels, shortly after the first killing frost on the valley floor.

(168) Substantial legal and financial commitments in a surface coal mining operation--Significant investments that have been made on the basis of a long-term coal contract in power plants, railroads, coal-handling, preparation, extraction or storage facilities and other capital-intensive activities. An example would be an existing mine, not actually producing coal, but in a substantial stage of development prior to production. Costs of acquiring the coal in place or the right to mine it without an existing mine, as described in the above example, alone are not sufficient to constitute substantial legal and financial commitments.

(169) Substantially disturb--For purposes of coal exploration, to significantly impact land, air or water resources by such activities as blasting; mechanical excavation; drilling or altering coal or water exploratory holes or wells; removal of vegetation, topsoil, or overburden; construction of roads or other access routes; placement of structures, excavated earth, or waste material on the natural surface of land; or by other such activities; or to remove more than 250 tons of coal.

(170) Successor in interest--Any person who succeeds to rights granted under a permit, by transfer, assignment, or sale of those rights.

(171) Surface coal mining and reclamation operations--Surface coal mining operations and all activities necessary or incidental to the reclamation of such operations. This term includes the term surface coal mining operations.

(172) Surface coal mining operations--Includes:

(A) activities conducted on the surface of lands in connection with a surface coal mine or, subject to the requirements of §134.015 of the Act, surface operations and surface impacts incident to an underground coal mine, the products of which enter or the operations of which directly or indirectly affect interstate commerce. Such activities include excavation for the purpose of obtaining coal, including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining; the use of explosives and blasting; in situ distillation or retorting; leaching or other chemical or physical processing; the cleaning, concentrating, or other processing or preparation of coal; and the loading of coal for interstate commerce at or near the mine-site. Provided, however, that such activities do not include the extraction of coal incidental to the extraction of other minerals, where coal does not exceed 16 2/3% of the tonnage of minerals removed annually from all sites operated by a person on contiguous tracts of land for purposes of commercial use or sale, or coal exploration subject to §134.014 and §134.031(d) of the Act; and provided further, that excavation for the purpose of obtaining coal includes extraction of coal from coal refuse piles; and

(B) areas upon which the activities described in subparagraph (A) of this definition occur or where such activities disturb the natural land surface. Such areas shall also include any adjacent land the use of which is incidental to any such activities, all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of those activities and for haulage and excavation, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas, and other areas upon which are site structures, facilities, or other property or material on the surface, resulting from or incident to those activities.

(173) Surface mining activities--Those surface coal mining and reclamation operations incident to the extraction of coal from the earth by removing the materials over a coal seam, before recovering the coal, by auger coal mining, or by recovery of coal from a deposit that is not in its original geologic location.

(174) Surface operations and impacts incident to an underground coal mine--All activities involved in or related to underground coal mining which are either conducted on the surface of the land, produce changes in the land surface or disturb the surface, air or water resources of the area, including all activities listed in §134.004(19) of the Act and the definition of surface coal mining operations contained in this section.

(175) Suspended solids or nonfilterable residue--Expressed as milligrams per liter, organic or inorganic materials carried or held in suspension in water which are retained by a standard glass fiber filter in the procedure outlined by the U.S. Environmental Protection Agency regulations for wastewater and analyses (40 CFR 136).

(176) Temporary diversion--A diversion of a stream or overland flow which is used during coal exploration or surface coal mining and reclamation operations and not approved by the Commission to remain after reclamation as part of the approved postmining land use.

(177) Temporary impoundment--An impoundment used during surface coal mining and reclamation operations, but not approved by the Commission to remain as part of the approved postmining land use.

(178) Thick overburden--More than sufficient spoil and other waste materials available from the entire permit area to restore the disturbed area to its approximate original contour. More than sufficient spoil and other waste materials occur where the overburden thickness times the swell factor exceeds the combined thickness of the overburden and coal bed prior to removing the coal, so that after backfilling and grading the surface configuration of the reclaimed area would not:

(A) closely resemble the surface configuration of the land prior to mining; or

(B) blend into and complement the drainage pattern of the surrounding terrain.

(179) Thin overburden--Insufficient spoil and other waste materials available from the entire permit area to restore the disturbed area to its approximate original contour.

Insufficient spoil and other waste materials occur where the overburden thickness times the swell factor, plus the thickness of other available waste materials, is less than the combined thickness of the overburden and coal bed prior to removing the coal, so that after backfilling and grading the surface configuration of the reclaimed area would not:

(A) closely resemble the surface configuration of the land prior to mining; or

(B) blend into and complement the drainage pattern of the surrounding terrain.

(180) Ton--2,000 pounds avoirdupois (0.90718 metric ton).

(181) Topsoil--The A and E soil-horizon layers of the four master soil horizons.

(182) Toxic-forming materials--Earth materials or wastes which, if acted upon by air, water, weathering, or microbiological processes, are likely to produce chemical or physical conditions in soils or water that are detrimental to biota or uses of water.

(183) Toxic mine drainage--Water that is discharged from active or abandoned mines or other areas affected by coal exploration or surface coal mining and reclamation operations, which contains a substance that through chemical action or physical effects is likely to kill, injure, or impair biota commonly present in the area that might be exposed to it.

(184) Transfer, assignment, or sale of rights--A change in ownership or other effective control over the right to conduct surface coal mining operations under a permit issued by the Commission.

(185) Unconsolidated streamlaid deposits holding streams--With respect to alluvial valley floors, all flood plains and terraces located in the lower portions of topographic valleys which contain perennial or other streams with channels that are greater than 3 feet in bankfull width and greater than 0.5 feet in bankfull depth.

(186) Underground development waste--Waste rock mixtures of coal, shale, claystone, siltstone, sandstone, limestone, or related materials that are excavated, moved, and disposed of during development and preparation of areas incident to underground mining activities.

(187) Underground mining activities--Includes:

(A) surface operations incident to underground extraction of coal or in situ processing, such as construction, use, maintenance, and reclamation of roads, above-ground repair areas, storage areas, processing areas, shipping areas, areas upon which are sited support facilities including hoist and ventilating ducts, areas utilized for the disposal and storage of waste, and areas on which materials incident to underground mining operations are placed; and

(B) underground operations such as underground construction, operation, and reclamation of shafts, adits, underground support facilities, in situ processing, and underground mining, hauling, storage, and blasting.

(188) Undeveloped rangeland--For purposes of alluvial valley floors, lands where the use is not specifically controlled and managed.

(189) Unwarranted failure to comply--The failure of the permittee to prevent the occurrence of any violation of the permit or any requirement of the Act, due to the indifference, lack of diligence, or lack of reasonable care, or the failure to abate any violation of such permit or the Act, due to indifference, lack of diligence, or lack of reasonable care.

(190) Upland areas--With respect to alluvial valley floors, those geomorphic features located outside the floodplain and terrace complex, such as isolated higher terraces, alluvial fans, pediment surfaces, landslide deposits, and surfaces covered with residuum, mud flows or debris flows, as well as highland areas underlain by bedrock and covered by residual weathered material or debris deposited by sheetwash, rillwash, or windblown material.

(191) Valid existing rights--A set of circumstances under which a person may, subject to Commission approval, conduct surface coal mining operations on lands where §134.022 of the Act and §12.71(a) of this title (relating to Areas Where Surface Coal Mining Operations are Prohibited or Limited) would otherwise prohibit such operations. Possession of valid existing rights only confers an exception from the prohibitions of §12.71(a) of this title and §134.022 of the Act. A person seeking to exercise valid existing rights must comply with all other pertinent requirements of the Act and this chapter.

(A) Property rights demonstration. Except as provided in subparagraph (C) of this paragraph, a person claiming valid existing rights must demonstrate that a legally binding conveyance, lease, deed, contract, or other document vests that person, or a predecessor in interest, with the right to conduct the type of surface coal mining operations intended. This right must exist at the time that the land came under the protection of §12.71(a) of this title or §134.022 of the Act. Applicable state statutory or case law will govern interpretation of documents relied upon to establish property rights. If no applicable state law exists, custom and generally accepted usage at the time and place that the documents came into existence will govern their interpretation.

(B) Additional demonstrations. Except as provided in subparagraph (C) of this paragraph, a person claiming valid existing rights must also demonstrate compliance with one of the following standards:

(i) Good faith/all permits standard. All permits and other authorizations required to conduct surface coal mining operations have been obtained, or a good faith effort to obtain all necessary permits and authorizations has been made, before the land came under the protection of §12.71(a) of this title or §134.022 of the Act. At a minimum, an application must have been submitted for any permit required under Subchapter G of this chapter (relating to Surface Coal Mining and Reclamation Operations, Permits, and Coal Exploration Procedure Systems); or

(ii) Needed for and adjacent standard. The land is needed for and immediately adjacent to a surface coal mining operation for which all permits and other authorizations required to conduct surface coal mining operations have been obtained, or a good faith attempt to obtain all permits and authorizations has been made, before the land came under the protection of §12.71(a) of this title or §134.022 of the Act. To meet this standard, a person must demonstrate that prohibiting expansion of the operation onto that land would unfairly impact the viability of the operation as originally planned before the land came under the protection of §12.71(a) of this title or §134.022 of the Act. Except for operations in existence before August 3, 1977, or for which a good faith effort to obtain all necessary permits have been made before August 3, 1977, this standard does not apply to lands already under the protection of §12.71(a) of this title or §134.022 of the Act when the Commission approved the permit for the original operation or when the good faith effort to obtain all necessary permits for the

original operation was made. In evaluating whether a person meets this standard, the Commission may consider factors such as:

(I) the extent to which coal supply contracts or other legal and business commitments that predate the time that the land came under the protection of §12.71(a) of this title or §134.022 of the Act depend upon use of that land for surface coal mining operations;

(II) the extent to which plans used to obtain financing for the operation before the land came under the protection of §12.71(a) of this title or §134.022 of the Act rely upon use of that land for surface coal mining operations;

(III) the extent to which investments in the operation before the land came under the protection of §12.71(a) of this title or §134.022 of the Act rely upon use of that land for surface coal mining operations; and

(IV) whether the land lies within the area identified on the life-of-mine map submitted under §12.136(3) of this title (relating to Maps: General Requirements) or §12.182(3) of this title (relating to Maps: General Requirements) before the land came under the protection of §12.71(a) of this title.

(C) Roads. A person who claims valid existing rights to use or construct a road across the surface of lands protected by §12.71(a) of this title or §134.022 of the Act must demonstrate that one or more of the following circumstances exist if the road is included within the definition of "surface coal mining operations" in this section:

(i) the road existed when the land upon which it is located came under the protection of §12.71(a) of this title or §134.022 of the Act, and the person has a legal right to use the road for surface coal mining operations;

(ii) a properly recorded right of way or easement for a road in that location existed when the land came under the protection of §12.71(a) of this title or §134.022 of the Act, and, under the document creating the right of way or easement, and under subsequent conveyances, the person has a legal right to use or construct a road across the right of way or easement for surface coal mining operations;

(iii) a valid permit for use or construction of a road in that location for surface coal mining operations existed when the land came under the protection of §12.71(a) of this title or §134.022 of the Act; or

(iv) valid existing rights exist under subparagraphs (A) and (B) of this paragraph.

(192) Valley fill--A fill structure consisting of any material other than coal waste and organic material that is placed in a valley where side slopes of the existing valley measured at the steepest point are greater than 20 degrees or the average slope of the profile of the valley from the toe of the fill to the top of the fill is greater than 10 degrees.

(193) Violation--When used in the context of the permit application information or permit eligibility requirements of the Act and this chapter:

(A) a failure to comply with an applicable provision of a Federal or state law or regulation pertaining to air or water environmental protection, as evidenced by a written notification from a governmental entity to the responsible person; or

(B) a noncompliance for which the Commission has provided one or more of the following types of notice, or another state's regulatory authority has provided equivalent notice under corresponding provisions of that state's regulatory program:

(i) a notice of violation under §12.678 of this title (relating to Notices of Violation);

(ii) a cessation order under §12.677 of this title (relating to Cessation Orders);

(iii) a final order, bill, or demand letter pertaining to a delinquent civil penalty assessed under Subchapter L of this chapter (relating to Permanent Program Inspection and Enforcement Procedures);

(iv) a bill or demand letter pertaining to delinquent reclamation fees owed under 30 CFR, Part 870; or

(v) a notice of bond forfeiture under §12.314(d) of this title (relating to Forfeiture of Bonds) when:

(I) one or more violations upon which the forfeiture was based have not been abated or corrected; or

(II) the amount forfeited and collected is insufficient for full reclamation under §12.314 of this title, the Commission orders reimbursement for additional reclamation costs, and the person has not complied with the reimbursement order.

(194) Violation, failure, or refusal--With respect to §§12.696 - 12.699 of this title, a violation of or a failure or refusal to comply with any order of the Commission including, but not limited to, a condition of a permit, notice of violation, failure-to-abate cessation order, imminent harm cessation order, order to show cause why a permit should not be suspended or revoked, and order in connection with a civil action for relief, except an order incorporated in a decision issued under §134.175 of the Act.

(195) Violation notice--Any written notification from a regulatory authority or other governmental entity, as specified in the definition of "violation" in this section.

(196) Water table--The upper surface of a zone of saturation, where the body of ground water is not confined by an overlying impermeable zone.

(197) Willful or willfully--With respect to §§12.696 - 12.699 of this title, an individual that authorized, ordered, or carried out an act or omission that resulted in either a violation or the failure to abate or correct a violation acted:

(A) intentionally, voluntarily, or consciously; and

(B) with intentional disregard or plain indifference to legal requirements.

(198) Willful violation--An act or omission which violates the Act, state, or federal laws or regulations, or any permit condition required by the Act or this chapter, committed by a person who intends the result which actually occurs.

The provisions of this §12.3 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640; amended to be effective December 29, 1998, 23 TexReg 13041; amended to be effective June 9, 2003, 28 TexReg 4412; amended to be effective February 24, 2014, 39 TexReg 1121.

§12.4 Petitions to Initiate Rulemaking

(a) Any person may petition the Commission to initiate a proceeding for the issuance, amendment, or repeal of any regulation under the Act. The petition shall be submitted to the Surface Mining and Reclamation Division, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711.

(b) The petition shall be a concise statement of the facts, technical justification, and law which require issuance, amendment, or repeal of a regulation under the Act and shall

indicate whether the petitioner desires a public hearing.

(c) Upon receipt of the petition, the Commission shall determine if the petition sets forth facts, technical justification and law which may provide a reasonable basis for issuance, amendment or repeal of a regulation. Facts, technical justification or law previously considered in a petition or rulemaking on the same issue shall not provide a reasonable basis. If a reasonable basis is shown, a notice shall be published in the Texas Register asking for public comments on the proposed change.

(d) Within 90 days from receipt of the petition, the Commission shall issue a written decision either granting or denying the petition.

(1) If the petition is granted, the Commission shall initiate a rulemaking proceeding in accordance with the APA.

(2) If the petition is denied, the Commission shall notify the petitioner in writing, setting forth the reasons for denial.

The provisions of this §12.4 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.5 Notice of Citizen Suits

(a) A person who intends to initiate a civil action on his or her own behalf under §§134.182-134.187 of the Act shall give notice of intent to do so, in accordance with this section.

(b) Notice shall be given by certified mail to the Commission, the Secretary of the U.S. Department of the Interior, and the Director of the federal Office of Surface Mining Reclamation and Enforcement, and by first class mail to the appropriate Regional Director.

(c) Notice shall be given by certified mail to the alleged violator, if the complaint alleges a violation of the Act or any regulation, order, or permit issued under the Act.

(d) Service of notice under this section is complete upon mailing to the last known address of the person being notified.

(e) A person giving notice regarding an alleged violation shall state, to the extent known:

(1) sufficient information to identify the provision of the Act, regulation, order, or permit allegedly violated;

(2) the act or omission alleged to constitute a violation;

(3) the name, address, and telephone numbers of the person or persons responsible for the alleged violation;

(4) the date, time, and location of the alleged violation;

(5) the name, address, and telephone number of the person giving notice; and

(6) the name, address, and telephone number of legal counsel, if any, of the person giving notice.

(f) A person giving notice of an alleged failure by the Commission to perform a mandatory act or duty under the Act shall state, to the extent known:

(1) the provision of the Act containing the mandatory act or duty allegedly not performed;

(2) sufficient information to identify the omission alleged to constitute the failure to perform a mandatory act or duty under the Act;

(3) the name, address, and telephone number of the person giving notice; and

(4) the name, address, and telephone number of legal counsel, if any, of the person giving notice.

The provisions of this §12.5 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.6 Availability of Records

(a) Records required by the Act to be made available locally to the public shall be retained at the geographically closest office to the Commission's Surface Mining and Reclamation Division.

(b) Other records or documents in the possession of the Commission may be requested pursuant to the Open Records Act (Texas Government Code, Chapter 552).

The provisions of this §12.6 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.7 Computation of Time

(a) Except as otherwise provided, computation of time under this chapter (relating to Coal Mining Regulations) is based on calendar days.

(b) In computing any period of prescribed time, the day on which the designated period of time begins is not included. The last day of the period is included unless it is a Saturday, Sunday, or legal holiday on which the Commission is not open for business, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday.

(c) Intermediate Saturdays, Sundays, and legal holidays are excluded from the computation when the period of prescribed time is 7 days or less.

The provisions of this §12.7 adopted to be effective April 7, 1997, 22 TexReg 3093.

DIVISION 2 PERMANENT REGULATORY PROGRAM

§12.9 Applicability

(a) On or after 8 months from the date of state program approval (approved February 11, 1980), no person shall conduct surface coal mining and reclamation operations in the state without first having obtained a permit from the Commission.

(b) The requirements of Subchapter K of this chapter (relating to Permanent Program Performance Standards) shall be effective and shall apply to each surface coal mining and reclamation operation which is required to obtain a permit under the Act, on the earliest date upon which the Act and this chapter (relating to Coal Mining Regulations) require a permit to be obtained, except as provided in subsection (c) of this section.

(c) With respect to existing structures:

(1) each structure used in connection with or to facilitate a coal exploration or surface coal mining and reclamation operation shall comply with the performance standards and the design requirements of Subchapter K of this chapter (relating to Permanent Program Performance Standards), except that:

(A) an existing structure which meets the performance standards of Subchapter K of this chapter (relating to Permanent Program Performance Standards) but does not meet the design requirements of Subchapter K of this chapter (relating to Permanent Program Performance Standards) may be exempted from meeting those design requirements by the Commission. The Commission may grant this exemption only as part of the permit application process after obtaining the information required by §§12.140 or 12.186 of this title (relating to Operation Plan: Existing Structures) and after making the findings required in §12.217

of this title (relating to Criteria for Permit Approval or Denial: Existing Structures); and

(B) an existing structure which does not meet a performance standard of Subchapter K of this chapter (relating to Permanent Program Performance Standards) shall be modified or reconstructed to meet the design standard of Subchapter K of this chapter (relating to Permanent Program Performance Standards) pursuant to a compliance plan approved by the Commission as part of the permit application as required in §§12.140 or 12.186 of this title (relating to Operation Plan: Existing Structures) and according to the findings required in §12.217 of this title (relating to Criteria for Permit Approval or Denial: Existing Structures); and

(2) the exemptions provided in paragraph (1)(A) of this subsection shall not apply to:

(A) the requirements for existing and new waste piles used either temporarily or permanently as dams or embankments; and

(B) the requirements to restore the approximate original contour of the land.

(d) The applicability of this chapter (relating to Coal Mining Regulations) to coal exploration is as follows:

(1) any person conducting coal exploration on or after approval of the state program shall either file a notice of intention to explore or obtain the approval of the Commission required under §§12.109-12.115 of this title (relating to General Requirements for Coal Exploration); and

(2) coal exploration performance standards of §§12.325-12.328 of this title (relating to Permanent Program Performance Standards--Coal Exploration) shall apply to coal exploration which substantially disturbs the natural land surface two months after approval of the state program.

The provisions of this §12.9 adopted to be effective April 7, 1997, 22 TexReg 3093.

DIVISION 3 RESTRICTION OF FINANCIAL INTERESTS OF STATE EMPLOYEES

§12.10 Responsibility

(a) The Commissioners or the Director of the Surface Mining and Reclamation Division, acting as their authorized representative, shall:

(1) provide advice, assistance, and guidance to all state employees required to file statements pursuant to §12.13 of this title (relating to Who Shall File);

(2) promptly review the statement of employment and financial interests and supplements, if any, filed by each employee, to determine if the employee has correctly identified those listed employment and financial interests which constitute a direct or indirect financial interest in an underground or surface coal mining operation;

(3) resolve prohibited financial interest situations by ordering or initiating remedial action, or by reporting the violations to the Director who is responsible for initiating action to impose the penalties of the Federal Act;

(4) certify on each statement that review has been made, that prohibited financial interests, if any, have been resolved, and that no other prohibited interests have been identified from the statement;

(5) submit to the Director such statistics and information as he or she may request to enable preparation of the required annual report to Congress;

(6) submit to the Director the initial listing and the subsequent annual listings of positions as required by §§12.13(b) and (c) of this title (relating to Who Shall File);

(7) furnish a blank statement 45 days in advance of the filing date established by §12.14(a) of this title (relating to When to File) to each state employee required to file a statement; and

(8) inform annually each state employee required to file a statement with the Commission, of the name, address, and telephone number of the person whom they may contact for advice and counseling.

(b) Commission employees performing any duties or functions under the Act shall:

(1) have no direct or indirect financial interest in coal mining operations;

(2) file a fully completed statement of employment and financial interest upon entrance to duty, and annually thereafter on the specified filing date; and

(3) comply with directives issued by persons responsible for approving each statement and comply with directives issued by those persons responsible for ordering remedial action.

(c) Members of advisory boards and commissions established in accordance with state laws or regulations to represent multiple interests, who perform a function or duty under the Act, shall recuse themselves from proceedings which may affect their direct or indirect financial interests.

The provisions of this §12.10 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.12 Penalties

(a) Criminal penalties are imposed by §134.007 of the Act. Section 134.007 of the Act prohibits each employee of the Commission who performs any function or duty under the Act from having a direct or indirect financial interest in any underground or surface coal mining operation. The Act provides that whoever knowingly violates the provisions of §134.007 of the Act shall, upon conviction, be punished by a fine of not more than $2,500, or by imprisonment of not more than one year, or by both.

(b) The provisions in §134.007 of the Act make compliance with the financial interest requirements a condition of employment for employees of the Commission who perform any functions or duties under the Act. Accordingly, an employee who fails to file the required statement will be considered in violation of the intended employment provisions of §134.007 of the Act and will be subject to removal from his or her position.

The provisions of this §12.12 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.13 Who Shall File

(a) Any employee who performs any function or duty under the Act is required to file a statement of employment and financial interests. Members of advisory boards and commissions established in accordance with state laws or regulations to represent multiple interests, who perform a function or duty under the Act, must file a statement of employment and financial interests. An employee who occupies a position which has been determined by the Commission not to involve performance of any function or duty under the Act or who is no longer employed by the Commission at the time a filing is due, is not required to file a statement.

(b) The Commission shall prepare a list of those positions within the Commission that do not involve

performance of any functions or duties under the Act.

(c) The Commission shall annually review and update the listing of positions not involving the performance of any functions or duties under the Act. For monitoring and reporting reasons, the listing must be submitted to the Director and must contain a written justification for inclusion of the positions listed. Proposed revisions or a certification that revision is not required shall be submitted to the Director by no later than September 30 of each year. The Commission may revise the listing by the addition or deletion of positions at any time such revisions are required to carry out the purpose of the law or the regulations of §§12.10, 12.12, this section, and §§12.14-12.19 of this title (relating to Restriction of Financial Interests of State Employees). Additions to and deletions from the listing of positions are effective upon notification to the incumbents of the positions added or deleted.

The provisions of this §12.13 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.14 When To File

(a) Employees and members of advisory boards and commissions representing multiple interests performing functions or duties under the Act shall file on February 1st of each year.

(b) New employees and new members of advisory boards and commissions representing multiple interests hired, appointed, or transferred to perform functions or duties under the Act will be required to file at the time of entrance to duty. No annual statement shall be required if the initial statement is filed with 60 days prior to February 1st.

The provisions of this §12.14 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.15 Where To File

The Commissioners shall file their statements with the Director. All other employees and members of advisory boards and commissions representing multiple interests, as provided in §12.13 of this title (relating to Who Shall File), shall file their statements with the Commission.

The provisions of this §12.15 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.16 What To Report

(a) Each employee or member of an advisory board or commission representing multiple interests, as provided in §12.13 of this title (relating to Who Shall File), shall report all information required on the statement of employment and financial interests of the filer, his or her spouse, minor children, or other relatives who are full-time residents of the filer's home. The report shall be on OSM Form 23 as provided by the Office.

(b) The statement will set forth the following information regarding any financial interest:

(1) Employment. Any continuing financial interests in business entities and nonprofit organizations through a pension or retirement plan, shared income, salary or other income arrangement as a result of prior or current employment. The employee, his or her spouse or other resident relative is not required to report a retirement plan from which he or she will receive a guaranteed income. A guaranteed income is one which is unlikely to be changed as a result of actions taken by the Commission;

(2) Securities. Any financial interest in business entities and nonprofit organizations through ownership of stock, stock options, bonds, securities or other arrangements including trusts. An employee is not required to report holdings in widely diversified mutual funds, investments clubs or regulated investment companies not specializing in underground and surface coal mining operations;

(3) Real Property. Ownership, lease, royalty or other interests or rights in land or minerals. Employees are not required to report lands developed and occupied for a personal residence; and

(4) Creditors. Debts owed to business entities and nonprofit organizations. Employees are not required to report debts owed to financial institutions (banks, savings and loan associations, credit unions, and the like) which are chartered to provide commercial or personal credit. Also excluded are charge accounts and similar short term debts for current and ordinary household and living expenses.

(c) Employee certification, and, if applicable, a listing of exceptions, shall include the following:

(1) the statement will provide for a signed certification by the employee that, to the best of his or her knowledge:

(A) none of the listed financial interests represent an interest in an underground or surface coal mining operation except as specifically identified and described as exceptions by the employee as part of the certificate; and

(B) the information shown on the statement is true, correct, and complete;

(2) an employee is expected to:

(A) have complete knowledge of his or her personal involvement in business enterprises such as a sole proprietorship and partnership, his or her outside employment and the outside employment of the spouse and other covered relatives; and

(B) be aware of the information contained in the annual financial statement or other corporate or business reports routinely circulated to investors or routinely made available to the public;

(3) the exceptions shown in the employee certification of the form must provide enough information for the Commission to determine the existence of a direct or indirect financial interest. Accordingly, the exceptions should:

(A) list the financial interests;

(B) show the number of shares, estimated value or annual income of the financial interests; and

(C) include any other information which the employee believes should be considered in determining whether or not the interest represents a prohibited interest; and

(4) employees are cautioned to give serious consideration to their direct and indirect financial interests before signing the statement of certification. Signing the certification without listing known prohibited financial interests may be the cause for imposing the penalties prescribed in §12.12(a) of this title (relating to Penalties).

The provisions of this §12.16 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.17 Gifts and Gratuities

(a) Except as provided in subsection (b) of this section,

employees shall not solicit or accept, directly or indirectly, any gift, gratuity, favor, entertainment, loan or any other thing of monetary value, from a coal company which:

(1) conducts or is seeking to conduct, operations or activities that are regulated by the Commission; or

(2) has interests that may be substantially affected by the performance or non-performance of the employee's official duty.

(b) The prohibitions in subsection (a) of this section do not apply in the context of obvious family or personal relationships, such as those between the parents, children, or spouse of the employee and the employee, when the circumstances make it clear that it is those relationships rather than the business of the person concerned which are the motivating factors.

(c) Employees found guilty of violating the provisions of this section will be subject to administrative remedies which may include:

(1) return of the gift or gratuity;

(2) reassignment;

(3) suspension or reduction in pay; and

(4) job termination.

The provisions of this §12.17 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.18 Resolving Prohibited Interests

Actions to be taken by the Commission:

(1) Remedial action to effect resolution. If an employee has a prohibited financial interest, the Commission shall promptly advise the employee that remedial action which will resolve the prohibited interest is required within 90 days.

(2) Form of remedial action. Remedial action may include:

(A) reassignment of the employee to a position which performs no function or duty under the Act; or

(B) divestiture of the prohibited financial interest; or

(C) other appropriate action which either eliminates the prohibited interest or eliminates the situation which creates the conflict.

(3) Reports of noncompliance. If 90 days after an employee is notified to take remedial action that employee is not in compliance with the requirements of the Act and these regulations, the Commission shall take appropriate legal action through the state Attorney General's office as specified under §12.12 of this title (relating to Penalties), and report the facts of the situation to the Director, who shall determine whether any additional action should be initiated. The report to the Director shall include the original or a certified true copy of the employee's statement and any other information pertinent to the Director's determination, including a statement of actions being taken at the time the report is made.

The provisions of this §12.18 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.19 Appeals Procedures

Employees have the right to appeal an order for remedial action under §12.18 of this title (relating to Resolving Prohibited Interests), and shall have 30 days to exercise this right before disciplinary action is initiated.

(1) Employees, other than the Commissioners, may file their appeal, in writing, through established procedures within the Commission.

(2) The Commissioners may file their appeals, in writing, with the Director, who will refer it to the Conflict of Interest Appeals Board within the U.S. Department of the Interior.

The provisions of this §12.19 adopted to be effective April 7, 1997, 22 TexReg 3093.

DIVISION 4 EXEMPTION FOR COAL EXTRACTION INCIDENT TO GOVERNMENT-FINANCED HIGHWAY OR OTHER CONSTRUCTION

§12.21 Applicability

(a) Coal extraction which is an incidental part of government-financed construction is exempt from the Act and this chapter (relating to Coal Mining Regulations).

(b) Any person who conducts or intends to conduct coal extraction which does not satisfy subsection (a) of this section shall not proceed until a permit has been obtained from the Commission.

The provisions of this §12.21 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.22 Information To Be Maintained on Site

Any person extracting coal incident to a government-financed highway or other construction who extracts more than 250 tons of coal shall maintain, on the site of the extraction operation and available for inspection, documents which show:

(1) a description of the construction project;

(2) the exact location of the construction, right-of-way or the boundaries of the area which will be directly affected by the construction; and

(3) the government agency which is providing the financing and the kind and amount of public financing, including the percentage of the entire construction costs represented by the government financing.

The provisions of this §12.22 adopted to be effective April 7, 1997, 22 TexReg 3093.

DIVISION 5 AWARDS OF COSTS AND EXPENSES

§12.23 Costs and Expenses

An award may be made pursuant to §134.172 of the Act:

(1) to the Commission when it demonstrates that any person applied for review pursuant to §§134.161-134.173 of the Act or that any party participated in such a proceeding in bad faith and for the purpose of harassing or embarrassing the Commission;

(2) to a permittee from any person when the permittee demonstrates that the person initiated a proceeding under §§134.161-134.173 of the Act or participated in such a proceeding in bad faith and for the purpose of harassing or embarrassing the permittee;

(3) to a permittee from the Commission when the permittee demonstrates that the Commission issued an order of cessation, a notice of violation, or an order to show cause why a permit should not be suspended or revoked, in bad faith and for the purpose of harassing or embarrassing the permittee;

(4) to any person other than a permittee or his representative from the Commission if the person initiates or participates in any proceeding under the Act, upon a finding that the person made a substantial contribution to a full and fair determination of the issues; or

(5) to any person from the permittee if the person

initiates any administrative proceedings reviewing enforcement actions, upon a finding that a violation of the Act, regulations, or permit has occurred, or that an imminent hazard existed; or to any person who participates in an enforcement proceeding when such finding is made if the Commission determines that the person made a substantial contribution to the full and fair determination of the issues.
The provisions of this §12.23 adopted to be effective April 7, 1997, 22 TexReg 3093.

DIVISION 6 EXEMPTION FOR COAL EXTRACTION INCIDENTAL TO THE EXTRACTION OF OTHER MINERALS

§12.25 Scope

This section and §§12.26-12.33 of this title (relating to Exemption for Coal Extraction Incidental to the Extraction of Other Minerals) implements the exemption contained in §134.004(19)(A) of the Act concerning the extraction of coal incidental to the extraction of other minerals where coal does not exceed 16 2/3% of the total tonnage of coal and other minerals removed for purposes of commercial use or sale.
The provisions of this §12.25 adopted to be effective November 4, 1997, 22 TexReg 10640.

§12.26 Application Requirements and Procedures

(a) Requirement to file an application. Any person who plans to commence or continue coal extraction after the effective date of §12.25, this section, and §§12.27-12.33 of this title (relating to Exemption for Coal Extraction Incidental to the Extraction of Other Minerals), in reliance on the incidental mining exemption shall file a complete application for exemption with the Commission for each mining area. A person may not commence coal extraction based upon the exemption until the Commission approves such application, except as provided in subsection (e)(3) of this section.

(b) Existing operations. Any person who has commenced coal extraction at a mining area in reliance upon the incidental mining exemption prior to the effective date of §12.25, this section, and §§12.27-12.33 of this title, may continue mining operations for 60 days after the effective date of §12.25, this section, and §§12.27-12.33 of this title. Coal extraction may not continue after such 60 day period unless that person files an administratively complete application for exemption with the Commission. An application will be determined to be administratively complete when it contains the information responsive to the requirements of §12.27 of this title (relating to Contents of Application for Exemption). If an administratively complete application is filed within 60 days, the person may continue extracting coal in reliance on the exemption beyond the 60-day period until the Commission makes an administrative decision on such application.

(c) Additional information. The Commission shall notify the applicant if the application for exemption is incomplete and may at any time require submittal of additional information.

(d) Public comment period. Following publication of the newspaper notice required by §12.27(i) of this title, the Commission shall provide a period of no less than 30 days, during which time any person having an interest which is or may be adversely affected by a decision on the application may submit written comments or objections.

(e) Exemption determination.

(1) No later than 90 days after filing of an administratively complete application, the Commission shall make a written determination whether, and under what conditions, the persons claiming the exemption are exempt under §12.25, this section, and §§12.27-12.33 of this title, and shall notify the applicant and persons submitting comments on the application of the determination and the basis for the determination.

(2) The determination of exemption shall be based upon information contained in the application and any other information available to the Commission at that time.

(3) If the Commission fails to provide an applicant with the determination as specified in paragraph (1) of this subsection, an applicant who has not begun may commence coal extraction pending a determination on the application unless the Commission issues an interim finding, together with reasons therefor, that the applicant may not begin coal extraction.

(f) Appeal and review. Any adversely affected person may request appeal or review of a determination under subsection (e) of this section in accordance with procedures established under §12.222 of this title (relating to Administrative Review).
The provisions of this §12.26 adopted to be effective November 4, 1997, 22 TexReg 10640.

§12.27 Contents of Application for Exemption

An application for exemption shall include, at a minimum:

(1) the name and address of the applicant;

(2) a list of the minerals sought to be extracted;

(3) estimates of annual production of coal and the other minerals within each mining area over the anticipated life of the mining operation;

(4) estimated annual revenues to be derived from bona fide sales of coal and other minerals to be extracted within the mining area;

(5) where coal or the other minerals are to be used rather than sold, estimated annual fair market values at the time of projected use of the coal and other minerals to be extracted from the mining area;

(6) the basis for all annual production, revenue, and fair market value estimates;

(7) a description, including county, township if any, and boundaries of the land, of sufficient certainty that the mining areas may be located and distinguished from other mining areas;

(8) an estimate to the nearest acre of the number of acres that will compose the mining area over the anticipated life of the mining operation;

(9) evidence of publication, in a newspaper of general circulation in the county of the mining area, of a public notice that an application for exemption has been filed with the Commission. (The public notice must identify the persons claiming the exemption and must contain a description of the proposed operation and its locality that is sufficient for interested persons to identify the operation.);

(10) representative stratigraphic cross-section(s) based on test borings or other information identifying and showing the relative position, approximate thickness and density of the coal and each other mineral to be extracted for commercial use or sale and the relative position and thickness of any material, not classified as other minerals, that will also be extracted during the conduct of mining activities;

(11) a map of appropriate scale which clearly identifies the mining area;

(12) a general description of mining and mineral processing activities for the mining area;

(13) a summary of sales commitments and agreements for future delivery, if any, which the applicant has received for other minerals to be extracted from the mining area, or a description of potential markets for such minerals;

(14) if the other minerals are to be commercially used by the applicant, a description specifying the use;

(15) for operations having extracted coal or other minerals prior to filing an application for exemption, in addition to the information required above, the following information must also be submitted:

(A) any relevant documents the operator has received from the Commission documenting its exemption from the requirements of the Act;

(B) the cumulative production of the coal and other minerals from the mining area; and

(C) estimated tonnages of stockpiled coal and other minerals; and

(16) any other information pertinent to the qualification of the operation as exempt.

The provisions of this §12.27 adopted to be effective November 4, 1997, 22 TexReg 10640.

§12.28 Public Availability of Information

(a) Except as provided in subsection (b) of this section, all information submitted to the Commission under §§12.25-12.27, this section, and §§12.29-12.33 of this title (relating to Exemption for Coal Extraction Incidental to the Extraction of Other Minerals) shall be made immediately available for public inspection and copying at the Division's central and local offices closest to the mining operations claiming exemption until at least three years after expiration of the period during which the subject mining area is active.

(b) The Commission may keep information submitted to the Commission under this part confidential if the person submitting it requests in writing, at the time of submission, that it be kept confidential and the information concerns trade secrets or is privileged commercial or financial information of the persons intending to conduct operations under §§12.25-12.27, this section, and §12.29-12.33 of this title.

(c) Information requested to be held as confidential under subsection (b) of this section shall not be made publicly available until after notice and opportunity to be heard is afforded persons both seeking and opposing disclosure of the information.

The provisions of this §12.28 adopted to be effective November 4, 1997, 22 TexReg 10640.

§12.29 Requirements for Exemption

(a) Activities are exempt from the requirements of the Act if all of the following are satisfied:

(1) The cumulative production of coal extracted from the mining area determined annually as described in this paragraph does not exceed 16 2/3% of the total cumulative production of coal and other minerals removed during such period for purposes of bona fide sale or reasonable commercial use.

(2) Coal is produced from a geological stratum lying above or immediately below the deepest stratum from which other minerals are extracted for purposes of bona fide sale or reasonable commercial use.

(3) The cumulative revenue derived from the coal extracted from the mining area determined annually shall not exceed 50% of the total cumulative revenue derived from the coal and other minerals removed for purposes of bona fide sale or reasonable commercial use. If the coal extracted or the minerals removed are used by the operator or transferred to a related entity for use instead of being sold in a bona fide sale, then the fair market value of the coal or other minerals shall be calculated at the time of use or transfer and shall be considered rather than revenue.

(b) Persons seeking or that have obtained an exemption from the requirements of the Act shall comply with the following:

(1) Each other mineral upon which an exemption under §§12.25-12.28, this section, and §§12.30-12.33 of this title (relating to Exemption for Coal Extraction Incidental to the Extraction of Other Minerals) is based must be a commercially valuable mineral for which a market exists or which is mined in bona fide anticipation that a market will exist for the mineral in the reasonably foreseeable future, not to exceed 12 months from the end of the current period for which cumulative production is calculated. A legally binding agreement for the future sale of other minerals is sufficient to demonstrate the above standard.

(2) If either coal or other minerals are transferred or sold by the operator to a related entity for its use or sale, the transaction must be made for legitimate business purposes.

The provisions of this §12.29 adopted to be effective November 4, 1997, 22 TexReg 10640.

§12.30 Conditions of Exemption and Right of Inspection and Entry

A person conducting activities covered by §§12.25-12.29, this section, and §12.31-12.33 of this title (relating to Exemption for Coal Extraction Incidental to the Extraction of Other Minerals) shall:

(1) maintain on-site or at other locations available to authorized representatives of the Commission, as well as authorized representatives of the Secretary, the information necessary to verify the exemption including, but not limited to, commercial use and sales information, extraction tonnages, and a copy of the exemption application and exemption approved by the Commission;

(2) notify the Commission upon the completion of the mining operation or permanent cessation of all coal extraction activities;

(3) conduct operations in accordance with the approved application or when authorized to extract coal under §12.26(b) or (e)(3) of this title (relating to Application Requirements and Procedures) prior to submittal or approval of an exemption application, in accordance with the standards of §§12.25-12.29, this section, and §§12.31-12.33 of this title.

(4) Authorized representatives of the Commission, as well as authorized representatives of the Secretary, shall have the right to conduct inspections of operations claiming exemption under §§12.25-12.29, this section, and §§12.31-12.33 of this title (relating to Exemption for Coal Extraction Incidental to the Extraction of Other Minerals).

(5) Each authorized representative of the Commission, as well as authorized representatives of the Secretary, conducting an inspection under §§12.25-12.29, this section, and §§12.31-12.33 of this title:

(A) shall have a right of entry to, upon, and

through any mining and reclamation operations without advance notice or a search warrant, upon presentation of appropriate credentials;

(B) may, at reasonable times and without delay, have access to and copy any records relevant to the exemption; and

(C) shall have a right to gather physical and photographic evidence to document conditions, practices, or violations at a site.

(6) No search warrant shall be required with respect to any activity under paragraphs (4) and (5) of this section, except that a search warrant may be required for entry into a building.

The provisions of this §12.30 adopted to be effective November 4, 1997, 22 TexReg 10640.

§12.31 Stockpiling of Minerals

(a) Coal. Coal extracted and stockpiled may be excluded from the calculation of cumulative production until the time of its sale, transfer to a related entity or use:

(1) up to an amount equaling a 12-month supply of the coal required for future sale, transfer or use as calculated based upon the average annual sales, transfer and use from the mining area over the two preceding years; or

(2) for a mining area where coal has been extracted for a period of less than two years, up to an amount that would represent a 12-month supply of the coal required for future sales, transfer or use as calculated based on the average amount of coal sold, transferred, or used each month.

(b) Other minerals.

(1) The Commission shall disallow all or part of an operator's tonnages of stockpiled other minerals for purposes of meeting the requirements of §§12.25-12.30, this section, and §12.32 and §12.33 of this title (relating to Exemption for Coal Extraction Incidental to the Extraction of Other Minerals) if the operator fails to maintain adequate and verifiable records of the mining area of origin, the disposition of stockpiles or if the disposition of the stockpiles indicates the lack of commercial use or market for the minerals.

(2) The Commission may only allow an operator to utilize tonnages of stockpiled other minerals for purposes of meeting the requirements of §§12.25-12.30, this section, and §12.32 and §12.33 if:

(A) the stockpiling is necessary to meet market conditions or is consistent with generally accepted industry practices; and

(B) except as provided in paragraph (3) of this subsection, the stockpiled other minerals do not exceed a 12-month supply of the mineral required for future sales as approved by the Commission on the basis of the exemption application.

(3) The Commission may allow an operator to utilize tonnages of stockpiled other minerals beyond the 12-month limit established in paragraph (2) of this subsection if the operator can demonstrate to the Commission's satisfaction that the additional tonnage is required to meet future business obligations of the operator, such as may be demonstrated by a legally binding agreement for future delivery of the minerals.

(4) The Commission may periodically revise the other mineral stockpile tonnage limits in accordance with the criteria established in paragraphs (2) and (3) of this subsection based on additional information available to the Commission.

The provisions of this §12.31 adopted to be effective November 4, 1997, 22 TexReg 10640.

§12.32 Revocation and Enforcement

(a) Commission responsibility. The Commission shall conduct an annual compliance review of the mining area, utilizing the annual report submitted pursuant to §12.33 of this title (relating to Reporting Requirements), an on-site inspection, and any other information available to the Commission.

(b) Notification by Commission. If the Commission has reason to believe that a specific mining area was not exempt under the provisions of §§12.25-12.31, this section, and §12.33 of this title (relating to Exemption for Coal Extraction Incidental to the Extraction of Other Minerals) at the end of the previous reporting period, is not exempt, or will be unable to satisfy the exemption criteria at the end of the current reporting period, the Commission shall notify the operator that the exemption may be revoked and the reason(s) therefor. The exemption will be revoked unless the operator demonstrates to the Commission within 30 days that the mining area in question should continue to be exempt.

(c) Exemption Revoked.

(1) If the Commission finds that an operator has not demonstrated that activities conducted in the mining area qualify for the exemption, the Commission shall revoke the exemption and immediately notify the operator and intervenors. If a decision is made not to revoke an exemption, the Commission shall immediately notify the operator and intervenors.

(2) Any adversely affected person may request appeal or review of a decision whether to revoke an exemption in accordance with procedures established under §12.222 of this title (relating to Administrative Review).

(d) Direct enforcement.

(1) An operator mining in accordance with the terms of an approved exemption shall not be cited for violations of the Act and this chapter (relating to Coal Mining Regulations) which occurred prior to the revocation of the exemption.

(2) An operator who does not conduct activities in accordance with the terms of an approved exemption and knows or should know such activities are not in accordance with the approved exemption shall be subject to direct enforcement action for violations of the Act and this chapter (relating to Coal Mining Regulations) which occur during the period of such activities.

(3) Upon revocation of an exemption or denial of an exemption application, an operator shall stop conducting surface coal mining operations until a permit is obtained and shall comply with the applicable reclamation standards of the Act and this chapter (relating to Coal Mining Regulations) with regard to conditions, areas, and activities existing at the time of revocation or denial.

The provisions of this §12.32 adopted to be effective November 4, 1997, 22 TexReg 10640.

§12.33 Reporting Requirements

(a) Exemption Approval.

(1) Following approval by the Commission of an exemption for a mining area, the person receiving the exemption shall, for each mining area, file a written report annually with the Commission containing the information specified in subsection (b) of this section.

(2) The report shall be filed no later than 30 days after the end of the 12-month period as determined in accordance with the definition of "cumulative measurement period" in §12.3 of this title (relating to Definitions).

(3) The information in the report shall cover:

(A) annual production of coal and other minerals and annual revenue derived from coal and other minerals during the preceding 12-month period; and

(B) the cumulative production of coal and other minerals and the cumulative revenue derived from coal and other minerals.

(b) Reporting. For each period and mining area covered by the report, the report shall specify:

(1) the number of tons of extracted coal sold in bona fide sales and total revenue derived from such sales;

(2) the number of tons of coal extracted and used or transferred by the operator or related entity and the estimated total fair market value of such coal;

(3) the number of tons of coal stockpiled;

(4) the number of tons of other commercially valuable minerals extracted and sold in bona fide sales and total revenue derived from such sales;

(5) the number of tons of other commercially valuable minerals extracted and used or transferred by the operator or related entity and the estimated total fair market value of such minerals; and

(6) the number of tons of other commercially valuable minerals removed and stockpiled by the operator.

The provisions of this §12.33 adopted to be effective November 4, 1997, 22 TexReg 10640.

SUBCHAPTER F LANDS UNSUITABLE FOR MINING

DIVISION 1 GENERAL

§12.69 Objectives

This subchapter (relating to Lands Unsuitable for Mining) establishes the procedures and standards to be followed in determining whether a proposed surface coal mining and reclamation operation can be authorized in light of the prohibitions and limitations in §§134.016-134.022 of the Act for those types of operations on certain public and private lands.

The provisions of this §12.69 adopted to be effective April 7, 1997, 22 TexReg 3093.

DIVISION 2 AREAS DESIGNATED BY ACT OF CONGRESS

§12.71 Areas Where Surface Coal Mining Operations are Prohibited or Limited

(a) Surface coal mining operations may not be conducted on the following lands unless those lands either qualify for the exception for existing operations under subsection (b) of this section or are subject to valid existing rights, as determined under §12.72(c) of this title (relating to Procedures for Compatibility Findings, Public Road Closures and Relocations, Buffer Zones, and Valid Existing Rights Determinations):

(1) Any lands within the boundaries of:

(A) the National Park System;

(B) the National Wildlife Refuge System;

(C) the National System of Trails;

(D) the National Wilderness Preservation System;

(E) the Wild and Scenic Rivers System, including study rivers designated under section 5(a) of the Wild and Scenic Rivers Act, 16 U.S.C. 1276(a), or study rivers or study river corridors established in any guidelines issued under that Act; or

(F) National Recreation Areas designated by Act of Congress.

(2) Any federal lands within a national forest, except that this prohibition must not apply if the Secretary finds that there are no significant recreational, timber, economic, or other values that may be incompatible with surface coal mining operations, and:

(A) any surface operations and impacts will be incident to an underground coal mine; or

(B) with respect to lands that do not have significant forest cover within national forests west of the 100th meridian, the Secretary of Agriculture has determined that surface mining is in compliance with the Act, the Multiple-Use Sustained Yield Act of 1960, 16 U.S.C. 528-531; the Federal Coal Leasing Amendments Act of 1975, 30 U.S.C. 181 et seq.; and the National Forest Management Act of 1976, 16 U.S.C. 1600 et seq.

(3) Any lands where the operation would adversely affect any publicly owned park or any place listed in the National Register of Historic Places; however, this prohibition does not apply if, as provided in §12.73(d) of this title (relating to Commission Obligations at Time of Permit Application Review), the Commission and the federal, state or local agency with jurisdiction over the park or place jointly approve the operation.

(4) Within 100 feet, measured horizontally, of the outside right-of-way line of any public road, except:

(A) where a mine access or haul road joins a public road, or

(B) when, as provided in §12.72(a) of this title, the Commission (or the appropriate public road authority designated by the Commission) allows the public road to be relocated or closed, or the area within the buffer zone to be affected by the surface coal mining operation, after:

(i) providing public notice and opportunity for a public hearing in accordance with §12.72(a)(3) of this title; and

(ii) finding in writing that the interests of the affected public and landowners will be protected.

(5) Within 300 feet, measured horizontally, of any occupied dwelling; except when:

(A) the owner of the dwelling has provided a written waiver consenting to surface coal mining operations within the protected zone, as provided in §12.72(b) of this title; or

(B) the part of the operation to be located closer than 300 feet to the dwelling is an access or haul road that connects with an existing public road on the side of the public road opposite the dwelling.

(6) Within 300 feet, measured horizontally, of any public building, school, church, community or institutional building, or public park.

(7) Within 100 feet, measured horizontally, of a cemetery; however, this prohibition does not apply if the cemetery is relocated in accordance with all applicable laws and regulations.

(b) Exception for existing operations. The prohibitions and limitations of subsection (a) of this section do not apply to surface coal mining operations for which a valid permit, issued under Subchapter G of this chapter (relating to

Surface Coal Mining and Reclamation Operations, Permits and Coal Exploration Procedures Systems), exists when the land comes under the protection of subsection (a) of this section; this exception applies only to lands within the permit area as it exists when the land comes under the protection of subsection (a) of this section.

The provisions of this §12.71 adopted to be effective June 9, 2003, 28 TexReg 4412.

§12.72 Procedures for Compatibility Findings, Public Road Closures and Relocations, Buffer Zones, and Valid Existing Rights Determinations

(a) Procedures for relocating or closing a public road or waiving the prohibition on surface coal mining operations within the buffer zone of a public road.

(1) This section does not apply to:

(A) lands for which a person has valid existing rights, as determined under subsection (c) of this section;

(B) lands within the scope of the exception for existing operations in §12.71(b) of this title (relating to Areas Where Surface Coal Mining Operations are Prohibited or Limited); and

(C) access or haul roads that join a public road, as described in §12.71(a)(4)(A) of this title (relating to Areas Where Surface Coal Mining Operations are Prohibited or Limited).

(2) All necessary approvals from the authority with jurisdiction over the road must be obtained for the following:

(A) relocation of a public road;

(B) closure of a public road; or

(C) surface coal mining operations proposed within 100 feet, measured horizontally, of the outside right-of-way line of a public road.

(3) Before approving an action proposed under paragraph (2) of this subsection, the Commission or a public road authority that it designates must determine that the interests of the public and affected landowners will be protected. Before making this determination, the Commission or designated authority must:

(A) provide a public comment period and opportunity to request a public hearing in the locality of the proposed operation;

(B) if a public hearing is requested, publish appropriate advance notice at least two weeks before the hearing in a newspaper of general circulation in the affected locality; and

(C) based upon information received from the public, make a written finding as to whether the interests of the public and affected landowners will be protected. If a hearing is held by the Commission or designated authority, the Commission or designated authority must make a written finding within 30 days after the hearing. If no hearing is held, the Commission or designated authority must make a written finding within 30 days after the end of the public comment period.

(b) Procedures for waiving the prohibition on surface coal mining operations within the buffer zone of an occupied dwelling.

(1) This section does not apply to:

(A) lands for which a person has valid existing rights, as determined under subsection (c) of this section;

(B) lands within the scope of the exception for existing operations in §12.71(b) of this title (relating to Areas Where Surface Coal Mining Operations are Prohibited or Limited); and

(C) access or haul roads that connect with an existing public road on the side of the public road opposite the dwelling, as provided in §12.71(a)(5)(B) of this title (relating to Areas Where Surface Coal Mining Operations are Prohibited or Limited).

(2) If surface coal mining operations are proposed to be conducted within 300 feet, measured horizontally, of any occupied dwelling, the permit application must include a written waiver by lease, deed, or other conveyance from the owner of the dwelling. The waiver must clarify that the owner and signatory have the legal right to deny mining and knowingly waived that right. The waiver will act as consent to surface coal mining operations within a closer distance of the dwelling as specified.

(3) If a valid waiver from the owner of an occupied dwelling to conduct operations within 300 feet of the dwelling was obtained before August 3, 1977, a new waiver does not need to be provided.

(4) If a valid waiver is obtained from the owner of an occupied dwelling, that waiver will remain effective against subsequent purchasers who have actual or constructive knowledge of the existing waiver at the time of purchase. A subsequent purchaser will be deemed to have constructive knowledge if the waiver has been properly filed in public property records pursuant to state laws or if surface coal mining operations have entered the 300-foot zone before the date of purchase.

(c) Submission and processing of requests for valid existing rights determinations.

(1) Basic framework for valid existing rights determinations. The following table identifies the agency responsible for making a valid existing rights determination and the definition that it must use, based upon which part of §12.71(a) of this title (relating to Areas Where Surface Coal Mining Operations are Prohibited or Limited) applies and whether the request includes federal lands.

Figure: 16_0012_0072-1 [***See Figure at end of this document.***]

(2) Contents of requests for a valid existing rights determination. A request for a valid existing rights determination for any land other than federal land must be submitted to the Commission if the applicant intends to conduct surface coal mining operations on the basis of valid existing rights under §12.71(a) of this title or wishes to confirm the right to do so. This request may be submitted before preparing and submitting an application for a permit or boundary revision for the land.

(A) Requirements for property rights demonstration. A property rights demonstration must be provided under the definition of "valid existing rights" in §12.3(187)(A) of this title (relating to Definitions) if the request relies upon the good faith/all permits standard or the needed for and adjacent standard in the definition of "valid existing rights" in §12.3(187)(B) of this title. This demonstration must include the following items:

(i) a legal description of the land to which the request pertains;

(ii) complete documentation of the character and extent of the applicant's current interests in the surface and mineral estates of the land to which the request pertains;

(iii) a complete chain of title for the surface and mineral estates of the land to which the request pertains;

(iv) a description of the nature and effect

of each title instrument that forms the basis for the request, including any provision pertaining to the type or method of mining or mining-related surface disturbances and facilities;

(v) a description of the type and extent of surface coal mining operations that the applicant claims the right to conduct, including the method of mining, any mining-related surface activities and facilities, and an explanation of how those operations would be consistent with state property law;

(vi) complete documentation of the nature and ownership, as of the date that the land came under the protection of §12.71(a) of this title (relating to Areas Where Surface Coal Mining Operations are Prohibited or Limited) or §134.022 of the Act, of all property rights for the surface and mineral estates of the land to which the request pertains;

(vii) names and addresses of the current owners of the surface and mineral estates of the land to which the request pertains;

(viii) if the coal interests have been severed from other property interests, documentation that the owners of other property interests in the land to which the request pertains has been notified and provided reasonable opportunity to comment on the validity of the applicant's property rights claims; and

(ix) any comments that are received by the applicant in response to the notification provided under clause (viii) of this subparagraph.

(B) Requirements for good faith/all permits standard. If the applicant's request relies upon the good faith/all permits standard in the definition of "valid existing rights" in §12.3(187)(B)(i) of this title, the information required under that clause must be submitted. The following information about permits, licenses, and authorizations for surface coal mining operations on the land to which the request pertains must also be submitted:

(i) approval and issuance dates and identification numbers for any permits, licenses, and authorizations that the applicant or a predecessor in interest obtained before the land came under the protection of §12.71(a) of this title (relating to Areas Where Surface Coal Mining Operations are Prohibited or Limited) or §134.022 of the Act;

(ii) application dates and identification numbers for any permits, licenses, and authorizations for which the applicant or a predecessor in interest submitted an application before the land came under the protection of §12.71(a) of this title or §134.022 of the Act; and

(iii) an explanation of any other good faith effort that the applicant or a predecessor in interest made to obtain the necessary permits, licenses, and authorizations as of the date that the land came under the protection of §12.71(a) of this title or §134.022 of the Act.

(C) Requirements for needed for and adjacent standard. If the applicant's request relies upon the needed for and adjacent standard in the definition of "valid existing rights" in §12.3(187)(B)(i) of this title, the information required under subparagraph (A) of this paragraph must be submitted. In addition, the applicant must explain how and why the land is needed for and immediately adjacent to the operation upon which the request is based, including a demonstration that prohibiting expansion of the operation onto that land would unfairly impact the viability of the operation as originally planned before the land came under the protection of §12.71(a) of this title or §134.022 of the Act.

(D) Requirements for standards for mine roads. If the applicant's request relies upon one of the standards for roads in the definition of "valid existing rights" in §12.3(187)(c)(i)-(iii) of this title, the applicant must submit satisfactory documentation that:

(i) the road existed when the land upon which it is located came under the protection of §12.71(a) of this title or §134.022 of the Act, and that the applicant has a legal right to use the road for surface coal mining operations;

(ii) a properly recorded right of way or easement for a road in that location existed when the land came under the protection of §12.71(a) of this title or §134.022 of the Act, and, under the document creating the right of way or easement, and under any subsequent conveyances, the applicant has a legal right to use or construct a road across that right of way or easement to conduct surface coal mining operations; or

(iii) a valid permit for use or construction of a road in that location for surface coal mining operations existed when the land came under the protection of §12.71(a) of this title or §134.022 of the Act.

(3) Initial review of request regarding any land other than federal land.

(A) The Commission must conduct an initial review to determine whether the applicant's request includes all applicable components of the submission requirements of paragraph (2) of this subsection. This review pertains only to the completeness of the request, not the legal or technical adequacy of the materials submitted.

(B) If the applicant's request does not include all applicable components of the submission requirements of paragraph (2) of this subsection, the Commission must notify the applicant and establish a reasonable time for submission of the missing information.

(C) When the applicant's request includes all applicable components of the submission requirements of paragraph (2) of this subsection, the Commission must implement the notice and comment requirements of paragraph (4) of this subsection.

(D) If the information requested by the Commission under subparagraph (B) of this paragraph is not provided within the time specified or as subsequently extended, the Commission must issue a determination that the applicant has not demonstrated valid existing rights, as provided in paragraph (5)(D) of this subsection.

(4) Notice and comment requirements and procedures.

(A) When the applicant's request satisfies the completeness requirements of paragraph (3) of this subsection, the Commission must publish a notice in a newspaper of general circulation in the county in which the land is located. This notice must invite comment on the merits of the request. Alternatively, the Commission may require that the applicant publish this notice and provide the Commission with a copy of the published notice. Each notice must include:

(i) the location of the land to which the request pertains;

(ii) a description of the type of surface coal mining operations planned;

(iii) a reference to and brief description of the applicable standard(s) under the definition of "valid existing rights" in §12.3(187) of this title; and

(I) if the request relies upon the good faith/all permits standard or the needed for and adjacent

standard in the definition of "valid existing rights" in §12.3(187)(B) of this title, the notice also must include a description of the property rights claimed and the basis for that claim;

(II) if the request relies upon the standard in the definition of "valid existing rights" in §12.3(187)(C)(i) of this title, the notice also must include a description of the basis for the claim that the road existed when the land came under the protection of §12.71(a) of this title or §134.022 of the Act. In addition, the notice must include a description of the basis for the claim that the applicant has a legal right to use that road for surface coal mining operations;

(III) if the request relies upon the standard in the definition of "valid existing rights" in §12.3(187)(C)(ii) of this title, the notice must also include a description of the basis for the claim that a properly recorded right of way or easement for a road in that location existed when the land came under the protection of §12.71(a) of this title or §134.022 of the Act. In addition, the notice must include a description of the basis for the claim that, under the document creating the right-of-way or easement, and under any subsequent conveyances, the applicant has a legal right to use or construct a road across the right-of-way or easement to conduct surface coal mining operations;

(iv) if the applicant's request relies upon one or more of the standards in the definition of "valid existing rights" in §12.3(187)(B), (C)(i), and (C)(ii) of this title, a statement that the Commission will not make a decision on the merits of the request if, by the close of the comment period under this notice or the notice required by subparagraph (C) of this paragraph, a person with a legal interest in the land initiates appropriate legal action to resolve any differences concerning the validity or interpretation of the deed, lease, easement, or other documents that form the basis of the applicant's claim;

(v) a description of the procedures that the Commission will follow in processing the request;

(vi) the closing date of the comment period, which must be a minimum of 30 days after the publication date of the notice;

(vii) a statement that interested persons may obtain a 30-day extension of the comment period upon request; and

(viii) the name and address of the Commission office where a copy of the request is available for public inspection and to which comments and requests for extension of the comment period should be sent.

(B) The Commission must promptly provide a copy of the notice required under subparagraph (A) of this paragraph to:

(i) all reasonably locatable owners of surface and mineral estates in the land included in the request; and

(ii) the owner of the feature causing the land to come under the protection of §12.71(a) of this title, and, when applicable, the agency with primary jurisdiction over the feature with respect to the values causing the land to come under the protection of §12.71(a) of this title. For example, both the landowner and the State Historic Preservation Officer must be notified if surface coal mining operations would adversely impact any site listed on the National Register of Historic Places. As another example, both the surface owner and the National Park Service must be notified if the request includes non-federal lands within the authorized boundaries of a unit of the National Park System.

(C) The letter transmitting the notice required under subparagraph (B) of this paragraph must provide a 30-day comment period, starting from the date of service of the letter, and specify that another 30 days is available upon request. At its discretion, the Commission may grant additional time for good cause upon request. The Commission need not necessarily consider comments received after the closing date of the comment period.

(5) How a decision will be made.

(A) Procedure. The Commission must review the materials submitted under paragraph (2) of this subsection, comments received under paragraph (4) of this subsection, and any other relevant, reasonably available information to determine whether the record is sufficiently complete and adequate to support a decision on the merits of the request. If not, the Commission must notify the applicant in writing, explaining the inadequacy of the record and requesting submittal, within a specified reasonable time, of any additional information that the agency deems necessary to remedy the inadequacy.

(B) Determination. Once the record is complete and adequate, the Commission must determine whether the applicant has demonstrated valid existing rights. The decision document must explain how the applicant has or has not satisfied all applicable elements of the definition of "valid existing rights" in §12.3(187) of this title. It must contain findings of fact and conclusions, and it must specify the reasons for the conclusions.

(C) Impact of property rights disagreements. This subparagraph applies only when the request relies upon one or more of the standards in the definition of "valid existing rights" in §12.3(187)(B), (C)(i) and (C)(ii) of this title.

(i) The Commission must issue a determination that the applicant has not demonstrated valid existing rights if those property rights claims are the subject of pending litigation in a court or administrative body with jurisdiction over the property rights in question. The Commission will make this determination without prejudice, meaning that an applicant may refile the request once the property rights dispute is finally adjudicated. This clause applies only to situations in which legal action has been initiated as of the closing date of the comment period under paragraph (4)(A) or (C) of this subsection.

(ii) If the record indicates disagreement as to the accuracy of property rights claims, but this disagreement is not the subject of pending litigation in a court or administrative agency of competent jurisdiction, the Commission must evaluate the merits of the information in the record and determine whether the applicant has demonstrated that the requisite property rights exist under the definition of "valid existing rights" in §12.3(187)(A), (C)(i) or (C)(ii) of this title, as appropriate. The Commission must then proceed with the decision process under subparagraph (B) of this paragraph.

(D) Default determination. The Commission must issue a determination that an applicant has not demonstrated valid existing rights if the information that is requested under paragraph (3)(B) of this subsection or subparagraph (A) of this paragraph has not been submitted within the time specified or as subsequently extended. The Commission will make this determination without prejudice, meaning that the applicant may refile a revised request at any

time.

(E) Notice after decision. After making a determination, the Commission must:

(i) provide a copy of the determination, together with an explanation of appeal rights and procedures, to the applicant, to the owner or owners of the land to which the determination applies, to the owner of the feature causing the land to come under the protection of §12.71(a) of this title, and, when applicable, to the agency with primary jurisdiction over the feature with respect to the values that caused the land to come under the protection of §12.71(a) of this title; and

(ii) publish notice of the determination in a newspaper of general circulation in the county in which the land is located. Alternatively, the Commission may require that the applicant publish this notice and provide a copy of the published notice to the Commission.

(6) Administrative and judicial review. A determination that an applicant has or does not have valid existing rights is subject to administrative and judicial review under §12.222 and §12.223 of this title (relating to Administrative Review and Judicial Review).

(7) Availability of records. The Commission must make a copy of that request available to the public in the same manner as it must make permit applications available to the public under §12.210 of this title (relating to Public Availability of Information in Permit Applications On File With the Commission). In addition, the Commission must make records associated with that request, and any subsequent determination under paragraph (5) of this subsection, available to the public in accordance with the requirements and procedures of §12.672 of this title (relating to Availability of Records).

The provisions of this §12.72 adopted to be effective June 9, 2003, 28 TexReg 4412.

DIVISION 3 CRITERIA FOR DESIGNATING AREAS AS UNSUITABLE FOR SURFACE COAL MINING OPERATIONS

§12.73 Commission Obligations at Time of Permit Application Review

(a) Obligation. Upon receipt of an administratively complete application for a permit for a surface coal mining operation, or an administratively complete application for revision of the boundaries of a surface coal mining operation permit, the Commission must review the application to determine whether the proposed surface coal mining operation would be located on any lands protected under §12.71(a) of this title (relating to Areas Where Surface Coal Mining Operations are Prohibited or Limited).

(b) Criteria for Rejection. The Commission must reject any portion of the application that would locate surface coal mining operations on land protected under §12.71(a) of this title unless:

(1) the site qualifies for the exception for existing operations under §12.71(b) of this title;

(2) a person has valid existing rights for the land, as determined under §12.72(c) of this title (relating to Procedures For Compatibility Findings, Public Road Closures and Relocations, Buffer Zones, And Valid Existing Rights Determinations);

(3) the applicant obtains a waiver or exception from the prohibitions of §12.71(a) of this title in accordance with §12.72(a)-(b) of this title; or

(4) for lands protected by §12.71(a)(3) of this title, both the Commission and the agency with jurisdiction over the park or place jointly approve the proposed operation in accordance with subsection (d) of this section.

(c) Location verification. If the Commission has difficulty determining whether an application includes land within an area specified in §12.71(a)(1) of this title or within the specified distance from a structure or feature listed in §12.71(a)(6) or (a)(7) of this title, the Commission must request that the federal, state, or local governmental agency with jurisdiction over the protected land, structure, or feature verify the location.

(1) The request for location verification must:

(A) include relevant portions of the permit application;

(B) provide the agency with 30 days after receipt to respond, with a notice that another 30 days is available upon request; and

(C) specify that the Commission will not necessarily consider a response received after the comment period provided under subparagraph (B) of this paragraph.

(2) If the agency does not respond in a timely manner, the Commission may make the necessary determination based on available information.

(d) Procedures for joint approval of surface coal mining operations that will adversely affect publicly owned parks or historic places.

(1) If the Commission determines that the proposed surface coal mining operation will adversely affect any publicly owned park or any place included in the National Register of Historic Places, the Commission must request that the federal, state, or local agency with jurisdiction over the park or place either approve or object to the proposed operation. The request must:

(A) include a copy of applicable parts of the permit application;

(B) provide the agency with 30 days after receipt to respond, with a notice that another 30 days is available upon request; and

(C) state that failure to interpose an objection within the time specified under subparagraph (B) of this paragraph will constitute approval of the proposed operation.

(2) The Commission may not issue a permit for a proposed operation subject to paragraph (1) of this subsection unless all affected agencies jointly approve.

(3) Paragraphs (1) and (2) of this subsection do not apply to:

(A) lands for which a person has valid existing rights, as determined under §12.72(c) of this title; and

(B) lands within the scope of the exception for existing operations in §12.71(b) of this title.

The provisions of this §12.73 adopted to be effective June 9, 2003, 28 TexReg 4412.

§12.74 Responsibility

The Commission must use the criteria in this Subchapter (relating to Lands Unsuitable for Mining) for the evaluation of each petition for the designation of areas as unsuitable for surface coal mining operations.

The provisions of this §12.74 adopted to be effective June 9, 2003, 28 TexReg 4412.

§12.75 Criteria for Designating Lands as Unsuitable

(a) Upon petition, an area shall be designated as unsuitable for all or certain types of surface coal mining

operations, if the Commission determines that reclamation is not technologically and economically feasible under the Act, this chapter (relating to Coal Mining Regulations), or the approved state program.

(b) Upon petition, an area may be (but is not required to be) designated as unsuitable for certain types of surface coal mining operations, if the operations will:

(1) be incompatible with existing state or local land-use plans or programs;

(2) affect fragile or historic lands in which the operations could result in significant damage to important historic, cultural, scientific, or esthetic values or natural systems;

(3) affect renewable resource lands in which the operations could result in a substantial loss or reduction of long-range productivity of water supply or of food or fiber products; or

(4) affect natural hazard lands in which the operations could substantially endanger life and property, such lands to include areas subject to frequent flooding and areas of unstable geology.

The provisions of this §12.75 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.76 Land Exempt from Designation as Unsuitable for Surface Coal Mining Operations

The requirements of this subchapter (relating to Lands Unsuitable for Mining) do not apply to:

(1) lands on which surface coal mining operations were being conducted on August 3, 1977;

(2) lands covered by a permit issued under the Act; or

(3) lands where substantial legal and financial commitments in surface coal mining operations were in existence prior to January 4, 1977.

The provisions of this §12.76 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.77 Applicability and Restrictions on Exploration on Land Designated as Unsuitable for Surface Coal Mining Operations

(a) Applicability. Pursuant to appropriate petitions, lands listed in §12.71(a) of this title (relating to Areas Where Surface Coal Mining Operations are Prohibited or Limited) are subject to designation as unsuitable for all or certain types of Surface coal mining operations under this Division and Division 4 of Subchapter F (relating to Lands Unsuitable for Mining).

(b) Exploration Restrictions. Designation of any area as unsuitable for all or certain types of surface coal mining operations pursuant to §§134.016-134.022 of the Act and regulations of this subchapter (relating to Lands Unsuitable for Mining) does not prohibit coal exploration operations in the area, if conducted in accordance with the Act, this chapter (relating to Coal Mining Regulations), the approved state program and other applicable requirements. Exploration operations on any lands designated unsuitable for surface coal mining operations must be approved by the Commission under §§12.109-12.115 of this title (relating to General Requirements for Coal Exploration) to ensure that exploration does not interfere with any value for which the area has been designated unsuitable for surface coal mining.

The provisions of this §12.77 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective June 9, 2003, 28 TexReg 4412.

DIVISION 4 PROCESS FOR DESIGNATING AREAS AS UNSUITABLE FOR SURFACE COAL MINING OPERATIONS

§12.78 Procedures: General Process Requirements

The Commission has established a process enabling objective decisions to be made on which, if any, land areas of the state are unsuitable for all or certain types of surface coal mining operations. These decisions shall be based on competent, scientifically sound data and other relevant information.

The provisions of this §12.78 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.79 Procedures: Petitions

(a) Right to Petition. Any person having an interest which is or may be adversely affected has the right to petition the Commission to have an area designated as unsuitable for surface coal mining operations, or to have an existing designation terminated. For the purpose of this action, a person having an interest which is or may be adversely affected must demonstrate how he or she meets an "injury in fact" test by describing the injury to his or her specific affected interests and demonstrate how he or she is among the injured.

(b) Designation. The Commission shall determine what information must be provided by the petitioner to have an area designated as unsuitable for surface coal mining operations.

(1) At a minimum, a complete petition for designation shall include:

(A) the petitioner's name, address, telephone number, and notarized signature;

(B) identification of the petitioned area, including its location and size, and a U.S. Geological Survey topographic map outlining the perimeter of the petitioned area;

(C) the names and mailing addresses of persons with an ownership interest of record in the petitioned area;

(D) an identification of the petitioner's interest which is or may be adversely affected by surface coal mining operations, including a statement demonstrating how the petitioner satisfies the requirements of subsection (a) of this section;

(E) a description of how mining of the area has affected or may adversely affect people, land, air, water, or other resources, including the petitioner's interests; and

(F) allegations of facts and supporting evidence, covering all lands in the petition area, which would tend to establish that the area is unsuitable for all or certain types of surface coal mining operations, pursuant to specific criteria of §§134.016-134.022 of the Act, assuming that contemporary mining practices required under the state regulatory program would be followed if the area were to be mined. Each of the allegations of fact should be specific as to the mining operation, if known, and the portion(s) of the petitioned area and petitioner's interests to which the allegation applies and be supported by evidence that tends to establish the validity of the allegations for the mining operation or portion of the petitioned area.

(2) The Commission may request that the petitioner provide other supplementary information which is readily available.

(c) Termination. The Commission shall determine what information must be provided by the petitioner to terminate designations of lands as unsuitable for surface coal mining operations.

(1) At a minimum, a complete petition for termination shall include:

(A) the petitioner's name, address, telephone number, and notarized signature;

(B) identification of the petitioned area, including its location and size as shown on a U.S. Geological Survey topographic map outlining the perimeter of the designated area and the area to which the termination petition applies;

(C) the names and mailing addresses of persons with an ownership interest of record in the designated areas to which the termination petition applies;

(D) an identification of the petitioner's interest which is or may be adversely affected by the designation that the area is unsuitable for surface coal mining operations, including a statement demonstrating how the petitioner satisfies the requirements of subsection (a) of this section; and

(E) allegations of facts covering all lands for which the termination is proposed. Each of the allegations of fact shall be specific as to the mining operation, if any, and to portions of the petitioned area and petitioner's interest to which the allegation applies. The allegations shall be supported by evidence, not contained in the record of the designation proceeding, that tends to establish the validity of the allegations for the mining operation or portion of the petitioned area, assuming that contemporary mining practices required under the state regulatory program would be followed were the area to be mined. For areas previously and unsuccessfully proposed for termination, significant new allegations of facts and supporting evidence must be presented in the petition. Allegations and supporting evidence should also be specific to establish that the designation should be terminated on the following bases:

(i) nature or abundance of the protected resource or condition or other basis of the designation if the designation was based on criteria found in §12.75(b) of this title (relating to Criteria for Designating Lands as Unsuitable);

(ii) reclamation now being technologically and economically feasible, if the designation was based on the criteria in §12.75(a) of this title (relating to Criteria for Designating Lands as Unsuitable); or

(iii) resources or conditions not being affected by surface coal mining operations, or in the case of land use plans, not being incompatible with surface coal mining operations during and after mining, if the designation was based on the criteria found in §12.75(b) of this title (relating to Criteria for Designating Lands as Unsuitable).

(2) The Commission may request that the petitioner provide other supplementary information which is readily available.

The provisions of this §12.79 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.80 Procedures: Initial Processing, Record Keeping, and Notification Requirements

(a) Initial processing procedures.

(1) Within 30 days of receipt of a petition, the Commission shall notify the petitioner by certified mail whether or not the petition is complete under §§12.79(b) or (c) of this title (relating to Procedures: Petitions). Complete, for a designation or termination petition, means that the information required under §§12.79(b) or (c) of this title (relating to Procedures: Petitions) has been provided.

(2) The Commission shall determine whether any identified coal resources exist in the area covered by the petition, without requiring any showing from the petitioner. If the Commission finds there are not any identified coal resources in that area, it shall return the petition to the petitioner with a statement of the findings.

(3) If the Commission determines that the petition is incomplete, frivolous, or that the petitioner does not meet the requirement of §12.79(a) of this title (relating to Procedures: Petitions), it shall return the petition to the petitioner with a written statement of the reasons for the determination and the categories of information needed to make the petition complete. A frivolous petition is one in which the allegations of harm lack serious merit or available information shows that either no mineable coal resources exist in the petitioned area or the petitioned area is not or could not be subject to related surface coal mining operations and surface impacts incident to an underground coal mine or an adjoining surface mine.

(4) When considering a petition for an area which was previously and unsuccessfully proposed for designation, the Commission shall determine if the new petition presents significant new allegations of facts with evidence which tends to establish the allegations. If the petition does not contain such materials, the Commission may choose not to consider the petition and may return the petition to the petitioner, with a statement of its findings and a reference to the record of the previous designation proceedings where the facts were considered.

(5) The Commission shall notify the person who submits a petition of any application for a permit received which includes any area covered by the petition.

(6) The Commission may determine not to process any petition received in so far as it pertains to lands for which an administratively complete permit application has been filed and the first newspaper notice has been published. Based on such a determination, the Commission may issue a decision on a complete and accurate permit application and shall inform the petitioner why the Commission cannot consider the part of the petition pertaining to the proposed permit area.

(b) Public notice and hearing procedures.

(1) Promptly after a petition is received, the Commission shall notify the general public of the receipt of the petition by a newspaper advertisement placed in the locale of the area covered by the petition. The notice shall be published in the county newspaper of the largest circulation in the county, for each county of the petitioned area and in the *Texas Register.* The Commission shall make copies of the petition available to the public and shall provide copies of the petition to other interested governmental agencies, intervenors, persons with an ownership interest of record in the property, and other persons known to the Commission to have an interest in the property. Proper notice to persons with an ownership interest of record in the property shall comply with the requirements of applicable State law.

(2) Promptly after the determination that a petition is complete, the Commission shall request submissions from the general public of relevant information by a newspaper advertisement placed once a week for two consecutive weeks in the locale of the area covered by the petition, in the county

newspaper of the largest circulation in the county, for each county of the petitioned area, and in the *Texas Register*.

(c) Right of intervention. Until three days before the Commission holds a hearing under §12.81 of this title (relating to Procedures: Hearing Requirements), any person may intervene in the proceeding by filing allegations of facts describing how the designation determination directly affects the intervenor, supporting evidence, a short statement identifying the petition to which the allegations pertain, and the intervenor's name, address and telephone number.

(d) Record-keeping procedures. Beginning from the date a petition is filed, the Commission shall compile and maintain a record consisting of all documents relating to the petition filed with or prepared by the Commission. The Commission shall make the record available to the public for inspection free of charge and for copying at reasonable cost during all normal hours at the main office of the Commission. The Commission shall also maintain information at or near the area in which the petitioned land is located and make this information available to the public for inspection free of charge and for copying at reasonable cost during all normal business hours. At a minimum, this information shall include a copy of the petition.

The provisions of this §12.80 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective June 12, 2001, 26 TexReg 4090.

§12.81 Procedures: Hearing Requirements

(a) Within 10 months after receipt of a complete petition, the Commission shall hold a public hearing in the locality of the area covered by the petition. If all petitioners and intervenors agree, the hearing need not be held. The Commission may subpoena witnesses as necessary. The hearing may be conducted with cross-examination of expert witnesses only. A record of the hearing shall be made and preserved according to state law. No person shall bear the burden of proof or persuasion. All relevant parts of the data base and inventory system and all public comments received during the public comment period shall be included in the record and considered by the Commission in its decision on the petition.

(b) The following notice requirements shall apply:

(1) the Commission shall give notice of the date, time, and location of the hearing to:

(A) local, state and federal agencies which may have an interest in the decision on the petition;

(B) the petitioner and intervenors; and

(C) any person known by the Commission to have a property interest in the petitioned area. Proper notice to persons with an ownership interest of record shall be accomplished by placing a postage paid notice, addressed as shown in the public record, in the U.S. mail; and

(2) notice of the hearing shall be sent by certified mail to petitioners and intervenors, and by regular mail to government agencies and property owners involved in the proceeding, and postmarked not less than 30 days before the scheduled date of the hearing.

(c) The Commission shall notify the general public of the date, time, and location of the hearing by placing a newspaper advertisement once a week for 2 consecutive weeks in the locale of the area covered by the petition and once during the week prior to the scheduled date of the public hearing. The consecutive weekly advertisement must begin between 4 and 5 weeks before the scheduled date of the public hearing.

(d) The Commission may consolidate in a single hearing the hearings required for each of several petitions which relate to areas in the same locale.

(e) Prior to designating any land areas as unsuitable for surface mining operations, the Commission shall prepare a detailed statement using existing and available information on the potential coal resources of the area, the demand for coal resources, and the impact of such designation on the environment, the economy, and the supply of coal.

(f) In the event that all petitioners and intervenors stipulate agreement prior to the hearing, the petition may be withdrawn from consideration.

The provisions of this §12.81 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.82 Procedures: Decision

(a) In reaching its decision, the Commission shall use:

(1) the information contained in the data base and inventory system;

(2) information provided by other governmental agencies;

(3) the detailed statement when it is prepared under §12.81(e) of this title (relating to Procedures: Hearing Requirements); and

(4) any other relevant information submitted during the comment period.

(b) A final written decision shall be issued by the Commission, including a statement of reasons, within 60 days of completion of the public hearing, or, if no public hearing is held, then a final written decision shall be issued within 12 months after receipt of the complete petition. The Commission shall simultaneously send the decision by certified mail to the petitioner and intervenors and by regular mail to all other persons with an ownership interest of record and persons known to the Commission to have an interest in the property as evidenced by the hearing registration forms.

(c) The decision of the Commission with respect to a petition, or the failure of the Commission to act within the time limits set forth in this section, shall be subject to judicial review by a court of competent jurisdiction. All relevant portions of the data base, inventory system, and public comments received during the public comment period set by the Commission shall be considered and included in the record of the administrative proceeding.

The provisions of this §12.82 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.83 Data Base and Inventory System Requirements

(a) The Commission has developed a data base and inventory system which will permit evaluation of whether reclamation is feasible in areas covered by petitions.

(b) The Commission shall include in the system information relevant to the criteria in §12.75 of this title (relating to Criteria for Designating Lands as Unsuitable), including, but not limited to, information received from the United States Fish and Wildlife Service, the State Historic Preservation Officer, and the agency administering §127 of the Clean Air Act, as amended (42 U.S.C. 7470 et seq.).

(c) The Commission shall add to the data base and inventory system information:

(1) on potential coal resources of the state, demand for those resources, the environment, the economy and the supply of coal, sufficient to enable the Commission to prepare the statements required by §12.81(e) of this title (relating to Procedures: Hearing Requirements); and

(2) that becomes available from petitions, publications, experiments, permit applications, mining and reclamation operations, and other sources.

The provisions of this §12.83 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.84 Public Information

The Commission shall:

(1) make the information in the data base and inventory system developed under §12.83 of this title (relating to Data Base and Inventory System Requirements) available to the public for inspection free of charge and for copying at reasonable cost, except that specific information relating to location of properties proposed to be nominated to, or listed in, the National Register of Historic Places need not be disclosed if the Commission determines that the disclosure of such information could create a risk of destruction or harm to such properties; and

(2) provide information to the public on the petition procedures necessary to have an area designated as unsuitable for all or certain types of surface coal mining operations or to have designations terminated and describe how the inventory and data base system can be used.

The provisions of this §12.84 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.85 Responsibility for Implementation

(a) The Commission shall not issue permits which are inconsistent with designations made pursuant to this Program.

(b) The Commission shall maintain a map or other unified and cumulative record of areas designated as unsuitable for all or certain types of surface coal mining operations.

(c) Information regarding designations shall be subject to the Texas Open Records Act (Texas Government Code, Chapter 552), excepting proprietary information on the chemical and physical properties of the coal.

The provisions of this §12.85 adopted to be effective April 7, 1997, 22 TexReg 3093.

SUBCHAPTER G SURFACE COAL MINING AND RECLAMATION OPERATIONS, PERMITS, AND COAL EXPLORATION PROCEDURES SYSTEMS DIVISION 1 GENERAL REQUIREMENTS FOR PERMIT AND EXPLORATION PROCEDURE SYSTEMS UNDER REGULATORY PROGRAMS

§12.100 Responsibilities

(a) Persons seeking to engage in surface coal mining and reclamation operations must submit an application for and obtain a permit for those operations in accordance with this subchapter (relating to Surface Coal Mining and Reclamation Operations, Permits, and Coal Exploration Procedures Systems). Persons seeking to conduct coal exploration must first file the notice of intention or obtain approval of the Commission as required under §§12.109 - 12.115 of this title (relating to General Requirements for Coal Exploration). A permittee will not be required to submit an application to renew a permit if no surface coal mining operations will be conducted under the permit and solely reclamation activities remain to be completed. A permit and the obligations established therein (to include payment of annual fees associated with the permit as required in §12.108 of this title, relating to Permit Fees) shall continue until all surface coal mining and reclamation operations are completed, regardless of whether the authorization to conduct surface coal mining operations has expired or has been terminated, revoked, or suspended.

(b) The Commission shall review each application for exploration approval and for a permit, approve or disapprove each permit application or exploration application, and issue, condition, suspend, or revoke exploration approval, permits, renewals, or revised permits under an approved regulatory program.

(c) The applicant for a permit or revision of a permit shall have the burden of establishing that the application is in compliance with all of the requirements of the Commission.

The provisions of this §12.100 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective October 22, 2012, 37 TexReg 8293; amended to be effective February 24, 2014, 39 TexReg 1121.

§12.102 Coordination with Requirements under Other Laws

The Commission shall, to avoid duplication, provide for the coordination of review and issuance of permits for surface coal mining and reclamation operations with:

(1) any other federal or state permit process applicable to those operations including, at a minimum, permits required under the:

(A) Clean Water Act, as amended (33 U.S.C. 1251 et seq.); and

(B) Clean Air Act, as amended (42 U.S.C. 7401 et seq.);

(2) the requirements of any water-quality management plans which have been approved by the administrator of the United States Environmental Protection Agency under Sections 208 or 303(c) and 303(e) of the Clean Water Act, as amended, (33 U.S.C. 1288, 1313(c) and 1313(e)); and

(3) the applicable requirements of the Endangered Species Act of 1973, as amended, (16 U.S.C. 1531 et seq.); the Fish and Wildlife Coordination Act, as amended, (16 U.S.C. 661 et seq.); the Migratory Bird Treaty Act of 1918, as amended, (16 U.S.C. 703 et seq.); the National Historic Preservation Act of 1966, as amended (16 U.S.C. 470 et seq.); and the Bald Eagle Protection Act, as amended, (16 U.S.C. 668a).

The provisions of this §12.102 adopted to be effective April 7, 1997, 22 TexReg 3093.

DIVISION 2 GENERAL REQUIREMENTS FOR PERMITS AND PERMIT APPLICATIONS

§12.103 General Requirements for Permits: Operators

Except as provided for in §12.104 of this title (relating to Continued Operation Under Interim Permits) on and after 8 months from the date of state program approval, no person shall engage in or carry out surface coal mining and reclamation operations on non-federal or non-Indian lands within the state, unless that person has first obtained a valid permit issued by the Commission.

The provisions of this §12.103 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.104 Continued Operation under Interim Permits

A person conducting surface coal mining operations,

under a permit issued or amended by the Commission in accordance with its requirements and those of Section 502 of the Federal Act, may conduct these operations beyond the period prescribed in §12.103 of this title (relating to General Requirements for Permits--Operators), if:

(1) timely and complete application for a permit has been made to the Commission in accordance with the provisions of the Act and this subchapter (relating to Surface Coal Mining and Reclamation Operations Permits and Coal Exploration Procedures Systems);

(2) the Commission has not yet rendered an initial decision with respect to such application; and

(3) the operations are conducted in compliance with all terms and conditions of the interim permit, the requirements of the Act and this chapter (relating to Coal Mining Regulations).

The provisions of this §12.104 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.105 Compliance with Permits

All persons shall conduct surface coal mining and reclamation operations under permits issued pursuant to this subchapter (relating to Surface Coal Mining and Reclamation Operations Permits and Coal Exploration Procedures Systems) and shall comply with the terms and conditions of the permit and the requirements of the Act and this chapter (relating to Coal Mining Regulations).

The provisions of this §12.105 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.106 Permit Application Filing Deadlines

(a) Initial implementation.

(1) Not later than 2 months following approval of the state program by the Secretary, regardless of litigation contesting that approval, each person who conducts or expects to conduct surface coal mining and reclamation operations after the expiration of 8 months from that approval shall file an application for a permit for those operations.

(2) Applications for those operations which are not filed within the time required by paragraph (1) of this subsection shall be deemed applications filed under subsection (b)(1) of this section.

(b) Filing deadlines after initial implementation.

(1) General. Each person who conducts or expects to conduct new surface coal mining and reclamation operations shall file a complete application for a permit for those operations at least 8 months prior to the projected commencement of operations where no special problems are anticipated.

(2) Renewal of valid permits. An application for renewal of a permit shall be filed with the Commission at least 180 days before the expiration of the permit involved.

(3) Revisions of permits. Any application for revision of a permit shall be filed with the Commission at least 180 days before the date on which the permittee expects to revise surface coal mining or reclamation operations.

(4) Succession to rights granted under prior permits. Any application for a new permit required for a person succeeding by transfer, sale, or assignment of rights granted under a permit shall be filed with the Commission not later than 30 days after that succession is approved by the Commission.

The provisions of this §12.106 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.107 Permit Applications: General Requirements for Format and Contents

(a) Applications for permits to conduct surface coal mining and reclamation operations shall be filed in the format required by the Commission. The application shall be complete and include, at a minimum: for surface mining activities, all the applicable information required under §§12.116-12.123, 12.124-12.138, and 12.139-12.154 of this title (relating to Surface Mining Permit Applications--Minimum Requirements for Legal, Financial, Compliance, and Related Information, to Surface Mining Permit Applications--Minimum Requirements for Information on Environmental Resources, and to Surface Mining Permit Applications--Minimum Requirements for Reclamation and Operation Plan); for underground mining activities, all the information required under §§12.155-12.163, 12.170-12.184, and 12.185-12.199 of this title (relating to Underground Mining Permit Applications--Minimum Requirements for Legal, Financial, Compliance, and Related Information, to Underground Mining Permit Applications Applications--Minimum Requirements for Information on Environmental Resources, and Underground Mining Permit Applications--Minimum Requirements for Reclamation and Operation Plan); and, for special types of surface coal mining and reclamation operations, all the information required under §§12.200-12.205 of this title (relating to Requirements for Permits for Special Categories of Mining).

(b) Information set forth in the application shall be current, presented clearly and concisely, and supported by appropriate references to technical and other written material available to the Commission.

(c) All technical data submitted in the application shall be accompanied by:

(1) names of persons or organizations which collected and analyzed such data;

(2) dates of the collection and analyses; and

(3) descriptions of methodology used to collect and analyze the data.

(d) Technical analyses shall be planned by or under the direction of a professional qualified in the subject to be analyzed.

(e) The application shall contain the name, address and position of officials of each private or academic research organization or governmental agency consulted by the applicant in preparation of the application for information on land uses, soils, geology, vegetation, fish and wildlife, water quantity and quality, air quality, and archeological, cultural, and historic features.

(f) Maps and plans shall meet the following general requirements:

(1) maps submitted with applications shall be presented in a consolidated format, to the extent possible, and shall include all the types of information that are set forth on topographic maps of the U.S. Geological Survey of the 1:24,000 scale series. Maps of the permit area shall be at a scale of 1:6,000 or larger. Maps of the adjacent area shall clearly show the lands and waters within those areas and be in a scale of 1:24,000 or larger; and

(2) all maps and plans submitted with the application shall distinguish among each of the phases during which surface coal mining operations were or will be conducted at any place within the mine plan area. At a minimum, distinctions shall be clearly shown among those portions of the mine plan area in which surface coal mining

operations occurred:

(A) prior to August 3, 1977;

(B) after August 3, 1977, and prior to either:

(i) May 3, 1978; or

(ii) in the case of an applicant or operator which obtained a small operator's exemption under 30 CFR 710.12, January 1, 1979;

(C) after May 3, 1978 (or January 1, 1979, for persons who received a small operator's exemption) and prior to state program approval; and

(D) After the estimated date of issuance of a permit by the Commission.

(g) Applications for permits shall be verified under oath, by a responsible official of the applicant, that the information contained in the application is true and correct to the best of the official's information and belief.

The provisions of this §12.107 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.108 Permit Fees

(a) Application Fees. Each application for a surface coal mining and reclamation permit or renewal or revision of a permit shall be accompanied by a fee. The initial application fee and the application fee for renewal of a permit may be paid in equal annual installments during the term of the permit. The fee schedule is as follows:

(1) application for a permit: $5,000.

(2) application for revision of a permit: $500.

(3) application for renewal of a permit: $3,000.

(b) Annual Fees. In addition to application fees required by this section, each permittee shall pay to the Commission the following annual fees due and payable not later than March 15th of the year following the calendar year for which these fees are applicable:

(1) a fee of $12.85 for each acre of land within a permit area covered by a reclamation bond on December 31st of the year, as shown on the map required by §12.142(2)(C) of this chapter (relating to Operation Plan: Maps and Plans); and

(2) a fee of $6,170 for each permit in effect on December 31st of the year.

(c) Fees paid to the Commission under this section shall be deposited in the state treasury and credited to the general revenue fund.

The provisions of this §12.108 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective July 28, 2003, 28 TexReg 5870; amended to be effective September 1, 2004, 29 TexReg 8280; amended to be effective January 1, 2006, 30 TexReg 8430; amended to be effective November 12, 2007, 32 TexReg 8123; amended to be effective December 28, 2009, 34 TexReg 9408; amended to be effective January 30, 2012, 37 TexReg 317; amended to be effective December 16, 2013, 38 TexReg 9011; amended to be effective November 23, 2015, 40TexReg 8201; amended to be effective December 25, 2017, 42 TexReg 7385; amended to be effective January 6, 2020, 45 TexReg 146 .

DIVISION 3 GENERAL REQUIREMENTS FOR COAL EXPLORATION

§12.109 Scope

This section and §§12.110-12.115 of this title (relating to General Requirements for Coal Exploration) establish the minimum requirements for the Secretary's approval of regulatory program coal exploration procedures, and apply to the Commission and to any person who conducts or seeks to conduct coal exploration outside of the permit area.

The provisions of this §12.109 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.110 General Requirements: Exploration of Less Than 250 Tons

(a) Any person who intends to conduct coal exploration during which less than 250 tons of coal will be removed in the area to be explored shall, prior to conducting the exploration, file with the Commission a written notice of intention to explore.

(b) The notice shall include:

(1) the name, address, and telephone number of the person seeking to explore;

(2) the name, address, and telephone number of the representative who will be present at and responsible for conducting the exploration activities;

(3) a precise description and map, at a scale of 1:24,000 or larger, of the exploration area;

(4) a statement of the period of intended exploration;

(5) if the surface is owned by a person other than the person who intends to explore, a description of the basis upon which the person who will explore claims the right to enter such area for the purpose of conducting exploration and reclamation; and

(6) a description of the practices proposed to be followed to protect the environment from adverse impacts as a result of the exploration activities.

(c) Any person who conducts coal exploration activities pursuant to this section which substantially disturb the natural land surface shall comply with §§12.325-12.328 of this title (relating to Permanent Program Performance Standards--Coal Exploration).

(d) The Commission shall, except as otherwise provided in §12.115 of this title (relating to Public Availability of Information), place such notices on public file and make them available for public inspection and copying.

The provisions of this §12.110 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.111 General Requirements: Exploration That Will Remove More Than 250 Tons of Coal or That Will Occur on Land Designated as Unsuitable for Surface Coal Mining Operations

Any person who intends to conduct coal exploration outside a permit area during which more than 250 tons of coal will be removed or which will take place on lands designated as unsuitable for surface mining under Subchapter F of this chapter (relating to Lands Unsuitable for Mining) shall, prior to conducting the exploration, submit an application and obtain the written approval of the Commission, in accordance with the following:

(1) Contents of application for approval. Each application for approval shall contain, at a minimum, the following information:

(A) the name, address, and telephone number of the applicant;

(B) the name, address, and telephone number of the representative of the applicant who will be present at and be responsible for conducting the exploration;

(C) an exploration and reclamation operations plan, including:

(i) a narrative description of the proposed exploration area, cross-referenced to the map required under subparagraph (E) of this paragraph, including surface topography; geological, surface water, and other physical features; vegetative cover, the distribution and important habitats of fish, wildlife, and plants, including, but not limited to, any endangered or threatened species listed pursuant to the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.); cultural or historic resources listed on or eligible for listing on the National Register of Historic Places; known archeological resources located within the proposed exploration area; and any other information which the Commission may require regarding known or unknown historic or archeological resources;

(ii) a narrative description of the methods to be used to conduct coal exploration and reclamation, including, but not limited to, the types and uses of equipment, drilling, blasting, road or other access route construction, and excavated earth and other debris disposal activities;

(iii) an estimated timetable for conducting and completing each phase of the exploration and reclamation;

(iv) the estimated amounts of coal to be removed and a description of the methods to be used to determine those amounts; and

(v) a description of the measures to be used to comply with the applicable requirements of §§12.325-12.328 of this title (relating to Permanent Program Performance Standards--Coal Exploration);

(D) the name and address of the owner of record of the surface land and of the subsurface mineral estate of the area to be explored;

(E) a map at a scale of 1:24,000 or larger, showing the areas of land to be substantially disturbed by the proposed exploration and reclamation. The map shall specifically show existing roads, occupied dwellings, and pipelines; proposed location of trenches, roads, and other access routes and structures to be constructed; the location of land excavations to be conducted, water or coal exploratory holes and wells to be drilled or altered, earth or debris disposal areas; existing bodies of surface water; historic, topographic, cultural and drainage features; the habitats of any endangered or threatened species listed pursuant to the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.);

(F) if the surface is owned by a person other than the applicant, a description of the basis upon which the applicant claims the right to enter that land for the purpose of conducting exploration and reclamation;

(G) a statement of why extraction of more than 250 tons of coal is necessary for exploration; and

(H) for any lands listed in §12.71(a) of this title (relating to Areas Where Surface Coal Mining Operations are Prohibited or Limited), a demonstration that, to the extent technologically and economically feasible, the proposed exploration activities have been designed to minimize interference with the values for which those lands were designated as unsuitable for Surface coal mining operations. The application must include documentation of consultation with the owner of the feature causing the land to come under the protection of §12.71(a) of this title, and, when applicable, with the agency with primary jurisdiction over the feature with respect to the values that caused the land to come under the protection of §12.71(a) of this title.

(2) Public notice and opportunity to comment. Public notice of the application and opportunity to comment shall be provided as follows:

(A) at the same time a complete application is filed with the Commission, public notice of the filing of the application with the Commission shall be published in a newspaper of general circulation in the county or counties of the proposed exploration area;

(B) the public notice shall state the name and business address of the person seeking approval, the date of filing of the application, the address of the Commission at which written comments on the application may be submitted, the closing date of the comment period, and a description of the general area of exploration; and

(C) any person with an interest which is or may be adversely affected shall have the right to file written comments on the application within 30 days of the posting of the above notice.

The provisions of this §12.111 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective June 9, 2003, 28 TexReg 4412.

§12.112 Applications: Approval or Disapproval of Exploration of More Than 250 Tons of Coal or That Will Occur on Land Designated as Unsuitable for Surface Coal Mining Operations

(a) The Commission shall act upon a completed application for approval within 45 days of the date of submission.

(b) The Commission shall approve a complete application filed in accordance with §§12.109-12.111, this section, and §§12.113-12.115 of this title (relating to General Requirements for Coal Exploration), if it finds, in writing, that the applicant has demonstrated that the exploration and reclamation described in the application:

(1) will be conducted in accordance with the Act, §§12.109-12.111, this section, and §§12.113-12.115 of this title (relating to General Requirements for Coal Exploration) and §§12.325-12.328 of this title (relating to Permanent Program Performance Standards--Coal Exploration);

(2) will not jeopardize the continued existence of an endangered or threatened species listed pursuant to Section 4 of the Endangered Species Act of 1973 (16 U.S.C. 1533) or result in the destruction or adverse modification of critical habitat of those species;

(3) will not adversely affect any cultural resources or districts, sites, buildings, structures, or objects listed or eligible for listing on the National Register of Historic Places, unless the proposed exploration has been approved by both the Commission and the agency with jurisdiction over such matters; and

(4) with respect to exploration activities on any lands protected under §12.71(a) of this title (relating to Areas Where Surface Coal Mining Operations are Prohibited Or Limited), minimize interference, to the extent technologically and economically feasible, with the values for which those lands were designated as unsuitable for surface coal mining operations. Before making this finding, the Commission must provide reasonable opportunity to the owner of the feature causing the land to come under the protection of §12.71(a) of this title, and, when applicable, to the agency with primary jurisdiction over the feature with respect to the values that caused the land to come under the protection of §12.71(a) of this title, to comment on whether the finding is appropriate.

(c) Each approval issued by the Commission shall

contain conditions necessary to ensure that the exploration and reclamation will be conducted in compliance with the Act, §§12.109-12.111, this section, §§12.113-12.115 of this title (relating to General Requirements for Coal Exploration), and §§12.325-12.328 of this title (relating to Permanent Program Performance Standards--Coal Exploration).
The provisions of this §12.112 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective June 9, 2003, 28 TexReg 4412.

§12.113 Applications: Notice and Hearing for Exploration of More Than 250 Tons

(a) The Commission shall notify the applicant and the appropriate local government officials, and other commenters on the application, in writing, of its decision to approve or disapprove the application. If the application is disapproved, the notice to the applicant shall include a statement of the reason for disapproval. The Commission shall provide public notice of approval or disapproval of each application by publication in a newspaper of general circulation in the general vicinity of the proposed operations.

(b) Any persons with interests which are or may be adversely affected by a decision of the Commission pursuant to subsection (a) of this section, shall have the opportunity for administrative and judicial review as set forth in §§12.222 and 12.223 of this title (relating to Administrative and Judicial Review of Decisions by Commission on Permit Applications).
The provisions of this §12.113 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective June 9, 2003, 28 TexReg 4412.

§12.114 Coal Exploration Compliance Duties

(a) All coal exploration and reclamation which substantially disturbs the natural land surface or which removes more than 250 tons of coal shall be conducted in accordance with the coal exploration requirements of the Act, §§12.109-12.113, this section, and §12.115 of this title (relating to General Requirements for Coal Exploration) and §§12.325-12.328 of this title (relating to Permanent Program Performance Standards--Coal Exploration), and any conditions on approval for exploration and reclamation imposed by the Commission.

(b) Any person who conducts any coal exploration in violation of §134.014 of the Act, the provisions of §§12.109-12.113, this section, and §12.115 of this title (relating to General Requirements for Coal Exploration) or §§12.325-12.328 of this title (relating to Permanent Program Performance Standards--Coal Exploration), shall be subject to the provisions of §§134.174-134.181 of the Act, and Subchapter L of this chapter (relating to Permanent Program Inspection and Enforcement Procedures).
The provisions of this §12.114 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.115 Public Availability of Information

(a) Except as provided in subsection (b) of this section, all information submitted to the Commission under this section and §§12.109-12.114 of this title (relating to General Requirements for Coal Exploration) shall be made available for public inspection and copying at the local offices of the Commission closest to the exploration area.

(b) Confidentiality shall be governed as follows:

(1) the Commission shall not make information available for public inspection if the person submitting it requests in writing, at the time of submission, that it not be disclosed and the Commission determines that the information is confidential.

(2) the Commission shall determine that information is confidential only if it concerns trade secrets or is privileged commercial or financial information which relates to the competitive rights of the person intending to conduct coal exploration.

(3) information requested to be held as confidential under this section shall not be made publicly available until after notice and opportunity to be heard is afforded both persons seeking and opposing disclosure of the information.
The provisions of this §12.115 adopted to be effective April 7, 1997, 22 TexReg 3093.

DIVISION 4 SURFACE MINING PERMIT APPLICATIONS--MINIMUM REQUIREMENTS FOR LEGAL, FINANCIAL, COMPLIANCE, AND RELATED INFORMATION, PART I

§12.116 Identification of Interests and Compliance Information

(a) Certification and update of existing permit application information.

(1) If an applicant has previously applied for a permit and the required information is already in AVS, then the applicant may update the information in its application as follows:

(A) If all or part of the information already in AVS is accurate and complete, the applicant may certify to the Commission by swearing or affirming, under oath and in writing, that the relevant information in AVS is accurate, complete, and up to date.

(B) If part of the information in AVS is missing or incorrect, the applicant must submit to the Commission the necessary information or corrections, and swear or affirm, under oath and in writing, that the information submitted is accurate and complete.

(C) If the applicant can neither certify that the data in AVS is accurate and complete, nor make the needed corrections, the applicant must provide the information required under this section.

(2) After approval of an application but before issuance of a permit, the applicant must update, correct, or indicate that no change has occurred in the information previously submitted under this section.

(b) Permit applicant and operator information. Each permit application shall contain:

(1) a statement indicating whether the applicant or its operator are corporations, partnerships, associations, sole proprietorships, or other business entities;

(2) taxpayer identification numbers for the applicant and its operator;

(3) the name, address, and telephone number for:

(A) the applicant;

(B) the applicant's resident agent who will accept service of process;

(C) any operator, if different from the applicant; and

(D) each business entity in the applicant's and operator's organizational structure, up to and including the ultimate parent entity of the applicant and operator; for every such business entity, the applicant must also provide the required information for every president, chief executive officer, and director (or persons in similar positions), and

every person who owns, of record, 10 percent or more of the entity;

(4) for the applicant and its operator, and for each officer, partner, member, director, person performing a function similar to a director, and person who owns, of record, 10 percent or more of the applicant or operator, the following information:

(A) the person's name, address, and telephone number;

(B) the person's position title and relationship to the applicant, including percentage of ownership and location in the organizational structure; and

(C) the date the person began serving in that position.

(c) Permit history information. The permit applicant must provide a list of all names under which it, its operator, partners or principal shareholders, and the operator's partners or principal shareholders operates or previously operated a surface coal mining operation in the United States within the five-year period preceding the date of submission of the application.

(1) For the applicant and operator, the applicant must provide a list of any pending permit applications for surface coal mining operations filed in the United States. The list must identify each application by its application number and jurisdiction, or by other identifying information when necessary.

(2) For any surface coal mining operations that the applicant or operator owned or controlled within the five-year period preceding the date of submission of the application, and for any surface coal mining operation the applicant or operator owns or controls on that date, the application must include the:

(A) permittee's and operator's name and address;

(B) permittee's and operator's taxpayer identification numbers;

(C) Federal or State permit number and corresponding MSHA number;

(D) regulatory authority with jurisdiction over the permit; and

(E) permittee's and operator's relationship to the operation, including percentage of ownership and location in the organizational structure.

(d) Property interest information. For the property to be mined, the applicant must provide in the permit application the following information:

(1) the name and address of each:

(A) legal or equitable owner of record of the surface and mineral estate;

(B) holder of record of any leasehold interest; and

(C) purchaser of record under a real estate contract;

(2) the name and address of each owner of record, as reflected in the tax records of the county where the land is located, of all property (surface and subsurface) contiguous to any part of the proposed permit area;

(3) a statement of all interests, options, or pending bids held by the applicant or that the applicant has made for lands contiguous to the proposed permit area; however, if requested by the applicant in writing, the Commission will hold as confidential, under §12.210 of this title (relating to Public Availability of Information in Permit Applications on File with the Commission), any information required to be submitted under this paragraph that is not on public file under State law; and

(4) the Mine Safety and Health Administration (MSHA) numbers for all structures that require MSHA approval.

(e) Violation information.

(1) The applicant must state in the permit application whether it, an operator, or any subsidiary, affiliate, or entity which it or an operator owns or controls or which is under common control with it or an operator, has:

(A) had a Federal or State permit for surface coal mining operations suspended or revoked during the five-year period preceding the date of submission of the application; or

(B) forfeited a performance bond or similar security deposited in lieu of bond in connection with surface coal mining and reclamation operations during the five-year period preceding the date of submission of the application.

(2) For each suspension, revocation, or forfeiture identified under paragraph (1) of this subsection, the applicant must provide a brief explanation of the facts involved, including the:

(A) permit number;

(B) date of suspension, revocation, or forfeiture, and, when applicable, the date and amount of bond or similar security forfeited;

(C) regulatory authority that suspended or revoked the permit or forfeited the bond and the stated reasons for the action;

(D) current status of the permit, bond, or similar security involved; and

(E) date, location, type, and current status of any administrative or judicial proceedings concerning the suspension, revocation, or forfeiture.

(3) The applicant must provide a list of all violation notices that it or the operator received for any surface coal mining and reclamation operation during the three-year period preceding the date of submission of the application, and a list of all unabated or uncorrected violation notices incurred in connection with any surface coal mining and reclamation operation that it or its operator owns or controls on the date or application. For each violation notice reported, the applicant must include the following information, when applicable:

(A) the permit number and associated MSHA number;

(B) the issue date, identification number, and current status of the violation notice;

(C) the name of the person to whom the violation notice was issued;

(D) the name of the regulatory authority or agency that issued the violation notice;

(E) a brief description of the violation alleged in the notice;

(F) the date, location, type, and current status of any administrative or judicial proceedings concerning the violation notice;

(G) if the abatement period for a violation in a notice of violation issued under §12.678 of this title (relating to Notices of Violation) has not expired, certification that the violation is being abated or corrected to the satisfaction of the agency with jurisdiction over the violation; and

(H) for all violations not covered by subparagraph (G) of this paragraph, the actions taken to abate or correct the violation.

(f) Commission actions. The Commission need not make a finding as provided for under §12.234(c) of this title (relating to Challenge of Ownership or Control, Information on Ownership and Control, and Violations, and Applicant/Violator System Procedures) before entering into AVS the information required to be disclosed under this section; however, the listing in AVS of a person identified in subsection (b) of this section does not create a presumption or constitute a determination that such person owns or controls a surface coal mining operation.
The provisions of this §12.116 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640; amended to be effective February 24, 2014, 39 TexReg 1121.

§12.117 Right of Entry and Operation Information

(a) Each application shall contain a description of the documents upon which the applicant bases his or her legal right to enter and begin surface mining activities in the permit area and whether that right is the subject of pending litigation. The description shall identify those documents by type and date of execution, identify the specific lands to which the document pertains, and explain the legal rights claimed by the applicant.

(b) Where the private mineral estate to be mined has been severed from the private surface estate, the application shall also provide, for lands within the permit area:

(1) a copy of the written consent of the surface owner to the extraction of coal by surface mining methods; or

(2) a copy of the document of conveyance that expressly grants or reserves the right to extract the coal by surface mining methods; or

(3) if the conveyance does not expressly grant the right to extract the coal by surface mining methods, documentation that under the applicable state law, the applicant has the legal authority to extract the coal by those methods.

(c) Nothing in this section shall be construed to afford the Commission the authority to adjudicate property title disputes.
The provisions of this §12.117 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.118 Relationship to Areas Designated Unsuitable for Mining

(a) Each application shall contain available information on whether the proposed permit area is within an area designated unsuitable for surface coal mining and reclamation or is within an area under study for designation in an administrative proceeding under §§12.74-12.77 of this title (relating to Criteria for Designating Areas as Unsuitable for Surface Coal Mining Operations) and §§12.78-12.85 of this title (relating to Process for Designating Areas as Unsuitable for Surface Coal Mining Operations).

(b) If an applicant claims the exemption in paragraph (4)(B) of §12.216 of this title (relating to Criteria for Permit Approval or Denial), the application shall contain information supporting the applicant's assertion that it made substantial legal and financial commitments before January 4, 1977, concerning the proposed surface mining activities.

(c) If an applicant proposes to conduct surface mining activities within 100 feet of a public road or within 300 feet of an occupied dwelling, the application must meet the requirements of §12.72(a) or (b) of this title (relating to Procedures for Compatibility Findings, Public Road Closures and Relocations, Buffer Zones, and Valid Existing Rights Determinations).
The provisions of this §12.118 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective June 9, 2003, 28 TexReg 4412.

§12.119 Permit Term Information

(a) Each application shall contain the anticipated or actual starting and termination date of each phase of the surface mining activities and the anticipated number of acres of land to be affected for each phase of mining and over the total life of the permit.

(b) If the applicant proposes to conduct the surface mining activities in excess of 5 years, the application shall contain the information needed for the showing required under §12.219(a) of this title (relating to Permit Terms).
The provisions of this §12.119 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.120 Personal Injury and Property Damage Insurance Information

Each permit application shall contain either a certificate of liability insurance or evidence that the self-insurance requirements in §12.311 of this title (relating to Terms and Conditions for Liability Insurance) are satisfied.
The provisions of this §12.120 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.121 Identification of Other Licenses and Permits

Each application shall contain a list of all other licenses and permits needed by the applicant to conduct the proposed surface mining activities. This list shall identify each license and permit by:

(1) type of permit or license;

(2) name and address of issuing authority;

(3) identification numbers of applications for those permits or licenses or, if issued, the identification numbers of the permits or licenses; and

(4) if a decision has been made, the date of approval or disapproval by each issuing authority.
The provisions of this §12.121 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.122 Identification of Location of Public Office for Filing of Application

Each application shall identify, by name and address, the public office where the applicant will simultaneously file a copy of the complete application for public inspection.
The provisions of this §12.122 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.123 Newspaper Advertisement and Proof of Publication

A copy of the newspaper advertisement of the application and proof of publication of the advertisement shall be filed with the Commission and made a part of the complete application, not later than 4 weeks after the last date of publication required under §12.207(a) of this title (relating to Public Notices of Filing of Permit Applications).
The provisions of this §12.123 adopted to be effective April 7, 1997, 22 TexReg 3093.

DIVISION 5 SURFACE MINING PERMIT

APPLICATIONS--MINIMUM REQUIREMENTS FOR INFORMATION ON ENVIRONMENTAL RESOURCES

§12.124 General Requirements

Each permit application shall include a description of the existing, premining environmental resources within the proposed permit area and adjacent areas that may be affected or impacted by the proposed surface mining activities.

The provisions of this §12.124 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.125 General Environmental Resources Information

Each application shall describe and identify:

(1) the size, sequence, and timing of the subareas of the permit and adjacent areas for which it is anticipated that individual permits for mining will be requested over the estimated total life of the proposed surface mining activities; and

(2) the nature of cultural, historic and archeological resources listed on or eligible for listing on the National Register of Historic Places and known archeological sites within the proposed permit and adjacent areas.

(A) The description shall be based on all available information, including, but not limited to, information from the State Historic Preservation Officer and from local archeological, historical, and cultural preservation agencies.

(B) The Commission may require the applicant to identify and evaluate important historic and archeological resources that may be eligible for listing on the National Register of Historic Places, through:

(i) collection of additional information;

(ii) conduct of field investigation; or

(iii) other appropriate analyses.

The provisions of this §12.125 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.126 Description of Hydrology and Geology: General Requirements

(a) Each application shall contain a description of the geology, hydrology, and water quality and quantity of all lands within the proposed permit area, the adjacent areas, and the general area. The description shall include information on the characteristics of all surface and ground waters within the general area, and any water which will flow into or receive discharges of water from the general area. The description shall include geologic information in sufficient detail to assist in determining:

(1) the probable hydrologic consequences of the operation upon the quality and quantity of surface and ground water in the permit and adjacent areas, including the extent to which surface- and ground-water monitoring is necessary;

(2) all potentially acid- or toxic-forming strata down to and including the stratum immediately below the lowest coal seam to be mined; and

(3) whether reclamation as required by this chapter (relating to Coal Mining Regulations) can be accomplished and whether the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area.

(b) The description shall be prepared according to this section and §§12.127-12.130 of this title (relating to Geology Description, to Ground-Water Information, to Surface-Water Information, and to Alternative Water Supply Information), and conform to the following:

(1) information on hydrology, water quality and quantity, and geology related to hydrology of areas outside the proposed permit area and within the general area shall be provided by the Commission, to the extent that this data is available from an appropriate federal or state agency; and

(2) if this information is not available from those agencies, the applicant may gather and submit this information to the Commission as part of the permit application; and

(3) the permit shall not be approved by the Commission until this information is made available in the application.

(c) The use of modeling techniques may be included as part of the permit application, but the same surface- and ground-water information may be required for each site as when models are not used.

(d) All water-quality analyses performed to meet the requirements of this chapter shall be conducted according to the methodology in the 15th edition of Standard Methods for the Examination of Water and Wastewater, which is incorporated by reference, or the methodology in 40 CFR Parts 136 and 434.

The provisions of this §12.126 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.127 Geology Description

(a) The description shall include, at a minimum:

(1) a description of the geology of the proposed permit and adjacent areas, down to and including the deeper of, either the stratum immediately below the lowest coal seam to be mined, or any aquifer below the lowest coal seam to be mined which may be adversely impacted by mining;

(2) the areal and structural geology of the permit and adjacent areas and other geologic parameters which influence the required reclamation; and

(3) the occurrence, availability, movement, quantity, and quality of potentially impacted surface and ground waters.

(b) The geologic description shall include analyses of samples collected from test borings, drill cores, or fresh unweathered, uncontaminated samples from rock outcrops from the permit area, down to and including the deeper of either the stratum immediately below the lowest coal seam to be mined or any aquifer below the lowest coal seam to be mined which may be adversely impacted by mining. The analyses shall result in the following:

(1) location of subsurface water, if encountered;

(2) logs of drill holes showing the lithologic characteristics, including physical properties and thickness of each stratum and each coal seam;

(3) chemical analyses identifying those strata that may contain acid- or toxic-forming or alkalinity-producing materials and to determine their content, except that the Commission may find that the analysis for alkalinity-producing material is unnecessary; and

(4) chemical analyses of the coal seam for acid- or toxic-forming materials, including the total sulfur and pyritic sulfur, except that the Commission may find that the analysis of pyritic sulfur content in unnecessary.

(c) If determined to be necessary to protect the

hydrologic balance or to meet the performance standards of this chapter (relating to Coal Mining Regulations), the Commission may require the collection, analysis, and description of geologic information in addition to that required by subsection (b) of this section.

(d) An applicant may request that the requirement for a statement of the results of the test borings or core samplings be waived by the Commission. The waiver may be granted only if the Commission makes a written determination that the statement is unnecessary because other equivalent information is accessible to it in a satisfactory form.

The provisions of this §12.127 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.128 Ground-water Information

(a) The application shall contain a description of the ground-water hydrology for the proposed permit area and adjacent area, including, at a minimum:

(1) the depth below the surface and the horizontal extent of the water table and aquifers;

(2) the lithology and thickness of the aquifers;

(3) the location and ownership of existing wells, springs, and other ground-water resources; and

(4) seasonal quality and quantity of ground water and usage. Water quality descriptions shall include, at a minimum, total dissolved solids or specific conductance corrected to 25 degrees C, pH, total iron, and total manganese. Ground-water quantity descriptions shall include, at a minimum, approximate rates of discharge or usage and depth to the water in the coal seam, and each water-bearing stratum above and potentially impacted stratum below the coal seam.

(b) The application shall contain additional information which describes the recharge and storage characteristics of aquifers.

The provisions of this §12.128 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.129 Surface-water Information

Surface-water information shall be described, including the name of the watershed which will receive water discharges, the name, location, ownership, and description of all surface-water bodies such as streams, lakes, ponds, impoundments, and springs, the location of any water discharge into any surface body of water in the proposed permit and adjacent areas, and information on surface-water quantity and quality sufficient to demonstrate seasonal variation and water usage. Water quantity and quality descriptions shall include, at a minimum:

(1) water-quantity data on present water usages, and minimum, maximum, and average discharge conditions which identify critical low flow and peak discharge rates of streams sufficient to identify seasonal variations in flow rates; and

(2) water-quality data to identify the characteristics of surface waters in, discharging into, or which will receive flows from surface or ground water from affected areas within the proposed permit area, sufficient to identify seasonal variations, showing:

(A) total dissolved solids in milligrams per liter or specific conductance corrected to 25 degrees C;

(B) total suspended solids in milligrams per liter;

(C) acidity and alkalinity information if there is a potential for acid drainage from the proposed surface mining operation;

(D) pH in standard units;

(E) total and dissolved iron in milligrams per liter;

(F) total manganese in milligrams per liter; and

(G) such other information as the Commission determines is relevant.

The provisions of this §12.129 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.130 Alternative Water Supply Information

The application shall identify the extent to which the proposed surface mining activities may proximately result in contamination, diminution, or interruption of an underground or surface source of water within the proposed permit or adjacent areas which is used for domestic, agricultural, industrial, or other legitimate use. If contamination, diminution, or interruption may result, then the application shall identify the alternative sources of water supply that could be developed to replace the existing water sources, including the suitability of alternative water sources for existing premine uses and approved postmine land uses.

The provisions of this §12.130 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.131 Climatological Information

(a) When requested by the Commission, the application shall contain a statement of the climatological factors that are representative of the proposed permit area, including:

(1) the average seasonal precipitation;

(2) the average direction and velocity of prevailing winds; and

(3) seasonal temperature ranges.

(b) The Commission may request such additional data as deemed necessary to ensure compliance with the requirements of this subchapter (relating to Surface Coal Mining and Reclamation Operations Permits and Coal Exploration Procedures Systems).

The provisions of this §12.131 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.132 Vegetative Information

(a) The permit application shall, if required by the Commission, contain a map that delineates existing vegetative types and a description of the plant communities within the proposed permit area and within any proposed reference area. This description shall include information adequate to predict the potential for reestablishing vegetation.

(b) When a map or aerial photograph is required, sufficient adjacent areas shall be included to allow evaluation of vegetation as important habitat for fish and wildlife for those species of fish and wildlife identified under §12.133 of this title (relating to Fish and Wildlife Resources Information).

The provisions of this §12.132 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.133 Fish and Wildlife Resources Information

(a) Resource Information. Each application shall include

fish-and-wildlife resource information for the permit area and adjacent area.

(1) The scope and level of detail for such information shall be determined by the Commission in consultation with state and federal agencies with responsibilities for fish and wildlife and shall be sufficient to design the protection and enhancement plan required under §12.144 of this title (relating to Fish and Wildlife Plan).

(2) Site-specific resource information necessary to address the respective species or habitats shall be required when the permit area or adjacent area is likely to include:

(A) listed or proposed endangered or threatened species of plants or animals or their critical habitats listed by the Secretary under the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.), or those species or habitats protected by similar state statutes;

(B) habitats of unusually high value for fish and wildlife such as important streams, wetlands, riparian areas, cliffs supporting raptors, areas offering special shelter or protection, migration routes, or reproduction and wintering areas; or

(C) other species or habitats identified through agency consultation as requiring special protection under state or federal law.

(b) Fish and Wildlife Service review. Upon request, the Commission shall provide the resource information required under subsection (a) of this section and the protection and enhancement plan required under §12.144 of this title (relating to Fish and Wildlife Plan) to the U.S. Department of the Interior, Fish and Wildlife Service Regional or Field Office for their review. This information shall be provided within 10 days of receipt of the request from the Service.

The provisions of this §12.133 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.134 Soil Resources Information

(a) The applicant shall provide adequate soil survey information for the permit area consisting of the following:

(1) a map delineating different soils;

(2) soil identification;

(3) soil description; and

(4) present and potential productivity of existing soils.

(b) Where the applicant proposes to use selected overburden materials as a supplement or substitute for topsoil, the application shall include results of the analyses, trials, and tests required under §12.335 of this title (relating to Topsoil: Removal).

The provisions of this §12.134 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.135 Land-Use Information

(a) The application shall contain a statement of the condition, capability, and productivity of the land within the proposed permit area, including:

(1) a map and supporting narrative of the uses of the land existing at the time of the filing of the application. If the premining use of the land was changed within 5 years before the anticipated date of beginning the proposed operations, the historic use of the land shall also be described;

(2) a narrative of land capability and productivity, which analyzes the land-use description under this section in conjunction with other environmental resources information required under §§12.124-12.138 of this title (relating to Surface Mining Permit Applications--Minimum Requirements for Information on Environmental Resources). The narrative shall provide analyses of:

(A) the capability of the land before any mining to support a variety of uses, giving consideration to soil and foundation characteristics, topography, vegetative cover and the hydrology of the proposed permit area; and

(B) the productivity of the proposed permit area before mining, expressed as average yield of food, fiber, forage, or wood products from such lands obtained under high levels of management. The productivity shall be determined by yield data or estimates for similar sites based on current data from the U.S. Department of Agriculture, state agricultural universities or appropriate state natural resource or agricultural agencies.

(b) The application shall identify whether the proposed permit area has been previously mined, and, if so, include the following information, if available:

(1) the type of mining method used;

(2) the coal seams or other mineral strata mined;

(3) the extent of coal or other minerals removed;

(4) the approximate dates of past mining; and

(5) the uses of the land preceding mining.

(c) The application shall contain a description of the existing land uses and land-use classifications under local law, if any, of the proposed permit and adjacent areas.

The provisions of this §12.135 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.136 Maps: General Requirements

The permit application shall include maps showing:

(1) all boundaries of lands and names of present owners of record of those lands, both surface and subsurface, included in or contiguous to the permit area;

(2) the boundaries of land within the proposed permit area upon which the applicant has the legal right to enter and begin surface mining activities;

(3) the boundaries of all areas proposed to be affected over the estimated total life of the proposed surface mining activities, with a description of size, sequence, and timing of the mining of sub-areas for which it is anticipated that additional permits will be sought;

(4) the location of all buildings on and within 1,000 feet of the proposed permit area, with identification of the current use of the buildings;

(5) the location of surface and subsurface man-made features within, passing through, or passing over the proposed permit area, including, but not limited to major electric transmission lines, pipelines, and agricultural drainage tile fields;

(6) the location and boundaries of any proposed reference areas for determining the success of revegetation;

(7) the locations of water supply intakes for current users of surface water flowing into, out of, and within a hydrologic area defined by the Commission, and those surface waters which will receive discharges from affected areas in the proposed mine plan area;

(8) each public road located in or within 100 feet of the proposed permit area;

(9) the boundaries of any public park and locations of any cultural or historical resources listed or eligible for listing on the National Register of Historic Places, and known archeological sites within the mine plan or adjacent areas;

(10) each public or private cemetery or Indian burial

ground located in or within 100 feet of the proposed permit area;

(11) any land within the proposed mine plan area and adjacent area which is within the boundaries of any units of the National System of Trails or the Wild and Scenic Rivers System, including study rivers designated under Section 5(a) of the Wild and Scenic Rivers Act; and

(12) other relevant information required by the Commission.

The provisions of this §12.136 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.137 Cross Sections, Maps, and Plans

(a) The application shall include cross sections, maps, and plans showing:

(1) elevations and locations of test borings and core samplings;

(2) elevations and locations of monitoring stations used to gather data for water quality and quantity, fish and wildlife, and air quality, if required, in preparation of the application;

(3) nature, depth, and thickness of the coal seams to be mined, any coal or rider seams above the seam to be mined, each stratum of the overburden, and the stratum immediately below the lowest coal seam to be mined;

(4) all coal crop lines and the strike and dip of the coal to be mined within the proposed permit area;

(5) location and extent of known workings of active, inactive, or abandoned underground mines, including mine openings to the surface within the proposed permit and adjacent areas;

(6) location and extent of subsurface water, if encountered, within the proposed permit and adjacent areas;

(7) location of surface water bodies such as streams, lakes, ponds, springs, constructed or natural drains, and irrigation ditches within the proposed permit and adjacent areas;

(8) location and extent of existing or previously surface-mined areas within the proposed permit area;

(9) location and dimensions of existing areas of spoil, waste, and noncoal waste disposal, dams, embankments, other impoundments, and water-treatment and air-pollution control facilities within the proposed permit area;

(10) location, and depth if available, of gas and oil wells within the proposed permit area and water wells in the permit area and adjacent area; and

(11) sufficient slope measurements to adequately represent the existing land surface configuration of the proposed permit area, measured and recorded according to the following:

(A) each measurement shall consist of an angle of inclination along the prevailing slope extending 100 linear feet above and below or beyond the coal outcrop or the area to be disturbed or, where this is impractical, at locations specified by the Commission;

(B) where the area has been previously mined, the measurements shall extend at least 100 feet beyond the limits of mining disturbances, or any other distance determined by the Commission to be representative of the pre-mining configuration of the land; and

(C) slope measurements shall take into account natural variations in slope, to provide accurate representation of the range of natural slopes and reflect geomorphic differences of the area to be disturbed.

(b) Maps, plans, and cross sections included in a permit application which are required by this section shall be prepared by or under the direction of and certified by a qualified registered professional engineer or professional geologist, with assistance from experts in related fields such as land surveying and landscape architecture and shall be updated as required by the Commission.

The provisions of this §12.137 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.138 Prime Farmland Investigation

(a) The applicant shall conduct a pre-application investigation of the proposed permit area to determine whether lands within the area may be prime farmland.

(b) Land shall not be considered as prime farmland where the applicant can demonstrate one or more of the following:

(1) the land has not been historically used as cropland;

(2) the land within the proposed permit area which has a slope, as measured pursuant to §12.137(a)(11) of this title (relating to Cross Sections, Maps, and Plans), of greater than 5.0%. Only that portion of the land having a slope of greater than 5.0% will not be considered as prime farmland;

(3) the land is not irrigated or naturally subirrigated, has no developed water supply that is dependable and of adequate quality, and the average annual precipitation is 14 inches or less;

(4) other factors exist, such as a very rocky surface or the land is frequently flooded, which clearly place all land within the area outside the purview of prime farmland; or

(5) on the basis of a soil survey of lands within the permit area, there are no soil mapping units which have been designated prime farmland by the U.S. Natural Resources Conservation Service.

(c) If the investigation establishes that the lands are not prime farmland, the applicant shall submit with the permit application, a request for a negative determination which shows that the land for which the negative determination is sought meets one of the criteria of subsection (b) of this section.

(d) If the investigation indicates that lands within the proposed permit area may be prime farmland historically used for cropland, the applicant shall contact the U.S. Natural Resources Conservation Service to determine if a soil survey exists for those lands and whether soil mapping units in the permit area have been designated as prime farmland. If no soil survey has been made for the lands within the proposed permit area, the applicant shall cause such a survey to be made. Soil surveys of the detail used by the U.S. Natural Resources Conservation Service for operational conservation planning shall be used to identify and locate prime farmland soils.

(1) When a soil survey of lands within the proposed permit area contains soil mapping units which have been designated as prime farmland, the applicant shall submit an application in accordance with §12.201(b) of this title (relating to Prime Farmland) for such designated land.

(2) When a soil survey of lands within the proposed permit area contains soil mapping units which have not been designated as prime farmland after review by the U.S. Natural Resources Conservation Service, the applicant shall submit a request for negative determination for non-designated land within the permit application establishing

compliance with subsection (b) of this section.
The provisions of this §12.138 adopted to be effective April 7, 1997, 22 TexReg 3093.

DIVISION 6 SURFACE MINING PERMIT APPLICATIONS--MINIMUM REQUIREMENTS FOR RECLAMATION AND OPERATION PLAN

§12.139 Operation Plan: General Requirements

Each application shall contain a description of the mining operations proposed to be conducted during the life of the mine within the proposed permit area, including, at a minimum, the following:

(1) a narrative description of the type and method of coal mining procedures and proposed engineering techniques, anticipated annual and total production of coal, by tonnage, and the major equipment to be used for all aspects of those operations; and

(2) a narrative explaining the construction, modification, use, maintenance, and removal of the following facilities (unless retention of such facilities is necessary for postmining land use as specified in §12.133 of this title (relating to Fish and Wildlife Resources Information):

(A) dams, embankments, and other impoundments;

(B) overburden and topsoil handling and storage areas and structures;

(C) coal removal, handling, storage, cleaning, and transportation areas and structures;

(D) spoil, coal processing waste, and noncoal waste removal, handling, storage, transportation, and disposal areas and structures;

(E) mine facilities; and

(F) water- and air-pollution control facilities.

The provisions of this §12.139 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.140 Operation Plan: Existing Structures

(a) Each application shall contain a description of each existing structure proposed to be used in connection with or to facilitate the surface coal mining and reclamation operation. The description shall include:

(1) location;

(2) plans of the structure which describe its current condition;

(3) approximate dates on which construction of the existing structure was begun and completed; and

(4) a showing, including relevant monitoring data or other evidence, whether the structure meets the performance standards of Subchapter K of this chapter (relating to Permanent Program Performance Standards).

(b) Each application shall contain a compliance plan for each existing structure proposed to be modified or reconstructed for use in connection with or to facilitate the surface coal mining and reclamation operation. The compliance plan shall include:

(1) design specifications for the modification or reconstruction of the structure to meet the design and performance standards of Subchapter K of this chapter (relating to Permanent Program Performance Standards);

(2) a construction schedule which shows dates for beginning and completing interim steps and final reconstruction;

(3) provisions for monitoring the structure during and after modification or reconstruction to ensure that the performance standards of Subchapter K of this chapter (relating to Permanent Program Performance Standards) are met; and

(4) a showing that the risk of harm to the environment or to public health or safety is not significant during the period of modification or reconstruction.

The provisions of this §12.140 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.141 Operation Plan: Blasting

Each application shall contain a blasting plan for the proposed permit area, explaining how the applicant will comply with the requirements of §§12.357-12.360 and 12.362 of this title (relating to Use of Explosives: General Requirements, to Use of Explosives: Pre-Blasting Survey, to Use of Explosives: Blasting Schedule, to Use of Explosives: Control of Adverse Effects, and to Use of Explosives: Records of Blasting Operations) and including the following:

(1) types and approximate amounts of explosives to be used for each type of blasting operation to be conducted;

(2) description of procedures and plans for recording and retention of information on the following during blasting:

(A) drilling patterns, including size, number, depths, and spacing of holes;

(B) charge and packing of holes;

(C) types of fuses and detonation controls; and

(D) sequence and timing of firing holes;

(3) description of blasting warning and site access control equipment and procedures;

(4) description of types, capabilities, sensitivities, and locations of use of any blast monitoring equipment and procedures proposed to be used;

(5) description of plans for recording and reporting to the Commission the results of pre-blasting surveys, if required;

(6) description of unavoidable hazardous conditions for which deviations from the blasting schedule will be needed under §12.360 of this title (relating to Use of Explosives: Control of Adverse Effects);

(7) description of limitations the applicant will meet with regard to ground vibrations and airblast, and the bases for those limitations; and

(8) description of methods to be applied in controlling the adverse effects of blasting operations.

The provisions of this §12.141 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.142 Operation Plan: Maps and Plans

Each application shall contain maps and plans of the proposed permit and adjacent areas as follows:

(1) The maps and plans shall show the lands proposed to be affected throughout the operation and any change in a facility or feature to be caused by the proposed operations, if the facility or feature was shown under §§12.136 and 12.137 of this title (relating to Maps: General Requirements, and to Cross Sections, Maps, and Plans).

(2) The following shall be shown for the proposed permit area unless specifically required for the permit and adjacent area by the requirements of this section:

(A) buildings, utility corridors and facilities to be used;

(B) the area of land to be affected within the

proposed permit area, according to the sequence of mining and reclamation;

(C) each area of land for which a performance bond or other equivalent guarantee will be posted under Subchapter J of this chapter (relating to Bond and Insurance Requirements for Surface Coal Mining and Reclamation Operations);

(D) each coal storage, cleaning and loading area;

(E) each topsoil, spoil, coal waste, and noncoal waste storage area;

(F) each water diversion, collection, conveyance, treatment, storage, and discharge facility to be used;

(G) each air-pollution collection and control facility;

(H) each source of waste and each waste-disposal facility relating to coal processing or pollution control;

(I) each facility to be used to protect and enhance fish and wildlife and related environmental values;

(J) each explosive storage-and-handling facility; and

(K) location of each sedimentation pond, permanent water impoundment, coal processing waste bank, and coal processing waste dam and embankment, in accordance with §12.148 of this title (relating to Reclamation Plan: Ponds, Impoundments, Banks, Dams, and Embankments), and fill area for the disposal of excess spoil in accordance with §12.153 of this title (relating to Disposal of Excess Spoil).

(3) Except as provided in §12.148(a)(2) and (3) of this title, §12.153(a) of this title (relating to Disposal of Excess Spoil), §12.363(b) of this title (relating to Disposal of Excess Spoil: General Requirements), §12.366(b)(1) of this title (relating to Disposal of Excess Spoil: Durable Rock Fills), and §12.368(c) of this title (relating to Coal Processing Waste Banks: General Requirements), maps, plans, and cross-sections required under paragraph (2)(D), (E), (F), (J), and (K) of this section shall be prepared by, or under the direction of, and certified by a qualified registered professional engineer, or professional geologist, with assistance from experts in related fields such as land surveying and landscape architecture.

(4) A description of and plans and drawings for each support facility to be constructed, used, or maintained within the proposed permit area. The plans and drawings shall include a map, appropriate cross sections, design drawings, and specifications sufficient to demonstrate compliance with §12.403 of this title (relating to Support Facilities) for each facility.

The provisions of this §12.142 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.143 Air Pollution Control Plan for Surface Mining

(a) For all surface mining activities with projected production rates exceeding 1 million tons of coal per year and located west of the 100th meridian west longitude, the application shall contain an air pollution control plan which includes the following:

(1) an air-quality monitoring program to provide sufficient data to evaluate the effectiveness of the fugitive-dust control practices proposed under paragraph (2) of this subsection to comply with federal and state air-quality standards; and

(2) a plan for fugitive-dust control practices as required under §12.389 of this title (relating to Stabilization of Surface Areas for Surface Mining).

(b) For all other surface mining activities the application shall contain an air-pollution control plan which includes the following:

(1) an air-quality monitoring program, if required by the Commission, to provide sufficient data to evaluate the effectiveness of the fugitive-dust control practices under paragraph (2) of this subsection to comply with applicable federal and state air-quality standards; and

(2) a plan for fugitive-dust control practices as required under §12.389 of this title (relating to Stabilization of Surface Areas for Surface Mining).

The provisions of this §12.143 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective September 14, 1999, 24 TexReg 7223.

§12.144 Fish and Wildlife Plan

Protection and enhancement plan. Each application shall contain a description of how, to the extent possible using the best technology currently available, the operator will minimize disturbances and adverse impacts on fish and wildlife and related environmental values, including compliance with the Endangered Species Act, during the surface coal mining and reclamation operations, and how enhancement of these resources will be achieved, where practicable. This description shall:

(1) be consistent with the requirements of §12.380 of this title (relating to Protection of Fish, Wildlife, and Related Environmental Values);

(2) apply, at a minimum, to species and habitats identified under §12.133(a) of this title (relating to Fish and Wildlife Resources Information); and

(3) include:

(A) protective measures that will be used during the active mining phase of operation. Such measures may include the establishment of buffer zones, the selective location and special design of haul roads and power lines, and the monitoring of surface-water quality and quantity; and

(B) enhancement measures that will be used during the reclamation and postmining phase of operation to develop aquatic and terrestrial habitat. Such measures may include restoration of streams and other wetlands, retention of ponds and impoundments, establishment of vegetation for wildlife food and cover, and the placement of perches and nest boxes. Where the plan does not include enhancement measures, a statement shall be given explaining why enhancement is not practicable.

The provisions of this §12.144 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.145 Reclamation Plan: General Requirements for Surface Mining

(a) Each application shall contain a plan for reclamation of the lands within the proposed permit area, showing how the applicant will comply with §§134.091-134.109 of the Act and Subchapter K of this chapter (relating to Permanent Program Performance Standards). The plan shall include, at a minimum, all information required under this section and §§12.146-12.154 of this title (relating to Reclamation Plan: Protection of Hydrologic Balance, to Reclamation Plan: Postmining Land Uses, to Reclamation Plan: Ponds, Impoundments, Banks, Dams, and Embankments, to

Reclamation Plan: Surface Mining Near Underground Mining, to Diversions, to Protection of Public Parks and Historic Places, to Relocation or Use of Public Roads, to Disposal of Excess Spoil, and to Road Systems and Support Facilities).

(b) Each plan shall contain the following information for the proposed permit area:

(1) a detailed timetable for the completion of each major step in the reclamation plan;

(2) a detailed estimate of the cost of reclamation of the proposed operations required to be covered by a performance bond under Subchapter J of this chapter (relating to Bond and Insurance Requirements for Surface Coal Mining and Reclamation Operations), with supporting calculations for the estimates;

(3) a plan for backfilling, soil stabilization, compacting, and grading, with contour maps or cross sections that show the anticipated final surface configuration of the proposed permit area, in accordance with §§12.384-12.389 of this title (relating to Backfilling and Grading: General Requirements, to Backfilling and Grading: General Grading Requirements, to Backfilling and Grading: Covering Coal and Acid- and Toxic- Forming Materials, to Backfilling and Grading: Thin Overburden, to Backfilling and Grading: Thick Overburden, and to Stabilization of Surface Areas for Surface Mining;

(4) a plan for removal, storage, and redistribution of topsoil, subsoil, and other material to meet the requirements of §§12.334-12.338 of this title (relating to Topsoil: General Requirements, to Topsoil: Removal, to Topsoil: Storage, to Topsoil: Redistribution, and to Topsoil: Nutrients and Soil Amendments). A demonstration of the suitability of topsoil substitutes or supplements under this chapter (relating to Coal Mining Regulations) shall be based upon analysis of the thickness of soil horizons, total depth, texture, percent coarse fragments, pH, and areal extent of the different kinds of soil series. The Commission may require other chemical and physical analyses, field-site trials, or greenhouse tests if determined to be necessary or desirable to demonstrate the suitability of topsoil substitutes or supplements;

(5) a plan for revegetation as required in §§12.390-12.393 and 12.395 of this title (relating to Revegetation: General Requirements, to Revegetation: Use of Introduced Species, to Revegetation: Timing, to Revegetation: Mulching and Other Stabilizing Practices, and to Revegetation: Standards for Success), including, but not limited to, descriptions of the:

(A) schedule of revegetation;

(B) species and amounts per acre of seeds and seedlings to be used;

(C) methods to be used in planting and seeding;

(D) mulching techniques;

(E) irrigation, if appropriate, and pest- and disease-control measures, if any;

(F) measures proposed to be used to determine the success of revegetation as required in §12.395 of this title (relating to Revegetation: Standards for Success); and

(G) a soil testing plan for evaluation of the results of topsoil handling and reclamation procedures related to revegetation;

(6) a description of the measures to be used to maximize the use and conservation of the coal resource as required in §12.356 of this title (relating to Coal Recovery);

(7) a description of measures to be employed to ensure that all debris, acid-forming and toxic-forming materials, and materials constituting a fire hazard are disposed of in accordance with §§12.375 and 12.386 of this title (relating to Disposal of Noncoal Wastes, and to Backfilling and Grading: Covering Coal and Acid- and Toxic-Forming Materials) and a description of the contingency plans which have been developed to preclude sustained combustion of such materials;

(8) a description, including appropriate cross sections and maps, of the measures to be used to seal or manage mine openings, and to plug, case, or manage exploration holes, other bore holes, wells, and other openings within the proposed permit area, in accordance with §§12.331-12.333 of this title (relating to Casing and Sealing of Drilled Holes: General Requirements, to Casing and Sealing of Drilled Holes: Temporary, and to Casing and Sealing of Drilled Holes: Permanent); and

(9) a description of steps to be taken to comply with the requirements of the Clean Air Act (42 U.S.C. 7401 et seq.), the Clean Water Act (33 U.S.C. 1251 et seq.), and other applicable air- and water-quality laws and regulations and health and safety standards.

The provisions of this §12.145 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640; amended to be effective September 14, 1999, 24 TexReg 7223.

§12.146 Reclamation Plan: Protection of Hydrologic Balance

(a) General requirements. The application shall include a hydrologic reclamation plan, with appropriate maps and descriptions, indicating how the relevant requirements of this chapter (relating to Coal Mining Regulations), including §§12.339-12.341, 12.346, 12.348 and 12.349, and 12.350-12.354 of this title (relating to Hydrologic Balance: General Requirements, to Hydrologic Balance: Water-Quality Standards and Effluent Limitations, to Hydrologic Balance: Diversions, to Hydrologic Balance: Acid-Forming and Toxic-Forming Spoil, to Hydrologic Balance: Ground-Water Protection, to Hydrologic Balance: Surface-Water Protection, to Hydrologic Balance: Surface and Ground-Water Monitoring, to Hydrologic Balance: Transfer of Wells, to Hydrologic Balance: Water Rights and Replacement, to Hydrologic Balance: Discharge of Water Into an Underground Mine, and to Hydrologic Balance: Postmine Rehabilitation of Sedimentation Ponds, Diversions, Impoundments, and Treatment Facilities), will be met. The plan shall be specific to the local hydrologic conditions. It shall contain the steps to be taken during mining and reclamation through bond release to minimize disturbances to the hydrologic balance within the permit and adjacent areas; to prevent material damage outside the permit area; to meet applicable federal and state water-quality laws and regulations; and to protect the rights of present water users. The plan shall specifically address any potential adverse hydrologic consequences identified in the PHC determination prepared under §§12.139-12.154 of this title (relating to Surface Mining Permit Applications--Minimum Requirements for Reclamation and Operation Plan) and shall include preventive and remedial measures. The plan shall identify the measures to be taken to:

(1) protect the quality of surface- and ground-water systems, both within the proposed permit and adjacent areas, from the adverse effects of the proposed surface mining activities, or to provide alternative sources of water in accordance with §12.130 and §12.352 of this title (relating to

Alternative Water Supply Information, and to Hydrologic Balance: Water Rights and Replacement), where the protection of quality cannot be ensured;

(2) protector replace the rights of present users of surface and ground water;

(3) protect the quantity of surface and ground water both within the proposed permit area and adjacent area from adverse effects of the proposed surface mining activities, or to provide alternative sources of water in accordance with §12.130 and §12.352 of this title (relating to Alternative Water Supply Information, and to Hydrologic Balance: Water Rights and Replacement), where the protection of quantity cannot be ensured;

(4) avoid acid or toxic drainage;

(5) prevent, to the extent possible using the best technology currently available, additional contributions of suspended solids to streamflow;

(6) provide water-treatment facilities when needed;

(7) control drainage; and

(8) restore approximate premining recharge capacity.

(b) Ground-water monitoring plan.

(1) The application shall include a ground-water monitoring plan based upon the PHC determination required under subsection (d) of this section and the analysis of all baseline hydrologic, geologic, and other information in the permit application. The plan shall provide for the monitoring of parameters that relate to the suitability of the ground water for current and approved postmine land uses and to the objectives for protection of the hydrologic balance as set forth in subsection (a) of this section. It shall identify the quantity and quality parameters to be monitored, sampling frequency, and site locations. It shall describe how the data may be used to determine the impacts of the operation upon the hydrologic balance. At a minimum, total dissolved solids or specific conductance corrected to 25 degrees C, pH, total iron, total manganese, and water levels shall be monitored and data submitted to the Commission at least every three months for each monitoring location. The Commission may require additional monitoring.

(2) If the applicant can demonstrate by the use of the PHC determination and other available information that a particular water-bearing stratum in the proposed permit and adjacent areas is not one which serves as an aquifer which significantly ensures the hydrologic balance within the cumulative impact area, then monitoring of that stratum may be waived by the Commission.

(c) Surface-water monitoring plan.

(1) The application shall include a surface-water monitoring plan based upon the PHC determination required under subsection (d) of this section and the analysis of all baseline hydrologic, geologic, and other information in the permit application. The plan shall provide for the monitoring of parameters that relate to the suitability of the surface water for current and approved postmine land uses, and to the objectives for protection of the hydrologic balance as set forth in subsection (a) of this section, as well as the effluent limitations found at 40 CFR Part 434.

(2) The plan shall identify the surface-water quantity and quality parameters to be monitored, sampling frequency, and site locations. It shall describe how the data may be used to determine the impacts of the operation upon the hydrologic balance.

(A) At all monitoring locations in the surface-water bodies such as streams, lakes, and impoundments that are potentially impacted or into which water will be discharged and at upstream monitoring locations, the total dissolved solids or specific conductance corrected to 25 degrees C, total suspended solids, pH, total iron, total manganese, and flow shall be monitored.

(B) For point-source discharges, monitoring shall be conducted in accordance with 40 CFR Parts 122, 123 and 434 and as required by the National Pollutant Discharge Elimination System permitting authority.

(3) The monitoring reports shall be submitted to the Commission every three months. The Commission may require additional monitoring.

(d) Probable hydrologic consequences determination.

(1) The application shall include a determination of the probable hydrologic consequences (PHC) of the proposed operation upon the quality and quantity of surface and ground water under seasonal flow conditions for the proposed permit and adjacent areas.

(2) The PHC determination shall be based on baseline hydrologic, geologic, and other information collected for the permit application and may include data statistically representative of the site.

(3) The PHC determination shall include findings on:

(A) whether adverse impacts may occur to the hydrologic balance;

(B) whether acid-forming or toxic-forming materials are present that could result in the contamination of ground- or surface-water supplies;

(C) whether the proposed operation may proximately result in contamination, diminution, or interruption of an underground or surface source of water within the proposed permit or adjacent areas which is used for domestic, agricultural, industrial, or other legitimate purpose; and

(D) what impact the proposed operation will have on:

(i) sediment yield from the disturbed area;

(ii) acidity, total suspended and dissolved solids, and other important water-quality parameters of local impact;

(iii) flooding or streamflow alteration;

(iv) ground- and surface-water availability; and

(v) other characteristics as required by the Commission.

(4) An application for a permit revision shall be reviewed by the Commission to determine whether a new or updated PHC determination shall be required.

(5) If the determination of the probable hydrologic consequences (PHC) required by this subsection indicates adverse impacts on or off the proposed permit area may occur to the hydrologic balance, or that acid-forming or toxic-forming material is present that may result in the contamination of ground-water or surface-water supplies, then information supplemental to that required under §12.128 and §12.129 of this title (relating to Ground-Water Information, and to Surface-Water Information) shall be provided to evaluate such probable hydrologic consequences and to plan remedial and reclamation activities. Such supplemental information may be based upon drilling, aquifer tests, hydrogeologic analysis of the water-bearing strata, flood flows, or analysis of other water quality and quantity characteristics. Information shall be provided on water availability and alternative water sources, including the

suitability of alternative water sources for existing premining uses and approved postmining land uses.

(e) Cumulative hydrologic impact assessment.

(1) The Commission shall provide an assessment of the probable cumulative hydrologic impacts (CHIA) of the proposed operation and all anticipated mining upon surface- and ground-water systems in the cumulative impact area. The CHIA shall be sufficient to determine, for purposes of permit approval, whether the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area. The Commission may allow the applicant to submit data and analyses relevant to the CHIA with the permit application.

(2) An application for a permit revision shall be reviewed by the Commission to determine whether a new or updated CHIA shall be required.

The provisions of this §12.146 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.147 Reclamation Plan: Postmining Land Uses

(a) Each plan shall contain a detailed description of the proposed use, following reclamation, of the land within the proposed permit area, including a discussion of the utility and capacity of the reclaimed land to support a variety of alternative uses, and the relationship of the proposed use to existing land-use policies and plans. This description shall explain:

(1) how the proposed postmining land use is to be achieved and the necessary support activities which may be needed to achieve the proposed land use; and

(2) where a land use different from the premining land use is proposed, all materials needed for approval of the alternative use under §12.399 of this title (relating to Postmining Land Use); and

(3) the consideration which has been given to making all of the proposed surface mining activities consistent with surface-owner plans and applicable state and local land-use plans and programs.

(b) The description shall be accompanied by a copy of the comments concerning the proposed use by the legal or equitable owner of record of the surface of the proposed permit area and the state and local government agencies which would have to initiate, implement, approve, or authorize the proposed use of the land following reclamation.

The provisions of this §12.147 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 12, 2007, 32 TexReg 8124.

§12.148 Reclamation Plan: Ponds, Impoundments, Banks, Dams, and Embankments

(a) General. Each application shall include a general plan for each proposed sedimentation pond, water impoundment, and coal processing waste bank, dam, or embankment within the proposed permit area.

(1) Each general plan shall:

(A) be prepared by or under the direction of, and certified by a qualified registered professional engineer, or by a professional geologist, with assistance from experts in related fields such as land surveying and landscape architecture;

(B) contain a description, map, and cross section of the structure and its location;

(C) contain preliminary hydrologic and geologic information required to assess the hydrologic impact of the structure;

(D) contain a survey describing the potential effect on the structure from subsidence of the subsurface strata resulting from past underground mining operations if underground mining has occurred; and

(E) contain a certification statement which includes a schedule setting forth the dates that any detailed design plans for structures that are not submitted with the general plan will be submitted to the Commission. The Commission shall have approved, in writing, the detailed design plan for a structure before construction of the structure begins.

(2) Each detailed design plan for a structure that meets or exceeds the size or other criteria of the Mine Safety and Health Administration, 30 CFR 77.216(a), shall:

(A) be prepared by or under the direction of, and certified by a qualified registered professional engineer with assistance from experts in related fields such as geology, land surveying, and landscape architecture;

(B) include any geotechnical investigation, design, and construction requirements for the structure;

(C) describe the operation and maintenance requirements for each structure; and

(D) describe the timetable and plans to remove each structure, if appropriate.

(3) Each detailed design plan for a structure that does not meet the size or other criteria of 30 CFR 77.216(a) shall:

(A) be prepared by or under the direction of, and certified by a qualified registered professional engineer;

(B) include any design and construction requirements for the structure, including any required geotechnical information;

(C) describe the operation and maintenance requirements for each structure; and

(D) describe the timetable and plans to remove each structure, if appropriate.

(b) Sedimentation ponds. Sedimentation ponds, whether temporary or permanent, shall be designed in compliance with the requirements of §12.344 of this title (relating to Hydrologic Balance: Sedimentation Ponds). Any sedimentation pond or earthen structure which will remain in the proposed permit area as a permanent water impoundment shall also be designed to comply with the requirements of §12.347 of this title (relating to Hydrologic Balance: Permanent and Temporary Impoundments). Each plan shall, at a minimum, comply with the requirements of the Mine Safety and Health Administration, 30 CFR 77.216-1 and 77.216-2.

(c) Permanent and temporary impoundments.

(1) Permanent and temporary impoundments shall be designed to comply with the requirements of §12.347 of this title (relating to Hydrologic Balance: Permanent and Temporary Impoundments).

(2) Each plan for an impoundment meeting the size or other criteria of the Mine Safety and Health Administration shall comply with the requirements of 30 CFR 77.216-1 and 30 CFR 77.216-2. The plan required to be submitted to the District Manager of MSHA under 30 CFR 77.216 shall be submitted to the Commission as part of the permit application in accordance with subsection (a) of this section.

(3) An impoundment not meeting the size or other criteria applicable under §12.347(a) of this title (relating to Hydrologic Balance: Permanent and Temporary

Impoundments) shall have a minimum static safety factor of 1.3 for a normal pool with steady state seepage saturation conditions.

(d) Coal processing waste banks. Coal processing waste banks shall be designed to comply with the requirements of §§12.368-12.371 of this title (relating to Coal Processing Waste Banks: General Requirements, to Coal Processing Waste Banks: Site Inspection, to Coal Processing Waste Banks: Water Control Measures, and to Coal Processing Waste Banks: Construction Requirements).

(e) Coal processing waste dams and embankments. Coal mine waste dams and embankments shall be designed to comply with the requirements of §§12.376-12.378 of this title (relating to Coal Mine Waste: Dams and Embankments: General Requirements, to Coal Mine Waste: Dams and Embankments: Site Preparation, and to Coal Mine Waste: Dams and Embankments: Design and Construction). Each plan shall comply with the requirements of the Mine Safety and Health Administration, 30 CFR 77.216-1 and 77.216-2, and shall contain the results of a geotechnical investigation of the proposed dam or embankment foundation area, to determine the structural competence of the foundation which will support the proposed dam or embankment structure and the impounded material. The geotechnical investigation shall be planned and supervised by an engineer or engineering geologist, according to the following:

(1) the number, location, and depth of borings and test pits shall be determined using current prudent engineering practice for the size of the dam or embankment, quantity of material to be impounded, and subsurface conditions;

(2) the character of the overburden and bedrock, the proposed abutment sites, and any adverse geotechnical conditions which may affect the particular dam, embankment, or reservoir site shall be considered;

(3) all springs, seepage, and ground water flow observed or anticipated during wet periods in the area of the proposed dam or embankment shall be identified on each plan; and

(4) consideration shall be given to the possibility of mudflows, rock-debris falls, or other landslides into the dam, embankment, or impounded material.

(f) Additional requirements. If the structure is 20 feet or higher or impounds more than 20 acre-feet, each plan under subsections (b), (c), and (e) of this section shall include a stability analysis of each structure. The stability analysis shall include, but not be limited to, strength parameters, pore pressures, and long-term seepage conditions. The plan shall also contain a description of each engineering design assumption and calculation with a discussion of each alternative considered in selecting the specific design parameters and construction methods.

The provisions of this §12.148 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.149 Reclamation Plan: Surface Mining Near Underground Mining

For surface mining activities within the proposed permit area to be conducted within 500 feet of an underground mine, the application shall describe the measures to be used to comply with §12.367 of this title (relating to Protection of Underground Mining).

The provisions of this §12.149 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.150 Diversions

Each application shall contain descriptions, including maps and cross sections, of stream channel diversions to be constructed within the proposed permit area to achieve compliance with §12.341 of this title (relating to Hydrologic Balance: Diversions).

The provisions of this §12.150 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.151 Protection of Public Parks and Historic Places

(a) For any publicly owned parks or any places listed on the National Register of Historic Places that may be adversely affected by the proposed operations, each plan shall describe the measures to be used:

(1) to prevent adverse impacts; or

(2) if a person has valid existing rights as determined under §12.72(c) of this title (relating to Procedures for Compatibility Findings, Public Road Closures and Relocations, Buffer Zones, and Valid Existing Rights Determinations), or if joint agency approval is to be obtained under §12.73(d) of this title (relating to Commission Obligations at Time of Permit Application Review), to minimize adverse impacts.

(b) The Commission may require the applicant to protect historic or archeological properties listed on or eligible for listing on the National Register of Historic Places through appropriate mitigation and treatment measures. Appropriate mitigation and treatment measures may be required to be taken after permit issuance provided that the required measures are completed before the properties are affected by any mining operation.

The provisions of this §12.151 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective June 9, 2003, 28 TexReg 4412.

§12.152 Relocation or Use of Public Roads

Each application shall describe, with appropriate maps and cross sections, the measures to be used to ensure that the interests of the public and landowners affected are protected if, under §12.72(a) of this title (relating to Procedures for Compatibility Findings, Public Road Closures and Relocations, Buffer Zones, and Valid Existing Rights Determinations), the applicant seeks to have the Commission approve:

(1) conducting the proposed surface mining activities within 100 feet of the right-of-way line of any public road, except where mine access or haul roads join that right-of-way; or

(2) relocating a public road.

The provisions of this §12.152 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective June 9, 2003, 28 TexReg 4412.

§12.153 Disposal of Excess Spoil

(a) Each application shall contain descriptions, including appropriate maps and cross-section drawings of the proposed disposal site and design of the spoil disposal structures according to §§12.363-12.366 of this title (relating to Disposal of Excess Spoil: General Requirements, to Disposal of Excess Spoil: Valley Fills, to Disposal of Excess Spoil: Head-of-Hollow Fills, and to Disposal of Excess Spoil: Durable Rock Fills). These plans shall describe the geotechnical investigation, design, construction, operation,

maintenance, and removal, if appropriate, of the site and structures.

(b) Each application shall contain the results of a geotechnical investigation of the proposed disposal site, including the following:

(1) the character of bedrock and any adverse geologic conditions in the disposal area;

(2) a survey identifying all springs, seepage, and ground-water flow observed or anticipated during wet periods in the area of the disposal site;

(3) a survey of the potential effects of subsidence of the subsurface strata due to past and future mining operations;

(4) a technical description of the rock materials to be utilized in the construction of those disposal structures containing rock chimney cores or underlain by a rock drainage blanket; and

(5) a stability analysis including, but not limited to, strength parameters, pore pressures and long-term seepage conditions. These data shall be accompanied by a description of all engineering design assumptions and calculations and the alternatives considered in selecting the specific design specifications and methods.

(c) If, under §12.363 of this title (relating to Disposal of Excess Spoil: General Requirements), rock-toe buttresses or keyway cuts are required, the application shall include the following:

(1) the number, location, and depth of borings or test pits which shall be determined with respect to the size of the spoil disposal structure and subsurface conditions; and

(2) engineering specifications utilized to design the rock-toe buttress or keyway cuts which shall be determined in accordance with subsection (b)(5) of this section.

The provisions of this §12.153 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.154 Road Systems and Support Facilities

(a) Plans and drawings. Each applicant for a surface coal mining and reclamation permit shall submit plans and drawings for each road, as defined in §12.3 of this title (relating to Definitions), to be constructed, used, or maintained within the proposed permit area. The plans and drawings shall:

(1) include a map, appropriate cross sections, design drawings and specifications for road widths, gradients, surfacing materials, cuts, fill embankments, culverts, bridges, drainage ditches, low-water crossings, and drainage structures;

(2) contain the drawings and specifications of each proposed road that is located in the channel of an intermittent or perennial stream, as necessary for approval of the road by the Commission in accordance with §12.400(d)(1) of this title (relating to Roads: General);

(3) contain the drawings and specifications for each proposed ford of perennial or intermittent streams that is used as a temporary route, as necessary for approval of the ford by the Commission in accordance with §12.401(3)(B) of this title (relating to Primary Roads);

(4) contain a description of measures to be taken to obtain approval of the Commission for alteration or relocation of a natural stream channel under §12.401(3)(B) of this title (relating to Primary Roads);

(5) contain the drawings and specifications for each low-water crossing of perennial or intermittent stream channels so that the Commission can maximize the protection of the stream in accordance with §12.401(4)(F) of this title (relating to Primary Roads); and

(6) describe the plans to remove and reclaim each road that would not be retained under an approved postmining land use, and the schedule for this removal and reclamation.

(b) Primary road certification. The plans and drawings for each primary road shall be prepared by, or under the direction of, and certified by a qualified registered professional engineer with experience in the design and construction of roads as meeting the requirements of this chapter (relating to Coal Mining Regulations), current, prudent engineering practices; and any design criteria established by the Commission.

(c) Support Facilities. Each applicant for a surface coal mining and reclamation permit shall submit a description, plans, and drawings for each support facility to be constructed, used, or maintained within the proposed permit area. The plans and drawings shall include a map, appropriate cross sections, design drawings, and specifications sufficient to demonstrate compliance with §12.403 of this title (relating to Support Facilities) for each facility.

The provisions of this §12.154 adopted to be effective April 7, 1997, 22 TexReg 3093.

DIVISION 7 SURFACE MINING PERMIT APPLICATIONS--MINIMUM REQUIREMENTS FOR LEGAL, FINANCIAL, COMPLIANCE, AND RELATED INFORMATION, PART II

§12.156 Identification of Interests and Compliance Information

(a) Certification and update of existing permit application information.

(1) If an applicant has previously applied for a permit and the required information is already in AVS, then the applicant may update the information in its application as follows:

(A) If all or part of the information already in AVS is accurate and complete, the applicant may certify to the Commission by swearing or affirming, under oath and in writing, that the relevant information in AVS is accurate, complete, and up to date.

(B) If part of the information in AVS is missing or incorrect, the applicant must submit to the Commission the necessary information or corrections, and swear or affirm, under oath and in writing, that the information submitted is accurate and complete.

(C) If the applicant can neither certify that the data in AVS is accurate and complete, nor make the needed corrections, the applicant must provide the information required under this section.

(2) After approval of an application but before issuance of a permit, the applicant must update, correct, or indicate that no change has occurred to the information previously submitted under this section.

(b) Permit applicant and operator information. Each permit application shall contain:

(1) a statement indicating whether the applicant or its operator are corporations, partnerships, associations, sole proprietorships, or other business entities;

(2) taxpayer identification numbers for the applicant and its operator;

(3) the name, address, and telephone number for:

(A) the applicant;

(B) the applicant's resident agent who will accept service of process;

(C) any operator, if different from the applicant; and

(D) each business entity in the applicant's and operator's organizational structure, up to and including the ultimate parent entity of the applicant and operator; for every such business entity, the applicant must also provide the required information for every president, chief executive officer, and director (or persons in similar positions), and every person who owns, of record, 10 percent or more of the entity;

(4) for the applicant and its operator, and for each officer, partner, member, director, person performing a function similar to a director, and person who owns, of record, 10 percent or more of the applicant or operator, the following information:

(A) the person's name, address, and telephone number;

(B) the person's position title and relationship to the applicant, including percentage of ownership and location in the organizational structure; and

(C) the date the person began serving in that position.

(c) Permit history information. The permit applicant must provide a list of all names under which it, its operator, partners or principal shareholders, and the operator's partners or principal shareholders operate or previously operated a surface coal mining operation in the United States within the five-year period preceding the date of submission of the application.

(1) For the applicant and operator, the applicant must provide a list of any pending permit applications for surface coal mining operations filed in the United States. The list must identify each application by its application number and jurisdiction, or by other identifying information when necessary.

(2) For any surface coal mining operations that the applicant or operator owned or controlled within the five-year period preceding the date of submission of the application, and for any surface coal mining operation the applicant or operator owns or controls on that date, the application must include the:

(A) permittee's and operator's name and address;

(B) permittee's and operator's taxpayer identification numbers;

(C) Federal or State permit number and corresponding MSHA number;

(D) regulatory authority with jurisdiction over the permit; and

(E) permittee's and operator's relationship to the operation, including percentage of ownership and location in the organizational structure.

(d) Property interest information. For the property to be mined, the applicant must provide in the permit application the following information:

(1) the name and address of each:

(A) legal or equitable owner of record of the surface and mineral estate;

(B) holder of record of any leasehold interest; and

(C) purchaser of record under a real estate contract;

(2) the name and address of each owner of record, as reflected in the tax records of the county where the land is located, of all property (surface and subsurface) contiguous to any part of the proposed permit area;

(3) a statement of all interests, options, or pending bids held by the applicant or that the applicant has made for lands contiguous to the proposed permit area; however, if requested by the applicant in writing, the Commission will hold as confidential, under §12.210 of this title (relating to Public Availability of Information in Permit Applications on File with the Commission), any information required to be submitted under this paragraph which is not on public file under State law; and

(4) the Mine Safety and Health Administration (MSHA) numbers for all structures that require MSHA approval.

(e) Violation information.

(1) The applicant must state in the permit application whether it, an operator, or any subsidiary, affiliate, or entity which it or an operator owns or controls or which is under common control with it or an operator, has:

(A) had a Federal or State permit for surface coal mining operations suspended or revoked during the five-year period preceding the date of submission of the application; or

(B) forfeited a performance bond or similar security deposited in lieu of bond in connection with surface coal mining and reclamation operations during the five-year period preceding the date of submission of the application.

(2) For each suspension, revocation, or forfeiture identified under paragraph (1) of this subsection, the applicant must provide a brief explanation of the facts involved, including the:

(A) permit number;

(B) date of suspension, revocation, or forfeiture, and, when applicable, the date and amount of bond or similar security forfeited;

(C) regulatory authority that suspended or revoked the permit or forfeited the bond and the stated reasons for the action;

(D) current status of the permit, bond, or similar security involved; and

(E) date, location, type, and current status of any administrative or judicial proceedings concerning the suspension, revocation, or forfeiture.

(3) The applicant must provide a list of all violation notices that the applicant or operator received for any surface coal mining and reclamation operation during the three-year period preceding the date of submission of the application, and a list of all unabated or uncorrected violation notices incurred in connection with any surface coal mining and reclamation operation that it or its operator own or control on the date of the application. For each violation notice reported, the applicant must include the following information, when applicable:

(A) the permit number and associated MSHA number;

(B) the issue date, identification number, and current status of the violation notice;

(C) the name of the person to whom the violation notice was issued;

(D) the name of the regulatory authority or agency that issued the violation notice;

(E) a brief description of the violation alleged in the notice;

(F) the date, location, type, and current status of any administrative or judicial proceedings concerning the violation notice;

(G) if the abatement period for a violation in a notice of violation issued under §12.678 of this title (relating to Notices of Violation) has not expired, certification that the violation is being abated or corrected to the satisfaction of the agency with jurisdiction over the violation; and

(H) for all violations not covered by subparagraph (G) of this paragraph, the actions taken to abate or correct the violation.

(f) Commission actions. The Commission need not make a finding as provided for under §12.234(c) of this title (relating to Challenge of Ownership or Control, Information on Ownership and Control, and Violations, and Applicant/Violator System Procedures) before entering into AVS the information required to be disclosed under this section; however, the listing in AVS of a person identified in subsection (b) of this section does not create a presumption or constitute a determination that such person owns or controls a surface coal mining operation.

The provisions of this §12.156 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective February 24, 2014, 39 TexReg 1121.

§12.157 Right of Entry and Operation Information

(a) Each application shall contain a description of the documents upon which the applicant bases his or her legal right to enter and begin underground mining activities in the permit area and whether that right is the subject of pending litigation. The description shall identify those documents by type and date of execution, identify the specific lands to which the document pertains, and explain the legal rights claimed by the applicant.

(b) For underground mining activities where the associated surface operations involve the surface mining of coal and the private mineral estate to be mined has been severed from the private surface estate, the application shall also provide, for lands to be affected by those operations within the permit area:

(1) a copy of the written consent of the surface owner to the extraction of coal by surface mining methods; or

(2) a copy of the document of conveyance that expressly grants or reserves the right to extract the coal by surface mining methods; or

(3) if the conveyance does not expressly grant the right to extract coal by surface mining methods, documentation that, under the applicable state law, the applicant has the legal authority to extract the coal by those methods.

(c) Nothing in this section shall be construed to afford the Commission the authority to adjudicate property title disputes.

The provisions of this §12.157 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.158 Relationship to Areas Designated Unsuitable for Mining

(a) Each application shall contain available information on whether the proposed permit area is within an area designated unsuitable for surface coal mining and reclamation operations or is within an area under study for designation in an administrative proceeding under §§12.74-12.77 of this title (relating to Criteria for Designating Areas as Unsuitable for Surface Coal Mining Operations) and §§12.78-12.85 of this title (relating to Process for Designating Areas as Unsuitable for Surface Coal Mining Operations).

(b) If an applicant claims the exemption in §12.216 of this title (relating to Criteria for Permit Approval or Denial), the application shall contain information supporting the applicant's assertion that it made substantial legal and financial commitments before January 4, 1977, concerning the proposed underground mining activities.

(c) An application that proposes to conduct Surface coal mining operations within 100 feet of a public road or within 300 feet of an occupied dwelling must meet the requirements of §12.72(a) or (b) of this title (relating to Procedures for Compatibility Findings, Public Road Closures and Relocations, Buffer Zones, and Valid Existing Rights Determinations), respectively.

The provisions of this §12.158 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective June 9, 2003, 28 TexReg 4412.

§12.159 Permit Term Information

(a) Each application shall contain the anticipated or actual starting and termination date of each phase of the underground mining activities and the anticipated number of acres of surface lands to be affected, and the horizontal and vertical extent of proposed underground mine workings, for each phase of mining and over the total life of the permit.

(b) If the applicant proposes to conduct the underground mining activities in excess of 5 years, the application shall contain the information needed for the showing required under §12.219 of this title (relating to Permit Terms).

The provisions of this §12.159 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.160 Personal Injury and Property Damage Insurance Information

Each application shall contain either a certificate of liability insurance or evidence that the self-insurance requirements in §12.311 of this title (relating to Terms and Conditions for Liability Insurance) are satisfied.

The provisions of this §12.160 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.161 Identification of Other Licenses and Permits

Each application shall contain a list of all other licenses and permits needed by the applicant to conduct the proposed underground mining activities. This list shall identify each license and permit by:

(1) type of permit or license;

(2) name and address of issuing authority;

(3) identification numbers of applications for those permits or licenses or, if issued, the identification numbers of the permits or licenses; and

(4) if a decision has been made, the date of approval or disapproval by each issuing authority.

The provisions of this §12.161 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.162 Identification of Location of Public Office for Filing of Application

Each application shall identify, by name and address, the public office where the applicant will simultaneously file a copy of the application for public inspection under §12.207 of this title (relating to Public Notices of filing of Permit

Applications).
The provisions of this §12.162 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.163 Newspaper Advertisement and Proof of Publication

A copy of the newspaper advertisement of the application and proof of publication of the advertisement shall be filed with the Commission and made a part of the complete application not later than 4 weeks after the last date of publication required under §12.207 of this title (relating to Public Notices of filing of Permit Applications).
The provisions of this §12.163 adopted to be effective April 7, 1997, 22 TexReg 3093.

DIVISION 8 UNDERGROUND MINING PERMIT APPLICATIONS--MINIMUM REQUIREMENTS FOR INFORMATION ON ENVIRONMENTAL RESOURCES

§12.170 General Requirements

Each permit application shall include a description of the existing, premining environmental resources within the proposed permit area and adjacent areas that may be affected or impacted by the proposed underground mining activities.
The provisions of this §12.170 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.171 General Environmental Resources Information

Each application shall describe and identify:

(1) the size, sequence, and timing of the subareas of the permit area for which it is anticipated that individual permits for mining will be requested over the estimated total life of the proposed underground mining activities; and

(2) the nature of cultural, historic and archeological resources listed on or eligible for listing on the National Register of Historic Places and known archeological sites within the proposed permit and adjacent areas.

(A) The description shall be based on all available information, including, but not limited to, information from the State Historic Preservation Officer and local archeological, historical, and cultural preservation agencies.

(B) The Commission may require the applicant to identify and evaluate important historic and archeological resources that may be eligible for listing on the National Register of Historic Places, through:

(i) collection of additional information;

(ii) conduct of field investigations; or

(iii) other appropriate analyses.

The provisions of this §12.171 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.172 Description of Hydrology and Geology: General Requirements

(a) Each application shall contain a description of the geology, hydrology, and water quality and quantity of all lands within the proposed permit area, the adjacent areas, and the general area. The description shall include information on the characteristics of all surface and ground waters within the general area, and any water which will flow into or receive discharges of water from the general area. The description shall include geologic information in sufficient detail to assist in determining:

(1) the probable hydrologic consequences of the operation upon the quality and quantity of surface and ground water in the permit and adjacent areas, including the extent to which surface- and ground-water monitoring is necessary;

(2) all potentially acid- or toxic-forming strata down to and including the stratum immediately below the lowest coal seam to be mined; and

(3) whether reclamation as required by this chapter (relating to Coal Mining Regulations) can be accomplished and whether the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area.

(b) The description shall be prepared according to this section and §§12.173-12.175 of this title (relating to Geology Description, to Ground-Water Description, and to Surface-Water Description), and conform to the following:

(1) information on hydrology, water quality and quantity, and geology related to hydrology of areas outside the proposed permit area and within the general area shall be provided by the Commission, to the extent that this data is available from an appropriate federal or state agency;

(2) if this information is not available from those agencies, the applicant may gather and submit this information to the Commission as part of the permit application; and

(3) the permit shall not be approved by the Commission until this information is made available in the application.

(c) The use of modeling techniques may be included as part of the permit application, but the same surface- and ground-water information may be required for each site as when models are not used.

(d) All water-quality analyses performed to meet the requirements of this chapter (relating to Coal Mining Regulations) shall be conducted according to the methodology in the 15th edition of "Standard Methods for the Examination of Water and Wastewater," which is incorporated by reference, or the methodology in 40 CFR Parts 136 and 434.
The provisions of this §12.172 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.173 Geology Description

(a) A description of the geology of the proposed permit and adjacent areas down to and including the deeper of either the stratum immediately below the lowest coal seam to be mined or any aquifer below the lowest coal seam to be mined which may be adversely impacted by mining. This description shall include the areal and structural geology of the permit and adjacent areas, and other parameters which influence the required reclamation and it shall also show how the areal and structural geology may affect the occurrence, availability, movement, quantity and quality of potentially impacted surface and ground water. It shall be based on:

(1) the cross sections, maps, and plans required by §12.183 of this title (relating to Cross-Sections, Maps, and Plans);

(2) the information obtained under subsections (b), (c) and (d) of this section; and

(3) geologic literature and practices.

(b) For any portion of a permit area in which the strata down to the coal seam to be mined will be removed or are

already exposed, samples shall be collected and analyzed from test borings; drill cores; or fresh, unweathered, uncontaminated samples from rock outcrops down to and including the deeper of either the stratum immediately below the lowest coal seam to be mined or any aquifer below the coal seam to be mined which may be adversely impacted by mining. The analyses shall result in the following:

(1) logs showing the lithologic characteristics including physical properties and thickness of each stratum and location of ground water where occurring;

(2) chemical analyses identifying those strata that may contain acid- or toxic-forming, or alkalinity-producing materials and to determine their content except that the Commission may find that the analysis for alkalinity-producing material is unnecessary; and

(3) chemical analysis of the coal seam for acid- and toxic-forming materials, including the total sulfur and pyritic sulfur, except that the Commission may find that the analysis of pyritic sulfur content is unnecessary.

(c) For lands within the permit and adjacent areas where the strata above the coal seam to be mined will not be removed, samples shall be collected and analyzed from test borings or drill cores to provide the following data:

(1) logs of drill holes showing the lithologic characteristics, including physical properties and thickness of each stratum that may be impacted, and location of ground water where occurring;

(2) chemical analyses for acid- or toxic-forming materials and their content in the strata immediately above and below the coal seam to be mined;

(3) chemical analyses of the coal seam for acid- and toxic-forming materials, including the total sulfur and pyritic sulfur, except that the Commission may find the analysis of pyritic sulfur content is unnecessary; and

(4) for standard room and pillar mining operations, the thickness and engineering properties of clays or soft rock such as clay shale, if any, in the stratum immediately above and below each coal seam to be mined.

(d) If determined to be necessary to protect the hydrologic balance, to minimize or prevent subsidence, or to meet the performance standards of this chapter (relating to Coal Mining Regulations), the Commission may require the collection, analysis and description of geologic information in addition to that required by subsections (a), (b), and (c) of this section.

(e) An applicant may request the Commission to waive in whole or in part the requirements of subsections (b) and (c) of this section. The waiver may be granted only if the Commission finds in writing that the collection and analysis of such data is unnecessary because other information having equal value or effect is available to the Commission in a satisfactory form.

(a) *The provisions of this §12.173 adopted to be effective November 4, 1997, 22 TexReg 10640.*

§12.174 Ground-water Information

(a) The application shall contain a description of the ground-water hydrology for the proposed permit and adjacent areas, including, at a minimum:

(1) the depth below the surface and the horizontal extent of the water table and aquifers;

(2) the lithology and thickness of the aquifers;

(3) the location and ownership of existing wells, springs, and other ground-water resources; and

(4) seasonal quality and quantity of ground-water and usage. Water quality descriptions shall include, at a minimum, total dissolved solids or specific conductance corrected to 25 degrees C, pH, total iron, and total manganese. Ground-water quantity descriptions shall include, at a minimum, approximate rates of discharge or usage and depth to the water in the coal seam, and each water-bearing stratum above and potentially impacted stratum below the coal seam.

(b) The application shall contain additional information which describes the recharge and storage characteristics of aquifers.

The provisions of this §12.174 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.175 Surface-water Information

Surface-water information shall be described, including the name of the watershed which will receive water discharges, the name, location, ownership and description of all surface-water bodies such as streams, lakes, ponds, impoundments, and springs, the location of any water discharge into any surface body of water in the proposed permit and adjacent areas, and information on surface-water quantity and quality sufficient to demonstrate seasonal variation and water usage. Water quantity and quality descriptions shall include, at a minimum:

(1) water-quantity data on present water usages, and minimum, maximum, and average discharge conditions which identify critical low flows and peak discharge rates of streams sufficient to identify seasonal variations in flow rates; and

(2) water-quality data to identify the characteristics of surface waters in, discharging into, or which will receive flows from surface or ground water from affected areas within the proposed permit area, sufficient to identify seasonal variations, showing:

(A) total dissolved solids in milligrams per liter or specific conductance corrected to 25 degrees C;

(B) total suspended solids in milligrams per liter;

(C) acidity and alkalinity information if there is a potential for acid drainage from the proposed underground mining operation;

(D) pH in standard units;

(E) total and dissolved iron in milligrams per liter;

(F) total manganese in milligrams per liter; and

(G) such other information as the Commission determines is relevant.

The provisions of this §12.175 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.176 Alternative Water Supply Information

The application shall identify the extent to which the proposed underground mining activities may proximately result in contamination, diminution, or interruption of an underground or surface source of water within the proposed permit or adjacent area for domestic, agricultural, industrial, or other legitimate use. If contamination, diminution, or interruption may result, then the description shall identify the alternative sources of water supply that could be developed to replace the existing sources.

The provisions of this §12.176 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November

4, 1997, 22 TexReg 10640.

§12.177 Climatological Information

(a) When requested by the Commission, the application shall contain a statement of the climatological factors that are representative of the proposed permit area, including:

(1) the average seasonal precipitation;

(2) the average direction and velocity of prevailing winds; and

(3) seasonal temperature ranges.

(b) The Commission may request such additional data as deemed necessary to ensure compliance with the requirements of this subchapter (relating to Surface Coal Mining and Reclamation Operations Permits and Coal Exploration Procedures Systems).

The provisions of this §12.177 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.178 Vegetative Information

(a) The permit application shall, if required by the Commission, contain a map that delineates existing vegetative types and a description of the plant communities within the area affected by surface operations and facilities and within any proposed reference area. This description shall include information adequate to predict the potential for reestablishing vegetation.

(b) When a copy or aerial photograph is required, sufficient adjacent areas shall be included to allow evaluation of vegetation as important habitat for fish and wildlife for those species of fish and wildlife identified under §12.179 of this title (relating to Fish and Wildlife Resources Information).

The provisions of this §12.178 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.179 Fish and Wildlife Resources Information

(a) Resource information. Each application shall include fish and wildlife resource information for the permit area and adjacent area.

(1) The scope and level of detail for such information shall be determined by the Commission in consultation with state and federal agencies with responsibilities for fish and wildlife and shall be sufficient to design the protection and enhancement plan required under §12.195 of this title (relating to Fish and Wildlife Plan).

(2) Site-specific resource information necessary to address the respective species or habitats shall be required when the permit area or adjacent area is likely to include:

(A) listed or proposed endangered or threatened species of plants or animals or their critical habitats listed by the Secretary under the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.), or those species or habitats protected by similar state statutes;

(B) habitats of unusually high value for fish and wildlife such as important streams, wetlands, riparian areas, cliffs supporting raptors, areas offering special shelter or protection, migration routes, or reproduction and wintering areas; or

(C) other species or habitats identified through agency consultation as requiring special protection under state or federal law.

(b) Fish and Wildlife Service review. Upon request, the Commission shall provide the resource information required under subsection (a) of this section and the protection and enhancement plan required under §12.195 of this title (relating to Fish and Wildlife Plan) to the U.S. Department of the Interior, Fish and Wildlife Service Regional or Field Office for their review. This information shall be provided within 10 days of receipt of the request from the Service.

The provisions of this §12.179 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.180 Soil Resources Information

(a) The applicant shall provide adequate soil survey information on those portions of the permit area to be affected by surface operations or facilities, consisting of the following:

(1) a map delineating different soils;

(2) soil identification;

(3) soil description; and

(4) present and potential productivity of existing soils.

(b) Where the applicant proposes to use selected overburden materials as a supplement or substitute for topsoil, the application shall contain results of the analyses, trials and tests required under §12.505 of this title (relating to Topsoil: Removal).

The provisions of this §12.180 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.181 Land-Use Information

(a) The application shall contain a statement of the condition, capability and productivity of the land which will be affected by surface operations and facilities within the proposed permit area, including:

(1) a map and supporting narrative of the uses of the land existing at the time of the filing of the application. If the premining use of the land was changed within 5 years before the anticipated date of beginning the proposed operations, the historic use of the land shall also be described.

(2) a narrative of land capability and productivity, which analyzes the land-use description under subsection (a) of this section in conjunction with other environmental resources information required under §§12.170-12.184 of this title (relating to Underground Mining Permit Applications--Minimum Requirements for Information on Environmental Resources). The narrative shall provide analyses of:

(A) the capability of the land before any mining to support a variety of uses, giving consideration to soil and foundation characteristics, topography, vegetative cover, and the hydrology of the area proposed to be affected by surface operations or facilities; and

(B) the productivity of the area proposed to be affected by surface operations and facilities before mining, expressed as average yield of food, fiber, forage, or wood products from such lands obtained under high levels of management. The productivity shall be determined by yield data or estimates for similar sites based on current data from the U.S. Department of Agriculture, state agricultural universities or appropriate state natural resources or agricultural agencies.

(b) The application shall indicate whether the proposed permit area has been previously mined, and, if so, the following information, if available:

(1) the type of mining method used;

(2) the coal seams or other mineral strata mined;

(3) the extent of coal or other minerals

removed;

(4) the approximate dates of past mining; and

(5) the uses of land preceding mining.

(c) The application shall contain a description of the existing land uses and land-use classifications under local law, if any, of the proposed permit and adjacent areas.

The provisions of this §12.181 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.182 Maps: General Requirements

The permit application shall include maps showing:

(1) all boundaries of lands and names of present owners of record of those lands, both surface and subsurface, included in or contiguous to the permit area;

(2) the boundaries of land within the proposed permit area upon which the applicant has the legal right to enter and begin underground mining activities;

(3) the boundaries of all areas proposed to be affected over the estimated total life of the underground mining activities, with a description of size, sequence and timing of the mining of sub-areas for which it is anticipated that additional permits will be sought;

(4) the location of all buildings in and within 1,000 feet of the proposed permit area, with identification of the current use of the buildings;

(5) the location of surface and subsurface man-made features within, passing through, or passing over the proposed permit area, including, but not limited to, major electric transmission lines, pipelines, and agricultural drainage-tile fields;

(6) the location and boundaries of any proposed reference areas for determining the success of revegetation;

(7) the locations of water supply intakes for current users of surface waters flowing into, out of, and within a hydrologic area defined by the Commission, and those surface waters which will receive discharges from affected areas in the proposed permit area;

(8) each public road located in or within 100 feet of the proposed permit area;

(9) the boundaries of any public park and locations of any cultural or historical resources listed or eligible for listing in the National Register of Historic Places, and known archeological sites within the permit or adjacent areas;

(10) each public or private cemetery or Indian burial ground located in or within 100 feet of the proposed permit area;

(11) any land within the proposed permit area and adjacent area which is within the boundaries of any units of the National System of Trails or the Wild and Scenic Rivers System, including study rivers designated under section 5(a) of the Wild and Scenic Rivers Act; and

(12) other relevant information required by the Commission.

The provisions of this §12.182 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.183 Cross Sections, Maps, and Plans

(a) The application shall include cross sections, maps, and plans showing:

(1) elevations and locations of test borings and core samplings;

(2) elevations and locations of monitoring stations used to gather data on water quality and quantity, fish and wildlife, and air quality, if required, in preparation of the application;

(3) nature, depth, and thickness of the coal seams to be mined, any coal or rider seams above the seam to be mined, each stratum of the overburden, and the stratum immediately below the lowest coal seam to be mined;

(4) all coal crop lines and the strike and dip of the coal to be mined within the proposed permit area;

(5) location and extent of known workings of active, inactive, or abandoned underground mines, including mine openings to the surface within the proposed permit and adjacent areas;

(6) location and extent of subsurface water, if encountered, within the proposed permit or adjacent areas, including, but not limited to areal and vertical distribution of aquifers, and portrayal of seasonal differences of head in different aquifers on cross sections and contour maps;

(7) location of surface-water bodies such as streams, lakes, ponds, springs, constructed or natural drains, and irrigation ditches within the proposed permit and adjacent areas;

(8) location and extent of existing or previously surface-mined areas within the proposed permit area;

(9) location and dimensions of existing areas of spoil, waste, coal development waste, and noncoal waste disposal, dams, embankments, other impoundments, and water treatment and air pollution control facilities within the proposed permit area;

(10) location, and depth if available, of gas and oil wells within the proposed permit area and water wells in the permit area and adjacent areas; and

(11) sufficient slope measurements to adequately represent the existing land-surface configuration of the area affected by surface operations and facilities, measured and recorded according to the following:

(A) each measurement shall consist of an angle of inclination along the prevailing slope extending 100 linear feet above and below or beyond the coal outcrop or the area to be disturbed or, where this is impractical, at locations specified by the Commission;

(B) where the area has been previously mined, the measurements shall extend at least 100 feet beyond the limits of mining disturbances, or any other distance determined by the Commission to be representative of the premining configuration of the land; and

(C) slope measurements shall take into account natural variations in slope, to provide accurate representation of the range of natural slopes and reflect geomorphic differences of the area to be disturbed.

(b) Maps, plans and cross sections included in a permit application and required by this shall be prepared by, or under the direction of and certified by a qualified registered professional engineer or professional geologist, with assistance from experts in related fields such as land surveying and landscape architecture and shall be updated as required by the Commission.

The provisions of this §12.183 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.184 Prime Farmland Investigation

(a) The applicant shall conduct a pre-application investigation of the area proposed to be affected by surface operations or facilities to determine whether lands within the area may be prime farmland.

(b) Land shall not be considered as prime farmland where the applicant can demonstrate one or more of the following:

(1) the land has not been historically used as cropland;

(2) the land within the proposed permit area which has a slope, as measured pursuant to §12.183(a)(11) of this title (relating to Cross Sections, Maps, and Plans), of greater than 5.0%. Only that portion of the land having a slope of greater than 5.0% will not be considered as prime farmland;

(3) the land is not irrigated or naturally subirrigated, has not developed water supply that is dependable and of adequate quality, and the average annual precipitation is 14 inches or less;

(4) other factors exist, such as a very rocky surface, or the land is frequently flooded, which clearly place all land within the area outside the purview of prime farmland; or

(5) on the basis of a soil survey of the lands within the proposed area to be affected by surface operations or facilities, there are no soil mapping units which have been designated prime farmland by the U.S. Natural Resources Conservation Service.

(c) If the investigation establishes that the lands are not prime farmland, the applicant shall submit with the permit application a request for a negative determination which shows that the land for which the negative determination is sought meets one or more of the criteria in subsection (b) of this section.

(d) If the investigation indicates that lands within the proposed area to be affected by surface operations and facilities may be prime farmland historically used for cropland, the applicant shall contact the U.S. Natural Resources Conservation Service to determine if a soil survey exists for these lands and whether soil mapping units have been designated as prime farmland. If no such soil survey has been made for these lands, the applicant shall cause such a survey to be made. Soil surveys of the detail used by the U.S. Natural Resources Conservation Service for operational conservation planning shall be used to identify and locate prime farmland soils.

(1) When a soil survey of lands within the proposed area to be affected by surface operations and facilities contains soil mapping units which have been designated as prime farmland, the application shall submit an application in accordance with §12.201 of this title (relating to Prime Farmland) for such designated land.

(2) When a soil survey of lands within the proposed area to be affected by surface operations and facilities contains soil mapping units which have not been designated, after review by the U.S. Natural Resources Conservation Service, as prime farmland, the applicant shall submit a request for negative determination for non-designated land with the permit application establishing compliance with subsection (b) of this section.

The provisions of this §12.184 adopted to be effective April 7, 1997, 22 TexReg 3093.

DIVISION 9 UNDERGROUND MINING PERMIT APPLICATIONS--MINIMUM REQUIREMENTS FOR RECLAMATION AND OPERATION PLAN

§12.185 Operation Plan: General Requirements

Each application shall contain a description of the mining operations proposed to be conducted during the life of the mine within the proposed permit area, including, at a minimum, the following:

(1) a narrative description of the type and method of coal mining procedures and proposed engineering techniques, anticipated annual and total production of coal, by tonnage, and the major equipment to be used for all aspects of those operations; and

(2) a narrative explaining the construction, modification, use, maintenance, and removal of the following facilities, unless retention of such facility is necessary for postmining land use as specified in §12.568 of this title (relating to Postmining Land Use):

(A) dams, embankments, and other impoundments;

(B) overburden and topsoil handling and storage areas and structures;

(C) coal removal, handling, storage, cleaning, and transportation areas and structures;

(D) spoil, coal processing waste, mine development waste, and noncoal waste removal, handling, storage, transportation, and disposal areas and structures;

(E) mine facilities; and

(F) water-pollution control facilities.

The provisions of this §12.185 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.186 Operation Plan: Existing Structures

(a) Each application shall contain a description of each existing structure proposed to be used in connection with or to facilitate the surface coal mining and reclamation operation. The description shall include:

(1) location;

(2) plans of the structure which describe its current condition;

(3) approximate dates on which construction of the existing structure was begun and completed; and

(4) a showing, including relevant monitoring data or other evidence, whether the structure meets the performance standards of Subchapter K of this chapter (relating to Permanent Program Performance Standards).

(b) Each application shall contain a compliance plan for each existing structure proposed to be modified or reconstructed for use in connection with or to facilitate the surface coal mining and reclamation operation. The compliance plan shall include:

(1) design specifications for the modification or reconstruction of the structure to meet the design and performance standards of Subchapter K of this chapter (relating to Permanent Program Performance Standards);

(2) a construction schedule which shows dates for beginning and completing interim steps and final reconstruction;

(3) provisions for monitoring the structure during and after modification or reconstruction to ensure that the performance standards of Subchapter K of this chapter (relating to Permanent Program Performance Standards) are met; and

(4) a showing that the risk of harm to the environment or to public health or safety is not significant during the period of modification or reconstruction.

The provisions of this §12.186 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.187 Reclamation Plan: General Requirements for Underground Mining

(a) Each application shall contain a plan for the reclamation of the lands within the proposed permit area showing how the applicant will comply with §§134.091-134.109 and §134.015 of the Act and Subchapter K of this chapter (relating to Permanent Program Performance Standards). The plan shall include at a minimum, all information required under this section and §§12.188-12.199 of this title (relating to Underground Mining Permit Applications--Minimum Requirements for Reclamation and Operation Plan).

(b) Each plan shall contain the following information for the proposed permit area:

(1) a detailed timetable for the completion of each major step in the reclamation plan;

(2) a detailed estimate of the cost of the reclamation of the proposed operations required to be covered by a performance bond under Subchapter J of this chapter (relating to Bond and Insurance Requirements for Surface Coal Mining and Reclamation Operations), with supporting calculations for the estimates;

(3) a plan for backfilling, soil stabilization, compacting and grading, with contour maps or cross sections that show the anticipated final surface configuration of the proposed permit area, in accordance with §§12.551-12.554 of this title (relating to Backfilling and Grading: General Requirements, to Backfilling and Grading: General Grading Requirements, to Backfilling and Grading: Covering Coal and Acid- and Toxic- Forming Materials, and to Stabilization of Surface Areas for Underground Mining;

(4) a plan for removal, storage, and redistribution of topsoil, subsoil, and other material to meet the requirements of §§12.504-12.508 of this title (relating to Topsoil: General Requirements, to Topsoil: Removal, to Topsoil: Storage, to Topsoil: Redistribution, and to Topsoil: Nutrients and Soil Amendments). A demonstration of the suitability of topsoil substitutes or supplements under this chapter (relating to Coal Mining Regulations) shall be based upon analysis of the thickness of soil horizons, total depth, texture, percent coarse fragments, pH, and areal extent of the different kinds of soils. The Commission may require other chemical and physical analyses, field-site trials, or greenhouse tests if determined to be necessary or desirable to demonstrate the suitability of topsoil substitutes or supplements;

(5) a plan for revegetation as required in §§12.555-12.560 of this title (relating to Revegetation: General Requirements, to Revegetation: Use of Introduced Species, to Revegetation: Timing, to Revegetation: Mulching and Other Soil Stabilizing Practices, to Revegetation: Grazing, and to Revegetation: Standards for Success), including, but not limited to, descriptions of the:

(A) schedule of revegetation;

(B) species and amounts per acre of seeds and seedlings to be used;

(C) methods to be used in planting and seeding;

(D) mulching techniques;

(E) irrigation, if appropriate, and pest- and disease-control measures, if any;

(F) measures proposed to be used to determine the success of revegetation as required in §12.560 of this title (relating to Revegetation: Standards for Success); and

(G) a soil testing plan for evaluation of the results of topsoil handling and reclamation procedures related to revegetation;

(6) a description of the measures to be used to maximize the use and conservation of the coal resource as required in §12.525 of this title (relating to Coal Recovery);

(7) a description of measures to be employed to ensure that all debris, acid-forming and toxic-forming materials, and materials constituting a fire hazard are disposed of in accordance with §§12.542 and 12.553 of this title (relating to Disposal of Noncoal Wastes, and to Backfilling and Grading: Covering Coal and Acid- and Toxic-Forming Materials), and a description of the contingency plans which have been developed to preclude sustained combustion of such materials;

(8) a description, including appropriate cross sections and maps, of the measures to be used to seal or manage mine openings, and to plug, case or manage exploration holes, other bore holes, wells and other openings within the proposed permit area, in accordance with §§12.501-12.503 of this title (relating to Casing and Sealing of Exposed Underground Openings: General Requirements, to Casing and Sealing of Underground Openings: Temporary, and to Casing and Sealing of Underground Openings: Permanent); and

(9) a description of steps to be taken to comply with the requirements of the Clean Air Act (42 U.S.C. 7401 et seq.), the Clean Water Act (33 U.S.C. 1251 et seq.), and other applicable air- and water-quality laws and regulations and health and safety standards.

The provisions of this §12.187 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective September 14, 1999, 24 TexReg 7223.

§12.188 Reclamation Plan: Protection of Hydrologic Balance

(a) General requirements. The application shall include a hydrologic reclamation plan, with appropriate maps and descriptions, indicating how the relevant requirements of this chapter (relating to Coal Mining Regulations), including §§12.509-12.511, 12.516, 12.518 and 12.519, and 12.520-12.524 of this title (relating to Hydrologic Balance: General Requirements, to Hydrologic Balance: Water-Quality Standards and Effluent Limitations, to Hydrologic Balance: Diversions, to Hydrologic Balance: Acid-Forming and Toxic-Forming Spoil, to Hydrologic Balance: Ground-Water Protection, to Hydrologic Balance: Surface-Water Protection, to Hydrologic Balance: Surface and Ground-Water Monitoring, to Hydrologic Balance: Transfer of Wells, to Hydrologic Balance: Water Rights and Replacement, to Hydrologic Balance: Discharge of Water Into an Underground Mine, and to Hydrologic Balance: Postmine Rehabilitation of Sedimentation Ponds, Diversions, Impoundments, and Treatment Facilities), will be met. The plan shall be specific to the local hydrologic conditions. It shall contain the steps to be taken during mining and reclamation through bond release to minimize disturbances to the hydrologic balance within the permit and adjacent areas; to prevent material damage outside the permit area; to meet applicable federal and state water-quality laws and regulations; and to protect the rights of present water users. The plan shall specifically address any potential adverse hydrologic consequences identified in the PHC determination prepared under §§12.185-12.198 of this title (relating to Underground Mining Permit Applications--Minimum Requirements for Reclamation and Operation Plan) and shall include preventive and remedial measures. The plan shall identify the measures to be taken to:

(1) protect the quality of surface- and ground-water systems, both within the proposed permit area and adjacent

areas, from the adverse effects of the proposed underground mining activities, or to provide alternative sources of water, in accordance with §12.176 and §12.521 of this title (relating to Alternative Water Supply Information, and to Hydrologic Balance: Water Rights and Replacement), where the protection of quality cannot be ensured;

(2) protect or replace the rights of present users of surface and ground water;

(3) protect the quantity of surface and ground water both within the proposed permit area and adjacent area from adverse effects of the proposed underground mining activities, or to provide alternative sources of water, in accordance with §12.176 and §12.521 of this title (relating to Alternative Water Supply Information, and to Hydrologic Balance: Water Rights and Replacement), where the protection of quantity cannot be ensured;

(4) avoid acid or toxic drainage;

(5) prevent, to the extent possible using the best technology currently available, additional contributions of sediment to streamflows;

(6) provide water-treatment facilities when needed;

(7) control drainage;

(8) restore approximate premining recharge capacity; and

(9) protect the quality of water by locating openings for mines in accordance with §12.518 of this title (relating to Hydrologic Balance: Underground Mine Entry and Access Discharges).

(b) Ground-water monitoring plan.

(1) The application shall include a ground-water monitoring plan based upon the PHC determination required under subsection (d) of this section and the analysis of all baseline hydrologic, geologic, and other information in the permit application. The plan shall provide for the monitoring of parameters that relate to the suitability of the ground water for current and approved postmine land uses and to the objectives for protection of the hydrologic balance as set forth in subsection (a) of this section. It shall identify the quantity and quality parameters to be monitored, sampling frequency, and site locations. It shall describe how the data may be used to determine the impacts of the operation upon the hydrologic balance. At a minimum, total dissolved solids or specific conductance corrected to 25 degrees C, pH, total iron, total manganese, and water levels shall be monitored and data submitted to the Commission at least every three months for each monitoring location. The Commission may require additional monitoring.

(2) If the applicant can demonstrate by the use of the PHC determination and other available information that a particular water-bearing stratum in the proposed permit and adjacent areas is not one which serves as an aquifer which significantly ensures the hydrologic balance within the cumulative impact area, then monitoring of that stratum may be waived by the Commission.

(c) Surface-water monitoring plan.

(1) The application shall include a surface-water monitoring plan based upon the PHC determination required under subsection (d) of this section and the analysis of all baseline hydrologic, geologic, and other information in the permit application. The plan shall provide for the monitoring of parameters that relate to the suitability of the surface water for current and approved postmine land uses and to the objectives for protection of the hydrologic balance as set forth in subsection (a) of this section, as well as the effluent limitations found at 40 CFR Part 434.

(2) The plan shall identify the surface-water quantity and quality parameters to be monitored, sampling frequency, and site locations. It shall describe how the data may be used to determine the impacts of the operation upon the hydrologic balance.

(A) At all monitoring locations in the surface-water bodies such as streams, lakes, and impoundments that are potentially impacted or into which water will be discharged and at upstream monitoring locations, the total dissolved solids or specific conductance corrected to 25 degrees C, total suspended solids, pH, total iron, total manganese, and flow shall be monitored.

(B) For point-source discharges, monitoring shall be conducted in accordance with 40 CFR Parts 122, 123 and 434 and as required by the National Pollutant Discharge Elimination System permitting authority.

(3) The monitoring reports shall be submitted to the Commission every three months. The Commission may require additional monitoring.

(d) Probable hydrologic consequences determination.

(1) The application shall contain a determination of the probable hydrologic consequences (PHC) of the proposed operation upon the quality and quantity of surface and ground water under seasonal flow conditions of the proposed permit and adjacent areas.

(2) The PHC determination shall be based on baseline hydrologic, geologic, and other information collected for the permit application and may include data statistically representative of the site.

(3) The PHC determination shall include findings on:

(A) whether adverse impacts may occur to the hydrologic balance;

(B) whether acid-forming or toxic-forming materials are present that could result in contamination of surface- or ground-water supplies;

(C) whether the proposed operation may proximately result in contamination, diminution, or interruption of an underground or surface source of water within the proposed permit or adjacent areas which is used for domestic, agricultural, industrial, or other legitimate purpose; and

(D) what impact the proposed operation will have on:

(i) sediment yield from the disturbed area;

(ii) acidity, total suspended and dissolved solids, and other important water-quality parameters of local impact;

(iii) flooding or streamflow alteration;

(iv) ground- and surface-water availability; and

(v) other characteristics as required by the Commission.

(4) An application for a permit revision shall be reviewed by the Commission to determine whether a new or updated PHC determination shall be required.

(5) If the determination of the probable hydrologic consequences (PHC) required by this subsection indicates adverse impacts on or off the proposed permit area may occur to the hydrologic balance, or that acid-forming or toxic-forming material is present that may result in the contamination of ground-water or surface-water supplies, then information supplemental to that required under §12.174 and §12.175 of this title (relating to Ground-Water Information, and to Surface-Water Information), shall be

provided to evaluate such probable hydrologic consequences and to plan remedial and reclamation activities. Such supplemental information may be based upon drilling, aquifer tests, hydrogeologic analysis of the water-bearing strata, flood flows, or analysis of other water quality and quantity characteristics. Information shall be provided on water availability and alternative water sources, including the suitability of alternative water sources for existing premining uses and approved postmining land uses.

(e) Cumulative hydrologic impact assessment.

(1) The Commission shall provide an assessment of the probable cumulative hydrologic impacts (CHIA) of the proposed operation and all anticipated mining upon surface- and ground-water systems in the cumulative impact area. The CHIA shall be sufficient to determine, for purposes of permit approval, whether the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area. The Commission may allow the applicant to submit data and analyses relevant to the CHIA with the permit application.

(2) An application for a permit revision shall be reviewed by the Commission to determine whether a new or updated CHIA shall be required.

(f) Additional Requirements. Each plan shall contain a detailed description, with appropriate drawings, of permanent entry seals and down-slope barriers designed to ensure stability under anticipated hydraulic heads developed while promoting mine inundation after mine closure for the proposed permit area.

The provisions of this §12.188 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640; amended to be effective December 29, 1998, 23 TexReg 13041.

§12.189 Reclamation Plan: Postmining Land Uses

(a) Each plan shall contain a detailed description of the proposed use, following reclamation, of the land to be affected within the proposed permit area by surface operations or facilities, including a discussion of the utility and capacity of the reclaimed land to support a variety of alternative uses, and the relationship of the proposed use to existing land-use policies and plans. This description shall explain:

(1) how the proposed postmining land use is to be achieved and the necessary support activities which may be needed to achieve the proposed land use;

(2) where a land use different from the premining land-use is proposed, all materials needed for approval of the alternative use under §12.568 of this title (relating to Postmining Land Use); and

(3) the consideration given to making all of the proposed underground mining activities consistent with surface-owner plans and applicable state and local land-use plans and programs.

(b) The description shall be accompanied by a copy of the comments concerning the proposed use from the legal or equitable owner of record of the surface areas to be affected by surface operations or facilities within the proposed permit area and the state and local government agencies which would have to initiate, implement, approve, or authorize the proposed use of the land following reclamation.

The provisions of this §12.189 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.190 Reclamation Plan: Ponds, Impoundments, Banks, Dams, and Embankments

(a) General. Each application shall include a general plan for each proposed sedimentation pond, water impoundment, and coal processing waste bank, dam, or embankment within the proposed permit area.

(1) Each general plan shall:

(A) be prepared by or under the direction of, and certified by, a qualified registered professional engineer or by a professional geologist with assistance from experts in related fields such as land surveying and landscape architecture;

(B) contain a description, map, and cross section of the structure and its location;

(C) contain preliminary hydrologic and geologic information required to assess the hydrologic impact of the structure;

(D) contain a survey describing the potential effect on the structure from subsidence of the subsurface strata resulting from past underground mining operations if underground mining has occurred; and

(E) contain a certification statement which includes a schedule setting forth the dates when any detailed design plans for structures that are not submitted with the general plan will be submitted to the Commission. The Commission shall have approved, in writing, the detailed design plan for a structure before construction of the structure begins.

(2) Each detailed design plan for a structure that meets or exceeds the size or other criteria of the Mine Safety and Health Administration, 30 CFR 77.216(a) shall:

(A) be prepared by or under the direction of, and certified by, a qualified registered professional engineer with assistance from experts in related fields such as geology, land surveying, and landscape architecture;

(B) include any geotechnical investigation, design, and construction requirements for the structure;

(C) describe the operation and maintenance requirements for each structure; and

(D) describe the timetable and plans to remove each structure, if appropriate.

(3) Each detailed design plan for a structure that does not meet the size or other criteria of 30 CFR 77.216(a) shall:

(A) be prepared by, or under the direction of, and certified by a qualified registered professional engineer;

(B) include any design and construction requirements for the structure, including any required geotechnical information;

(C) describe the operation and maintenance requirements for each structure; and

(D) describe the timetable and plans to remove each structure, if appropriate.

(b) Sedimentation ponds.

(1) Sedimentation ponds, whether temporary or permanent, shall be designed in compliance with the requirements of §12.514 of this title (relating to Hydrologic Balance: Sedimentation Ponds). Any sedimentation pond or earthen structure which will remain on the proposed permit area as a permanent water impoundment shall also be designed to comply with the requirements of §12.517 of this title (relating to Hydrologic Balance: Permanent and Temporary Impoundments).

(2) Each plan shall, at a minimum, comply with the requirements of the Mine Safety and Health Administration,

30 CFR 77.216-1 and 77.216-2.

(c) Permanent and temporary impoundments.

(1) Permanent and temporary impoundments shall be designed to comply with the requirements of §12.517 of this title (relating to Hydrologic Balance: Permanent and Temporary Impoundments).

(2) Each plan for an impoundment meeting the size or other criteria of the Mine Safety and Health Administration shall comply with the requirements of 30 CFR 77.216-1 and 30 CFR 77.216-2. The plan required to be submitted to the District Manager of MSHA under 30 CFR 77.216 shall be submitted to the Commission as part of the permit application in accordance with subsection (a) of this section.

(3) An impoundment not meeting the size or other criteria applicable under §12.517(a) of this title (relating to Hydrologic Balance: Permanent and Temporary Impoundments) shall have a minimum static safety factor of 1.3 for a normal pool with steady state seepage saturation conditions.

(d) Coal mine waste banks. Coal mine waste banks shall be designed to comply with the requirements of §§12.535-12.538 of this title (relating to Coal Mine Waste Banks: General Requirements, to Coal Mine Waste Banks: Site Inspection, to Coal Mine Waste Banks: Water-Control Measures, and to Coal Mine Waste Banks: Construction Requirements).

(e) Coal mine waste dams and embankments. Coal mine waste dams and embankments shall be designed to comply with the requirements of §12.543 and §12.544 of this title (relating to Coal Mine Waste: Dams and Embankments: General Requirements, and to Coal Mine Waste: Dams and Embankments: Site Preparation). Each plan shall comply with the requirements of the Mine Safety and Health Administration, 30 CFR 77.216-1 and 77.216-2, and shall contain the results of a geotechnical investigation of the proposed dam or embankment foundation area, to determine the structural competence of the foundation which will support the proposed dam or embankment structure and the impounded material. The geotechnical investigation shall be planned and supervised by an engineer or engineering geologist, according to the following:

(1) the number, location, and depth of borings and test pits shall be determined using current prudent engineering practice for the size of the dam or embankment, quantity of material to be impounded, and subsurface conditions;

(2) the character of the overburden and bedrock, the proposed abutment sites, and any adverse geotechnical conditions which may affect the particular dam, embankment, or reservoir site shall be considered;

(3) all springs, seepage, and ground water flow observed or anticipated during wet periods in the area of the proposed dam or embankment shall be identified on each plan; and

(4) consideration shall be given to the possibility of mudflows, rock-debris falls, or other landslides into the dam, embankment, or impounded material.

(f) If the structure is 20 feet or higher or impounds more than 20 acre-feet, each plan under subsections (b), (c), and (e) of this section shall include a stability analysis of each structure. The stability analysis shall include, but not be limited to, strength parameters, pore pressures, and long-term seepage conditions. The plan shall also contain a description of each engineering design assumption and calculation, with a discussion of each alternative considered in selecting the specific design parameters and construction methods.

The provisions of this §12.190 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.191 Protection of Public Parks and Historic Places

(a) For any publicly owned parks or any places listed on the National Register of Historic Places that may be adversely affected by the proposed operations, each plan shall describe the measures to be used:

(1) to prevent adverse impacts; or

(2) If a person has valid existing rights as determined under §12.72(c) of this title (relating to Procedures for Compatibility Findings, Public Road Closures and Relocations, Buffer Zones, and Valid Existing Rights Determinations), or if joint agency approval is to be obtained under §12.73(d) of this title (relating to Commission Obligations at Time of Permit Application Review), to minimize adverse impacts.

(b) The Commission may require the applicant to protect historic and archeological properties listed on or eligible for listing on the National Register of Historic Places through appropriate mitigation and treatment measures. Appropriate mitigation and treatment measures may be required to be taken after permit issuance provided that the required measures are completed before the properties are affected by any mining operation.

The provisions of this §12.191 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective June 9, 2003, 28 TexReg 4412.

§12.192 Relocation or Use of Public Roads

Each application shall describe, with appropriate maps and cross sections, the measures to be used to ensure that the interests of the public and landowners affected are protected if, under §12.72(a) of this title (relating to Procedures for Compatibility Findings, Public Road Closures and Relocations, Buffer Zones, and Valid Existing Rights Determinations), the applicant seeks to have the Commission approve:

(1) conducting the proposed surface mining activities within 100 feet of the right-of-way line of any public road, except where mine access or haul roads join that right-of-way; or

(2) relocating a public road.

The provisions of this §12.192 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective June 9, 2003, 28 TexReg 4412.

§12.193 Underground Development Waste/Return of Coal Processing Waste to Abandoned Underground Workings

(a) Underground Development Waste. Each plan shall contain descriptions, including appropriate maps and cross-section drawings of the proposed disposal methods and sites for placing underground development waste and excess spoil generated at surface areas affected by surface operations and facilities, according to §§12.531-12.534 of this title (relating to Disposal of Underground Development Waste and Excess Spoil: General Requirements, to Disposal of Underground Development Waste and Excess Spoil: Valley fills, to Disposal of Underground Development Waste and Excess Spoil: Head-of-Hollow Fills, and to Disposal of Underground Development Waste and Excess Spoil: Durable

Rock Fills). Each plan shall describe the geotechnical investigation, design, construction, operation, maintenance and removal, if appropriate, of the structures and be prepared according to §12.153 of this title (relating to Disposal of Excess Spoil).

(b) Return of Coal Processing Waste to Abandoned Underground Workings.

(1) Each plan shall describe the design, operation and maintenance of any proposed coal processing waste disposal facility, including flow diagrams and any other necessary drawings and maps, for the approval of the Commission and the Mine Safety and Health Administration under §12.541 of this title (relating to Coal Processing Waste: Return to Underground Workings).

(2) Each plan shall describe the source and quality of waste to be stowed, area to be backfilled, percent of the mine void to be filled, method of constructing underground retaining walls, influence of the backfilling operation on active underground mine operations, surface area to be supported by the backfill, and the anticipated occurrence of surface effects following backfilling.

(3) The applicant shall describe the source of the hydraulic transport mediums, method of dewatering the placed backfill, retainment of water if released to surface streams, and the effect on the hydrologic regime.

(4) The plan shall describe each permanent monitoring well to be located in the backfilled area, the stratum underlying the mined coal, and gradient from the backfilled area.

(5) The requirements of paragraphs (1)-(4) of this subsection shall also apply to pneumatic backfilling operations, except where the operations are exempted by the Commission from requirements specifying hydrologic monitoring.

The provisions of this §12.193 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.194 Subsidence Control Plan

The application shall include a survey which shall show whether structures or renewable resource lands exist within the proposed permit and adjacent area and whether subsidence if it occurred could cause material damage or diminution of reasonably foreseeable use of such structures or renewable resource lands. If the survey shows that no such structures or renewable resource lands exist, or no such material damage or diminution could be caused in the event of mine subsidence, and if the Commission agrees with such conclusion, no further information need be provided in the application under this section. In the event the survey shows such structures or renewable resource lands exist and that subsidence could cause material damage or diminution of value or foreseeable use of the land, or if the Commission determines that such damage or diminution could occur, the application shall include a subsidence plan which shall contain the following information:

(1) a detailed description of the mining method and other measures to be taken which may affect subsidence, including:

(A) the technique of coal removal, such as longwall mining, room and pillar with pillar removal, hydraulic mining or other methods;

(B) the extent, if any, to which planned and controlled subsidence is intended; and

(C) a description of the physical conditions, such as depth of cover, seam thickness, and lithology, which affect the likelihood and extent of subsidence and subsidence-related damage.

(2) a detailed description of the measures to be taken to prevent subsidence from causing material damage or lessening the value or reasonably foreseeable use of the surface, including:

(A) the anticipated effects of planned subsidence, if any;

(B) measures, if any, to be taken in the mine to reduce the likelihood of subsidence, including such measures as:

(i) backstowing or backfilling of voids;

(ii) leaving support pillars of coal; and

(iii) areas in which no real coal removal is planned, including a description of the overlying area to be protected by leaving coal in place; and

(C) Measures to be taken on the surface to prevent material damage or lessening of the value or reasonably foreseeable use of the surface including such measures as:

(i) reinforcement of sensitive structures or features;

(ii) installation of footers designed to reduce damage caused by movement;

(iii) change of location of pipelines, utility lines or other features;

(iv) relocation of movable improvements to sites outside the angle-of-draw; and

(v) monitoring, if any, to determine the commencement and degree of subsidence so that other appropriate measures can be taken to prevent or reduce material damage;

(3) a detailed description of the measures to be taken to mitigate the effects of any material damage or diminution of value or foreseeable use of lands which may occur, including one or more of the following as required by §12.564 of this title (relating to Subsidence Control: Surface-Owner Protection):

(A) restoration or rehabilitation of structures and features, including approximate land-surface contours, to premining condition;

(B) replacement of structures destroyed by subsidence;

(C) purchase of structures prior to mining and restoration of the land after subsidence to condition capable of supporting and suitable for the structures and foreseeable land uses; and

(D) purchase of non-cancellable insurance policies payable to the surface owner in the full amount of the possible material damage or other comparable measures;

(4) a detailed description of measures to be taken to determine the degree of material damage or diminution of value or foreseeable use of the surface, including such measures as:

(A) the results of pre-subsidence surveys of all structures and surface features which might be materially damaged by subsidence; and

(B) monitoring, if any, proposed to measure deformations near specified structures or features or otherwise as appropriate for the operation;

(5) a map of underground workings which describes the location and extent of areas in which planned-subsidence mining methods will be used and which includes all areas where the measures described in paragraph (2) of this section will be taken to prevent or minimize subsidence and

subsidence-related damage; and

(6) other information specified by the Commission as necessary to demonstrate that the operation will be conducted in accordance with the performance standards of §§12.562-12.565 of this title (relating to Subsidence Control: General Requirements, to Subsidence Control: Public Notice, to Subsidence Control: Surface-Owner Protection, and to Subsidence Control: Buffer Zones).

The provisions of this §12.194 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.195 Fish and Wildlife Plan

Protection and enhancement plan. Each application shall contain a description of how, to the extent possible using the best technology currently available, the operator will minimize disturbances and adverse impacts on fish and wildlife and related environmental values, including compliance with the Endangered Species Act, during the surface coal mining and reclamation operations, and how enhancement of these resources will be achieved, where practicable. This description shall:

(1) be consistent with the requirements of §12.547 of this title (relating to Protection of Fish, Wildlife, and Related Environmental Values);

(2) apply, at a minimum, to species and habitats identified under §12.179(a) of this title (relating to Fish and Wildlife Resources Information); and

(3) include:

(A) protective measures that will be used during the active mining phase of operation. Such measures may include the establishment of buffer zones, the selective location and special design of haul roads and power lines, and the monitoring of surface-water quality and quantity; and

(B) enhancement measures that will be used during the reclamation and postmining phase of operation to develop aquatic and terrestrial habitat. Such measures may include restoration of streams and other wetlands, retention of ponds and impoundments, establishment of vegetation for wildlife food and cover, and the placement of perches and nest boxes. Where the plan does not include enhancement measures, a statement shall be given explaining why enhancement is not practicable.

The provisions of this §12.195 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.196 Diversions

Each application shall contain descriptions, including maps and cross sections, of stream-channel diversions and other diversions to be constructed within the proposed permit area to achieve compliance with §12.511 of this title (relating to Hydrologic Balance: Diversions).

The provisions of this §12.196 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.197 Operation Plan: Maps and Plans

Each application shall contain maps, plans, and cross sections of the proposed permit and adjacent areas as follows:

(1) the maps, plans and cross sections shall show the underground mining activities to be conducted, the lands to be affected throughout the operation, and any change in a facility or feature to be caused by the proposed operations, if the facility or feature was shown under §12.182 and §12.183 of this title (relating to Maps: General Requirements, and to Cross Sections, Maps, and Plans);

(2) the following shall be shown for the proposed permit area unless specifically required for the permit and adjacent area by the requirements of this section:

(A) buildings, utility corridors, and facilities to be used;

(B) the area of land to be affected within the proposed permit area, according to the sequence of mining and reclamation;

(C) each area of land for which a performance bond or other equivalent guarantee will be posted under Subchapter J of this chapter (relating to Bond and Insurance Requirements for Surface Coal Mining and Reclamation Operations);

(D) each coal storage, cleaning and loading area;

(E) each topsoil, spoil, coal preparation waste, underground development waste, and noncoal waste storage area;

(F) each water diversion, collection, conveyance, treatment, storage and discharge facility to be used;

(G) each source of waste and each waste-disposal facility relating to coal processing or pollution control;

(H) each facility to be used to protect and enhance fish and wildlife related environmental values;

(I) each explosive storage and handling facility;

(J) location of each sedimentation pond, permanent water impoundment, coal mine waste bank, and coal mine waste dam and embankment, in accordance with §12.190 of this title (relating to Reclamation Plan: Ponds, Impoundments, Banks, Dams, and Embankments) and disposal areas for underground development waste and excess spoil in accordance with §12.193 of this title (relating to Underground Development Waste/Return of Coal Processing Waste to Underground Workings);

(K) each profile, at cross sections specified by the Commission of the anticipated final surface configuration to be achieved for the affected areas;

(L) location of each water and subsidence monitoring point; and

(M) location of each facility that will remain on the proposed permit area as a permanent feature, after the completion of underground mining activities.

(3) except as provided in §§12.190(a)(2) and (3), 12.193(a), 12.531(b), 12.534(b)(1), and 12.535(c) of this title (relating to Reclamation Plan: Ponds, Impoundments, Banks, Dams, and Embankments, to Underground Development Waste/Return of Coal Processing Waste to Underground Workings, to Disposal of Underground Development Waste and Excess Spoil: General Requirements, to Disposal of Underground Development Waste and Excess Spoil: Durable Rock Fills, and to Coal Mine Waste Banks: General Requirements), maps, plans, and cross-sections required under paragraph (2)(D)-(F), (J), and (K) of this subsection shall be prepared by, or under the direction of, and certified by a qualified registered professional engineer, or professional geologist, with assistance from experts in related fields such as land surveying and landscape architecture; and

(4) a description of and plans and drawings for each support facility to be constructed, used, or maintained within the proposed permit area. The plans and drawings shall

include a map, appropriate cross sections, design drawings, and specifications sufficient to demonstrate compliance with §12.572 of this title (relating to Support Facilities) for each facility.

The provisions of this §12.197 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.198 Road Systems and Support Facilities

(a) Plans and drawings. Each applicant for an underground coal mining and reclamation permit shall submit plans and drawings for each road, as defined in §12.3 of this title (relating to Definitions), to be constructed, used, or maintained within the proposed permit area. The plans and drawings shall:

(1) include a map, appropriate cross sections, design drawings, and specifications for road widths, gradients, surfacing materials, cuts, fill embankments, culverts, bridges, drainage ditches, low-water crossings, and drainage structures;

(2) contain the drawings and specifications of each proposed road that is located in the channel of an intermittent or perennial stream, as necessary for approval of the road by the Commission in accordance with §12.569(d)(1) of this title (relating to Roads: General);

(3) contain the drawings and specifications for each proposed ford of perennial or intermittent streams that is used as a temporary route, as necessary for approval of the ford by the Commission in accordance with §12.570(3)(B) of this title (relating to Primary Roads);

(4) contain a description of measures to be taken to obtain approval of the Commission for alteration or relocation of a natural stream channel under §12.570(4)(E) of this title (relating to Primary Roads);

(5) contain the drawings and specifications for each low-water crossing of perennial or intermittent stream channels so that the Commission can maximize the protection of the stream in accordance with §12.570(4)(F) of this title (relating to Primary Roads); and

(6) describe the plans to remove and reclaim each road that would not be retained under an approved postmining land use, and the schedule for this removal and reclamation.

(b) Primary road certification. The plans and drawings for each primary road shall be prepared by, or under the direction of, and certified by a qualified registered professional engineer as meeting the requirements of this chapter (relating to Coal Mining Regulations); current, prudent engineering practices; and any design criteria established by the Commission.

(c) Support facilities. Each applicant for an underground coal mining and reclamation permit shall submit a description, plans, and drawings for each support facility to be constructed, used, or maintained within the proposed permit area. The plans and drawings shall include a map, appropriate cross sections, design drawings, and specifications sufficient to demonstrate compliance with §12.572 of this title (relating to Support Facilities) for each facility.

The provisions of this §12.198 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.199 Air Pollution Control Plan for Underground Mining

For all surface operations associated with underground mining activities, the application shall contain an air pollution control plan which includes the following:

(1) an air-quality monitoring program, if required by the Commission to provide sufficient data to evaluate the effectiveness of the fugitive-dust control practices, under paragraph (2) of this section to comply with applicable federal and state air-quality standards; and

(2) a plan for fugitive-dust control practices as required under §12.554 of this title (relating to Stabilization of Surface Areas for Underground Mining).

The provisions of this §12.199 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective September 14, 1999, 24 TexReg 7223.

DIVISION 10 REQUIREMENTS FOR PERMITS FOR SPECIAL CATEGORIES OF MINING

§12.200 Experimental Practices Mining

(a) Experimental practices provide a variance from the environmental protection performance standards of the Act and Subchapter K of this chapter (relating to Permanent Program Performance Standards) for experimental or research purposes, or to allow an alternative postmining land use. They may be undertaken if they are approved by the Commission and the Director and if they are incorporated in a permit revision issued in accordance with the requirements of Subchapter G of this chapter (relating to Surface Coal Mining and Reclamation Operations Permits and Coal Exploration Procedures Systems).

(b) No person shall engage in or maintain any experimental practice, unless that practice is first approved in a permit by the Commission and the Director.

(c) Each person who desires to conduct an experimental practice shall submit a permit application which contains descriptions, maps, plans, and data which show:

(1) the nature of the experimental practice, including a description of the performance standards for which variances are requested, the duration of the experimental practice, and any special monitoring which will be conducted;

(2) how use of the experimental practice encourages advances in mining and reclamation technology or, allows a postmining land use for industrial, commercial, residential, or public use (including recreational facilities) on an experimental basis;

(3) that the mining and reclamation operations proposed for using an experimental practice are not larger or more numerous than necessary to determine the effectiveness and economic feasibility of the experimental practice;

(4) that the experimental practice:

(A) is potentially more or at least as environmentally protective during and after the proposed mining and reclamation operations, as those required under Subchapter K of this chapter (relating to Permanent Program Performance Standards); and

(B) will not reduce the protection afforded public health and safety below that provided by the requirements of Subchapter K of this chapter (relating to Permanent Program Performance Standards); and

(5) that the applicant will conduct monitoring of the effects of the experimental practice. The monitoring program shall ensure the collection, analysis, and reporting of reliable data that are sufficient to enable the Commission and the Director to:

(A) evaluate the effectiveness of the

experimental practice; and

(B) identify, at the earliest possible time, potential risk to the environment and public health and safety which may be caused by the experimental practice during and after mining.

(d) Each application shall set forth the environmental protection performance standards of Subchapter K of this chapter (relating to Permanent Program Performance Standards) which will be implemented, in the event the objective of the experimental practice is a failure.

(e) All experimental practices for which variances are sought shall be specifically identified through newspaper advertisements by the applicant and the written notifications by the Commission required under §12.207 of this title (relating to Public Notices of Filing of Permit Applications).

(f) No permit authorizing an experimental practice shall be issued, unless the Commission first finds, in writing, upon the basis of both a complete application filed in accordance with the requirements of this section and the comments of the Director, that:

(1) the experimental practice meets all of the requirements of subsection (c)(2)-(5) of this section;

(2) the experimental practice is based on a clearly defined set of objectives which can reasonably be expected to be achieved;

(3) the experimental practice has been specifically approved, in writing, by the Director, based on his or her findings that all of the requirements of subsection (c)(1)-(5) of this section will be met; and

(4) the permit contains conditions which specifically:

(A) limit the experimental practice authorized to that granted by the Commission and the Director.

(B) impose enforceable alternative environmental protection requirements; and

(C) require the person to conduct the periodic monitoring, recording and reporting program set forth in the application, with such additional requirements as the Commission or the Director may require.

(g) Experimental practices granting variances from the special environmental protection performance standards of this chapter (relating to Coal Mining Regulations) and of the Act applicable to prime farmland shall be approved only after consultation with the U.S. Department of Agriculture, Natural Resources Conservation Service.

(h) Each experimental practice shall be reviewed by the Commission as set forth in the approved permit, but no less frequently than every 2 1/2 years. After review, the Commission may require such reasonable modifications of the experimental practice necessary to ensure that the operations involved are conducted to fully protect the environment and the public health and safety. Copies of the decision of the Commission shall be sent to the permittee and shall be subject to administrative and judicial review.

(i) Revisions or modifications to an experimental practice shall be processed in accordance with the requirements of this chapter (relating to Coal Mining Regulations) and approved by the Commission. Any revisions which propose significant alterations in the experimental practice shall, at a minimum, be subject to the notice, hearing, and public participation requirements of this chapter (relating to Coal Mining Regulations) and concurrence by the Director. Revisions that do not propose significant alterations in the experimental practice shall not require concurrence by the Director.

The provisions of this §12.200 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.201 Prime Farmland

(a) Scope. This section applies to any person who conducts or intends to conduct surface coal mining and reclamation operations on prime farmlands historically used for cropland. Areas where mining is authorized under permits issued or mining plans approved prior to August 3, 1977, are exempt from the prime farmland reconstruction standards.

(b) Application contents for prime farmland. If land within the proposed permit area is identified as prime farmland under §§12.138 or 12.184 of this title (relating to Prime Farmland Investigation), the applicant shall submit a plan for the mining and restoration of the land. Each plan shall contain, at a minimum:

(1) a soil survey of the permit area according to the standards of the National Cooperative Soil Survey and in accordance with the procedures set forth in U.S. Department of Agriculture Handbook 436 (Soil Taxonomy, 1975) as amended on March 22, 1982 and October 5, 1982, and Handbook 18 (Soil Survey Manual, 1951), as amended on December 18, 1979, May 7, 1980, May 9, 1980, September 11, 1980, June 9, 1981, June 29, 1981, and November 16, 1982. The U.S. Natural Resources Conservation Service establishes the standards of the National Cooperative Soil Survey and maintains a National Soils Handbook which gives current acceptable procedures for conducting soil surveys. This National Soils Handbook is available for review at area and state NRCS offices.

(A) U.S. Department of Agriculture Handbooks 436 (Soil Taxonomy) and 18 (Soil Survey Manual) are on file and available for inspection at the Surface Mining and Reclamation Division, Railroad Commission of Texas, 1701 N. Congress Avenue, Austin, Texas.

(B) The soil survey shall include a description of soil mapping units and a representative soil profile as determined by the U.S. Natural Resources Conservation Service, including, but not limited to, soil-horizon depths, pH, and the range of soil densities for each prime farmland soil unit within the permit area unless other representative soil-profile descriptions from the locality, prepared according to the standards of the National Cooperative Soil Survey, are available and their use is approved by the principal officer in Texas of the U.S. Natural Resources Conservation Service, and by the Commission. The Commission may require the operator to provide information on other physical and chemical soil properties as needed to make a determination that the operator has the technological capability to restore the prime farmland within the permit area to the soil-reconstruction standards of §§12.620-12.622, 12.624, and 12.625 of this title (relating to Special Permanent Program Performance Standards--Operations on Prime Farmland);

(2) a plan for soil reconstruction, replacement, and stabilization for the purpose of establishing the technological capability of the mine operator to comply with the requirements of §§12.620-12.622, 12.624, and 12.625 of this title (relating to Special Permanent Program Performance Standards--Operations on Prime Farmland);

(3) scientific data, such as agricultural school studies, for areas with comparable soils, climate, and management (including water management) that demonstrate that the proposed method of reclamation, including the use of

soil mixtures or substitutes, if any, will achieve, within a reasonable time, levels of yield equivalent to, or higher than, those of nonmined prime farmland in the surrounding area;

(4) the productivity prior to mining, including the average yield of food, fiber, forage, or wood products obtained under a high level of management; and

(5) in all cases, soil productivity for prime farmlands shall be returned to equivalent levels of yield as nonmined land of the same soil type in the surrounding area under equivalent management practices as determined from the soil survey performed pursuant to §12.201(b)(1) of this title (relating to Prime Farmland).

(c) Consultation with Secretary of Agriculture.

(1) The Secretary of Agriculture has assigned the responsibilities under this section to the chief of the U.S. Natural Resources Conservation Service. The federal official who is responsible to the chief of the U.S. Natural Resources Conservation Service for its program in Texas currently has the title of State Conservationist. The State Conservationist is the principal officer in Texas of the U.S. Natural Resources Conservation Service and is responsible for consultation and review of plans submitted under this section.

(2) Before any permit is issued for areas that include prime farmland, the Commission shall consult with the principal officer in Texas of the U.S. Natural Resources Conservation Service. The principal officer in Texas of the U.S. Natural Resources Conservation Service shall provide for the review of, and comment on, the proposed method of soil reconstruction in the plan submitted under subsection (b) of this section. If the principal officer in Texas of the U.S. Natural Resources Conservation Service considers those methods to be inadequate, he or she shall suggest revisions to the Commission which result in more complete and adequate reconstruction.

(d) Issuance of permit. A permit for the mining and reclamation of prime farmland may be granted by the Commission, if it first finds, in writing, upon the basis of a complete application, that:

(1) the approved proposed postmining land use of these prime farmlands will be cropland;

(2) the permit incorporates as specific conditions the contents of the plan submitted under subsection (b) of this section, after consideration of any revisions to that plan suggested by the principal officer in Texas of the U.S. Natural Resources Conservation Service under subsection (c) of this section; and

(3) the applicant has the technological capability to restore the prime farmland, within a reasonable time, to equivalent or higher levels of yield as non-mined prime farmland in the surrounding area under equivalent levels of management; and

(4) The proposed operations will be conducted in compliance with the requirements of §§12.620-12.622, 12.624, and 12.625 of this title (relating to Special Permanent Program Performance Standards--Operations on Prime Farmland) and other environmental protection performance and reclamation standards for mining and reclamation of prime farmland of the regulatory program.

(5) The aggregate total prime farmland acreage shall not be decreased from that which existed prior to mining. Water bodies, if any, to be constructed during mining and reclamation operations, shall be located within the post-reclamation non-prime farmland portions of the permit area. The creation of any such water bodies shall be approved by the Commission and the consent of all affected property owners within the permit area shall be obtained.

The provisions of this §12.201 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective December 29, 1998, 23 TexReg 13041.

§12.202 Surface Coal Mining and Reclamation Operations on Areas or Adjacent to Areas Including Alluvial Valley Floors in the Arid or Semiarid Areas West of the 100th Meridian

(a) Alluvial valley floor determination.

(1) Before applying for a permit to conduct, or before conducting surface coal mining and reclamation operations within a valley holding a stream or in a location where the adjacent area includes any stream in the arid or semiarid regions of the United States, the applicant shall either affirmatively demonstrate, based on available data, the presence of an alluvial valley floor, or submit to the Commission the results of a field investigation of the proposed permit area and adjacent area. The field investigations shall include sufficiently detailed geologic, hydrologic, land-use, soils, and vegetation studies on areas required to be investigated by the Commission, after consultation with the applicant, to enable the Commission to make an evaluation regarding the existence of the probable alluvial valley floor in the proposed permit area or adjacent area and to determine which areas, if any, require more detailed study in order to allow the Commission to make a final determination regarding the existence of an alluvial valley floor. Studies performed during the investigation by the applicant or subsequent studies as required of the applicant by the Commission, shall include an appropriate combination, adapted to site-specific conditions, of:

(A) mapping of unconsolidated stream-laid deposits holding streams including, but not limited to, geologic maps of unconsolidated deposits and stream-laid deposits, maps of stream delineation of surface watersheds and directions of shallow ground-water flows through and into the unconsolidated deposits, topography showing local and regional terrace levels, and topography of terraces, flood plains and channels showing surface drainage patterns;

(B) mapping of all lands included in the area in accordance with this paragraph and subject to agricultural activities, showing the area in which different types of agricultural lands, such as flood irrigated lands, pasture lands and undeveloped rangelands, exist, and accompanied by measurements of vegetation in terms of productivity and type;

(C) mapping of all lands that are currently or were historically flood irrigated, showing the location of each diversion structure, ditch, dam and related reservoir, irrigated land, and topography of those lands;

(D) documentation that areas identified in this paragraph are, or are not, subirrigated, based on ground-water monitoring data, representative water-quality soil-moisture measurements, and measurements of rooting depth, soil mottling, and water requirements of vegetation;

(E) documentation, based on representative sampling, that areas identified under this paragraph are, or are not, flood irrigable, based on streamflow, water quality, water yield, soil measurements, and topographic characteristics; and

(F) analysis of a series of aerial photographs, including color infrared imagery flown at a time of year to show any late summer and fall differences between upland

and valley floor vegetative growth and of a scale adequate for reconnaissance identification of areas that may be alluvial valley floors.

(2) Based on the investigations conducted under paragraph (1) of this subsection, the Commission shall make a determination of the extent of any alluvial valley floors within the study area and whether any stream in the study area may be excluded from further consideration as lying within an alluvial valley floor. The Commission shall determine that an alluvial valley floor exists if it finds that:

(A) unconsolidated stream-laid deposits holding streams are present; and

(B) there is sufficient water to support agricultural activities as evidenced by:

(i) the existence of flood irrigation in the area in question or its historical use;

(ii) the capability of an area to be flood irrigated, based on stream-flow water yield, soils, water quality, and topography; or

(iii) subirrigation of the lands in question, derived from the ground-water system of the valley floor.

(b) Application contents for operations affecting designated alluvial valley floors.

(1) If land within the proposed permit area or adjacent area is identified as an alluvial valley floor and the proposed mining operation may affect an alluvial valley floor or waters that supply alluvial valley floors, the applicant shall submit a complete application for the proposed mining and reclamation operations, to be used by the Commission, together with other relevant information, including the information required by subsection (a) of this section, as a basis for approval or denial of the permit. The complete application shall include detailed surveys and baseline data required by the Commission for a determination of:

(A) the essential hydrologic functions of the alluvial valley floor which might be affected by the mining and reclamation process;

(B) the significance of the area to be affected to agricultural activities;

(C) whether the operation will cause, or presents an unacceptable risk of causing, material damage to the quantity or quality of surface or ground waters that supply the alluvial valley floor;

(D) the effectiveness of proposed reclamation with respect to requirements of the Act and this chapter (relating to Coal Mining Regulations); and

(E) specific environmental monitoring required to measure compliance with §§12.610-12.613 of this title (relating to Alluvial Valley Floors: Monitoring) during and after mining and reclamation operations.

(2) Information required under this subsection shall include, but not be limited to:

(A) geologic data, including geologic structure, surficial geologic maps, and geologic cross-sections;

(B) soils and vegetation data, including a detailed soil survey and chemical and physical analyses of soils, a vegetation map and narrative descriptions of quantitative and qualitative surveys, and land-use data, including an evaluation of crop yields;

(C) surveys and data required under this subsection for areas designated as alluvial valley floors because of their flood irrigation characteristics shall also include, at a minimum, surface hydrologic data, including streamflow runoff, sediment yield, and water-quality analyses describing seasonal variations over at least 1 full year, field geomorphic surveys and other geomorphic studies;

(D) surveys and data required under this subsection for areas designated as alluvial valley floors because of their subirrigation characteristics, shall also include, at a minimum, geohydrologic data including observation well establishment for purposes of water-level measurements, ground-water contour maps, testing to determine aquifer characteristics that affect waters supplying the alluvial valley floors, well and spring inventories, and water-quality analyses describing seasonal variations over at least 1 full year, and physical and chemical analysis of overburden to determine the effect of the proposed mining and reclamation operations on water quality and quantity;

(E) plans showing how the operation will avoid, during mining and reclamation, interruption, discontinuance or preclusion of farming on the alluvial valley floors unless the premining land use has been undeveloped rangeland which is not significant to farming and will not materially damage the quantity or quality of water in surface- and ground-water systems that supply alluvial valley floors;

(F) maps showing farms that could be affected by the mining and, if any farm includes an alluvial valley floor, statements of the type and quantity of agricultural activity performed on the alluvial valley floor and its relationship to the farm's total agricultural activity including an economic analysis; and

(G) such other data as the Commission may require.

(3) The information required by paragraph (1) of this subsection shall evaluate those factors which contribute to the collecting, storing, regulating and making natural flow of water available for agricultural activities on the alluvial valley floor and shall include, but not be limited to:

(A) factors contributing to the function of collecting water which include, but are not limited to:

(i) the amount and rate of runoff and a water balance analysis, with respect to rainfall, evapotranspiration, infiltration and ground-water recharge;

(ii) the relief, slope, and density of the network of drainage channels;

(iii) the infiltration, permeability, porosity and transmissivity of unconsolidated deposits of the valley floor that either constitute the aquifer associated with the stream or lie between the aquifer and the stream; and

(iv) other factors that affect the interchange of water between surface streams and ground-water systems, including the depth to ground water, the direction of ground-water flow, the extent to which the stream and associated alluvial ground-water aquifers provide recharge to, or are recharged by, bedrock aquifers;

(B) factors contributing to the function of storing water which include, but are not limited to:

(i) surface roughness, slope, and vegetation of the channel, floodplain, and low terraces that retard the flow of surface waters;

(ii) porosity, permeability, water-holding capacity, saturated thickness and volume of aquifers associated with streams, including alluvial aquifers, perched aquifers, and other water-bearing zones found beneath valley floors; and

(iii) moisture held in soils or the plant growth medium within the alluvial valley floor, and the physical and chemical properties of the subsoil that provide

for sustained vegetation growth or cover during extended periods of low precipitation;

(C) factors contributing to the function of regulating the flow of water which include, but are not limited to:

(i) the geometry and physical character of the valley, expressed in terms of the longitudinal profile and slope of the valley and the channel, the sinuosity of the channel, the cross-section, slopes and proportions of the channels, flood plains and low terraces, the nature and stability of the stream banks and the vegetation established in the channels and along the stream banks and flood plains;

(ii) the nature of surface flows as shown by the frequency and duration of flows of representative magnitude including low flows and floods; and

(iii) the nature of interchange of water between streams, their associated alluvial aquifers and any bedrock aquifers as shown by the rate and amount of water supplied by the stream to associated alluvial and bedrock aquifers (i.e., recharge) and by the rates and amounts of water supplied by aquifers to the stream (i.e., baseflow); and

(D) factors which make water available and which include, but are not limited to, the presence of landforms, including floodplains and terraces, suitable for agricultural activities.

(c) Requirements for approval.

(1) No permit or permit revision application for surface coal mining and reclamation operations on lands located west of the one hundredth meridian west longitude, shall be approved by the Commission, unless the application demonstrates and the Commission finds in writing, on the basis of information set forth in the application that:

(A) the proposed operation would not interrupt, discontinue, or preclude farming on an alluvial valley floor, unless the premining land use has been undeveloped range land which is not significant to farming on the alluvial valley floor, or unless the area of an affected alluvial valley floor is small and provides, or may provide, negligible support for production of one or more farms; provided, however, this subparagraph does not apply to those lands which were identified in a reclamation plan approved by the state prior to August 3, 1977, for any surface coal mining and reclamation operation that, in the year preceding August 3, 1977:

(i) produced coal in commercial quantities and was located within or adjacent to alluvial valley floors; or

(ii) obtained specific permit approval by the Commission to conduct surface coal mining and reclamation operations within an alluvial valley floor;

(B) the proposed operations would not materially damage the quantity and quality of water in surface and underground water systems that supply those alluvial valley floors or portions of alluvial valley floors which are:

(i) included in subparagraph (A) of this paragraph; or

(ii) outside the permit area of an existing or proposed surface coal mining operation;

(C) the proposed operations would be conducted in accordance with §§12.610-12.613 of this title (relating to Special Permanent Program Performance Standards--Operations in Alluvial Valley Floors) and all other applicable requirements of the Act and this chapter (relating to Coal Mining Regulations); and

(D) any change in the land use of the lands covered by the proposed permit area from its premining use in or adjacent to alluvial valley floors will not interfere with or preclude the reestablishment of the essential hydrologic functions of the alluvial valley floor.

(2) The significance of the impact of the proposed operations on farming will be based on the relative importance of the vegetation and water of the developed grazed or hayed alluvial valley floor area to the farm's production, or any more stringent criteria established by the Commission as suitable for site-specific protection of agricultural activities in alluvial valley floors. The effect of the proposed operations on farming will be concluded to be significant if they would remove from production, over the life of the mine, a proportion of the farm's production that would decrease the expected annual income from agricultural activities normally conducted at the farm.

(3) Criteria for determining whether a surface coal mining operation will materially damage the quantity or quality of waters subject to subparagraphs (A) and (B) of this paragraph include, but are not limited to:

(A) potential increases in the concentration of total dissolved solids of waters supplied to an alluvial valley floor, as measured by specific conductance in millimhos, to levels above the threshold value at which crop yields decrease, as specified in Maas and Hoffman, Crop Salt Tolerance--Current Assessment, Table 1, A Salt Tolerance of Agricultural Crops, unless the applicant demonstrates compliance with subparagraph (B) of this paragraph.

(i) Salt tolerances for agricultural crops have been published by E.V. Maas and G.J. Hoffman, in a paper titled Crop Salt Tolerance--Current Assessment, contained in The Journal of The Irrigation and Drainage Division, American Society of Civil Engineers, pages 115 through 134, June, 1977. Table 1, giving threshold salinity values is presented on pages 122 through 125.

(ii) The Maas and Hoffman publication is on file and available for inspection at the Surface Mining and Reclamation Division Office, Railroad Commission of Texas, 1701 N. Congress Avenue, Austin, Texas 78711;

(B) potential increases in the concentration of total dissolved solids of waters supplied to an alluvial valley floor in excess of those specified by Maas and Hoffman shall not be allowed unless the applicant demonstrates, through testing related to the production of crops grown in the locality, that the proposed operations will not cause increases that will result in crop yield decreases;

(C) for types of vegetation not listed in Maas and Hoffman as specified by the Commission, based upon consideration of observed correlation between total dissolved solids concentrations in water and crop yield declines, taking into account the accuracy of the correlations;

(D) potential increases in the average depth to water-saturated zones (during the growing season) located within the root zone of the alluvial valley floor that would reduce the amount of subirrigation land compared to pre-mining conditions;

(E) potential decrease in surface flows that would reduce the amount of irrigable land compared to pre-mining conditions; and

(F) potential changes in the surface- or ground-water systems that reduce the area available to agriculture as a result of flooding or increased saturation of the root zone.

(4) For the purposes of this subsection, a farm is one or more land units on which agricultural activities are conducted. A farm is generally considered to be the

combination of land units with acreage and boundaries in existence prior to August 3, 1977, or, if established after August 3, 1977, with those boundaries based on enhancement of the farm's agricultural productivity and not related to surface coal mining operations.
The provisions of this §12.202 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.203 Augering

(a) This section applies to any person who conducts or intends to conduct surface coal mining and reclamation operations utilizing augering methods.

(b) Any application for a permit for operations covered by this section shall contain, in the mining and reclamation plan, a description of the augering methods to be used and the measures to be used to comply with §12.600 of this title (relating to Auger Mining: Additional Performance Standards).

(c) No permit shall be issued for any operations covered by this section unless the Commission finds, in writing, that in addition to meeting all other applicable requirements of this subchapter (relating to Surface Coal Mining and Reclamation Operations Permits and Coal Exploration Procedures Systems), the operation will be conducted in compliance with §12.600 of this title (relating to Auger Mining: Additional Performance Standards).
The provisions of this §12.203 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.204 Coal Processing Plants or Support Facilities Not Located Within the Permit Area of a Specified Mine

(a) This section applies to any person who conducts or intends to conduct surface coal mining and reclamation operations utilizing coal processing plants or support facilities not within a permit area of a specific mine. Any person who operates such a processing plant or support facility shall have obtained a permit from the Commission in accordance with the requirements of this section.

(b) Any application for a permit for operations covered by this section shall contain, in the mining and reclamation plan, specific plans, including descriptions, maps and cross sections of the construction, operation, maintenance and removal of the processing plants and associated support facilities. The plan shall demonstrate that those operations will be conducted in compliance with §§12.650 and 12.651 of this title (relating to Special Permanent Program Performance Standards--Coal Processing Plants and Support Facilities Not Located At or Near the Minesite Or Not Within the Permit Area For a Mine).

(c) No permit shall be issued for any operation covered by this section, unless the Commission finds, in writing, that, in addition to meeting all other applicable requirements of this subchapter (relating to Surface Coal Mining and Reclamation Operations Permits and Coal Exploration Procedures Systems), the operations will be conducted in compliance with the requirements of §§12.650 and 12.651 of this title (relating to Special Permanent Program Performance Standards--Coal Processing Plants and Support Facilities Not Located At or Near the Minesite Or Not Within the Permit Area For a Mine).
The provisions of this §12.204 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.205 In Situ Processing Activities

As in effect on January 6, 2020.

(a) This section applies to any person who conducts or intends to conduct surface coal mining and reclamation operations utilizing in situ processing activities.

(b) Any application for a permit for operations covered by this section shall be made according to all requirements of this subchapter applicable to underground mining activities. In addition, the mining and reclamation operations plan for operations involving in situ processing activities shall contain information establishing how those operations will be conducted in compliance with the requirements of §§12.660 and 12.661 of this title (relating to Special Permanent Program Performance Standards--In Situ Processing), including:

(1) delineation of proposed holes and wells and production zone for approval of the Commission;

(2) specifications of drill holes and casings proposed to be used;

(3) a plan for treatment, confinement or disposal of all acid-forming, toxic-forming or radioactive gases, solids, or liquids constituting a fire, health, safety or environmental hazard caused by the mining and recovery process; and

(4) plans for monitoring surface and ground water and air quality, as required by the Commission.

(c) No permit shall be issued for operations covered by this section, unless the Commission first finds, in writing, upon the basis of a complete application made in accordance with subsection (b) of this section, that the operation will be conducted in compliance with all requirements of this subchapter (relating to Surface Coal Mining and Reclamation Operations Permits and Coal Exploration Procedures Systems) relating to underground mining activities, and §§12.500-12.572 of this title (relating to Permanent Program Performance Standards--Underground Mining Activities), and to §§12.660 and 12.661 of this title (relating to Special Permanent Program Performance Standards--In Situ Processing).
The provisions of this §12.205 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.206 Mining in Previously Mined Areas

(a) An applicant for a permit to conduct surface coal mining operations on lands eligible for remining must comply with this section.

(b) The application shall be made according to all requirements of this subchapter applicable to surface coal mining and reclamation operations and shall:

(1) to the extent not otherwise addressed in the permit application, identify potential environmental and safety problems related to prior mining activity at the site and that could be reasonably anticipated to occur. This identification shall be based on a due diligence investigation which shall include visual observations at the site, a record review of past mining at the site, and environmental sampling tailored to current site conditions; and

(2) with regard to potential environmental and safety problems referred to in paragraph (1) of this subsection, describe the mitigative measures that will be taken to ensure that the applicable reclamation requirements of the regulatory program will be met.
The provisions of this §12.206 adopted to be effective February 24, 2014, 39 TexReg 1121.

DIVISION 11 REVIEW, PUBLIC PARTICIPATION, AND APPROVAL OF PERMIT APPLICATIONS AND

PERMIT TERMS AND CONDITIONS

§12.207 Public Notices of Filing of Permit Applications

(a) An applicant for a permit shall place an advertisement in a local newspaper of general circulation in the locality of the proposed surface coal mining and reclamation operations at least once a week for four consecutive weeks. The applicant shall place the advertisement in the newspaper at the same time the complete permit application is filed with the Commission. The advertisement shall contain, at a minimum, the following information:

(1) the name and business address of the applicant;

(2) a map or description which shall:

(A) clearly show or describe towns, rivers, streams, or other bodies of water, local landmarks, and any other information, including routes, streets, or roads and accurate distance measurements, necessary to allow local residents to readily identify the proposed permit area;

(B) clearly show or describe the exact location and boundaries of the proposed permit area;

(C) state the name of the U.S. Geological Survey 7.5-minute quadrangle map(s) which contains the area shown or described; and

(D) if a map is used, indicate the north point;

(3) the location where a copy of the application is available for public inspection under subsection (c) of this section;

(4) the name and address of the Commission to which written comments, objections, or requests for a public hearing or informal conference on the application may be submitted under §§12.208-12.210 of this title (relating to Opportunity for Submission of Written Comments on Permit Applications, to Right to File Written Objections, and to Public Availability of Information in Permit Applications on File With the Commission); and

(5) if an applicant seeks a permit to mine within 100 feet of the outside right-of-way of a public road or to relocate or close a public road, except where public notice and hearing has previously been provided for this particular part of the road in accordance with §12.72(a) of this title (relating to Procedures for Compatibility Findings, Public Road Closures and Relocations, Buffer Zones, and Valid Existing Rights Determinations), a concise statement describing the public road, the particular part to be relocated or closed, where the relocation or closure is to occur, and the duration of the relocation or closure.

(b) Upon receipt of a complete application for a permit, the Commission shall issue written notification of:

(1) the applicant's intention to surface mine a particularly described tract of land;

(2) the application number;

(3) where a copy of the application may be inspected; and

(4) where comments on the application may be submitted under §12.208 of this title (relating to Opportunity for Submission of Written Comments on Permit Applications).

(c) The written notifications shall be sent to:

(1) The following State and federal agencies:

(A) Texas Commission on Environmental Quality;

(B) Texas Historical Commission;

(C) University of Texas Bureau of Economic Geology;

(D) Texas State Soil and Water Conservation Board;

(E) Texas Parks and Wildlife Department;

(F) Texas General Land Office;

(G) U.S. Natural Resources Conservation Service;

(H) U.S. Fish and Wildlife Service; and

(I) Office of Surface Mining--Regional Office;

(2) federal, state and local government agencies with jurisdiction over or an interest in the area of the proposed operations, including, but not limited to, general governmental entities and fish and wildlife and historic preservation agencies;

(3) governmental planning agencies with jurisdiction to act with regard to land use, air, or water quality planning in the area of the proposed operations;

(4) sewage and water treatment authorities and water companies, either providing sewage or water services to users in the area of the proposed operations or having water sources or collection, treatment, or distribution facilities located in these areas; and

(5) the federal or state governmental agencies with authority to issue all other permits and licenses needed by the applicant in connection with operations proposed in the application.

(d) The applicant shall:

(1) make a full copy of his or her complete application for a permit available for the public to inspect and copy. This shall be done by filing a copy of the application submitted to the Commission with the County Clerk at the courthouse of the county where the mining is proposed to occur, or if approved by the Commission, at another equivalent public office; and

(2) file the copy of the complete application under paragraph (1) of this subsection by the first date of newspaper advertisement of the application. The applicant shall file any subsequent revision of the application with the County Clerk or other approved public office at the same time the revision is submitted to the Commission.

The provisions of this §12.207 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640; amended to be effective June 9, 2003, 28 TexReg 4412

§12.208 Opportunity for Submission of Written Comments on Permit Applications

(a) Written comments on permit applications may be submitted to the Commission by the public entities to whom notification is provided under §§12.207(b) and (c) of this title (relating to Public Notices of Filing of Permit Applications) with respect to the effects of the proposed mining operations on the environment within their area of responsibility.

(b) These comments shall be submitted to the Commission within 30 days after the last publication of the newspaper notice.

(c) The Commission shall immediately transmit a copy of all such comments for filing and public inspection at the public office where the applicant filed a copy of the application for permit under §12.207(d) of this title (relating to Public Notices of Filing of Permit Applications). A copy shall also be transmitted to the applicant.

The provisions of this §12.208 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.209 Right To File Written Objections

(a) Any person whose interests are or may be adversely affected or an officer or head of any federal, state, or local government agency or authority shall have the right to file written objections to an initial or revised application for a permit with the Commission, within 30 days after the last publication of the newspaper notice required by §12.207(a) of this title (relating to Public Notices of Filing of Permit Applications).

(b) The Commission shall, immediately upon receipt of any written objections:

(1) transmit a copy of them to the applicant; and

(2) file a copy for public inspection at the public office where the applicant filed a copy of the application for permit under §12.207(d) of this title.

The provisions of this §12.209 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.210 Public Availability of Information in Permit Applications on File with the Commission

(a) Except as provided by subsection (c) of this section, all applications for permits; revisions; renewals; and transfers; assignments or sales of permit rights on file with the Commission shall be available, at reasonable times, for public inspection and copying.

(b) Except as provided by subsection (c)(1) of this section, information pertaining to coal seams, test borings, core sampling, or soil samples in permit applications shall be made available for inspection and copying to any person with an interest which is or may be adversely affected.

(c) Confidential information is limited to:

(1) information that pertains only to the analysis of the chemical and physical properties of the coal to be mined, except information on components of such coal which are potentially toxic in the environment;

(2) information required under §134.041 of the Act that is not on public file and that the applicant has requested in writing to be held confidential; and

(3) information on the nature and location of archeological resources on public land and Indian land shall be kept confidential as required under the Archeological Resources Protection Act of 1979 (Pub. L. 96-95, 93 Stat. 721, 16 USC 470).

(d) The Commission shall maintain information required to be kept confidential under subsection (c) of this section separately from other portions of the permit application. This information shall be clearly identified by applicant and submitted separately from other portions of the application.

(e) The Commission shall provide reasonable notice and an opportunity to be heard for persons seeking or opposing disclosure of information under this section.

The provisions of this §12.210 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.211 Public Hearing on Application

(a) Within 45 days after the last publication of the required newspaper notice, the applicant or any person with an interest which is or may be adversely affected may request a hearing on the application. During this time, the Commission may, on its own motion, call a hearing.

(b) Where a hearing is requested pursuant to subsection (a) of this section, it shall be held, within 30 days after the request is received or the determination made, in the locality of the proposed surface mining and reclamation operations unless otherwise agreed to by all persons expressing an interest.

(c) Any person having a valid legal interest or an interest which is or may be adversely affected by any Commission action taken or proposed on any application or existing permit, may request informal consideration or disposition of the matter in accordance with §§2001.051, 2001.052, 2001.056-2001.060, and 2001.141 of the APA (relating to Opportunity for Hearing and Participation: Notice of Hearing, to Contents of Notice, to Informal Disposition of Contested Case, to Continuances, to Hearing Conducted by State Office of Administrative Hearings, to Transcript, to Record, and to Form of Decision: Findings of Fact and Conclusions of Law).

The provisions of this §12.211 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.212 Notice of Public Hearing on Application

(a) The Commission shall publish notice of the public hearing in a local newspaper of general circulation in the locality of the proposed surface coal mining and reclamation operations at least once a week for three consecutive weeks prior to the scheduled hearing date.

(b) The notice shall contain the following information:

(1) the name and address of the applicant;

(2) the date, time and nature of the hearing;

(3) a statement of the legal authority and jurisdiction under which the hearing is to be held; and

(4) a short and plain statement of the matters asserted.

(c) The Commission shall mail the same notice to the applicant and to all persons who have expressed by written notification to the Commission an interest in the pending permit application.

(d) In case the Commission determines that a material error is made in the notice of a public hearing, or that a material change is made in an application after notice has been issued, the Commission shall cause revised notice to be issued. If the material change or error affecting the content of the notice does not come to the attention of the Commission in sufficient time to make the correction in each of the newspaper publications, the Commission shall reschedule the hearing and/or appropriately readjust the time limitation schedules provided in this section. If the change or error requiring the revised notice is that of an applicant for a permit of an amendment, the expense thereof shall be borne by that person; and, if the change or error is made by the agency, the agency will bear the expense.

The provisions of this §12.212 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.213 Continuance

The hearings examiner conducting the hearing may continue the hearing without the necessity of publishing, serving, mailing or otherwise issuing a new notice, by simply making an announcement at the hearing prior to recessing or reconvention, of the date, time and place for the hearing to reconvene. If a hearing is continued and a time and place for the hearing is not publicly announced at the hearing by the hearings examiner before it is recessed, a notice of any further setting of the hearing shall be mailed to those parties in attendance at the hearing and to all other parties whom the Commission has reason to believe should be notified at least ten days prior to the date of the hearing.

The provisions of this §12.213 adopted to be effective April

7, 1997, 22 TexReg 3093.

§12.214 Transcript

A verbatim transcript and complete record of the proceedings of each public hearing shall be retained by the Commission. On request, the Commission shall transcribe all or part of any such proceedings and shall furnish a verbatim transcript within a reasonable time to the requesting party; provided that the Commission may charge a fee based on the estimated cost of the service of transcribing and printing the requested material.

The provisions of this §12.214 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.215 Review of Permit Applications

(a) The Commission shall:

(1) review the complete application and written comments, written objections submitted, and the record of any public hearing held under §§12.208 - 12.214 of this title (relating to Opportunity for Submission of Written Comments on Permit Applications; Right to File Written Objections; Public Availability of Information in Permit Applications on File with the Commission; Public Hearing on Application; Notice of Public Hearing on Application; Continuance; and Transcript);

(2) determine the adequacy of the fish and wildlife plan submitted pursuant to §12.144 or §12.195 of this title (relating to Fish and Wildlife Plan), in consultation with state and federal fish and wildlife management and conservation agencies having responsibilities for the management and protection of fish and wildlife or their habitats which may be affected or impacted by the proposed surface coal mining and reclamation operations;

(3) based on an administratively complete application, enter into AVS:

(A) the information required to be submitted under §12.116(b) and (c) or §12.156(b) and (c) of this title (relating to Identification of Interests and Compliance Information); and

(B) the information submitted under §12.116(e) or §12.156(e) of this title pertaining to violations which are unabated or uncorrected after the abatement or correction period has expired; and

(4) update the information referred to in paragraph (3) of this subsection in AVS upon verification of any additional information submitted or discovered during the permit application review.

(b) Within the time frame provided by the APA if the public hearing provided for occurs, or within 45 days of the last publication of notice of application if no public hearing is held, the Commission shall notify the applicant and any objectors whether the application has been approved or denied.

(c) All provisions of the APA apply to each permit application and notices, other than specifically provided for above, of hearings and appeals are governed thereby.

(d) If the Commission decides to approve the application, it shall require that the applicant file the performance bond or provide other equivalent guarantee before the permit is issued, in accordance with the provisions of Subchapter J of this chapter (relating to Bond and Insurance Requirements for Surface Coal Mining and Reclamation Operations).

(e) The following criteria shall apply with regard to denial or conditional issuance of an application for permit:

(1) if the Commission determines from either the schedule submitted as part of an application submitted after the adoption of these rules under §12.116(e) or §12.156(e) of this title, or from other available information concerning federal and state failure-to-abate cessation orders, unabated federal and state imminent harm cessation orders, delinquent civil penalties issued pursuant to the Act or Federal Act or federally-approved coal regulatory program, bond forfeitures where violations upon which the forfeitures were based have not been corrected, delinquent abandoned mine reclamation fees, and unabated violations of federal and any state laws, rules, and regulations pertaining to air or water environmental protection incurred in connection with any surface coal mining operation, the Commission shall deny the permit if any surface coal mining and reclamation operation owned or controlled by either the applicant or by any person who owns or controls the applicant is currently in violation of the Act or any other law, rule or regulation referred to in this subsection. In the absence of a failure-to-abate cessation order, the Commission may presume that a notice of violation issued pursuant to §12.678 of this title (relating to Notices of Violation) or under a federal or state program has been or is being corrected to the satisfaction of the agency with jurisdiction over the violation, except where evidence to the contrary is set forth in the permit application, or where the notice of violation is issued for nonpayment of abandoned mine reclamation fees or civil penalties. If a current violation exists, the Commission shall require the applicant or person who owns or controls the applicant, before the issuance of the permit, to either:

(A) submit to the Commission proof that the current violation has been or is in the process of being corrected to the satisfaction of the agency that has jurisdiction over the violation; or

(B) establish for the Commission that the applicant, or any person owned or controlled by either the applicant or any person who owns or controls the applicant, has filed and is presently pursuing, in good faith, a direct administrative or judicial appeal to contest the validity of the current violation. If the initial judicial review affirms the violation, the applicant shall within 30 days of the judicial action submit the proof required under subparagraph (A) of this paragraph; and

(2) any permit that is issued on the basis of proof submitted under paragraph (1)(A) of this subsection that a violation is in the process of being corrected, or pending the outcome of an appeal described in paragraph (1)(B) of this subsection, shall be conditionally issued.

(f) Before any final determination by the Commission that the applicant, anyone who owns or controls the applicant, or the operator specified in the application, controls or has controlled mining operations with a demonstrated pattern of willful violations of the Act or Federal Act and its implementing Federal Regulations and all federal and state programs approved under the Federal Act or federal or state laws as used in 30 CFR 773.15(b) of such nature, duration, and with such resulting irreparable damage to the environment that indicates an intent not to comply with the provisions of the Act or Federal Act and its implementing Federal Regulations and all federal and state programs approved under the Federal Act or federal or state laws as used in 30 CFR 773.15(b), no permit shall be issued and a hearing shall be held. The applicant or operator shall be afforded an opportunity for an adjudicatory hearing on the determination as provided for in the regulatory program.

Such hearing shall be conducted pursuant to §12.222 of this title (relating to Administrative Review). The Commission shall deny an application after a determination has been made that a pattern of willful violations exists.

(g) After an application is approved, but before the permit is issued, the Commission shall review and consider any new compliance information submitted pursuant to §12.116(a)(3) of this title under the criteria of subsection (e)(1) of this section. If the applicant fails or refuses to respond as required by the Commission to provide new compliance information, or the new compliance information shows that the applicant, anyone who owns or controls the applicant, or the operator is in violation, the Commission shall deny the permit.

(h) The Commission shall rely upon the permit history information submitted in the application under §12.116(c) or §12.156(c) of this title, information from AVS, and any other available information to review the permit histories of the applicant and its operator. The Commission shall:

(1) conduct a review of the permit history information before making a permit eligibility determination under subsection (j) of this section;

(2) determine whether the applicant or its operator have previous mining experience; and

(3) conduct an additional review under §12.234(c)(6) of this title (relating to Challenge of Ownership or Control, Information on Ownership and Control, and Violations, and Applicant/Violator System Procedures) if the applicant or operator do not have any previous mining experience to determine if a person with mining experience controls the mining operation.

(i) The Commission, relying upon the violation information supplied by the applicant under §12.116(e) or §12.156(e) of this title, a report from AVS, and any other available information to review histories of compliance with the Act or the applicable State regulatory program, and any other applicable air or water quality laws, for the permittee, operator, and for operations owned or controlled by the permittee or by the operator, shall conduct the review before making a permit eligibility determination required under subsection (j) of this section.

(j) Based on reviews of the applicant's and any operator's organizational structure and ownership or control relationships provided in the application as required under subsections (h) and (i) of this section, the Commission shall determine whether an applicant is eligible for a permit under §134.068 and §134.069 of the Act (relating to Schedule of Notices of Violations, and to Effect of Past or Present Violation).

(1) Except as provided in subsections (k) and (l) of this section, an applicant is not eligible for a permit if the Commission finds that any surface coal mining operation that:

(A) the applicant directly owns or controls has an unabated or uncorrected violation; or

(B) the applicant or the operator indirectly controls has an unabated or uncorrected violation and the control was established or the violation was cited after November 2, 1988.

(2) The Commission shall not issue the permit if the applicant or operator are permanently ineligible to receive a permit under §12.234(c)(3) of this title.

(3) After approval of the permit under §12.216 of this title (relating to Criteria for Permit Approval or Denial), the Commission shall not issue the permit until the information updates and certification requirements of §12.116(a)(3) or §12.156(a)(3) of this title are met. After the applicant completes this requirement, the Commission shall again request a compliance history report from AVS to determine if there are any unabated or uncorrected violations which affect permit eligibility under paragraphs (1) and (2) of this subsection. The Commission shall request this report no more than five business days before permit issuance under §12.218 and §12.219 of this title (relating to Permit Approval or Denial Actions, and Permit Terms).

(4) If the applicant is determined to be ineligible for a permit under this section, the Commission shall send written notification to the applicant of its decision. The notice will contain an explanation as to why the applicant is ineligible and include notice of the rights of appeal under §12.222 and §12.223 of this title (relating to Administrative Review, and Judicial Review).

(k) An applicant is eligible for a permit:

(1) under subsection (j) of this section if an unabated violation:

(A) occurred after October 24, 1992; and

(B) resulted from an unanticipated event or condition at a surface coal mining and reclamation operation on lands that are eligible for remining under a permit that was held by the person applying for the new permit; or

(2) under §12.206 of this title (relating to Mining in Previously Mined Areas), an event or condition is presumed to be unanticipated for the purpose of this section if it:

(A) arose after permit issuance;

(B) was related to prior mining; and

(C) was not identified in the permit application.

(l) For provisionally issued permits:

(1) This subsection applies to an applicant who owns or controls a surface coal mining and reclamation operation with:

(A) a notice of violation for which the abatement period has not yet expired; or

(B) a violation that is unabated or uncorrected beyond the abatement or correction period.

(2) The Commission shall find an applicant eligible for a provisionally issued permit under this section if the applicant demonstrates that one or more of the following circumstances exists with respect to all violations listed in paragraph (1) of this subsection:

(A) for violations meeting the criteria of paragraph (1)(A) of this subsection, the applicant certifies that the violation is being abated to the satisfaction of the regulatory authority with jurisdiction over the violation, and the Commission has no evidence to the contrary;

(B) the applicant, operator, and operations owned or controlled by the applicant or operator, as applicable, are in compliance with the terms of any abatement plan, or a payment schedule for delinquent fees or penalties, approved by the Commission;

(C) the applicant is pursuing a good faith:

(i) challenge to all pertinent ownership or control listings or findings under §12.234(a)(1) - (3) of this title; or

(ii) administrative or judicial appeal of all pertinent ownership or control listings or findings, unless there is an initial judicial decision affirming the listing or finding and that decision remains in force; or

(D) the violation is the subject of a good faith administrative or judicial appeal contesting the validity of the violation, unless there is an initial judicial decision affirming

the violation and that decision remains in force.

(3) A provisionally issued permit will be considered to be improvidently issued, and the Commission will immediately initiate procedures under §12.225(g) of this title (relating to Commission Review of Outstanding Permits) to suspend or rescind that permit, if:

(A) violations included in paragraph (2)(A) of this subsection are not abated within the specified abatement period;

(B) the permittee, operator, or operations that the permittee or operator own or control do not comply with the terms of an abatement plan or payment schedule mentioned in paragraph (2)(B) of this subsection;

(C) in the absence of a request for judicial review, the disposition of a challenge and any subsequent administrative review referenced in paragraph (2)(C) or (D) of this subsection affirms the validity of the violation or the ownership or control listing or finding; or

(D) the initial judicial review decision referenced in paragraph (2)(C)(ii) or (D) of this subsection affirms the validity of the violation or the ownership or control listing or finding.

The provisions of this §12.215 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640; amended to be effective February 24, 2014, 39 TexReg 1121.

§12.216 Criteria for Permit Approval or Denial

No permit or revision application shall be approved, unless the application affirmatively demonstrates and the Commission finds, in writing, on the basis of information set forth in the application or from information otherwise available, which is documented in the approval and made available to the applicant, that:

(1) the permit application is accurate and complete and that all requirements of the Act and this chapter (relating to Coal Mining Regulations) have been complied with;

(2) the applicant has demonstrated that surface coal mining and reclamation operations, as required by the Act and this chapter (relating to Coal Mining Regulations), can be feasibly accomplished under the mining and reclamation operations plan contained in the application;

(3) the assessment of the probable cumulative impacts of all anticipated coal mining in the cumulative impact area on the hydrologic balance has been made by the Commission, and the operations proposed under the application have been designed to prevent damage to the hydrologic balance outside the proposed permit area;

(4) the proposed permit area is:

(A) not included within an area designated unsuitable for surface coal mining operations under §§12.74 - 12.77 of this title (relating to Criteria for Designating Areas as Unsuitable for Surface Coal Mining Operations) and §§12.78 - 12.85 of this title (relating to Process for Designating Areas as Unsuitable for Surface Coal Mining Operations) or within an area subject to the prohibitions of §12.71(a) of this title (relating to Areas Where Surface Coal Mining Operations are Prohibited or Limited); or

(B) not within an area under study for designation as unsuitable for surface coal mining operations or in an administrative proceeding begun under §§12.78 - 12.85 of this title (relating to Process for Designating Areas as Unsuitable for Surface Coal Mining Operations), unless the applicant demonstrates that, before January 4, 1977, he or she made substantial legal and financial commitments in relation to the operation for which he or she is applying for a permit; or

(C) not on any lands subject to the prohibitions or limitations of §12.71(a)(1), (a)(6) or (a)(7) of this title; or

(D) not within 100 feet of the outside right-of-way line of any public road, except as provided for in §12.72(a) of this title (relating to Procedures for Compatibility Findings, Public Road Closures and Relocations, Buffer Zones, and Valid Existing Rights Determinations); or

(E) not within 300 feet from any occupied dwelling, except as provided for in §12.71(a)(5) of this title;

(5) the proposed operations will not adversely affect any properties listed on and eligible for listing on the National Register of Historic Places, except as provided for in §12.71(a)(3) of this title. This finding may be supported in part by inclusion of appropriate permit conditions, revisions in the operation plan, or a documented decision by the Commission that no additional protection measures are required under the National Historic Preservation Act;

(6) for operations involving the surface mining of coal where the private mineral estate to be mined has been severed from the private surface estate, the applicant has submitted to the Commission the documentation required under §§12.117(b) or 12.157(b) of this title (relating to Right of Entry and Operation Information);

(7) the applicant has either:

(A) submitted the proof required by §12.215(e)(1) of this title (relating to Review of Permit Applications); or

(B) made the demonstration required by §12.215(e)(2) of this title (relating to Review of Permit Applications);

(8) the applicant has submitted proof that all reclamation fees required by Subchapter R of this chapter (relating to Texas Abandoned Mine Reclamation Program) have been paid;

(9) surface coal mining and reclamation operations to be performed under the permit will not be inconsistent with other such operations anticipated to be performed in areas adjacent to the proposed permit area;

(10) the applicant will submit the performance bond or other equivalent guarantee required under Subchapter J of this chapter (relating to Bond and Insurance Requirements for Surface Coal Mining and Reclamation Operations), prior to the issuance of the permit;

(11) the applicant has, with respect to both prime farmland and alluvial valley floors obtained either a negative determination or satisfied the requirements of §12.201 and §12.202 of this title (relating to Prime Farmland, and to Surface Coal Mining and Reclamation Operations on Areas or Adjacent to Areas Including Alluvial Valley Floors in the Arid or Semiarid Areas West of the 100th Meridian);

(12) the proposed postmining land use of the permit area has been approved by the Commission in accordance with the requirements of §12.399 or §12.568 of this title (relating to Postmining Land Use);

(13) the Commission has made all specific approvals required under Subchapter K of this chapter (relating to Permanent Program Performance Standards);

(14) the Commission has found that the activities would not affect the continued existence of endangered or threatened species or result in the destruction or adverse modification of their critical habitats as determined under the Endangered Species Act of 1973 (16 USC 1531 et seq.); and

(15) the applicant has, where applicable, satisfied the requirements for approval of a long-term, intensive agricultural postmining land use, in accordance with the requirements of §12.390 or §12.555 of this title (relating to Revegetation: General Requirements).

(16) For permits to be issued under §12.206 of this title (relating to Mining in Previously Mined Areas), the permit application must:

(A) identify the lands eligible for remining;

(B) identify the potential environmental and safety problems related to prior mining activity which could reasonably be anticipated to occur at the site; and

(C) include the mitigation plans to sufficiently address these potential environmental and safety problems so that reclamation as required by the applicable requirements of the regulatory program can be accomplished.

The provisions of this §12.216 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640; amended to be effective June 9, 2003, 28 TexReg 4412; amended to be effective February 24, 2014, 39 TexReg 1121.

§12.217 Criteria for Permit Approval or Denial: Existing Structures

(a) No application for a permit or revision which proposes to use an existing structure in connection with or to facilitate the proposed surface coal mining and reclamation operation shall be approved, unless the applicant demonstrates and the Commission finds, in writing, on the basis of information set forth in the complete application that:

(1) if the applicant proposes to use an existing structure in accordance with exemption provided in §12.9(c)(1)(A) of this title (relating to Applicability):

(A) the structure meets the performance standards of the Act and Subchapter K of this chapter (relating to Permanent Program Performance Standards); and

(B) no significant harm to the environment or public health or safety will result from use of the structure;

(2) if the applicant proposes to use an existing structure in accordance with the exemption provided in §12.9(c)(1)(B) of this title (relating to Applicability):

(A) the structure meets the performance standards of the Act and the initial regulatory program;

(B) no significant harm to the environment or public health or safety will result from use of the structure; and

(C) the performance standards of the initial regulatory program are at least as stringent as the performance standards of Subchapter K of this chapter (relating to Permanent Program Performance Standards); and

(3) if the Commission finds that the structure meets the criteria of §12.9(c)(1)(B) of this title (relating to Applicability), the Commission shall require the applicant to submit a compliance plan for modification or reconstruction of the structure and shall find prior to the issuance of the permit that:

(A) the modification or reconstruction of the structure will bring the structure into compliance with the design and performance standards of Subchapter K of this chapter (relating to Permanent Program Performance Standards) as soon as possible, but not later than six months after issuance of the permit;

(B) the risk of harm to the environment or to public health or safety is not significant during the period of modification or reconstruction; and

(C) the applicant will monitor the structure to determine compliance with the performance standards of Subchapter K of this chapter (relating to Permanent Program Performance Standards).

(b) Should the Commission find that the existing structure cannot be reconstructed without causing significant harm to the environment or public health or safety, the applicant will be required to abandon the existing structure. The structure shall not be used for or to facilitate surface coal mining operations after the effective date of issuance of the permanent regulatory program permit. Abandonment of the structure shall proceed on a schedule approved by the Commission, in compliance with §§12.398 or 12.567 of this title (relating to Cessation of Operations: Permanent).

The provisions of this §12.217 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.218 Permit Approval or Denial Actions

(a) The Commission shall approve, require modification of, or deny all applications for permits under regulatory programs on the basis of:

(1) complete applications for permits and revisions or renewals thereof;

(2) public participation as provided for in this subchapter (relating to Surface Coal Mining and Reclamation Operations Permits and Coal Exploration Procedures Systems);

(3) Compliance with any applicable provisions of §§12.200-12.205 of this title (relating to Requirements for Permits for Special Categories of Mining); and

(4) Processing and review of applications as required by §§12.207-12.221 of this title (relating to Review, Public Participation, and Approval of Permit Applications and Permit Terms and Conditions).

(b) The Commission shall take action as required under subsection (a) of this section, within the following times:

(1) Initiation of regulatory program. Except as provided for in §12.104 of this title (relating to Continued Operation Under Interim Permits), a complete application submitted to the Commission within the time required by §12.106(a)(1) of this title (relating to Permit Application Filing Deadlines) shall be processed by the Commission so that an application is approved or denied within eight months after the date of approval of the state program, unless Texas or the Commission is specifically enjoined from submitting a state program, or the Commission is specifically enjoined from implementing a regulatory program, but in no case later than February 3, 1981; and

(2) Subsequent operation of regulatory program. Except as provided for in this section, all complete applications shall be approved according to the time frames in §12.215 of this title (relating to Review of Permit Applications).

(c) If a public hearing is held under §12.211 of this title (relating to Public Hearing on Application), the Commission shall give its written findings to the permit applicant and to each person who is a party to the hearing, approving, modifying or denying the application in whole or in part, and stating the specific reasons therefor in the decision.

(d) If no such public hearing has been held, the Commission shall give its written findings to the permit applicant, approving, modifying or denying the application in whole or in part, and stating the specific reasons in the decision.

(e) Simultaneously, the Commission shall:

(1) give a copy of its decision to:

(A) each person and government official who filed a written objection or comment with respect to the application; and

(B) the Regional Director together with a copy of any permit issued; and

(2) publish a summary of its decision in a newspaper or similar periodical of general circulation in the general area of the proposed operation.

(f) Within 10 days after the granting of a permit, including the filing of the performance bond or other equivalent guarantee which complies with Subchapter J of this chapter (relating to Bond and Insurance Requirements for Surface Coal Mining and Reclamation Operations), the Commission shall notify the local government officials in the local political subdivision of which the area of land to be affected is located, that a permit has been issued and shall describe the location of the lands within the permit area.

The provisions of this §12.218 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective December 29, 1998, 23 TexReg 13041.

§12.219 Permit Terms

(a) Each permit shall be issued for a fixed term not to exceed 5 years. A longer fixed permit term may be granted, if:

(1) the application is full and complete for the specified longer term; and

(2) the applicant shows that a specified longer term is reasonably needed to allow the applicant to obtain necessary financing of equipment and the opening of the operation, and this need is confirmed, in writing, by the applicant's proposed source for the financing. An applicant who obtains the necessary financing through internally generated funds must confirm the showing with a written statement demonstrating the internal funding.

(b) Automatic termination shall occur as follows:

(1) a permit shall terminate, if the permittee has not begun the surface coal mining and reclamation operation covered by the permit within 3 years of the issuance of the permit;

(2) the Commission may grant reasonable extensions of time for commencement of these operations, upon receipt of a written statement showing that such extensions of time are necessary, if:

(A) litigation precludes the commencement or threatens substantial economic loss to the permittee; or

(B) there are conditions beyond the control and without the fault or negligence of the permittee;

(3) with respect to coal to be mined for use in a synthetic fuel facility or specified major electric generating facility, the permittee shall be deemed to have commenced surface mining operations at the time that the construction of the synthetic fuel or generating facility is initiated; and

(4) extensions of time granted by the Commission under this subsection shall be specifically set forth in the permit and notice of the extension shall be made to the public.

(c) Permits may be suspended, revoked, or modified by the Commission, in accordance with §§12.200 and 12.225 of this subchapter (relating to Experimental Practices Mining, and to Commission Review of Outstanding Permits), and Subchapter L of this chapter (relating to Permanent Program Inspection and Enforcement Procedures).

The provisions of this §12.219 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.220 Conditions of Permits: General and Right of Entry

(a) Except to the extent that the Commission otherwise directs in the permit that specific actions be taken, the permittee shall conduct all surface coal mining and reclamation operations as described in the complete application.

(b) The permittee shall allow the authorized representatives of the Secretary, including, but not limited to, inspectors and fee compliance officers, and the representatives of the Commission, without advance notice or a search warrant, upon presentation of appropriate credentials, and without delay, to:

(1) have the rights of entry provided for in §12.671 of this title (relating to Right of Entry); and

(2) be accompanied by private persons for the purpose of conducting an inspection in accordance with §§12.670-12.675 of this title (relating to Commission Inspection and Enforcement), when the inspection is in response to an alleged violation reported to the Commission by the private person.

(c) The permittee shall conduct surface coal mining and reclamation operations only on those lands specifically designated on the maps submitted under §§12.124-12.138 and 12.139-12.154 of this title (relating to Surface Mining Permit Applications--Minimum Requirements for Information on Environmental Resources, and to Surface Mining Permit Applications--Minimum Requirements for Reclamation and Operation Plan), or to §§12.170-12.184 and 12.185-12.199 of this title (relating to Underground Mining Permit Applications--Minimum Requirements for Information on Environmental Resources, and to Underground Mining Permit Applications--Minimum Requirements for Reclamation and Operation Plan), and approved for the term of the permit, and which are subject to the performance bond or other equivalent guarantee in effect pursuant to Subchapter J of this chapter (relating to Bond and Insurance Requirements for Surface Coal Mining and Reclamation Operations).

(d) The operator shall pay all reclamation fees required by Subchapter R of this chapter (relating to Texas Abandoned Mine Land Reclamation Program) and by 30 CFR Subchapter R for coal produced under the permit for sale, transfer or use.

The provisions of this §12.220 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.221 Conditions of Permits: Environment, Public Health, and Safety

(a) The permittee shall take all possible steps to minimize any adverse impact to the environment or public health and safety resulting from noncompliance with any term or condition of the permit; including, but not limited to:

(1) any accelerated or additional monitoring necessary to determine the nature and extent of noncompliance and the results of the noncompliance;

(2) immediate implementation of measures necessary to comply; and

(3) warning, as soon as possible after learning of such noncompliance, any person whose health and safety is in imminent danger due to the noncompliance.

(b) The permittee shall dispose of solids, sludge, filter backwash, or pollutants removed in the course of treatment or control of waters or emissions to the air in the manner required by Subchapter K of this chapter (relating to Permanent Program Performance Standards), and which prevents violation of any other applicable state or federal law.

(c) The permittee shall conduct its operations:

(1) in accordance with any measures specified in the permit as necessary to prevent significant, imminent environmental harm to the health or safety of the public; and

(2) utilizing any methods specified in the permit by the Commission in approving alternative methods of compliance with the performance standards of the Act and these Regulations, in accordance with the provisions of the Act, of §12.216(12) of this title (relating to Criteria for Permit Approval or Denial) and Subchapter K of this chapter.

(d) Within 30 days after a cessation order is issued under §§12.677 - 12.684 of this title (relating to Enforcement) for operations conducted under the permit, except where a stay of the cessation order is granted and remains in effect the permittee shall either submit to the Commission the following information, current to the date the cessation order was issued, or notify the Commission in writing that there has been no change since the immediately preceding submittal of such information:

(1) any new information needed to correct or update the information previously submitted to the Commission by the permittee under §12.116(a) or §12.156(a) of this title (relating to Identification of Interests and Compliance Information); or

(2) If not previously submitted, the information required from a permit applicant by §12.116(a) or §12.156(a) of this title.

The provisions of this §12.221 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640; amended to be effective February 24, 2014, 39 TexReg 1121.

DIVISION 12 ADMINISTRATIVE AND JUDICIAL REVIEW OF DECISIONS BY THE COMMISSION ON PERMIT APPLICATIONS

§12.222 Administrative Review

Within 30 days after the applicant or permittee is notified of the final decision of the Commission concerning the application for a permit, revision or renewal thereof, permit, application for transfer, sale, or assignment of rights, or concerning an application for coal exploration under §12.113 of this title (relating to Applications: Notice and Hearing for Exploration of More Than 250 Tons), the applicant, permittee, or any person with an interest which is or may be adversely affected may request a hearing on the reasons for the final decision in accordance with this section.

(1) The Commission shall commence the hearing within 30 days of such request. This hearing shall be of record, adjudicatory in nature, and the examiner from any previous hearing on this matter shall not preside at the hearing, or participate in the decision following the hearing, or in any administrative appeal therefrom.

(2) The Commission may, under such conditions as it may prescribe, grant such temporary relief as it deems appropriate, pending final determination of the proceeding, if:

(A) all parties to the proceeding have been notified and given an opportunity to be heard on a request for temporary relief;

(B) the person requesting that relief shows that there is a substantial likelihood that he or she will prevail on the merits of the final determination of the proceeding;

(C) the relief is not to affect adversely the public health or safety, or cause significant, imminent environmental harm to land, air, or water resources; and

(D) the relief sought is not the issuance of a permit where a permit has been denied, in whole or in part, by the Commission.

(3) With regard to public hearings, the following shall apply:

(A) for the purpose of such hearing, the hearing examiner may administer oaths and affirmations, subpoena witnesses, written, or printed materials, compel attendance of witnesses or production of those materials, compel discovery, and take evidence, including, but not limited to, site inspections of the land to be affected and other surface coal mining and reclamation operations carried on by the applicant in the general vicinity of the proposed operations;

(B) a verbatim record of each public hearing required by this section shall be made, and a transcript made available on the motion of any party or by order of the hearing examiner; and

(C) ex parte contacts between representatives of the parties before the hearing examiner and the hearing examiner shall be prohibited.

(4) Within 30 days after the close of the record, the hearing examiner shall issue and furnish the applicant, and each person who participated in the hearing, with the written findings of fact, conclusions of law, and order of the Commission with respect to the appeal.

(5) The burden of proof at such hearings shall be on the party seeking to reverse the decision of the Commission.

The provisions of this §12.222 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.223 Judicial Review

(a) Right to appeal. Any applicant or any person with an interest which is or may be adversely affected and who has participated in the administrative proceedings as an objector shall have the right to appeal as provided in subsection (b) of this section, if:

(1) the applicant or person is aggrieved by the decision of the Commission in an administrative review proceeding conducted pursuant to §12.222 of this title (relating to Administrative Review); or

(2) the Commission fails to act within time limits specified in the Act or this subchapter (relating to Surface Coal Mining and Reclamation Operations Permits and Coal Exploration Procedures Systems).

(b) State programs.

(1) Action of the Commission shall be subject to judicial review as provided for in the APA, but the availability of such review shall not be construed to limit the operation of the rights established in §§134.182-134.187 of the Act.

(2) Trial in the District Court shall be on the Administrative Record

The provisions of this §12.223 adopted to be effective April 7, 1997, 22 TexReg 3093.

DIVISION 13 PERMIT REVIEWS, REVISIONS, AND

RENEWALS, AND TRANSFERS, SALE, AND ASSIGNMENT OF RIGHTS GRANTED UNDER PERMITS

§12.225 Commission Review of Outstanding Permits

(a) Requirement for and timing of review.

(1) The Commission shall review each permit issued and outstanding under an approved regulatory program during the term of the permit. This review shall occur not later than the middle of the permit term and as required by §12.200 of this title (relating to Experimental Practices Mining).

(2) For permits of longer than five-year terms, a review of the permit shall be no less frequent than the permit midterm or every five years, whichever is more frequent.

(3) No less frequently than every 2 1/2 years, the Commission shall conduct a review of any permit which, in accordance with §12.100(a) of this title (relating to Responsibilities), is not required to be renewed but which nonetheless authorizes the permittee to perform reclamation activities within the permit area.

(b) Action. After this review, the Commission may, by order, require reasonable revision or modification of the permit provisions to ensure compliance with the Act and this chapter (relating to Coal Mining Regulations).

(c) Notice to permittee. Copies of the decision of the Commission shall be sent to the permittee.

(d) Written findings and appeal. Any order of the Commission requiring revision or modification of permits, including suspension or rescission, shall be based upon written findings and shall be subject to the provisions for administrative and judicial review of §12.222 and §12.223 of this title (relating to Administrative Review, and Judicial Review, respectively), and for review under §§134.161 - 134.173 of the Act, and §§2001.141 - 2001.147 of the APA (relating to Contested Cases: Final Decisions and Orders; Motions for Rehearing).

(e) Improvident issuance. The Commission, when it has reason to believe, based on evidence sufficient to establish a prima facie case, that a permit was improvidently issued, shall review a permit under the authority of §134.082 of the Act and shall, after notice and opportunity for a hearing, make a preliminary finding and serve written notice of that finding to the permittee that the permit was improvidently issued if:

(1) under the violations review criteria of the regulatory program at the time the permit was issued:

(A) the permit should not have been issued because of an unabated violation or a delinquent penalty or fee; or

(B) the permit was issued on the information that a notice of violation was in the process of being corrected to the satisfaction of the agency with jurisdiction over the violation, but a cessation order subsequently was issued; and

(2) the violation, penalty or fee referred to in paragraph (1) of this subsection:

(A) remains unabated or delinquent; and

(B) is not the subject of a good faith appeal, or of an abatement plan or payment schedule with which the permittee or other person responsible is complying to the satisfaction of the responsible agency; and

(3) where the permittee was linked to the violation, penalty or fee through ownership or control, under the violations review criteria of the regulatory program at the time the permit was issued an ownership or control link between the permittee and the person responsible for the violation, penalty or fee still exists, or where the link was severed the permittee continues to be responsible for the violation, penalty or fee.

(f) Remedial measures. If the Commission, under subsection (e) of this section, finds that, because of an unabated violation or a delinquent penalty or fee a permit was improvidently issued, it shall use one or more of the following remedial measures:

(1) implement, with the cooperation of the permittee or other person responsible, and of the responsible agency, a plan for abatement of the violation or a schedule for payment of the penalty or fee;

(2) require revision of the permit to impose a condition that in a reasonable period of time the permittee abate the violation or pay the penalty or fee;

(3) suspend the permit until the violation is abated or the penalty fee is paid; or

(4) rescind the permit under subsection (g) of this section.

(g) Suspension and rescission. If the Commission elects to rescind an improvidently issued permit, it shall serve on the permittee a written notice of the proposed suspension and rescission which includes the reasons for the findings of the Commission under subsection (e) of this section and states that:

(1) after a specified period of time not to exceed 60 days, the permit will automatically become suspended, and not to exceed 60 days thereafter rescinded, unless within those periods the permittee submits proof, and the Commission finds that:

(A) the finding of the Commission under subsection (e) of this section was erroneous;

(B) the permittee or operator has abated the violation on which the finding was based, or paid the penalty or fee, to the satisfaction of the responsible agency;

(C) the violation, penalty, or fee is the subject of a good-faith appeal, or of an abatement plan or payment schedule with which the permittee or operator is complying to the satisfaction of the responsible agency;

(D) since the finding was made, the permittee has severed any ownership or control link with the person responsible for, and does not continue to be responsible for, the violation, penalty, or fee.

(2) upon permit suspension or rescission under this section, the Commission shall issue a written notice to the permittee requiring that the permittee or operator cease all surface coal mining and reclamation operations under the permit, except for violation abatement and for reclamation and other environmental protection measures as required by the Commission. Notice of permit suspension or rescission will also be posted at the Commission's office closest to the permit area.

The provisions of this §12.225 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640; amended to be effective October 22, 2012, 37 TexReg 8293; amended to be effective February 24, 2014, 39 TexReg 1121.

§12.226 Permit Revisions

(a) A revision to a permit shall be obtained:

(1) for changes in the surface coal mining or reclamation operations described in the original application and approved under the original permit, when such changes

constitute a significant departure from the method of conduct of mining or reclamation operations contemplated by the original permit. Significant departures would include any change in permit area, mining method or reclamation procedure, which would, in the opinion of the Commission, significantly change the effect the mining operation would have on either those persons impacted by the permitted operation or on the environment;

(2) when required by an order issued under §12.225 of this title (relating to Commission Review of Outstanding Permits);

(3) in order to continue operation after the cancellation or material reduction of the liability insurance policy, capability of self-insurance, performance bond, or other equivalent guarantee upon which the original permit was issued; or

(4) as otherwise required under the regulatory program.

(b) The application for revision shall be filed in accordance with the following:

(1) the permittee shall submit the application to the Commission within the time provided for in §12.106(b)(3) of this title (relating to Permit Application Filing Deadlines);

(2) any application for a revision which proposes significant alterations in the operations described in the materials submitted in the application for the original permit under §§12.116 - 12.123, 12.124 - 12.138, and 12.139 - 12.154 of this title (relating to Surface Mining Permit Applications--Minimum Requirements for Legal, Financial, Compliance, and Related Information, to Surface Mining Permit Applications--Minimum Requirements for Information on Environmental Resources, and to Surface Mining Permit Applications--Minimum Requirements for Reclamation and Operation Plan), or §§12.156 - 12.163, 12.170 - 12.184, and 12.185 - 12.199 of this title (relating to Underground Mining Permit Applications--Minimum Requirements for Legal, Financial, Compliance, and Related Information, to Underground Mining Permit Applications Minimum Requirements for Information on Environmental Resources, and to Underground Mining Permit Applications--Minimum Requirements for Reclamation and Operation Plan) or in the conditions of the original permit, shall, at a minimum, be subject to the requirements of §§12.207 - 12.221 of this title (relating to Review, Public Participation, and Approval of Permit Applications and Permit Terms and Conditions), and §12.222 and §12.223 of this title (relating to Administrative and Judicial Review of Decisions by Commission on Permit Applications).

(A) Application requirements. Permit revision requests shall be submitted on the Permit Application Form (SMRD-1C) with only the applicable portions showing changes or additions being completed.

(B) Notice and hearing. Notice as for a new permit application is required whenever new landowners will be affected. If objections to the revision are received and a hearing is requested, the Commission shall schedule and hold a public hearing as required for an original application.

(c) The Commission shall approve or disapprove the complete application for revision within 90 days from receipt in accordance with the requirements of §§12.207 - 12.221 of this title (relating to Review, Public Participation, and Approval of Permit Applications and Permit Terms and Conditions) and the Act.

(d) Proposed revisions must be approved by the Commission prior to commencement of the proposed change.

(e) Any extensions to the area covered by a permit, except for incidental boundary revisions, shall be made by application for a new permit and shall not be approved under §§12.225, this section, and §§12.227 - 12.233 of this title (relating to Permit Reviews, Revisions, and Renewals, and Transfer, Sale, and Assignment of Rights Granted Under Permits).

The provisions of this §12.226 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective December 29, 1998, 23 TexReg 13041; amended to be effective February 24, 2014, 39 TexReg 1121.

§12.227 Permit Renewals: General Requirements

(a) Any valid, existing permit issued pursuant to a regulatory program shall carry with it the right of successive renewal upon expiration of the term of the permit, in accordance with §§12.228-12.230 of this title (relating to Permit Renewals: Completed Applications, to Permit Renewals: Terms, and to Permit Renewals: Approval or Denial). Successive renewal shall be available only for those areas which were specifically approved by the Commission on the application for the existing permit as within the boundaries of the permit.

(b) Permit renewal shall not be available for conducting surface coal mining and reclamation operations on lands beyond the boundaries of the permit area approved under the existing permit. Approval of permits to conduct operations on these lands, including, but not limited to, any remainder of the general area described in the application for the existing permit, shall be obtained in accordance with §12.228(b)(2) of this title (relating to Permit Renewals: Completed Applications).

The provisions of this §12.227 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.228 Permit Renewals: Completed Applications

(a) Contents. Complete applications for renewals of a permit shall be made within the time prescribed by §12.106(b)(2) of this title (relating to Permit Application Filing Deadlines). Renewal applications shall be in a form and with contents required by the Commission under the regulatory program and in accordance with subsection (b)(2) of this section, including, at a minimum, the following:

(1) a statement of the name and address of the permittee, the term of the renewal requested, the permit number, and a description of any changes to the matters set forth in the original application for a permit or prior permit renewal;

(2) a copy of the newspaper notice and proof of publication of same under §12.207(a) of this title (relating to Public Notices of Filing of Permit Applications); and

(3) Evidence that liability insurance policy or adequate self-insurance under §12.311 of this title (relating to Terms and Conditions for Liability Insurance) will be provided by the applicant for the proposed period of renewal.

(b) Processing and review.

(1) Complete applications for renewal shall be subject to the requirements of public notification and participation contained in §§12.207 - 12.209 of this title (relating to Public Notices of Filing of Permit Applications, to Opportunity for Submission of Written Comments on Permit Applications, and to Right to File Written Objections).

(2) If a complete application for renewal of a permit includes a proposal to extend the mining and reclamation operation beyond the boundaries authorized in the existing permit, the portion of the complete application for renewal of a valid permit which addresses any new land areas shall be subject to the full standards applicable to new permit applications under the Act, §§12.103 - 12.108 of this title (relating to General Requirements for Permits and Permit Applications), §§12.116 - 12.123, 12.124 - 12.138, and 12.139 - 12.154 of this title (relating to Surface Mining Permit Applications--Minimum Requirements for Legal, Financial, Compliance, and Related Information, to Surface Mining Permit Applications--Minimum Requirements for Information on Environmental Resources, and to Surface Mining Permit Applications--Minimum Requirements for Reclamation and Operation Plan), §§12.156 - 12.163, 12.170 - 12.184, and 12.185 - 12.199 of this title (relating to Underground Mining Permit Applications--Minimum Requirements for Legal, Financial, Compliance, and Related Information, to Underground Mining Permit Applications--Minimum Requirements for Information on Environmental Resources, and to Underground Mining Permit Applications--Minimum Requirements for Reclamation and Operation Plan), §§12.200 - 12.205 of this title (relating to Requirements for Permits for Special Categories of Mining), §§12.207 - 12.221 of this title (relating to Review, Public Participation and Approval of Permit Applications and Permit Terms and Conditions), §12.222 and §12.223 of this title (relating to Administrative and Judicial Review of Decisions by Commission on Permit Applications), §§12.225 - 12.227, this section, and §§12.229 - 12.233 of this title (relating to Permit Reviews, Revisions, and Renewals, and Transfer, Sale, and Assignment of Rights Granted Under Permits), and Subchapter J of this chapter (relating to Bond and Insurance Requirements for Surface Coal Mining and Reclamation Operations).

(3) If the surface coal mining reclamation operations authorized under the original permit were not subject to the standards contained in §134.066(a)(5) of the Act and §12.202 of this title (relating to Surface Coal Mining and Reclamation Operations On Areas or Adjacent to Areas Including Alluvial Valley Floors In The Arid or Semiarid Areas West of The 100th Meridian), because the permittee complied with the exceptions in §134.066(c) of the Act, the portion of the application for renewal of the permit which addresses any new land areas previously identified in the reclamation plan submitted pursuant to §§12.139 - 12.154 of this title (relating to Surface Mining Permit Applications--Minimum Requirements for Reclamation and Operation Plan), or §§12.185 - 12.199 of this title (relating to Underground Mining Permit Applications--Minimum Requirements for Reclamation and Operation Plan) for the original permit shall not be subject to the standards contained in §134.066(a)(5) of the Act and §12.202 of this title (relating to Surface Coal Mining and Reclamation Operations On Areas or Adjacent to Areas Including Alluvial Valley Floors In The Arid or Semiarid Areas West of The 100th Meridian).

(4) Before finally acting to grant the permit renewal, the Commission shall require any additional performance bond needed by the permittee to comply with the requirements of §12.230(a)(4) of this title (relating to Permit Renewals: Approval or Denial) to be filed with the Commission.

The provisions of this §12.228 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective December 29, 1998, 23 TexReg 13041; amended to be effective February 24, 2014, 39 TexReg 1121.

§12.229 Permit Renewals: Terms

Any permit renewal shall be for a term not to exceed the period of the original permit established under §12.219 of this title (relating to Permit Terms).

The provisions of this §12.229 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.230 Permit Renewals: Approval or Denial

(a) The Commission shall, upon the basis of a complete application for renewal and completion of all procedures required under §§12.228 and 12.229 of this title (relating to Permit Renewals: Completed Applications, and to Permit Renewals: Terms), issue a renewal of a permit, unless it is established and written findings by the Commission are made that:

(1) the terms and conditions of the existing permit are not being satisfactorily met;

(2) the present surface coal mining and reclamation operations are not in compliance with the environmental protection standards under the Act and Subchapter K of this chapter (relating to Permanent Program Performance Standards);

(3) the requested renewal substantially jeopardizes the operator's continuing responsibility to comply with the Act and this chapter (relating to Coal Mining Regulations) on existing permit areas;

(4) the operator has not provided evidence that any performance bond required to be in effect for the operations will continue in full force and effect for the proposed period of renewal, as well as any additional bond the Commission might require pursuant to Subchapter J of this chapter (relating to Bond and Insurance Requirements for Surface Coal Mining and Reclamation Operations);

(5) the operator has not provided evidence of having liability insurance or self-insurance as required by §12.311 of this title (relating to Terms and Conditions for Liability Insurance); and

(6) any additional revised or updated information required by the Commission has not been provided by the applicant.

(b) In determining whether to approve or deny a renewal, the burden shall be on the opponents of renewal.

(c) The Commission shall send copies of its decision to the applicant, any persons who filed objections or comments to the renewal, and to any persons who were parties to the public hearing held on the permit renewal.

(d) Any person having an interest which is or may be adversely affected by the decision of the Commission shall have the right to administrative and judicial review set forth in §§12.222 and 12.223 of this title (relating to Administrative and Judicial Review of Decisions by Commission on Permit Applications).

The provisions of this §12.230 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.231 Transfer, Assignment, or Sale of Permit Rights: General Requirements

No transfer, assignment, or sale of the rights granted under any permit issued pursuant to the regulatory program shall be made without the prior written approval of the Commission in accordance with this section and §§12.232

and 12.233 of this title (relating to Transfer, Assignment or Sale of Permit Rights: Obtaining Approval, and to Requirements for New Permits for Persons Succeeding to Rights Granted Under a Permit).
The provisions of this §12.231 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.232 Transfer, Assignment or Sale of Permit Rights: Obtaining Approval

(a) Any person seeking to succeed by transfer, assignment, or sale to the rights granted by a permit issued under a regulatory program shall, prior to the date of such transfer, assignment or sale:

(1) obtain the performance bond coverage of the original permittee by:

(A) obtaining transfer of the original bond;

(B) obtaining a written agreement with the original permittee and all subsequent successors in interest (if any) that the bond posted by the original permittee and all successors shall continue in force on all areas affected by the original permittee and all successors, and supplementing such previous bonding with such additional bond as may be required by the Commission. If such an agreement is reached, the Commission may authorize for each previous successor and the original permittee the release of any remaining amount of bond in excess of that required by the agreement;

(C) providing sufficient bond to cover the original permit in its entirety from inception to completion of reclamation operations; or

(D) such other methods as would provide that reclamation of all areas affected by the original permittee is assured under bonding coverage at least equal to that of the original permittee;

(2) provide the Commission with an application for approval of such proposed transfer, assignment, or sale, including:

(A) the name and address of the existing permittee;

(B) the name and address of the person proposing to succeed by such transfer, assignment, or sale and the name and address of that person's resident agent;

(C) for surface mining activities, the same information as is required by §§12.116, 12.117, 12.118(c), 12.120 and 12.121 of this title (relating to Identification of Interests and Compliance Information; Right of Entry and Operation Information; Relationship to Areas Designated Unsuitable for Mining; Personal Injury and Property Damage Insurance Information; and Identification of Other Licenses and Permits) for applications for new permits for those activities; or

(D) for underground mining activities, the same information as is required by §§12.156 12.157, 12.158(c), 12.160 and 12.161 of this title (relating to Identification of Interests and Compliance Information; Right of Entry and Operation Information; Relationship to Areas Designated Unsuitable for Mining; Personal Injury and Property Damage Insurance Information; and Identification of Other Licenses and Permits) for applications for new permits for those activities; and

(3) Obtain the written approval of the Commission for transfer, assignment, or sale of rights, according to subsection (c) of this section.

(b) Public notice and comment shall apply as follows:

(1) the person applying for approval of such transfer, assignment or sale of rights granted by a permit shall advertise the filing of the application in a newspaper of general circulation in the locality of the operations involved, indicating the name and address of the applicant, the original permittee, the number and particular geographic location of the permit, and the address to which written comments may be sent under this subsection; and

(2) any person whose interests are or may be adversely affected, including, but not limited to, the head of any local, state or federal government agency may submit written comments on the application for approval to the Commission, within the time required by the regulations.

(c) The Commission may, upon the basis of the applicant's compliance with the requirements of subsections (a) and (b) of this section, grant written approval for the transfer, sale, or assignment of rights under a permit, if it first finds, in writing, that:

(1) the applicant is eligible to receive a permit in accordance with this chapter;

(2) the applicant will conduct the operations covered by the permit in accordance with the criteria specified in §§12.200 - 12.205, 12.216 and 12.217 of this title (relating to Requirements for Permits for Special Categories of Mining; Criteria for Permit Approval or Denial; and Criteria for Permit Approval or Denial: Existing Structures) and the requirements of the Act and this chapter;

(3) the applicant has, in accordance with §12.232(a)(1) of this title (relating to Transfer, Assignment, or Sale of Permit Rights: Obtaining Approval), submitted a performance bond or other guarantee as required by Subchapter J of this chapter (relating to Bond and Insurance Requirements for Surface Coal Mining and Reclamation Operations), and at least equivalent to the bond or other guarantee of the original permittee; and

(4) the applicant will continue to conduct the operations involved in full compliance with the terms and conditions of the original permit, unless and until it has obtained a new permit in accordance with this subchapter as required in §12.233 of this title (relating to Requirements for New Permits for Persons Succeeding to Rights Granted under a Permit).

(d) The Commission shall notify the permittee, the successor, commentors, and OSM of its findings.

(e) The successor shall immediately notify the Commission of the consummation of the transfer, assignment, or sale of permit rights.
The provisions of this §12.232 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective February 24, 2014, 39 TexReg 1121.

§12.233 Requirements for New Permits for Persons Succeeding to Rights Granted under a Permit

(a) A successor in interest to a permittee who is able to obtain the bond coverage of the original permittee may continue surface coal mining and reclamation operations according to the approved mining and reclamation plan and permit of the original permittee.

(b) Pursuant to §12.232(c)(3) of this title (relating to Transfer, Assignment, or Sale of Permit Rights: Obtaining Approval), any successor in interest seeking to change the conditions of mining or reclamation operations, or any of the terms or conditions of the original permit shall:

(1) make application for a new permit under §§12.103 - 12.108 of this title (relating to General Requirements for Permits and Permit Applications),

§§12.109 - 12.115 of this title (relating to General Requirements for Coal Exploration), §§12.116 - 12.123, 12.124 - 12.138, and 12.139 - 12.154 of this title (relating to Surface Mining Permit Applications--Minimum Requirements for Legal, Financial, Compliance, and Related Information, to Surface Mining Permit Applications--Minimum Requirements for Information on Environmental Resources, and to Surface Mining Permit Applications--Minimum Requirements for Reclamation and Operation Plan), §§12.156 - 12.163, 12.170 - 12.184, and 12.185 - 12.199 of this title (relating to Underground Mining Permit Applications--Minimum Requirements for Legal, Financial, Compliance, and Related Information, to Underground Mining Permit Applications--Minimum Requirements for Information on Environmental Resources, to and Underground Mining Permit Applications--Minimum Requirements for Reclamation and Operation Plan), §§12.200 - 12.205 and 12.207 - 12.221 of this title (relating to Requirements for Permits for Special Categories of Mining, and to Review, Public Participation, and Approval of Permit Applications and Permit Terms and Conditions), and §12.222 and §12.223 of this title (relating to Administrative and Judicial Review of Decisions by Commission on Permit Applications), if the change involves conducting operations outside the original permit area; or

(2) make application for a revised permit under §12.226 of this title (relating to Permit Revisions).

The provisions of this §12.233 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective December 29, 1998, 23 TexReg 13041; amended to be effective February 24, 2014, 39 TexReg 1121.

DIVISION 14 SMALL OPERATOR ASSISTANCE

§12.234 Challenge of Ownership or Control, Information on Ownership and Control, and Violations, and Applicant/Violator System Procedures

(a) Challenges to ownership and control information.

(1) Applicability. An applicant or operator may challenge a listing or finding of ownership or control using the provisions under paragraphs (2) and (3) of this subsection if the challenger is:

(A) listed in a permit application or AVS as an owner or controller of an entire surface coal mining operation, or any portion or aspect thereof;

(B) found to be an owner or controller of an entire surface coal mining operation, or any portion or aspect thereof, under §12.225(e) of this title (relating to Commission Review of Outstanding Permits) or subsection (c)(7) of this section; or

(C) an applicant or permittee affected by an ownership or control listing or finding.

(2) Procedure.

(A) To challenge an ownership or control listing or finding, the challenger shall submit to the Commission a written explanation of the basis for the challenge, along with any evidence or explanatory materials that the challenger wishes to provide under paragraph (3)(B) of this subsection.

(B) The provisions of paragraph (3) of this subsection and of subsection (b) of this section apply only to challenges to ownership or control listings or findings. A challenger may not use these provisions to challenge its liability or responsibility under any other provision of the Act or the implementing regulations.

(C) When the challenge concerns a violation under the jurisdiction of a regulatory authority other than the Commission, the Commission must consult the regulatory authority with jurisdiction over the violation and the AVS Office to obtain additional information.

(D) The Commission may request an investigation by the AVS Office.

(E) At any time, a person listed in AVS as an owner or controller of a surface coal mining operation, may request an informal explanation from the AVS Office as to the reason that person is shown in AVS in an ownership or control capacity. Pursuant to 30 CFR 773.26(e), within 14 days of the request, the AVS Office will provide a response describing why that person is listed in AVS.

(3) Burden of proof.

(A) In a challenge to a listing of ownership or control in AVS or a finding of ownership or control made under subsection (c)(7) of this section, the challenger must prove by a preponderance of the evidence that it either:

(i) does not own or control the entire surface coal mining operation or relevant portion or aspect thereof; or

(ii) did not own or control the entire surface coal mining operation or relevant portion or aspect thereof during the relevant time period.

(B) In meeting this burden of proof, the challenger must present reliable, credible, and substantial evidence and any explanatory materials to the regulatory authority identified in paragraph (2) of this subsection and to the Commission. The materials presented in connection with the challenge will become part of the permit file, an investigation file, or another public file. If requested by the challenger, the Commission will hold as confidential any information submitted under this paragraph which is not required to be made available to the public under §12.672 of this title (relating to Availability of Records).

(C) Materials that may be submitted in response to the requirements of subparagraph (B) of this paragraph include, but are not limited to:

(i) notarized affidavits containing specific facts concerning the duties that the challenger performed for the relevant operation, the beginning and ending dates of the challenger's ownership or control of the operation, and the nature and details of any transaction creating or severing the challenger's ownership or control of the operation;

(ii) certified copies of corporate minutes, stock ledgers, contracts, purchase and sale agreements, leases, correspondence, or other relevant company records;

(iii) certified copies of documents filed with or issued by any State, municipal, or Federal governmental agency;

(iv) an opinion of counsel, when supported by:

(I) evidentiary materials;

(II) a statement by counsel that he or she is qualified to render the opinion; and

(III) a statement that counsel has personally and diligently investigated the facts of the matter.

(b) Written agency decision.

(1) Within 60 days of receipt of a challenge under subsection (a)(2)(A) of this section, the Commission will review and investigate the evidence and explanatory materials submitted and any other reasonably available information bearing on the challenge and issue a written decision. The decision document must include a statement of

whether the challenger owns or controls the relevant surface coal mining operation, or owned or controlled the operation, during the relevant time period.

(2) The Commission will promptly provide the challenger with a copy of its decision by either:

(A) certified mail, return receipt requested; or

(B) any means consistent with the rules governing service of a summons and complaint under Rule 176 of the Texas Rules of Civil Procedure.

(3) Service of the decision on the challenger is complete upon delivery and is not incomplete if the challenger refuses to accept delivery.

(4) The Commission will post all decisions made under this section on AVS.

(5) Any person who receives a written decision under this section and who wishes to appeal that decision must exhaust administrative remedies under the procedures at §12.222 of this title (relating to Administrative Review), before seeking review under §12.223 of this title (relating to Judicial Review).

(6) Following service of the written decision or any decision by a reviewing administrative or judicial tribunal, the Commission shall review the information in AVS to determine if it is consistent with the decision. If it is not, the Commission shall promptly revise the information in AVS to reflect the decision.

(c) Post-permit issuance information requirements for the Commission.

(1) For the purposes of future permit eligibility determinations and enforcement actions, the Commission shall enter into AVS all permit records, unabated or uncorrected violations, changes to information initially required to be provided by an applicant under §12.116(b) or §12.156(b) of this title (relating to Identification of Interests and Compliance Information), and any changes in violation status within 30 days after:

(A) the permit is issued or subsequent changes made;

(B) the abatement or correction period for a violation expires;

(C) the receipt of notice of a change; or

(D) abatement, correction, or termination of a violation, or a decision from an administrative or judicial tribunal.

(2) If, at any time, the Commission discovers that any person owns or controls an operation with an unabated or uncorrected violation, the Commission shall determine whether enforcement action is appropriate under Subchapter L of this title (relating to Permanent Program Inspection and Enforcement Procedures), and will enter the results of each enforcement action, including administrative and judicial decisions, into AVS.

(3) The Commission shall serve a preliminary finding of permanent permit ineligibility under §134.068 and §134.069 of the Act on a permittee or operator, if the criteria in subparagraphs (A) and (B) of this paragraph are met. In making a finding under this paragraph, the Commission will only consider control relationships and violations that would make, or would have made, a permittee ineligible for a permit under §12.215(j) of this title (relating to Review of Permit Applications). The Commission shall make a preliminary finding of permanent permit ineligibility if it finds that:

(A) the permittee controls or has controlled surface coal mining and reclamation operations with a demonstrated pattern of willful violations under §134.068 and §134.069 of the Act; and

(B) the violations are of such nature and duration with such resulting irreparable damage to the environment as to indicate the permittee's intent not to comply with the Act, its implementing regulations, the regulatory program, or the permit.

(4) The permittee may request a hearing on a preliminary finding of permanent permit ineligibility under §12.222 and §12.223 of this title.

(5) The Commission shall enter its findings into AVS:

(A) if a hearing is not requested and the time for seeking a hearing has expired; or

(B) if a hearing is requested, only if the Commission's findings are upheld on administrative appeal.

(6) At any time, the Commission may identify any person who owns or controls an entire surface coal mining operation or any relevant portion or aspect thereof. If such person is identified, the Commission shall issue a written preliminary finding to the person and the applicant or permittee describing the nature and extent of ownership or control. The Commission's written preliminary finding shall be based on evidence sufficient to establish a prima facie case of ownership or control.

(7) After the Commission issues a written preliminary finding under paragraph (6) of this subsection, the Commission shall allow the person subject to the preliminary finding 30 days in which to submit any information tending to demonstrate the person's lack of ownership or control. If, after reviewing any information the person submits, the Commission is persuaded that the person is not an owner or controller, the Commission shall serve the person a written notice to that effect. If, after reviewing any information submitted, the Commission still finds that the person is an owner or controller, or if the person does not submit any information within the 30-day period, the Commission shall issue a written finding and enter that finding into AVS.

(8) If the Commission identifies a person as an owner or controller under paragraph (7) of this subsection, the person may challenge the finding using the provisions of subsection (a) of this section.

(d) Post-permit issuance information requirements for permittees.

(1) Within 30 days after the issuance of a cessation order under §12.677 of this title (relating to Cessation Orders), the permittee must provide or update all the information required under §12.116(b) or §12.156(b) of this title.

(2) The permittee does not need to submit information under paragraph (1) of this subsection if a court of competent jurisdiction grants a stay of the cessation order and the stay remains in effect.

(3) Within 60 days of any addition, departure, or change in position of any person identified in §12.116(b)(4) or §12.156(b)(4) of this title, the permittee must provide:

(A) the information required under §12.116(b)(4) or §12.156(b)(4) of this title; and

(B) the date of any departure.

The provisions of this §12.234 adopted to be effective February 24, 2014, 39 TexReg 1121.

§12.235 Responsibilities: General

The Commission shall:

(1) review requests for assistance and determine qualified operators;

(2) develop and maintain a list of qualified laboratories, and select and pay laboratories for services rendered;

(3) conduct periodic on-site evaluations of program activities with the small operator; and

(4) participate with the Office in data coordination activities with the U.S. Geological Survey, U.S. Environmental Protection Agency, and other appropriate agencies or institutions.

The provisions of this §12.235 adopted to be effective February 24, 2014, 39 TexReg 1121.

§12.236 Program Services

To the extent possible with available funds, for qualified small operators who request assistance, the Commission shall:

(1) select and pay a qualified laboratory to:

(A) determine for the operator the probable hydrologic consequences of the mining and reclamation operations both on and off the proposed permit area in accordance with the data requirements of this Program; and

(B) prepare a statement of the results of test borings or core samplings in accordance with the data requirements of this program; and

(2) collect and provide general hydrologic information on the basin or subbasin areas within which the anticipated mining will occur. The information provided shall be limited to that required to relate the basin or subbasin hydrology to the hydrology of the proposed permit area.

The provisions of this §12.236 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.237 Eligibility for Assistance

An applicant is eligible for assistance if he or she:

(1) intends to apply for a permit pursuant to the Act; and

(2) establishes that his or her probable total actual and attributed production from all locations during any consecutive 12-month period either during the term of his or her permit or during the first 5 years after issuance of his or her permit, whichever period is shorter, will not exceed 300,000 tons. Production from the following operations shall be attributed to the permittee:

(A) all coal produced by operations beneficially owned entirely by the applicant or controlled, by reason of ownership, direction of the management or in any other manner whatsoever, by the applicant;

(B) the pro rata share, based upon percentage of beneficial ownership, of coal produced by operations in which the applicant owns more than a 10% interest;

(C) all coal produced by persons who own more than 10% of the applicant or who directly or indirectly control the applicant by reason of stock ownership, direction of the management or in any other manner whatsoever;

(D) the pro rata share of the coal produced by operations owned or controlled by the person who owns or controls the applicant; and

(E) all coal produced by operations owned by members of the applicant's family and the applicant's relatives, unless it is established that there is no direct or indirect business relationship between or among them;

(3) is not restricted in any manner from receiving a permit under this chapter (relating to Coal Mining Regulations); and

(4) does not organize or reorganize his or her company solely for the purpose of obtaining assistance under the small operator assistance program.

The provisions of this §12.237 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective December 29, 1998, 23 TexReg 13041.

§12.238 Filing for Assistance

Each applicant shall submit to the Commission an application for small operator assistance program containing the following information in order to procure funds for program services:

(1) a statement of intent to file a permit application;

(2) the names and addresses of:

(A) the potential permit applicant; and

(B) the potential operator if different from the applicant;

(3) a schedule of the estimated total production of coal from the proposed permit area and all other locations from which production is attributed to the applicant under the eligibility parameters. The schedule shall include for each location:

(A) the name under which coal is or will be mined;

(B) the permit number and Mine Safety and Health Administration (MSHA) identification number;

(C) the actual coal production for the year preceding the application for assistance and that portion of the production attributed to the applicant; and

(D) the estimated coal production for each year of the proposed permit and that portion attributed to the applicant;

(4) A description of:

(A) the method of surface coal mining operation proposed;

(B) the anticipated starting and termination dates of mining operations;

(C) the number of acres of land to be affected by the proposed mining; and

(D) a general statement on the probable depth and thickness of the coal resource, including a statement of reserves in the permit area and the method by which they were calculated;

(5) A U.S. Geological Survey topographic map which clearly shows:

(A) the area of land to be affected and the natural drainage above and below the affected area;

(B) the names of property owners within the area to be affected and of adjacent lands;

(C) the location of existing structures and developed water sources within the area to be affected and on adjacent lands;

(D) the location of existing and proposed test boring or core samplings; and

(E) the location and extent of known workings of any underground mines; and

(6) Copies of documents which show that:

(A) the applicant has a legal right to enter and commence mining within the permit area; and

(B) a legal right of entry has been obtained for the Commission, Office and laboratory personnel to inspect the lands to be mined and adjacent lands which may be affected to collect environmental data or install necessary

instruments.
The provisions of this §12.238 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.239 Application Approval and Notice

(a) If the applicant is eligible and information is not readily available which would preclude issuance of a permit to the applicant for mining in the area proposed, the Commission shall:

(1) determine the minimum data requirements necessary for the proposed site;

(2) select the services of one or more qualified laboratories to perform the required work; and

(3) provide a copy of the contract or other appropriate work order and the final approved report to the applicant.

(b) The Commission shall inform the applicant in writing if the application is denied and shall state the reasons for denial.

(c) The granting of assistance under §§12.235 - 12.238, this section, and §§12.240 - 12.243 of this title (relating to Small Operator Assistance) shall not be a factor in decisions by the Commission on a subsequent permit application.
The provisions of this §12.239 adopted to be effective February 24, 2014, 39 TexReg 1121.

§12.240 Data Requirements

(a) Minimum Requirements.

(1) A determination of the probable hydrologic consequences of the mining and reclamation operations, both on- and off-site, shall be made by a qualified laboratory. The data for this determination shall include:

(A) the existing and projected surface- and ground-water seasonal flow regime, including water-level and water-table evaluations; and

(B) the existing and projected seasonal quality of the surface- and ground-water regime. This shall include measurements and estimates of dissolved and suspended solids, pH, iron, manganese, surface and channel erosion and other water-quality parameters specified in the application for surface mining operation permit.

(2) A statement of the results of test borings or core samplings from the proposed permit area, including:

(A) logs from any drill holes including identification of each stratum and water level penetrated;

(B) the coal seam thickness and its chemical analysis including sulfur content;

(C) the chemical analysis of potentially acid- or toxic-forming sections of the overburden, and the chemical analysis of the stratum lying immediately underneath the coal to be mined; and

(D) other information as needed on a site-specific basis.

(b) Exemptions. The statement by a qualified laboratory under subsection (a)(2) of this section may be waived by the Commission by a written determination that such requirements are unnecessary with respect to a specific surface mining operation permit application.

(c) Data Availability. Data collected under this program shall be made available to all interested persons, except information related to the chemical and physical properties of coal, when so requested by the applicant. Information regarding the mineral or elemental content of the coal which is potentially toxic in the environment shall be made available.

The provisions of this §12.240 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.241 Qualified Laboratories

Basic Qualifications.

(1) To qualify for designation, the laboratory shall demonstrate that it:

(A) is staffed with experienced, professional personnel in the fields of hydrology, mining engineering, aquatic biology, geology or chemistry as applicable to the work to be performed;

(B) is capable of collecting necessary field data and samples;

(C) has adequate space for material preparation, cleaning and sterilizing of necessary equipment, stationary equipment, storage and space to accommodate periods of peak work loads;

(D) meets the requirements of the Occupational Safety and Health Act;

(E) has the financial capability and business organization necessary to perform the work required;

(F) has analytical, monitoring and measuring equipment capable of meeting the applicable standards and methods contained in:

(i) Standard Methods for the Examination of Water and Wastewater, 15th Edition, 1980. This publication is available from the American Public Health Association, 1015 18th Street, NW, Washington, D.C. 20036; and

(ii) Methods for Chemical Analysis of Water and Wastes, 1974. This publication is available from the Office of Technology Transfer, U.S. Environment. Research Laboratory, Cincinnati, Ohio 45268. These standards are hereby incorporated by reference; and

(G) has the capability of making hydrologic field measurements and analytical laboratory determinations by acceptable hydrologic engineering or analytical methods, or other appropriate methods or guidelines for data acquisition.

(2) The qualified laboratory shall be capable of performing either the determination of probable hydrologic consequences or the statement of results of test borings as described in §12.240(a)(1) or (2) of this title (relating to Data Requirements). Subcontractors may be used to provide the services required provided they have been designated as a qualified laboratory.
The provisions of this §12.241 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.242 Assistance Funding

Allocation of funds. If funds are inadequate to provide services pursuant to this program, the Commission shall, to the extent practicable, establish a formula for allocating funds among eligible operators by prorating monies available downward as tonnage of coal to be mined increases, and considering such factors as the applicant's:

(1) anticipated date of filing a permit application;

(2) anticipated date for commencing mining; and

(3) performance history.

The provisions of this §12.242 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.243 Applicant Liability

(a) A coal operator who has received assistance pursuant to §§12.236 and 12.240 of this title (relating to Program

Services, and to Data Requirements) shall reimburse the Commission for the cost of the services rendered if the applicant:

(1) submits false information;

(2) fails to submit a permit application within 1 year from the date of receipt of the approved laboratory report;

(3) fails to mine after obtaining a permit;

(4) if the Commission finds that the operator's actual and attributed annual production of coal for all locations exceeds 300,000 tons during the 12 months immediately following the date on which the operator is issued the surface coal mining and reclamation permit; or

(5) the permit is sold, transferred, or assigned to another person and the transferee's total actual and attributed production exceeds the 300,000-ton production limit during the 12 months immediately following the date on which the permit was originally issued. Under this subsection, the applicant and its successor are jointly and severally obligated to reimburse the Commission.

(b) The Commission may waive the reimbursement obligation if it finds that the applicant at all times acted in good faith.

The provisions of this §12.243 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective December 29, 1998, 23 TexReg 13041.

SUBCHAPTER J BOND AND INSURANCE REQUIREMENTS FOR SURFACE COAL MINING AND RECLAMATION OPERATIONS

DIVISION 1 GENERAL REQUIREMENTS FOR INSURANCE AND BONDING OF SURFACE COAL MINING AND RECLAMATION OPERATIONS UNDER REGULATORY PROGRAMS

§12.300 Definitions

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

(1) Collateral bond--An indemnity agreement in a sum certain deposited with the Commission and executed by the permittee and supported by one or more of the following:

(A) the deposit of cash in one or more accounts, payable only to the Commission upon demand after the Commission has determined the need for forfeiture and has notified the permittee of forfeiture action;

(B) negotiable bonds of the United States, a state or municipality, endorsed to the order of, and in the possession of, the Commission;

(C) negotiable certificates of deposit, made payable only to the Commission in its possession;

(D) an irrevocable letter of credit of any bank authorized to transact business in the United States, payable upon demand;

(E) a perfected, first-lien security interest in real or personal property, in favor of the Commission; or

(F) investment-grade related securities, having a rating of AAA, AA, A or equivalent rating, issued by a nationally recognized securities rating service, endorsed to the order of, and in the possession of, the Commission.

(2) Self-bond--An indemnity agreement in a sum certain payable to the Commission, executed by the permittee and in an amount determined sufficient to assure performance of reclamation responsibilities pursuant to the permit requirements.

(3) Surety bond--An indemnity agreement in a sum certain payable to the Commission executed by the permittee as principal which is supported by the performance guarantee of a corporation licensed to do business as a surety in Texas.

The provisions of this §12.300 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.301 Requirements To File a Bond

(a) After an application for a permit to conduct surface coal mining and reclamation operations has been approved but before such permit is issued, the applicant shall file with the Commission a performance bond or bonds payable to the Commission. The performance bond will be conditioned upon the faithful performance of all the requirements of the Act, this chapter (relating to Coal Mining Regulations), and the provisions of the reclamation plan and permit. The amount, duration, form, conditions and terms of the performance bond shall conform to §§12.304-12.307 of this title (relating to Amount and Duration of Performance Bond) and §§12.308-12.311 of this title (relating to Form, Conditions, and Terms of Performance Bond and Liability Insurance).

(b) The bond or bonds shall cover the entire permit area, or an identified increment of land within the permit area upon which the operator will initiate and conduct surface coal mining and reclamation operations during the initial term of the permit. As operations on succeeding areas are initiated and conducted, the permittee shall file with the Commission an additional bond or bonds to cover such areas in accordance with this section. The bond or bonds shall not be for an area that is smaller than the entire area upon which surface coal mining and reclamation operations will be conducted in a given permit term.

(1) After the amount of the bond has been determined for the permit area in accordance with §§12.304-12.307 of this title (relating to Amount and Duration of Performance Bond), the permittee or applicant may either file:

(A) the entire performance bond required during the term of the permit; or

(B) an incremental bond schedule and the new performance bond required for the first increment in the schedule.

(2) When the operator elects to "increment" the amount of the performance bond during the term of the permit, he shall identify the initial and successive incremental areas for bonding on the permit application map submitted for approval as provided in §12.142 of this title (relating to Operation Plan: Maps and Plans), and shall specify the proportion of the total bond amount required for the term of the permit which will be filed prior to commencing operations on each incremental area. Independent increments shall be of sufficient size and configuration to provide for efficient reclamation operations should reclamation by the Commission become necessary pursuant to §§12.314-12.317 of this title (relating to Performance Bond Forfeitures Criteria and Procedures). The scheduled amount of each performance bond increment shall be filed with the Commission at least 30 days prior to the commencement of surface coal mining and reclamation operations in the next incremental area.

(c) Surface disturbances which are a part of underground operations, and other long-term operations may be bonded for a period of less than the permit term; however, continuous bond coverage must be maintained during active operations at those sites and for the applicable liability

period after operations have ceased.
The provisions of this §12.301 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.302 Requirement To File a Certificate of Liability Insurance

Each applicant for a permit shall submit to the Commission as part of the permit application:

(1) a certificate issued by an insurance company authorized to do business in Texas. The amount, duration, form, conditions and terms of this insurance shall conform to §12.311 of this title (relating to Terms and Conditions for Liability Insurance); or

(2) evidence that it satisfies applicable state or federal self-insurance requirements and that self-insurance for liability is otherwise consistent with §12.311 of this title (relating to Terms and Conditions for Liability Insurance).
The provisions of this §12.302 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.303 Commission Responsibilities

(a) The Commission shall prescribe and furnish the form for filing a performance bond.

(b) The Commission shall prescribe terms and conditions for performance bonds and insurance by regulations which meet, at a minimum, the requirements of §§12.304-12.307 of this title (relating to Amount and Duration of Performance Bond), and of §§12.308-12.311 of this title (relating to Form, Conditions, and Terms of Performance Bond and Liability Insurance).

(c) The Commission shall determine the amount of the performance bond required for the permit area including adjustments to the initial amount from time-to-time as land acreages in the permit area are revised, or when other relevant conditions change according to the minimum requirements of §12.304(a) of this title (relating to Determination of Bond Amount).

(d) The Commission may accept a self-bond in lieu of a surety or collateral bond if the permittee meets the requirements of §12.309(j) of this title (relating to Terms and Conditions of the Bond) and any additional requirements of §12.309(a)-(d) of this title (relating to Terms and Conditions of the Bond).

(e) The Commission shall release the permittee from his bond and insurance requirements consistent with §§12.312 and 12.313 of this title (relating to Procedures, Criteria, and Schedule for Release of Performance Bond).

(f) The Commission may cause all or part of a bond to be forfeited consistent with §§12.314-12.317 of this title (relating to Performance Bond Forfeitures Criteria and Procedures).
The provisions of this §12.303 adopted to be effective April 7, 1997, 22 TexReg 3093.

DIVISION 2 AMOUNT AND DURATION OF PEFORMANCE BOND

§12.304 Determination of Bond Amount

(a) The amount of the bond required for each bonded area shall depend upon the reclamation requirements of the approved permit; shall reflect the probable difficulty of reclamation giving consideration to such factors as topography, geology of the site, hydrology, and revegetation potential, and shall be determined by the Commission.

(b) The amount of the bond shall be sufficient to assure the completion of the reclamation plan if the work has to be performed by the Commission in the event of forfeiture; and

(c) In no case shall the bond for the entire area under one permit be less than $10,000.

(d) The amount of bond shall be based on, but not limited to, the estimated cost submitted by the permit applicant and shall be determined by the Commission.
The provisions of this §12.304 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.306 Period of Liability

(a) Liability under the performance bond(s) shall continue until all reclamation, restoration and abatement work required of persons who conduct surface coal mining and reclamation operations under requirements of the Act, this chapter (relating to Coal Mining Regulations), and the provisions of the permit has been completed, and the permit terminated by release of the permittee from any further liability in accordance with §§12.312 and 12.313 of this title (relating to Procedures, Criteria, and Schedule for Release of Performance Bond).

(b) The period of liability shall continue in areas with more than 26.0 inches average annual precipitation, for not less than 5 years and in areas of 26.0 inches or less average annual precipitation for not less than 10 years.

(c) A portion of a bonded area requiring extended liability because of augmentation may be separated from the original area and bonded separately upon approval by the Commission.

(d) If the Commission approves a long-term intensive agricultural post-mining land use, in accordance with §12.399 of this title (relating to Postmining Land Use), the applicable five- or ten-year period of liability shall commence at the date of initial planting.

(e) The Commission shall cause all or part of a bond to be forfeited consistent with §§12.314-12.317 of this title (relating to Performance Bond Forfeitures Criteria and Procedures). Actions of third parties which are beyond the control of the operator and for which the operator is not responsible under the permit need not be covered by the bond.
The provisions of this §12.306 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.307 Adjustment of Amount

(a) The amount of the performance bonds applicable to a permit may be adjusted by the Commission when the cost of future reclamation work changes. The Commission shall notify the permittee, surety, and any other person with a property interest in the collateral posted under this subchapter (relating to Bond and Insurance Requirements for Surface Coal Mining and Reclamation Operations), of any proposed bond adjustment and provide the permittee an opportunity for an informal conference on the adjustment. Bond adjustments are not subject to procedures of bond release under §§12.312 and 12.313 of this title (relating to Procedures, Criteria, and Schedule for Release of Performance Bond).

(b) A permittee may request reduction of the amount of performance bond upon submission of evidence to the Commission proving that the permittee's method of operation or other circumstances will reduce the estimated cost to the Commission to reclaim the area bonded. This reduction of bond shall be deemed a bond adjustment.

(c) In the event that an approved operations and reclamation plan is modified in accordance with Subchapter G of this chapter (relating to Surface Coal Mining and Reclamation Operations Permits and Coal Exploration Procedures Systems), the Commission will review the bond for adequacy and, if necessary, will adjust the bond to conform to the operations and reclamation plan as modified.

(d) The amount of the bond or deposit required and the terms of each acceptance of the applicant's bond shall be adjusted by the Commission from time to time as affected land acreages are increased or decreased or where the cost of future reclamation changes.

The provisions of this §12.307 adopted to be effective April 7, 1997, 22 TexReg 3093.

DIVISION 3 FORM, CONDITIONS, AND TERMS OF PERFORMANCE BOND AND LIABILITY INSURANCE

§12.308 Form of the Performance Bond

(a) The form for the performance bond shall be prescribed by the Commission in accordance with this section. The Commission may allow for:

(1) a surety bond;

(2) a collateral bond;

(3) an escrow account bond;

(4) self-bonding; or

(5) combined surety/escrow bonding.

(b) Where the mining operation is owned by two or more persons or entities, the Commission shall allow each person to provide separate financial assurance provided that the total of such assurance is sufficient to accomplish reclamation.

(c) A blanket bond covering statewide or countywide operations may be furnished if the terms and conditions thereof are sufficient to comply with the regulations in §§12.308 through 12.311 of this title (relating to Form, Conditions, and Terms of Performance Bond and Liability Insurance), and if approved by the Commission.

The provisions of this §12.308 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.309 Terms and Conditions of the Bond

(a) Amount of bond. The performance bond shall be in an amount determined by the Commission as provided in §12.304 of this title (relating to Determination of Bond Amount).

(b) Payee. The performance bond shall be payable to the Commission.

(c) Performance requirement. The performance bond shall be conditioned upon faithful performance of all of the requirements of the Act, this chapter (relating to Coal Mining Regulations), and the conditions of the permit.

(d) Time period of bond. The duration of the bond shall be for the time period provided in §12.306 of this title (relating to Period of Liability).

(e) Bonding bank and surety company requirements.

(1) The bond shall provide a mechanism for a bond or surety company to give prompt notice to the Commission and the permittee of any action filed alleging the insolvency or bankruptcy of the surety company or the bank or alleging any violation which would result in suspension or revocation of the surety or bank's charter or license to do business; and

(2) Upon the incapacity of a bank or surety company by reason of bankruptcy, insolvency or suspension, or revocation of its charter or license, the permittee shall be deemed to be without bond coverage. The Commission shall issue a notice to any operator who is without bond coverage and shall specify a reasonable period to replace bond coverage, not to exceed 90 days.

(f) Surety bonds. Surety bonds shall be subject to the following conditions:

(1) the bond shall be executed by the operator and a corporate surety licensed to do business in the state where such operation is located; and

(2) surety bonds shall be non-cancellable during their term.

(g) Letters of credit. Letters of credit shall be subject to the following conditions:

(1) the letter may only be issued by a bank organized or authorized to do business in the U.S.;

(2) letters of credit must be irrevocable during their terms. A letter of credit used as security in areas requiring continuous bond coverage shall be forfeited and shall be collected by the Commission if not replaced by another suitable bond or letter of credit at least 30 days before its expiration date; and

(3) the letter must be payable to the Commission in part or in full upon demand and receipt from the Commission of a notice of forfeiture issued in accordance with §§12.314 through 12.317 of this title (relating to Performance Bond Forfeitures Criteria and Procedures).

(h) Collateral Bonds. Real and personal property posted as a collateral bond shall meet the following criteria:

(1) the applicant shall grant the Commission a mortgage or perfected first-lien security interest in real or personal property with a right to sell or otherwise dispose of the property in the event of forfeiture under §§12.314 through 12.317 of this title (relating to Performance Bond Forfeitures Criteria and Procedures);

(2) in order for the Commission to evaluate the adequacy of the property offered to satisfy this requirement, the applicant shall submit a schedule of the real or personal property which shall be pledged to secure the obligations under the indemnity agreement. The list shall include:

(A) a description of the property;

(B) the fair market value as determined by an appraisal conducted by an appraiser authorized by the Commission; and

(C) proof of possession and title to the real property; and

(3) the property may include land which is part of the permit area; however, land pledged as security shall not be mined under any permit.

(i) Escrow bonding.

(1) The Commission may authorize the operator to supplement the bond through the establishment of an escrow account deposited in one or more accounts payable on demand only to the Commission or deposited with the Commission directly. The total bond, including the escrow amount, shall not be less than the amount required under terms of performance bonds, including any adjustments, less amounts released in accordance with release of performance bonds.

(2) Interest paid on an escrow account shall be retained in the escrow account and applied to the bond value of the escrow account unless the Commission has approved that the interest be paid to the operator.

(3) Certificates of deposit may be substituted for escrow accounts upon approval of the Commission.

(j) Self-bonding.

(1) Definitions. For the purposes of this subsection only:

(A) Current assets--Cash or other assets or resources which are reasonably expected to be converted to cash or sold or consumed within one year or within the normal operating cycle of the business.

(B) Current liabilities--Obligations which are reasonably expected to be paid or liquidated within one year or within the normal operating cycle of the business.

(C) Fixed assets--Plants and equipment, but does not include land or coal in place.

(D) Governmental entity--Municipal corporation, political subdivision, or public agency of the State of Texas.

(E) Liabilities--Obligations to transfer assets or provide services to other entities in the future as a result of past transactions.

(F) Net worth--Total assets minus total liabilities and is equivalent to owner's equity.

(G) Self-bond--An indemnity agreement in a sum certain executed by a qualified applicant, or by an applicant and its qualified third-party guarantor, and made payable to the Commission, with or without separate surety.

(H) SIC code--The standard industrial classification used by Dun and Bradstreet Corporation to identify various industry groups such as electric utility companies. Data identified by SIC code are to be the current data for the last annual period compiled and reported by Dun and Bradstreet Corporation.

(I) Tangible net worth--Net worth minus intangibles such as goodwill and rights to patents or royalties.

(2) Requirements for a business and governmental entities. The Commission may accept a self bond from an applicant that is a business or governmental entity if all of the following conditions are met by the applicant:

(A) the applicant designates a suitable agent to receive service of process in this state;

(B) the applicant has been in continuous operation for a period of not less than 5 years immediately preceding the date of application.

(i) The Commission may allow a joint venture or syndicate with less than 5 years of continuous operation to qualify under this requirement, if each member of the joint venture or syndicate has been in continuous operation for at least 5 years immediately preceding the date of application.

(ii) When calculating the period of continuous operation, the Commission may exclude past periods of interruption of the operation of the entity that were beyond the applicant's control and do not affect the applicant's likelihood of remaining in business during the proposed surface coal mining and reclamation operations;

(C) the applicant submits financial information in sufficient detail to show that the applicant meets one or more of the following criteria:

(i) the applicant has a current rating for its most recent bond issuance of "A" or higher as issued by either Moody's Investor Service or Standard and Poor's Corporation;

(ii) the application has a tangible net worth of at least $10 million, a ratio of total liabilities to net worth of 2.5 times or less, and a ratio of current assets to current liabilities of 1.2 times or greater; or

(iii) the applicant's fixed assets in the United States total at least $20 million, and the applicant has a ratio of total liabilities to net worth of 2.5 times or less, and a ratio of current assets to current liabilities of 1.2 times or greater; or

(iv) the applicant has an investment-grade rating for its most recent bond issuance of "Baa3" or higher from Moody's Investor Service and "BBB-" or higher from Standard and Poor's Corporation, and meets the requirements of either subclause (I) or (II) of this clause. If the applicant or the guarantor of a self-bond receives an investment rating or notification of an investment rating by Moody's Investor Service or Standard and Poor's Corporation of any of its bonds lower than the rating included in the application as a bond approval criterion existing at time of Commission approval of its application for self-bonding, the guarantor and permittee receiving such rating shall promptly notify the Commission, which shall immediately hold a hearing to consider and determine the adequacy of the guarantor's self-bond. The limitation contained in subclause (II)(-c-) of this clause applies only to applicants or guarantors qualifying pursuant to subclause (II) of this clause, and does not affect the limitation set out in paragraph (4)(A) of this subsection for applicants or guarantors seeking acceptance of a self-bond pursuant to clauses (i) - (iii) or (iv)(I) of this subparagraph.

(I) The applicant:

(-a-) has a tangible net worth of at least $10 million and fixed assets in the United States totaling at least $20 million; and

(-b-) has a ratio of total liabilities to net worth of 2.5 or less; or a ratio of total liabilities to net worth that is equal to or less than the industry median reported by Dun and Bradstreet Corporation for the applicant's primary SIC code; and

(-c-) has a ratio of current assets to current liabilities that is equal to or greater than the industry median reported by Dun and Bradstreet Corporation for the applicant's primary SIC code; or the applicant has a current credit rating of "4A2" or higher from Dun and Bradstreet Corporation; or

(II) The applicant:

(-a-) has a net worth of at least $100 million and fixed assets in the United States totaling at least $200 million; and

(-b-) has issued and currently has outstanding securities pursuant to the provisions of the Securities Act of 1933 and is subject to the periodic financial reporting requirements established by the Securities and Exchange Act of 1934; and

(-c-) has a total amount of outstanding and proposed self-bonds for surface coal mining and reclamation operations not exceeding 16 2/3 percent of the applicant's net worth in the United States; and

(D) the applicant submits:

(i) financial statements for the most recently completed fiscal year accompanied by a report prepared by an independent certified public accountant in conformity with generally accepted accounting principles and containing the accountant's audit opinion or review opinion of the financial statements with no adverse opinion;

(ii) unaudited financial statements for completed quarters in the current fiscal year; and

(iii) additional information as may be requested by the Commission.

(3) Requirements for a third-party guarantee. The Commission may accept a self-bond from an applicant and the applicant's qualified third-party guarantor if the guarantor meets the conditions of paragraph (2)(A), (B), (C) and (D) of this subsection as if it were the applicant and the applicant meets the conditions of paragraph (2)(A), (B) and (D) of this subsection. Such a written guarantee shall be referred to as a "third-party guarantee." The terms of the third-party guarantee shall provide for the following:

(A) if the applicant fails to complete the reclamation plan, the guarantor shall do so or the guarantor shall be liable under the indemnity agreement to provide funds to the Commission sufficient to complete the reclamation plan, but not to exceed the bond amount;

(B) the third-party guarantee shall remain in force unless the guarantor sends notice of cancellation by certified mail to the applicant and to the Commission at least 90 days in advance of the cancellation date, and the Commission accepts the cancellation.

(C) the cancellation may be accepted by the Commission if the applicant obtains suitable replacement bonding in accordance with §12.310 of this title (relating to Replacement of Bonds) before the cancellation date or if the lands for which the self-bond, or portion thereof, was accepted have not been disturbed.

(4) Limitations.

(A) For the Commission to accept an applicant's self-bond, the total amount of the outstanding and proposed self-bonds of the applicant for surface coal mining and reclamation operations shall not exceed 25 percent of the applicant's tangible net worth in the United States.

(B) For the Commission to accept a third-party guarantee, the total amount of the guarantor's present and proposed self-bonds and guaranteed self-bonds for surface coal mining and reclamation operations shall not exceed 25 percent of the guarantor's tangible net worth in the United States.

(5) Indemnity agreement. If the Commission accepts an applicant's self-bond, an indemnity agreement shall be submitted subject to the following requirements:

(A) the indemnity agreement shall be executed by all persons and parties who are to be bound by it, including the third-party guarantor, and shall bind each jointly and severally;

(B) applicants applying for a self-bond and third-parties guaranteeing an applicant's self-bond shall submit an indemnity agreement signed by two officers who are authorized to bind the applicant and third-party guarantor. A copy of such authorization shall be provided to the Commission with an affidavit certifying that such an agreement is valid under all applicable state and federal laws. Whenever the applicant or third-party guarantor is a corporation, each respective corporation shall provide a copy of the corporate authorization demonstrating that the corporation may guarantee the self-bond and execute the indemnity agreement;

(C) if the applicant is a partnership, joint venture or syndicate, the agreement shall bind each partner or party who has a beneficial interest, directly or indirectly, in the applicant;

(D) pursuant to §12.314 of this title (relating to Forfeiture of Bonds), the applicant or third-party guarantor shall be required to complete the approved reclamation plan for the lands in default or to pay to the Commission an amount necessary to complete the approved reclamation plan, not to exceed the bond amount; and

(E) when under forfeiture and when necessary to enforce the provisions of the Act and these regulations, the indemnity agreement shall be referred by the Commission to the Attorney General to obtain a judgement as provided by law;

(6) Current financial information. An applicant that is self-bonded under this section shall submit to the Commission an update of the information required under paragraph (2)(C) and (D) of this subsection within 90 days after the close of each fiscal year following the issuance of the self-bond or corporate guarantee. When a self-bond is guaranteed by a third-party guarantor, both the applicant and its third-party guarantor shall comply with this paragraph.

(7) Substitute bonding. If at any time during the period when a self-bond is in effect, the financial conditions of the applicant or the third-party guarantor change so that the criteria of paragraph (2)(C) and (D) of this subsection are not satisfied, the permittee shall notify the Commission immediately and shall submit an alternate form of bond in the same amount as the self-bond. It is the intent of the Commission that substitute bonds under this paragraph be timely filed in order that they may be reviewed and acted upon by the Commission within a reasonable time, not to exceed 90 days, from the date of notification. Should the permittee fail to post an adequate substitute bond as required by this paragraph, the permittee shall cease coal extraction and shall immediately begin to conduct reclamation operations in accordance with the reclamation plan. Mining operations shall not resume until the Commission has determined that an acceptable bond has been posted.

(k) Combined surety/escrow bonding. The Commission may accept a combined surety/escrow bonding schedule provided that:

(1) a surety bond payable to the Commission is posted in the amount determined under §12.304 of this title (relating to Determination of Bond Amount) for reclamation of each successive increment;

(2) an interest-bearing escrow account payable to the Commission with a predetermined deposit amount and frequency is established;

(3) the amount of the surety bond shall always be sufficient to cover the difference between the escrow balance and the total reclamation cost;

(4) the terms and conditions of the escrow account shall be developed jointly by the operator, surety and Commission. Deposits to the escrow account by the operator shall be made periodically and so reported to the Commission. Failure to make deposits on schedule shall be just cause for action by the Commission; and

(5) a certified escrow account balance statement shall be provided periodically to the surety and the Commission.

(l) Persons with an interest in collateral posted as a bond, and who desire notification of actions pursuant to the bond, shall request the notification in writing to the Commission at the time collateral is offered.

The provisions of this §12.309 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective December 29, 1998, 23 TexReg 13041; amended to be effective November 12, 2007, 32 TexReg 8124; amended to be effective April 25, 2017, 42 TexReg 2167

§12.310 Replacement of Bonds

(a) The Commission may allow permittees to replace

existing bonds with other bonds if the liability which has accrued against the permittee on the permit area is transferred to such replacement bonds.

(b) The Commission shall not release existing performance bonds until the permittee has submitted and the Commission has approved acceptable replacement performance bonds. A replacement of performance bonds pursuant to this section shall not constitute a release of bond under §§12.312 and 12.313 of this title (relating to Procedures, Criteria, and Schedule for Release of Performance Bond).

The provisions of this §12.310 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.311 Terms and Conditions for Liability Insurance

(a) The Commission shall require the applicant to submit at the time of permit application, a certificate certifying that the applicant has a public liability insurance policy in force for the surface coal mining and reclamation operation for which the permit is sought. The certificate shall provide for personal injury and property damage protection in an amount adequate to compensate all persons injured or property damaged as a result of surface coal mining and reclamation operations, including use of explosives and damage to water wells, and entitled to compensation under the applicable provisions of state law. Minimum insurance coverage for bodily injury shall be $500,000 for each occurrence and $1,500,000 aggregate; and minimum insurance coverage for property damage shall be $500,000 for each occurrence and $1,000,000 aggregate.

(b) The policy shall be maintained in full force during the life of the permit or any renewal thereof and until all surface coal mining and reclamation operations under this chapter (relating to Coal Mining Regulations) have been completed.

(c) The policy shall include a rider requiring that the insurer notify the Commission whenever substantive changes are made in the policy, including any termination or failure to renew.

(d) The Commission may accept from the applicant, in lieu of a certificate for a public liability insurance policy, satisfactory evidence from the applicant that it satisfies Texas self-insurance requirements and the requirements of this section. The Commission may, upon the request of an applicant that is self-bonded or determined to be eligible for self-bonding under §12.309(j)(2) of this title (relating to Terms and Conditions of the Bond), consider such applicant to meet the self-insurance requirements of this subsection.

The provisions of this §12.311 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective October 22, 2012, 37 TexReg 8293.

DIVISION 4 PROCEDURES, CRITERIA, AND SCHEDULE FOR RELEASE OF PERFORMANCE BOND

§12.312 Procedure for Seeking Release of Performance Bond

(a) Bond release application.

(1) The permittee may file a request with the Commission for the release of all or part of a performance bond or deposit. Applications may be filed only at times or during seasons authorized by the Commission in order to properly evaluate the completed reclamation operations. The times or seasons appropriate for the evaluation of certain types of reclamation shall be established in the regulatory program or identified in the mining and reclamation plan required in Subchapter G of this chapter (relating to Surface Coal Mining and Reclamation Operations Permits and Coal Exploration Procedures Systems) and approved by the Commission.

(2) Within 30 days after any application for bond or deposit release has been filed with the Commission, the operator shall submit a copy of an advertisement placed at least once a week for four successive weeks in a newspaper of general circulation in the locality of the surface coal mining operation. Such advertisement shall be considered part of any bond release application and shall contain the permittee's name, a notification of the precise location of the land affected, the number of acres, the permit number and date approved, the amount of the bond filed and the portion sought to be released, and the type and appropriate dates of reclamation work performed, and a description of the results achieved as they relate to the operator's approved reclamation plan, and the name and address of the Commission office to which written comments, objections, or requests for public hearings and informal conferences on the specific bond release may be submitted pursuant to §12.313(d) and (e) of this title (relating to Criteria and Schedule for Release of Performance Bond). In addition, as part of any bond release application, the permittee shall submit copies of letters which he or she has sent to adjoining property owners, local governmental bodies, planning agencies, sewage and water treatment authorities, and water companies in the locality in which the surface coal mining and reclamation activities took place, notifying them of the intention to seek release from the bond.

(3) The permittee shall include in the application for bond release a notarized statement which certifies that all applicable reclamation activities have been accomplished in accordance with the requirements of the Act, the regulatory program, and the approved reclamation plan. Such certification shall be submitted for each application or phase of bond release.

(b) Inspection by Commission.

(1) Upon receipt of the bond release application, the Commission shall, within 30 days, or as soon thereafter as weather conditions permit, conduct an inspection and evaluation of the reclamation work involved. Such evaluation shall consider, among other things, the degree of difficulty to complete any remaining reclamation, whether pollution of surface and subsurface water is occurring, the probability of future occurrence of such pollution, and the estimated cost of abating such pollution. The surface owner, agency, or lessee shall be given notice of such inspection and may participate with the Commission in making the bond release inspection. The Commission may arrange with the permittee to allow access to the permit area, upon request by any person with an interest in bond release, for the purpose of gathering information relevant to the proceeding.

(2) Within 60 days from the filing of the bond release application, if no public hearing is held pursuant to §12.313(d) of this title (relating to Criteria and Schedule for Release of Performance Bond), or, within 30 days after a public hearing has been held pursuant to §12.313(d), the Commission shall notify in writing the permittee, the surety, or other persons with an interest in bond collateral who have requested notification under §12.309(l) of this title (relating to Terms and Conditions of the Bond), and the persons who either filed objections in writing or objectors who were a

party to the hearing proceedings, if any, of its decision to release or not to release all or part of the performance bond. *The provisions of this §12.312 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective December 29, 1998, 23 TexReg 13041.*

§12.313 Criteria and Schedule for Release of Performance Bond

(a) The Commission may release all or part of the bond for the entire permit area or incremental area if the Commission is satisfied that the reclamation or a phase of the reclamation covered by the bond or deposit or portion thereof has been accomplished in accordance with the following schedules for reclamation of Phases I, II, and III:

(1) at the completion of Phase I, after the operator completes the backfilling, regrading (which may include the replacement of topsoil), and drainage control of a bonded area in accordance with the approved reclamation plan, 60% of the bond or collateral for the applicable area;

(2) at the completion of Phase II, after revegetation has been established on the regraded mined lands in accordance with the approved reclamation plan, an additional amount of bond. When determining the amount of bond to be released after successful revegetation has been established, the Commission shall retain that amount of bond for the revegetated area which would be sufficient to cover the cost of reestablishing revegetation if completed by a third party and for the period specified for operator responsibility in §§134.091-134.109 of the Act for reestablishing revegetation. No part of the bond or deposit shall be released under this Subsection so long as the lands to which the release would be applicable are contributing suspended solids to streamflow or runoff outside the permit area in excess of the requirements set by §134.092(a)(10) of the Act and Subchapter K of this chapter (relating to Permanent Program Performance Standards), or until soil productivity for prime farmlands has returned to the equivalent levels of yield as nonmined land of the same soil type in the surrounding area under equivalent management practices as determined from the soil survey performed pursuant to §134.052(a)(16) of the Act and §§12.620-12.625 of this title (relating to Special Permanent Program Performance Standards--Operations on Prime Farmland). Where a silt dam is to be retained as a permanent impoundment pursuant to Subchapter K of this Chapter, the Phase II portion of the bond may be released under this paragraph so long as provisions for sound further maintenance by the operator or the landowner have been made with the Commission; and

(3) at the completion of Phase III, after the operator has completed successfully all surface coal mining and reclamation activities, the release of the remaining portion of the bond, but not before the expiration of the period specified for operator responsibility in §12.395 of this title (relating to Revegetation: Standards for Success) or §12.560 of the title (relating to Revegetation: Standards for Success). However, no bond shall be fully released until all reclamation requirements of the Act and the permit are fully met.

(b) If the Commission disapproves the application for release of the bond or portion thereof, the Commission shall notify the permittee, the surety, and any person with an interest in collateral as provided for in §12.309(l) of this title (relating to Terms and Conditions of the Bond), in writing, stating the reasons for disapproval and recommending corrective action necessary to secure said release and allowing opportunity for a public hearing.

(c) When any application for total or partial bond release is filed with the Commission, the Commission shall notify the municipality in which a surface coal mining operation is located by certified mail at least 30 days prior to the release of all or a portion of the bond.

(d) Any person with a valid legal interest which might be adversely affected by release of the bond, or the responsible officer or head of any federal, state, or local government agency which has jurisdiction by law or special expertise with respect to any environmental, social, or economic impact involved in the operation, or is authorized to develop and enforce environmental standards with respect to such operations, shall have the right to file written objection to the proposed release from bond to the Commission within thirty days after the last publication of the above notice. If written objections are filed, and a hearing requested, the Commission shall inform all interested parties of the time and place of the hearing, and hold a public hearing in the locality of the surface coal mining operation proposed for bond release, or at the State capital, at the option of the objector, within 30 days of the request for such hearing. The date, time, and location of such public hearing shall be advertised by the Commission in a newspaper of general circulation in the locality for two consecutive weeks.

(e) Without prejudice to the rights of the objectors, the applicant, or the responsibilities of the Commission pursuant to this section, the Commission may establish an informal conference to resolve such written objections.

(f) For the purpose of such hearings under subsection (d) of this section, the Commission shall have the authority to administer oaths, subpoena witnesses or written or printed materials, compel the attendance of witnesses or production of materials, and take evidence including, but not limited to, inspections of the land affected and other surface coal mining operations carried on by the applicant in the general vicinity. A verbatim record of each public hearing shall be made, and a transcript made available on the motion of any party or by order of the Commission.

The provisions of this §12.313 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective December 29, 1998, 23 TexReg 13041.

DIVISION 5 PERFORMANCE BOND FORFEITURES CRITERIA AND PROCEDURES

§12.314 Forfeiture of Bonds

(a) The Commission may forfeit all or part of a bond for any permit area or an increment of a permit area if reclamation operations are not conducted in accordance with the reclamation plan or the operator defaults on the conditions under which the bond was posted.

(b) The Commission may withhold forfeiture if the permittee and surety, if any, agree to a compliance schedule to comply with the violations of the permit or bond conditions.

(c) The Commission may allow the surety to complete the reclamation plan if the surety can demonstrate the ability to complete the reclamation plan, including achievement of the capability to support the alternative post-mining land use approved by the Commission. No bond shall be released, except for partial releases authorized under §12.313 of this title (relating to Criteria and Schedule for Release of Performance Bond), until successful completion of all reclamation under the terms of the permit, including applicable liability periods of §12.306 of this title (relating to

Period of Liability).

(d) In the event forfeiture of the bond is required by this section, the Commission shall:

(1) send written notification by certified mail, return receipt requested, to the permittee and the surety on the bond, if any, of the Commission's determination to forfeit all or part of the bond and reasons for the forfeiture, including a finding of the amount to be forfeited;

(2) advise the permittee and surety, if applicable, of any rights of appeal that may be available from the determination under state law;

(3) proceed in an action for collection on the bond as provided by applicable laws for the collection of defaulted bonds or other debts, consistent with this section, for the amount forfeited, if an appeal is not filed within a time established by the Commission and a stay of collection issued by the hearing authority or such appeal is unsuccessful; and

(4) if an appeal is filed, defend the action.

(e) The written determination to forfeit all or part of the bond, including the reasons for forfeiture and the amount to be forfeited, shall be a final decision by the Commission.

(f) Upon default, the Commission may forfeit any and all bonds deposited to complete those reclamation operations for which the bonds were posted.

(g) The Commission shall utilize funds collected from bond forfeiture to complete the reclamation plan on the permit area on which bond coverage applies and to cover associated administrative expenses.

The provisions of this §12.314 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.317 Determination of Forfeiture Amount

The Commission shall forfeit the amount of the bond for which liability is outstanding and deposit the proceeds thereof in an interest-bearing escrow account for use in the payment of all costs and administrative expenses associated with the conduct of reclamation activities by the Commission.

(1) If the estimated amount forfeited is insufficient to pay for the full cost of reclamation, the operator shall be liable for remaining costs. The Commission may complete, or authorize completion of, reclamation of the bonded area and may recover from the operator all costs of reclamation in excess of the amount forfeited.

(2) Funds forfeited, including interest accrued, but not used to contract for completion of reclamation work, as indicated in this section, shall be returned by the Commission after reclamation operations have been completed.

The provisions of this §12.317 adopted to be effective April 7, 1997, 22 TexReg 3093.

SUBCHAPTER K PERMANENT PROGRAM PERFORMANCE STANDARDS
DIVISION 1 PERMANENT PROGRAM PERFORMANCE STANDARDS--COAL EXPLORATION

§12.325 General Responsibility of Persons Conducting Coal Exploration

(a) Each person who conducts coal exploration which substantially disturbs the natural land surface and in which 250 tons or less of coal are removed shall file the notice of intention to explore required under §12.110 of this title (relating to General Requirements: Exploration of Less Than 250 Tons) and shall comply with §12.327 of this title (relating to Performance Standards for Coal Exploration).

(b) Each person who conducts coal exploration which substantially disturbs the natural land surface and in which more than 250 tons of coal are removed in the area described by the written approval from the Commission, shall comply with the procedures described in the exploration and reclamation operations plan approved under §12.111 of this title (relating to General Requirements: Exploration of More Than 250 Tons) and shall comply with §12.327 of this title (relating to Performance Standards for Coal Exploration).

The provisions of this §12.325 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.326 Required Documents

Each person who conducts coal exploration which substantially disturbs the natural land surface and which removes more than 250 tons of coal shall, while in the exploration area, possess written approval of the Commission for the activities granted under §12.111 of this title §12.111 of this title (relating to General Requirements: Exploration of More Than 250 Tons). The written approval shall be available for review by the authorized representative of the Commission or the Office upon request.

The provisions of this §12.326 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.327 Performance Standards for Coal Exploration

(a) Habitats of unique or unusually high value for fish, wildlife, and other related environmental values and critical habitats of threatened or endangered species identified pursuant to the Endangered Species Act of 1973 (16 USC 1531 et seq.) shall not be disturbed during coal exploration.

(b) The person who conducts coal exploration shall, to the extent practicable, measure important environmental characteristics of the exploration area during the operations, to minimize environmental damage to the area and to provide supportive information for any permit application that person may submit under Subchapter G of this chapter (relating to Surface Coal Mining and Reclamation Operations Permits and Coal Exploration Procedures Systems).

(c) All roads or other transportation facilities used for coal exploration shall comply with the applicable provisions of §§12.400(b)-(f), 12.402, and 12.403 of this title (relating to Roads: General, to Utility Installations, and to Support Facilities).

(d) If excavations, artificial flat areas, or embankments are created during exploration, these areas shall be returned to the approximate original contour promptly after such features are no longer needed for coal exploration.

(e) Topsoil shall be removed, stored, and redistributed on disturbed areas as necessary to assure successful revegetation or as required by the Commission.

(f) Revegetation of areas disturbed by coal exploration shall be performed by the person who conducts the exploration, or his or her agent. All areas disturbed by coal exploration activities shall be revegetated in compliance with the plan approved by the Commission and carried out in a manner that encourages prompt vegetative cover and recovery of productivity levels compatible with approved post-exploration land use and in accordance with the following:

(1) all disturbed lands shall be seeded or planted to

the same seasonal variety native to the disturbed area. If both the pre-exploration and post-exploration land uses are intensive agriculture, planting of the crops normally grown will meet the requirements of this subsection; and

(2) the vegetative cover shall be capable of stabilizing the soil surface in regards to erosion.

(g) With the exception of small and temporary diversions of overland flow of water around new roads, drill pads, and support facilities, no ephemeral, intermittent or perennial streams shall be diverted during coal exploration activities. Overland flow of water shall be diverted in a manner that:

(1) prevents erosion;

(2) to the extent possible using the best technology currently available, prevents additional contributions of suspended solids to streamflow or runoff outside the exploration area; and

(3) complies with all other applicable state and federal requirements.

(h) Each exploration hole, borehole, well, or other exposed underground opening created during exploration must meet the requirements of §§12.331-12.333 of this title (relating to Casing and Sealing of Drilled Holes: General Requirements, to Casing and Sealing of Drilled Holes: Temporary, and to Casing and Sealing of Drilled Holes: Permanent).

(i) All facilities and equipment shall be removed from the exploration area promptly when they are no longer needed for exploration, except for those facilities and equipment that the Commission determines may remain to:

(1) provide additional environmental quality data;

(2) reduce or control the on- and off-site effects of the exploration activities; or

(3) facilitate future surface mining and reclamation operations by the person conducting the exploration under an approved permit.

(j) Coal exploration shall be conducted in a manner which minimizes disturbance of the prevailing hydrologic balance, and shall include sediment control measures such as those listed in §12.343 of this title (relating to Hydrologic Balance: Sediment Control Structures) or sedimentation ponds which comply with §12.344 of this title (relating to Hydrologic Balance: Sedimentation Ponds). The Commission may specify additional measures which shall be adopted by the person engaged in coal exploration.

(k) Toxic- or acid-forming materials shall be handled and disposed of in accordance with §§12.346 and 12.386 of this title (relating to Hydrologic Balance: Acid-Forming and Toxic-Forming Spoil, and to Backfilling and Grading: Covering Coal and Acid- and Toxic-Forming Materials). If specified by the Commission, additional measures shall be adopted by the person engaged in coal exploration.

The provisions of this §12.327 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.328 Requirement for a Permit

(a) Any person who extracts coal for commercial use or sale during coal exploration operations must first obtain a permit to conduct surface coal mining operations for those operations from the Commission under Subchapter G of this chapter (relating to Surface Coal Mining and Reclamation Operations Permits and Coal Exploration Procedures Systems).

(b) With the prior written approval of the Commission, no permit to conduct surface coal mining operations is required for the sale or commercial use of coal extracted during exploration operations if such sale or commercial use is for coal testing purposes only. The person conducting the exploration shall file an application for such approval with the Commission. The application shall demonstrate that the coal testing is necessary for the development of a surface coal mining and reclamation operation for which a surface coal mining operations permit application is to be submitted in the near future, and that the proposed commercial use or sale of coal extracted during exploration operations is solely for the purpose of testing the coal. The application shall contain the following:

(1) the name of the testing firm and the locations at which the coal will be tested.

(2) if the coal will be sold directly to, or commercially used directly by, the intended end user, a statement from the intended end user, or if the coal is sold indirectly to the intended end user through an agent or broker, a statement from the agent or broker. The statement shall include:

(A) the specific reason for the test, including why the coal may be so different from the intended user's other coal supplies as to require testing;

(B) the amount of coal necessary for the test and why a lesser amount is not sufficient; and

(C) a description of the specific tests that will be conducted.

(3) evidence that sufficient reserves of coal are available to the person conducting exploration or its principals for future commercial use or sale to the intended end user, or agent or broker of such user identified above, to demonstrate that the amount of coal to be removed is not the total reserve, but is a sampling of a larger reserve.

(4) an explanation as to why other means of exploration, such as core drilling, are not adequate to determine the quality of the coal and/or the feasibility of developing a surface coal mining operation.

The provisions of this §12.328 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

DIVISION 2 PERMANENT PROGRAM PERFORMANCE STANDARDS--SURFACE MINING ACTIVITIES

§12.330 Signs and Markers

(a) Specifications. Signs and markers required under this section and §§12.331-12.403 of this title (relating to Permanent Program Performance Standards--Surface Mining Activities) shall:

(1) be posted and maintained by the person who conducts the surface mining activities;

(2) be of a uniform design throughout the operation that can be easily seen and read;

(3) be made of durable material; and

(4) conform to local ordinances and codes.

(b) Duration of maintenance. Signs and markers shall be maintained during the conduct of all activities to which they pertain.

(c) Mine and permit identification signs.

(1) Identification signs shall be displayed at each point of access to the permit area from public roads.

(2) Signs shall show the name, business address, and telephone number of the person who conducts the

surface mining activities and the identification number of the current permit authorizing surface mining activities.

(3) Signs shall be retained and maintained until after the release of all bonds for the permit area.

(d) Perimeter markers. The perimeter of a permit area shall be clearly marked before the beginning of surface mining activities.

(e) Buffer zone markers. Buffer zones shall be marked along their boundaries as required under §12.355 of this title (relating to Hydrologic Balance: Stream Buffer Zones).

(f) Blasting signs. If blasting is conducted incident to surface mining activities, the operator shall provide warning signs as required under §12.360 of this title (relating to Use of Explosives: Control of Adverse Effects).

(g) Topsoil markers. Where topsoil or other vegetation-supporting material is segregated and stockpiled as required under §12.336 of this title (relating to Topsoil: Storage), the stockpiled material shall be clearly marked.

The provisions of this §12.330 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.331 Casing and Sealing of Drilled Holes: General Requirements

Each exploration hole, other drill hole or borehole, well, or other exposed underground opening shall be cased, sealed, or otherwise managed, as approved by the Commission, to prevent acid or other toxic drainage from entering ground or surface waters, to minimize disturbance to the prevailing hydrologic balance, and to ensure the safety of people, livestock, fish and wildlife, and machinery in the permit area and adjacent area. If these openings are uncovered or exposed by surface mining activities within the permit area they shall be permanently closed, unless approved for water monitoring, or otherwise managed in a manner approved by the Commission. Use of a drilled hole or borehole or monitoring well as a water well must meet the provisions of §12.351 of this title (relating to Hydrologic Balance: Transfer of Wells). This section does not apply to holes solely drilled and used for blasting.

The provisions of this §12.331 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.332 Casing and Sealing of Drilled Holes: Temporary

Each exploration hole, other drill hole or borehole, well, and other exposed underground opening which has been identified in the approved permit application for use to return coal processing waste or water to underground workings, or to be used to monitor ground-water conditions, shall be temporarily sealed before use and protected during use by barricades, fences, or other protective devices approved by the Commission. These devices shall be periodically inspected and maintained in good operating condition by the person who conducts the surface mining activities.

The provisions of this §12.332 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.333 Casing and Sealing of Drilled Holes: Permanent

When no longer needed for monitoring or other use approved by the Commission upon a finding of no adverse environmental or health and safety effect, or unless approved for transfer as a water well under §12.351 of this title (relating to Hydrologic Balance: Transfer of Wells), each exploration hole, other drilled hole or borehole, well, and other exposed underground opening shall be capped, sealed, backfilled, or otherwise properly managed, as required by the Commission, under §12.331 of this title (relating to Casing and Sealing of Drilled Holes: General Requirements) and consistent with 30 CFR 75.1711. Permanent closure measures shall be designed to prevent access to the mine workings by people, livestock, fish and wildlife, and machinery, and to keep acid or other toxic drainage from entering ground or surface waters.

The provisions of this §12.333 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.334 Topsoil: General Requirements

(a) Before disturbance of an area, topsoil and subsoils to be saved under §12.335 of this title (relating to Topsoil: Removal) shall be separately removed and segregated from other material.

(b) After removal, topsoil shall either be immediately redistributed as required under §12.337 of this title (relating to Topsoil: Redistribution) or stockpiled pending redistribution as required under §12.336 of this title (relating to Topsoil: Storage).

The provisions of this §12.334 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.335 Topsoil: Removal

(a) Timing. Topsoil shall be removed after vegetative cover that would interfere with the use of the topsoil is cleared from the areas to be disturbed, but before any drilling, blasting, mining, or other surface disturbance.

(b) Materials to be removed. All topsoil shall be removed in a separate layer from the areas to be disturbed, unless use of substitute or supplemental materials is approved by the Commission in accordance with subsection (e) of this section. If use of substitute or supplemental materials is approved, all materials to be redistributed shall be removed.

(c) Materials to be removed in thin topsoil situations. If the topsoil is less than six inches, a six-inch layer that includes the A horizon and the unconsolidated materials immediately below the A horizon or the A horizon and all unconsolidated material if the total available is less than six inches, shall be removed and the mixture segregated and redistributed as the surface soil layer, unless topsoil substitutes are approved by the Commission pursuant to subsection (e) of this section.

(d) Subsoil segregation. The B horizon and portions of the C horizon, or other underlying layers demonstrated to have qualities for comparable root development shall be segregated and replaced as subsoil, if the Commission determines that either of these is necessary or desirable to ensure soil productivity consistent with the approved postmining land use.

(e) Topsoil substitutes and supplements.

(1) Selected overburden materials may be substituted for or used as a supplement to topsoil, if the Commission determines that the resulting soil medium is equal to or more suitable for sustaining revegetation than is the available topsoil and the substitute material is the best available to support revegetation. This determination shall be based on the results of chemical and physical analyses of overburden and topsoil. These analyses shall include determinations of pH, net acidity or alkalinity, phosphorus, potassium, texture class, and other analyses as required by the Commission. The Commission may also require that results of field-site trials or greenhouse tests be used to

demonstrate the feasibility of using these overburden materials.

(2) Results of analyses, trials, and tests shall be submitted to the Commission. Certification of trials and tests shall be made by a laboratory approved by the Commission stating that:

(A) the proposed substitute material is equal to or more suitable for sustaining the vegetation than is the available topsoil;

(B) the substitute material is the best available material to support the vegetation; and

(C) the trials and tests were conducted using standard testing procedures.

(3) Substituted or supplemental material shall be removed, segregated, and replaced in compliance with the requirements for topsoil under this section.

(f) Limits on topsoil removal area. Where the removal of vegetative material, topsoil, or other materials may result in erosion which may cause air or water pollution:

(1) the size of the area from which topsoil is removed at any one time shall be limited;

(2) the surface soil layer shall be redistributed at a time when the physical and chemical properties of topsoil can be protected and erosion can be minimized; and

(3) such other measures shall be taken as the Commission may approve or require to control erosion.

The provisions of this §12.335 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.336 Topsoil: Storage

(a) Topsoil and other materials removed under §12.335 of this title (relating to Topsoil: Removal) shall be stockpiled only when it is impractical to promptly redistribute such materials on regraded areas.

(b) Stockpiled materials shall be selectively placed on a stable area within the permit area, not disturbed, and protected from wind and water erosion, unnecessary compaction, and contaminants which lessen the capability of the materials to support vegetation when redistributed.

(1) Protection measures shall be accomplished either by:

(A) an effective cover of non-noxious, quick-growing annual and perennial plants, seeded or planted during the first normal period after removal for favorable planting conditions; or

(B) other methods demonstrated to and approved by the Commission to provide equal protection.

(2) Unless approved by the Commission, stockpiled topsoil and other materials shall not be moved until required for redistribution on a regraded area.

The provisions of this §12.336 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.337 Topsoil: Redistribution

(a) After final grading and before the replacement of topsoil, topsoil substitutes, and other materials segregated in accordance with §12.335 of this title (relating to Topsoil: Removal), regraded land shall be scarified or otherwise treated as required by the Commission to eliminate slippage surfaces and to promote root penetration. If the person who conducts the surface mining activities shows, through appropriate tests, and the Commission approves, that no harm will be caused to the topsoil and vegetation, scarification may be conducted after topsoiling.

(b) Topsoil material, and topsoil substitutes, and other supplements shall be redistributed in a manner that:

(1) achieves an approximate uniform, stable thickness consistent with the approved postmining land uses, contours, and surface water drainage system. Soil thickness may also be varied to the extent that such variations help meet the specific revegetation goals identified in the permit;

(2) prevents excess compaction of the topsoil, topsoil substitutes, and supplements; and

(3) protects the topsoil, topsoil substitutes, and supplements from wind and water erosion before and after it is seeded and planted.

The provisions of this §12.337 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 12, 2007, 32 TexReg 8124.

§12.338 Topsoil: Nutrients and Soil Amendments

Nutrients and soil amendments in the amounts determined by soil tests shall be applied to the redistributed surface soil layer, so that it supports the approved postmining land use and meets the revegetation requirements of §§12.390-12.393 and 12.395 of this title (relating to Revegetation: General Requirements, to Revegetation: Use of Introduced Species, to Revegetation: Timing, to Revegetation: Mulching and Other Soil Stabilizing Practices, and to Revegetation: Standards for Success). All soil tests shall be performed by a qualified laboratory using standard methods approved by the Commission.

The provisions of this §12.338 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective December 29, 1998, 23 TexReg 13041.

§12.339 Hydrologic Balance: General Requirements

(a) Surface mining activities shall be planned and conducted to minimize disturbance of the hydrologic balance within the permit and adjacent areas, to prevent material damages to the hydrologic balance outside the permit area, to assure the protection or replacement of water rights, and to support approved postmining land uses in accordance with the terms and conditions of the approved permit and the performance standards of §§12.330-12.338, this section, and §§12.340-12.403 of this title (relating to Permanent Program Performance Standards--Surface Mining Activities). The Commission may require additional preventative, remedial, or monitoring measures to assure that material damage to the hydrologic balance outside the permit area is prevented. Surface mining and reclamation practices that minimize water pollution and changes in flow shall be used in preference to water treatment.

(b) Changes in water quality and quantity, in the depth to ground water, and in the location of surface-water drainage channels shall be minimized so that the approved postmining land use of the permit area is not adversely affected.

(c) In no case shall federal and state water-quality statutes, regulations, standards, or effluent limitations be violated.

(d) Operations shall be conducted to minimize water pollution and, where necessary, treatment methods shall be used to control water pollution.

(1) Each person who conducts surface mining activities shall emphasize mining and reclamation practices that prevent or minimize water pollution. Changes in flow of drainage shall be used in preference to the use of water treatment facilities.

(2) Acceptable practices to control and minimize

water pollution include, but are not limited to:

(A) stabilizing disturbed areas through land shaping;

(B) diverting runoff;

(C) achieving quickly germinating and growing stands of temporary vegetation;

(D) regulating channel velocity of water;

(E) lining drainage channels with rock or vegetation;

(F) mulching;

(G) selectively placing waste materials in backfill areas; and

(H) selectively placing and sealing acid-forming and toxic-forming materials.

(3) If the practices listed in subsection (d)(2) of this section are not adequate to meet the requirements of §§12.330-12.338, this section, and §§12.340-12.403 of this title (relating to Permanent Program Performance Standards--Surface Mining Activities), the person who conducts surface mining activities shall operate and maintain the necessary water treatment facilities for as long as treatment is required under §§12.330-12.338, this section, and §§12.340-12.403 of this title (relating to Permanent Program Performance Standards--Surface Mining Activities).

The provisions of this §12.339 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.340 Hydrologic Balance: Water-Quality Standards and Effluent Limitations

Discharge of water from areas disturbed by surface mining activities shall be made in compliance with all applicable state and federal water-quality laws and regulations and with the effluent limitations for coal mining promulgated by the U.S. Environmental Protection Agency set forth in 40 CFR 434.

The provisions of this §12.340 adopted to be effective November 4, 1997, 22 TexReg 10640.

§12.341 Hydrologic Balance: Diversions

(a) General Requirements.

(1) With the approval of the Commission, any flow from mined areas abandoned before May 3, 1978, and any flow from undisturbed areas or reclaimed areas, after meeting the criteria of §12.344 of this title (relating to Hydrologic Balance: Sedimentation Ponds) for siltation structures removal, may be diverted from disturbed areas by means of temporary or permanent diversions. All diversions shall be designed to minimize adverse impacts to the hydrologic balance within the permit and adjacent areas, to prevent material damage outside the permit area and to assure the safety of the public. Diversions shall not be used to divert water into underground mines without approval of the Commission under §12.353 of this title (relating to Hydrologic Balance: Discharge of Water Into an Underground Mine).

(2) The diversion and its appurtenant structures shall be designed, located, constructed, maintained and used to:

(A) be stable;

(B) provide protection against flooding and resultant damage to life and property;

(C) prevent, to the extent possible using the best technology currently available, additional contributions of suspended solids to streamflow outside the permit area; and

(D) comply with all applicable local, state, and federal laws and regulations.

(3) Temporary diversions shall be removed when no longer needed to achieve the purpose for which they were authorized. The land disturbed by the removal process shall be restored in accordance with §§12.330-12.340, this section, and §§12.342-12.403 of this title (relating to Permanent Program Performance Standards--Surface Mining Activities). Before diversions are removed, downstream water-treatment facilities previously protected by the diversion shall be modified or removed, as necessary, to prevent overtopping or failure of the facilities. This requirement shall not relieve the operator from maintaining water-treatment facilities as otherwise required. A permanent diversion or a stream channel reclaimed after the removal of a temporary diversion shall be designed and constructed so as to restore or approximate the premining characteristics of the original stream channel including the natural riparian vegetation to promote the recovery and the enhancement of aquatic habitat.

(4) Diversion designs shall incorporate the following:

(A) be constructed with gentle sloping banks that are stabilized by vegetation. Asphalt, concrete or other similar linings shall be used only when approved by the Commission to prevent seepage or to provide stability. Channel linings shall be designed using standard engineering practices to pass safely the design velocities and shall be approved for permanent diversions only where they are stable and will require infrequent maintenance;

(B) erosion protection shall be provided for transition of flows and for critical areas such as swales and curves;

(C) energy dissipators shall be installed when necessary at discharge points, where diversions intersect with natural streams and exit velocities of the diversion ditch flow is greater than that of the receiving stream;

(D) excess excavated material not necessary for diversion channel geometry or regrading of the channel shall be disposed of in accordance with §§12.363-12.366 of this title (relating to Disposal of Excess Spoil: General Requirements, to Disposal of Excess Spoil: Valley Fills, to Disposal of Excess Spoil: Head-of-Hollow Fills, and to Disposal of Excess Spoil: Durable Rock Fills); and

(E) topsoil shall be handled in compliance with §§12.334-12.338 of this title (relating to Topsoil: General Requirements, to Topsoil: Removal, to Topsoil: Storage, to Topsoil: Redistribution, and to Topsoil: Nutrients and Soil Amendments).

(b) Diversions of Perennial and Intermittent Streams.

(1) Diversions of perennial and intermittent streams within the permit area may be approved by the Commission after making the finding relating to stream buffer zones that the diversion will not adversely affect the water quantity and quality and related environmental resources of the stream.

(2) The design capacity of channels for temporary and permanent stream channel diversions shall be at least equal to the capacity of the unmodified stream channel immediately upstream and downstream from the diversion.

(3) The requirements of subsection (a)(2)(B) of this section shall be met when the temporary and permanent diversions for perennial and intermittent streams are designed so that the combination of channel, bank and floodplain configuration is adequate to pass safely the peak runoff of a 10-year, 6-hour precipitation event for a

temporary diversion and a 100-year, 6-hour precipitation event for a permanent diversion.

(4) The design and construction of all stream channel diversions of perennial and intermittent streams shall be certified by a qualified registered professional engineer as meeting the performance standards of this part and any design criteria set by the Commission.

(c) Diversion of Miscellaneous Flows.

(1) Miscellaneous flows, which consists of all flows except for perennial and intermittent streams, may be diverted away from disturbed areas if required or approved by the Commission. Miscellaneous flows shall include ground-water discharges and ephemeral streams.

(2) The design, location, construction, maintenance, and removal of diversions of miscellaneous flows shall meet all of the performance standards set forth in subsection (a) of this section.

(3) The requirements of subsection (a)(2)(B) of this section shall be met when the temporary and permanent diversions for miscellaneous flows are designed so that the combination of channel, bank and flood-plain configuration is adequate to pass safely the peak runoff of a 2-year, 6-hour precipitation event for a temporary diversion and a 10-year, 6-hour precipitation event for a permanent diversion.

The provisions of this §12.341 adopted to be effective November 4, 1997, 22 TexReg 10640.

§12.343 Hydrologic Balance: Sediment Control Measures

(a) Appropriate sediment control measures shall be designed, constructed, and maintained using the best technology currently available to:

(1) prevent, to the extent possible, additional contributions of sediment to streamflow or to runoff outside the permit area;

(2) meet the more stringent of applicable state or federal effluent limitations; and

(3) minimize erosion to the extent possible.

(b) Sediment control measures include practices carried out within and adjacent to the disturbed area. The sedimentation storage capacity of practices in and downstream from the disturbed area shall reflect the degree to which successful mining and reclamation techniques are applied to reduce erosion and control sediment. Sediment control measures consist of the utilization of proper mining and reclamation methods and sediment control practices, singly or in combination. Sediment control methods include but are not limited to:

(1) disturbing the smallest practicable area at any one time during the mining operation through progressive backfilling, grading, and prompt revegetation as required in §12.390(b) of this title (relating to Revegetation: General Requirements);

(2) stabilizing the backfill material to promote a reduction in the rate and volume of runoff, in accordance with the requirements of §12.384 of this title (relating to Backfilling and Grading: General Requirements);

(3) retaining sediment within disturbed areas;

(4) diverting runoff away from disturbed areas;

(5) diverting runoff using protected channels or pipes through disturbed areas so as not to cause additional erosion;

(6) using straw dikes, riprap, check dams, mulches, vegetative sediment filters, dugout ponds, and other measures that reduce overland-flow velocity, reduce runoff volume, or trap sediment; and

(7) treating with chemicals.

The provisions of this §12.343 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.344 Hydrologic Balance: Siltation Structures

(a) Scope. For the purposes of this section only, disturbed areas shall not include those areas:

(1) in which the only surface mining activities include diversion ditches, siltation structures, or roads that are designed, constructed and maintained in accordance with §§12.330-12.343, this section, and §§12.345-12.403 of this title (relating to Permanent Program Performance Standards--Surface Mining Activities); and

(2) for which the upstream area is not otherwise disturbed by the operator.

(b) General requirements.

(1) Additional contributions of suspended solids sediment to streamflow or runoff outside the permit area shall be prevented to the extent possible using the best technology currently available.

(2) All surface drainage from the disturbed area shall be passed through a siltation structure before leaving the permit area, except as provided in paragraph (5) of this subsection or subsection (e) of this section.

(3) Siltation structures for an area shall be constructed before beginning any surface mining activities in that area, and upon construction shall be certified by a qualified registered professional engineer to be constructed as designed and as approved in the reclamation plan.

(4) Any siltation structure which impounds water shall be designed, constructed and maintained in accordance with §12.347 of this title (relating to Hydrologic Balance: Permanent and Temporary Impoundments).

(5) Siltation structures shall be maintained until the disturbed area has been stabilized and revegetated and removal is authorized by the Commission. In no case shall the structure be removed sooner than two years after the last augmented seeding.

(6) When a siltation structure is removed, the land on which the siltation structure was located shall be regraded and revegetated in accordance with the reclamation plan and §§12.390-12.395 of this title (relating to Revegetation: General Requirements, to Revegetation: Use of Introduced Species, to Revegetation: Timing, to Revegetation: Mulching and Other Soil Stabilizing Practices, and to Revegetation: Standards for Success). Sedimentation ponds approved by the Commission for retention as permanent impoundments may be exempted from this requirement.

(c) Sedimentation ponds.

(1) When used, sedimentation ponds shall:

(A) be used individually or in series;

(B) be located as near as possible to the disturbed area and out of perennial streams unless approved by the Commission; and

(C) be designed, constructed, and maintained to:

(i) provide adequate sediment storage volume. The minimum sediment storage volume shall be equal to the three year accumulated sediment volume from the drainage area to the pond. The sediment volume shall be determined using the Universal Soil Loss Equation, gully erosion rates, and the sediment delivery ratio converted to sediment volume, using either the sediment density or other empirical methods approved by the Commission;

(ii) provide adequate detention time to

allow the effluent from the ponds to meet state and federal effluent limitations. The minimum detention time without a chemical treatment process shall be 10 hours;

(iii) contain or treat the 10-year, 24-hour precipitation event ("design event") unless a lesser design event is approved by the Commission based on terrain, climate, other site-specific conditions and on a demonstration by the operator that the effluent limitations of §12.340 of this title (relating to Hydrologic Balance: Water-Quality Standards and Effluent Limitations) will be met;

(iv) provide a nonclogging dewatering device adequate to maintain the detention time required under clause (ii) of this subparagraph;

(v) minimize, to the extent possible, short circuiting;

(vi) provide periodic sediment removal sufficient to maintain adequate volume for the design event;

(vii) ensure against excessive settlement;

(viii) be free of sod, large roots, frozen soil, and acid- or toxic-forming coal-processing waste; and

(ix) be compacted properly.

(2) A sedimentation pond shall include either a combination of principal and emergency spillways or single spillway configured as specified in §12.347(a)(9) of this title (relating to Hydrologic Balance: Permanent and Temporary Impoundments).

(d) Other treatment facilities.

(1) Other treatment facilities shall be designed to treat the 10-year, 24-hour precipitation event unless a lesser design event is approved by the Commission based on terrain, climate, other site-specific conditions and a demonstration by the operator that the effluent limitations of §12.340 of this title (relating to Hydrologic Balance: Water-Quality Standards and Effluent Limitations) will be met.

(2) Other treatment facilities shall be designed in accordance with the applicable requirements of subsection (c) of this section.

(e) Exemptions. Exemptions to the requirements of this section may be granted if:

(1) the disturbed drainage area within the total disturbed area is small; and

(2) the operator demonstrates that siltation structures and alternate sediment control measures are not necessary for drainage from the disturbed area to meet the effluent limitations under §12.340 of this title (relating to Hydrologic Balance: Water-Quality Standards and Effluent Limitations) and the applicable state and federal water-quality standards for the receiving waters.

The provisions of this §12.344 adopted to be effective November 4, 1997, 22 TexReg 10640.

§12.345 Hydrologic Balance: Discharge Structures

Drainage from sedimentation ponds, permanent and temporary impoundments, coal processing waste dams and embankments, and diversions shall be controlled by energy dissipators, riprap channels, and other devices, where necessary, to reduce erosion, to prevent deepening or enlargement of stream channels, and to minimize disturbance of the hydrologic balance. Discharge structures shall be designed according to standard engineering-design procedures.

The provisions of this §12.345 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.346 Hydrologic Balance: Acid-Forming and Toxic-Forming Spoil

Drainage from acid-forming and toxic-forming spoil into ground and surface waters shall be avoided by:

(1) identifying, burying, and treating where necessary, spoil which, in the judgment of the Commission, may be detrimental to vegetation or may adversely affect water quality if not treated or buried;

(2) preventing water from coming into contact with acid-forming and toxic-forming spoil in accordance with §12.386 of this title (relating to Backfilling and Grading: Covering Coal and Acid- and Toxic-Forming Materials), and other measures as required by the Commission; and

(3) burying or otherwise treating all acid-forming or toxic-forming spoil within 30 days after it is first exposed on the mine site, or within a lesser period required by the Commission. Temporary storage of the spoil may be approved by the Commission upon a finding that burial or treatment within 30 days is not feasible and will not result in any material risk of water pollution or other environmental damage. Storage shall be limited to the period until burial or treatment first becomes feasible. Acid-forming or toxic-forming spoil to be stored shall be placed on impermeable material and protected from erosion and contact with surface water.

The provisions of this §12.346 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.347 Hydrologic Balance: Permanent and Temporary Impoundments

(a) General Requirements. The requirements of this subsection apply to both temporary and permanent impoundments.

(1) Impoundments meeting the Class B or C criteria of dams in the U.S. Department of Agriculture, Natural Resources Conservation Service Technical Release No. 60 (210-VI-TR60, Oct. 1985), Earth Dams and Reservoirs, shall comply with the Minimum Emergency Spillway Hydrologic Criteria table in TR-60 and the requirements of this section. Technical Release No. 60 is hereby incorporated by reference. Copies may be obtained from the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161, Order No. PB 87-157509/AS. Copies can be inspected at the Commission's Surface Mining and Reclamation Division Office at 1701 N. Congress Avenue, Austin, Texas.

(2) An impoundment meeting the size or other criteria of 30 CFR 77.216(a) shall comply with the requirements of 30 CFR 77.216 and of this section.

(3) The design of impoundments shall be certified in accordance with §12.148(a) of this title (relating to Reclamation Plan: Ponds, Impoundments, Banks, Dams, and Embankments) as designed to meet the requirements of this part using current, prudent, engineering practices and any design criteria established by the Commission. The qualified, registered professional engineer shall be experienced in the design and construction of impoundments.

(4) Stability.

(A) An impoundment meeting the Class B or C criteria for dams in TR-60, or the size or other criteria of 30 CFR 77.216(a), shall have a minimum static factor of 1.5 for a normal pool with steady-state seepage saturation conditions, and a seismic safety factor of at least 1.2.

(B) An impoundment not included in subparagraph (A) of this paragraph, except for a coal-mine waste impounding structure, shall have a minimum static

safety factor of 1.3 for a normal pool with steady state seepage saturation conditions or meet the requirements of §12.148(c) of this title (relating to Reclamation Plan: Ponds, Impoundments, Banks, Dams, and Embankments).

(5) Impoundments shall have adequate freeboard to resist overtopping by waves and by sudden increases in storage volume. Impoundments meeting the Class B or C criteria for dams in TR-60 shall comply with the freeboard hydrograph criteria in the Minimum Emergency Spillway Hydrologic Criteria table in TR-60.

(6) Foundations.

(A) Foundations and abutments for an impounding structure shall be stable during all phases of construction and operation and shall be designed based on adequate and accurate information on the foundation conditions. For an impoundment meeting the Class B or C criteria for dams in TR-60, or the size or other criteria of 30 CFR 77.216(a), foundation investigation, as well as any necessary laboratory testing of foundation material, shall be performed to determine the design requirements for foundation stability.

(B) All vegetative and organic materials shall be removed and foundations excavated and prepared to resist failure. Cutoff trenches shall be installed if necessary to ensure stability.

(7) Slope protection shall be provided to protect against surface erosion at the site and protect against sudden drawdown.

(8) Faces of embankments and surrounding areas shall be vegetated, except that faces where water is impounded may be riprapped or otherwise stabilized in accordance with accepted design practices.

(9) An impoundment shall include either a combination of principal and emergency spillways or a single spillway configured as specified in subparagraph (A) of this paragraph, designed and constructed to safely pass the applicable design precipitation event specified in subparagraph (B) of this paragraph.

(A) The Commission may approve a single open-channel spillway that is of nonerodible construction and designed to carry sustained flows or earth- or grass-lined and designed to carry short-term, infrequent flows at non-erosive velocities where sustained flows are not expected.

(B) Except as specified in subsection (c)(2) of this section, the required design precipitation event for an impoundment meeting the spillway requirements of this paragraph is:

(i) for an impoundment meeting the Class B or C criteria for dams in TR-60, the emergency spillway hydrograph criteria in the Minimum Emergency Spillway Hydrologic Criteria table in TR-60, or greater event as specified by the Commission;

(ii) for an impoundment meeting or exceeding the size or other criteria of 30 CFR 77.216(a), a 100-year, 6-hour event, or greater event as specified by the Commission; and

(iii) for an impoundment not included in clauses (i) and (ii) of this subparagraph, a 25-year, 6-hour event, or greater event as specified by the Commission.

(10) The vertical portion of any remaining highwall shall be located far enough below the low-water line along the full extent of the highwall to provide adequate safety and access for the proposed water users.

(11) A qualified registered professional engineer or other qualified professional specialist under the direction of a professional engineer, shall inspect each impoundment as provided in subparagraph (A) of this paragraph. The professional engineer or specialist shall be experienced in the construction of impoundments.

(A) Inspections shall be made regularly during construction, upon completion of the construction, and at least yearly until removal of the structure or release of the performance bond.

(B) The qualified registered professional engineer shall promptly after each inspection required in subparagraph (A) of this paragraph, provide the Commission a certified report that the impoundment has been constructed and/or maintained as designed and in accordance with the approved plan and this chapter. The report shall include discussion of any appearance of instability, structural weakness or other hazard condition, depth and elevation of any impounded waters, existing storage capacity, any existing or required monitoring procedures and instrumentation, and any other aspects of the structure affecting stability.

(C) A copy of the report shall be retained at or near the minesite.

(12) Impoundments meeting the NRCS Class B or C criteria for dams in TR-60, or the size or other criteria of 30 CFR 77.216 must be examined in accordance with 30 CFR 77.216-3. Impoundments not meeting the NRCS Class B or C criteria for dams in TR-60, or subject to 30 CFR 77.216, shall be examined at least quarterly. A qualified person designated by the operator shall examine impoundments for the appearance of structural weakness and other hazardous conditions.

(13) If any examination or inspection discloses that a potential hazard exists, the person who examined the impoundment shall promptly inform the Commission of the finding and of the emergency procedures formulated for public protection and remedial action. If adequate procedures cannot be formulated or implemented, the Commission shall be notified immediately. The Commission shall then notify the appropriate agencies that other emergency procedures are required to protect the public.

(b) Permanent Impoundments. A permanent impoundment of water may be created, if authorized by the Commission in the approved permit based upon the following demonstration:

(1) the size and configuration of such impoundment will be adequate for its intended purposes;

(2) the quality of impounded water will be suitable on a permanent basis for its intended use and, after reclamation, will meet applicable state and federal water-quality standards, and discharges from the impoundment will meet applicable effluent limitations and will not degrade the quality of receiving water below applicable state and federal water-quality standards;

(3) the water level will be sufficiently stable and be capable of supporting the intended use;

(4) final grading will provide for adequate safety and access for proposed users;

(5) the impoundment will not result in the diminution of the quality and quantity of water utilized by adjacent or surrounding landowners for agricultural, industrial, recreational, or domestic uses; and

(6) the impoundment will be suitable for the approved postmining land use.

(c) Temporary Impoundments.

(1) The Commission may authorize the construction

of temporary impoundments as part of a surface coal mining operation.

(2) In lieu of meeting the requirements of subsection (a)(9)(A) of this section, the Commission may approve an impoundment that relies primarily on storage to control the runoff from the design precipitation event when it is demonstrated by the operator and certified by a qualified registered professional engineer that the impoundment will safely control the design precipitation event, the water from which shall be safely removed in accordance with current, prudent engineering practices. Such an impoundment shall be located where failure would not be expected to cause loss of life or serious property damage, except where:

(A) impoundments meeting the NRCS Class B or C criteria for dams in TR-60, or the size or other criteria of 30 CFR 77.216(a), shall be designed to control the precipitation of the probable maximum precipitation of a 6-hour event, or greater event as specified by the Commission; and

(B) impoundments not included in subparagraph (A) of this paragraph shall be designed to control the precipitation of the 100-year, 6-hour event, or greater event as specified by the Commission.

The provisions of this §12.347 adopted to be effective November 4, 1997, 22 TexReg 10640.

§12.348 Hydrologic Balance: Ground-Water Protection

In order to protect the hydrologic balance, surface mining activities shall be conducted according to the plan approved under §12.146 of this title (relating to Reclamation Plan: Protection of Hydrologic Balance) and the following:

(1) ground-water quality shall be protected by handling earth materials and runoff in a manner that minimizes acidic, toxic, or other harmful infiltration to ground-water systems and by managing excavations and other disturbances to prevent or control the discharge of pollutants into the ground water; and

(2) ground-water quantity shall be protected by handling earth materials and runoff in a manner that will restore the approximate premining recharge capacity of the reclaimed area as a whole, excluding coal mine waste disposal areas and fills, so as to allow the movement of water to the ground-water system.

The provisions of this §12.348 adopted to be effective November 4, 1997, 22 TexReg 10640.

§12.349 Hydrologic Balance: Surface-Water Protection

In order to protect the hydrologic balance, surface mining activities shall be conducted according to the plan approved under §12.146 of this title (relating to Reclamation Plan: Protection of Hydrologic Balance) and the following:

(1) surface-water quality shall be protected by handling earth materials, ground-water discharges, and runoff in a manner that minimizes the formation of acidic or toxic drainage; prevents, to the extent possible using the best technology currently available, additional contribution of suspended solids to streamflow outside the permit area; and otherwise prevents water pollution. If drainage control, restabilization and revegetation of disturbed areas, diversion of runoff, mulching, or other reclamation and remedial practices are not adequate to meet the requirements of §12.340 of this title (relating to Hydrologic Balance: Water-Quality Standards and Effluent Limitations), the operator shall use and maintain the necessary water-treatment facilities or water controls; and

(2) surface-water quality and flow rates shall be protected by handling earth materials and runoff in accordance with the steps outlined in the plan approved under §12.146 of this title (relating to Reclamation Plan: Protection of Hydrologic Balance).

The provisions of this §12.349 adopted to be effective November 4, 1997, 22 TexReg 10640.

§12.350 Hydrologic Balance: Surface and Ground-Water Monitoring

(a) Ground water.

(1) Ground-water monitoring shall be conducted according to the ground-water monitoring plan approved under §12.146(b) of this title (relating to Reclamation Plan: Protection of Hydrologic Balance). The Commission may require additional monitoring when necessary.

(2) Ground-water monitoring data shall be submitted every three months to the Commission or more frequently as prescribed by the Commission. Monitoring reports shall include analytical results from each sample taken during the reporting period. When the analysis of any ground-water sample indicates noncompliance with the permit conditions, then the operator shall promptly notify the Commission and immediately take the action provided for in §12.221(a) and §12.146(a) of this title (relating to Conditions of Permits: Environment, Public Health, and Safety, and to Reclamation Plan: Protection of Hydrologic Balance).

(3) Ground-water monitoring shall proceed through mining and continue during reclamation until bond release. Consistent with the procedures of §§12.206-12.221 of this title (relating to Review, Public Participation, and Approval of Permit Applications and Permit Terms and Conditions), the Commission may modify the monitoring requirements, including the parameters covered and the sampling frequency, if the operator demonstrates, using the monitoring data obtained under this section, that:

(A) the operation has minimized disturbance to the hydrologic balance in the permit and adjacent areas and prevented material damage to the hydrologic balance outside the permit area; water quantity and quality are suitable to support approved postmining land uses; and the water rights of other users have been protected or replaced; or

(B) monitoring is no longer necessary to achieve the purposes set forth in the monitoring plan approved under §12.146(b) of this title (relating to Reclamation Plan: Protection of Hydrologic Balance).

(4) Equipment, structures, and other devices used in conjunction with monitoring the quality and quantity of ground water onsite and offsite shall be properly installed, maintained, and operated and shall be removed when no longer needed.

(b) Surface water.

(1) Surface-water monitoring shall be conducted according to the surface water monitoring plan approved under §12.146(c) of this title (relating to Reclamation Plan: Protection of Hydrologic Balance). The Commission may require additional monitoring when necessary.

(2) Surface-water monitoring data shall be submitted every three months to the Commission or more frequently as prescribed by the Commission. Monitoring reports shall include analytical results from each sample taken during the reporting period. When the analysis of any surface water sample indicates noncompliance with the permit conditions, then the operator shall promptly notify the Commission and immediately take the action provided for in

§12.221(a) and §12.146(a) of this title (relating to Conditions of Permits: Environment, Public Health, and Safety, and to Reclamation Plan: Protection of Hydrologic Balance). The reporting requirements of this paragraph do not exempt the operator from meeting any National Pollutant Discharge Elimination System (NPDES) requirements.

(3) Surface-water monitoring shall proceed through mining and continue during reclamation until bond release. Consistent with the procedures of §§12.206-12.221 of this title (relating to Review, Public Participation, and Approval of Permit Applications and Permit Terms and Conditions), the Commission may modify the monitoring requirements, except those required by the NPDES permitting authority, including the parameters covered and the sampling frequency, if the operator demonstrates, using the monitoring data obtained under this section, that:

(A) the operation has minimized disturbance to the hydrologic balance in the permit and adjacent areas and prevented material damage to the hydrologic balance outside the permit area; water quantity and quality are suitable to support approved postmining land uses; and the water rights of other users have been protected or replaced; or

(B) monitoring is no longer necessary to achieve the purposes set forth in the monitoring plan approved under §12.146(c) of this title (relating to Reclamation Plan: Protection of Hydrologic Balance).

(4) Equipment, structures, and other devices used in conjunction with monitoring the quality and quantity of surface water onsite and offsite shall be properly installed, maintained, and operated and shall be removed when no longer needed.

The provisions of this §12.350 adopted to be effective November 4, 1997, 22 TexReg 10640.

§12.351 Hydrologic Balance: Transfer of Wells

(a) An exploratory or monitoring well may only be transferred by the person who conducts surface mining activities for further use as a water well with the prior approval of the Commission. That person and the surface owner of the lands where the well is located shall jointly submit a written request to the Commission for that approval.

(b) Upon an approved transfer of a well, the transferee shall:

(1) assume primary liability for damages to persons or property from the well;

(2) plug the well when necessary, but in no case later than abandonment of the well; and

(3) assume primary responsibility for compliance with §§12.331-12.333 of this title (relating to Casing and Sealing of Drilled Holes: General Requirements, to Casing and Sealing of Drilled Holes: Temporary, and to Casing and Sealing of Drilled Holes: Permanent) with respect to the well.

(c) Upon an approved transfer of a well, the transferor shall be secondarily liable for the transferee's obligations under subsection (b) of this section, until release of the bond or other equivalent guarantee required by Subchapter J of this chapter (relating to Bond and Insurance Requirements for Surface Coal Mining and Reclamation Operations) for the area in which the well is located.

The provisions of this §12.351 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.352 Hydrologic Balance: Water Rights and Replacement

As in effect on January 6, 2020.

Any person who conducts surface mining activities shall replace the water supply of an owner of interest in real property who obtains all or part of his or her supply of water for domestic, agricultural, industrial, or other legitimate use from an underground or surface source, where the water supply has been adversely impacted by contamination, diminution, or interruption proximately resulting from the surface mining activities. Baseline hydrologic information required in §§12.126, 12.130, and 12.146 of this title (relating to Description of Hydrology and Geology: General Requirements, to Alternative Water Supply Information, and to Reclamation Plan: Protection of Hydrologic Balance) shall be used to determine the extent of the impact of mining upon ground water and surface water.

The provisions of this §12.352 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.353 Hydrologic Balance: Discharge of Water into an Underground Mine

Surface water shall not be diverted or otherwise discharged into underground mine workings, unless the person who conducts the surface mining activities demonstrates to the Commission that the discharge will:

(1) abate water pollution or otherwise eliminate public hazards resulting from surface mining activities;

(2) be discharged as a controlled flow, meeting the effluent limitations referenced in §12.340 of this title (relating to Hydrologic Balance: Water-Quality Standards and Effluent Limitations) for pH and total suspended solids, except that the pH and total suspended solid limitations may be exceeded, if approved by the Commission, and the discharge is limited to:

(A) coal processing waste;

(B) fly ash from a coal-fired facility;

(C) sludge from an acid mine drainage treatment facility;

(D) flue-gas desulfurization sludge;

(E) inert materials used for stabilizing underground mines; or

(F) underground mine development wastes;

(3) in any event not cause, result in, or contribute to a violation of applicable water-quality standards or effluent limitations due to discharge from underground mines to surface waters;

(4) minimize disturbance to the hydrologic balance of the permit area, prevent material damage outside the permit area, and otherwise eliminate public hazards resulting from surface mining activities; and

(5) meet with the approval of the Mine Safety and Health Administration.

The provisions of this §12.353 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.354 Hydrologic Balance: Postmining Rehabilitation of Sedimentation Ponds, Diversions, Impoundments, and Treatment Facilities

Before abandoning the permit area, the person who conducts the surface mining activities shall renovate all permanent sedimentation ponds, diversions, impoundments, and treatment facilities to meet criteria specified in the detailed design plans for the permanent structures and impoundments.

The provisions of this §12.354 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.355 Hydrologic Balance: Stream Buffer Zones

(a) No land within 100 feet of a perennial stream or an intermittent stream shall be disturbed by surface mining activities, unless the Commission specifically authorizes surface mining activities closer to, or through, such a stream. The Commission may authorize such activities only upon finding that:

(1) surface mining activities will not cause or contribute to the violation of applicable state or federal water-quality standards, and will not adversely affect the water quantity and quality or other environmental resources of the stream; and

(2) if there will be a temporary or permanent stream-channel diversion, it will comply with §12.341 of this title (relating to Hydrologic Balance: Diversions).

(b) The area not to be disturbed shall be designated as a buffer zone, and the operator shall mark it as specified in §12.330 of this title (relating to Signs and Markers).

The provisions of this §12.355 adopted to be effective November 4, 1997, 22 TexReg 10640.

§12.356 Coal Recovery

Surface mining activities shall be conducted so as to maximize the utilization and conservation of the coal, while utilizing the best appropriate technology currently available to maintain environmental integrity, so that reaffecting the land in the future through surface coal mining operations is minimized.

The provisions of this §12.356 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.357 Use of Explosives: General Requirements

(a) Each operator shall comply with all applicable state and federal laws and regulations in the use of explosives.

(b) Blasts that use more than 5 pounds of explosive or blasting agent shall be conducted according to the schedule required by §12.359 of this title (relating to Use of Explosives: Blasting Schedule).

(c) All blasting operations shall be conducted by experienced, trained, and competent persons who understand the hazards involved. A blaster and at least one other person shall be present at the firing of a blast. Each person responsible for blasting operations shall possess a valid certification as required by §§12.700-12.710 of this title (relating to Training, Examination, and Certification of Blasters) and:

(1) be familiar with the blasting plan and site-specific performance standards; and

(2) give direction and on-the-job training to persons who are not certified and who are assigned to the blasting crew to assist in the use of explosives.

(d) Blast-design requirements shall include the following:

(1) the operator shall submit to the Commission an anticipated blast design if blasting operations will be conducted within:

(A) 1,000 feet of any building used as a dwelling, public building, school, church, hospital, nursing facility, or community or institutional building outside the permit area;

(B) 500 feet of facilities including, but not limited to, disposal wells, petroleum or gas storage facilities, active or abandoned underground mines, fluid-transmission pipelines, gas or oil-collection lines, or water and sewage lines;

(2) the blast design may be presented as part of a permit application or at a time, before the blast, approved by the Commission;

(3) the blast design shall contain sketches of the drill patterns, delay periods, and decking and shall indicate the type and amount of explosives to be used, critical dimensions, and the location and general description of structures to be protected, as well as a discussion of design factors to be used, which protect the public and meet the applicable airblast, flyrock and ground-vibration standards in §12.360 of this title (relating to Use of Explosives: Control of Adverse Effects);

(4) the blast design shall be prepared and signed by a certified blaster; and

(5) the Commission may require changes to the design submitted.

The provisions of this §12.357 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.358 Use of Explosives: Pre-blasting Survey

(a) At least 30 days before initiation of a blasting program, the operator shall notify, in writing, all residents or owners of dwellings or other structures located within 1/2 mile of any part of the permit area regarding how to request a preblasting survey. The request shall be made, in writing, directly to the operator or to the Commission who shall promptly notify the operator. The operator shall promptly conduct a pre-blasting survey of the dwelling or structure and promptly submit a report of the survey to the Commission and to the person requesting the survey. If a structure is renovated or modified subsequent to a pre-blast survey, then upon request a survey of such additions and renovations shall be performed by the operator in accordance with this section.

(b) The operator shall determine the condition of the dwelling or structure and shall document any pre-blasting damage and other physical factors that could reasonably be affected by the blasting. Assessments of structures such as pipelines, pipes, cables, transmission lines, cisterns, wells, and other water systems warrant special attention; however, assessment of these structures may be limited to surface conditions and other readily available data. Special attention shall be given to the pre-blasting condition of wells and other water systems used for human, animal, or agricultural purposes and to the quantity and quality of the water.

(c) A written report of the survey shall be prepared and signed by the person who conducted the survey. The report may include recommendations of any special conditions or proposed adjustments to the blasting procedure which should be incorporated into the blasting plan to prevent damage. Copies of the report shall be promptly provided to the person requesting the survey and to the Commission. If the person requesting the survey disagrees with the results of the survey, he or she may notify, in writing, both the operator and the Commission of the specific areas of disagreement.

(d) Any pre-blasting surveys requested before the 10th day before the planned initiation of blasting shall be completed by the operator before the initiation of blasting.

The provisions of this §12.358 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.359 Use of Explosives: Blasting Schedule

(a) Blasting schedule publication.

(1) Each operator shall publish a blasting schedule at least 10 days, but not more than 20 days, before beginning a blasting program in which blasts that use more than 5 pounds of explosive or blasting agent are detonated. The blasting schedule shall be published in a newspaper of general circulation in the locality of the blasting site.

(2) Copies of the schedule shall be distributed by mail to local governments and public utilities and by mail or delivered to each residence within 1/2 mile of the proposed blasting site described in the schedule.

(3) The operator shall republish and redistribute the schedule at least every 12 months.

(b) Blasting schedule contents.

(1) A blasting schedule shall not be so general as to cover the entire permit area or all working hours, but shall identify as accurately as possible the location of the blasting sites and the time periods when blasting will occur.

(2) The blasting schedule shall contain at a minimum:

(A) name, address, and telephone number of the operator;

(B) identification of the specific areas in which blasting will take place;

(C) dates and time periods when explosives are to be detonated;

(D) methods to be used to control access to the blasting area;

(E) types and patterns of audible warnings and all-clear signals to be used before and after blasting; and

(F) a description of unavoidable hazardous situations referred to in §12.360(b) of this title (relating to Use of Explosives: Control of Adverse Effects) which have been approved by the Commission for blasting at times other than those described in the schedule.

(c) Public notice of changes to blasting schedule.

(1) Before blasting in areas or at times not in a previous schedule, the operator shall prepare a revised blasting schedule according to the procedures in subsections (a) and (b) of this section. Where notice has previously been mailed to the owner or residents under subsection (a)(2) of this section with advice on requesting a pre-blast survey, the notice of change need not include information regarding pre-blast surveys.

(2) If there is a substantial pattern of non-adherence to the published blasting schedule as evidenced by the absence of blasting during scheduled periods, the Commission may require that the operator prepare a revised blasting schedule according to the procedures in subsection (c)(1) of this section.

The provisions of this §12.359 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.360 Use of Explosives: Control of Adverse Effects

(a) General requirements.

(1) Blasting shall be conducted in a manner that will prevent injury to persons, damage to public or private property outside the permit area, adverse impacts on any underground mine, and change in the course, channel, or availability of ground or surface waters outside the permit area.

(2) Except where lesser distances are approved by the Commission, based upon a pre-blasting survey, seismic investigation, and an approved blast design submitted in accordance with the requirements of §12.357(d) of this title (relating to Use of Explosives: General Requirements), blasting shall not be conducted within:

(A) 1,000 feet of any building used as a dwelling, public building, school, church, hospital, nursing facility, or community or institutional building outside the permit area; and

(B) 500 feet of facilities including, but not limited to, disposal wells, petroleum or gas storage facilities, active and abandoned underground mines, fluid-transmission pipelines, gas or oil-collection lines, or water and sewage lines.

(b) Scheduled blasting. All blasting shall be conducted between sunrise and sunset, unless otherwise approved by the Commission upon a showing by the operator that the public will be protected from adverse noise and other impacts.

(1) The Commission may limit the area covered, timing and sequence of blasting as listed in the blasting schedule if such limitations are reasonable and necessary in order to protect the public health, safety or welfare.

(2) Blasting may be conducted between sunset and sunrise if:

(A) a blast that has been prepared during the afternoon must be delayed due to the occurrence of an unavoidable hazardous condition and cannot be delayed until the next day because a potential safety hazard could result that cannot be adequately mitigated;

(B) in addition to the required warning signals, oral notices are provided to persons within 1/2 mile of the blasting site; and

(C) a complete written report of blasting at night is filed by the operator with the Commission not later than three days after the night blasting. The report shall include a description in detail of the reasons for the delay in blasting including why the blast could not be held over to the next day, when the blast was actually conducted, the warning notices given, and a copy of the blast report required by §12.362 of this title (relating to Use of Explosives: Records of Blasting Operations).

(c) Unscheduled blasting. Unscheduled blasting may be conducted only where public or operator health and safety so require, and for emergency blasting actions. The operator shall use audible signals to notify residents within 1/2 mile of the blasting site prior to conducting unscheduled blasting, and shall document the reason for the unscheduled blasting in accordance with §12.362 of this title (relating to Use of Explosives: Records of Blasting Operations).

(d) Warnings. All blasting shall require blasting signs, warnings, and access control.

(1) Blasting signs shall meet the specifications of §12.330 of this title (relating to Signs and Markers). The operator shall:

(A) conspicuously place signs reading, "Blasting Area", along the edge of any blasting area that comes within 100 feet of any public road right-of-way, and at the point where any other road provides access to the blasting area; and

(B) conspicuously place at all entrances to the permit area from public roads or highways, signs reading, "Warning! Explosives in Use". The signs shall clearly list and describe the meaning of the audible blast warning and all-clear signals that are in use, and shall explain the marking of the blasting areas and charged holes awaiting firing within the permit area.

(2) Warning and all-clear signals of different

character or pattern that are audible within a range of 1/2 mile from the blasting site shall be given. The operator shall notify each person within the permit area and each person who resides or regularly works within 1/2 mile of the permit area regarding the meaning of the signals in the blasting schedule.

(e) Access control. Access to the blasting area shall be controlled to prevent the presence of livestock or unauthorized persons during blasting and until an authorized representative of the operator has reasonably determined that:

(1) no unusual hazards, such as imminent slides or undetonated charges, exist; and

(2) access to and travel within the blasting area can be safely resumed.

(f) Airblast.

(1) Limits.

(A) Airblast shall not exceed the maximum limits specified below at the location of any dwelling, public building, school, church, or community or institutional building outside the permit area, except as provided in subsection (i) of this section.

Figure: 16_0012_0360-1 [***See Figure at end of this document***.]

(B) In all cases except the C-weighted, slow-response, the measuring systems used shall have a flat frequency response of at least 200 Hz at the upper end. The C-weighted shall be measured with a Type 1 sound-level meter that meets the standard American National Standards Institute (ANSI) S1.4-1971 specifications. ANSI S1.4-1971 is on file and available for inspection at the offices of the Commission, 170l N. Congress Avenue, Austin, Texas.

(C) If necessary to prevent damage, the Commission shall specify lower maximum allowable airblast levels than those of subparagraph (A) of this paragraph for use in the vicinity of a specific blasting operation.

(2) Monitoring.

(A) The operator shall conduct periodic monitoring to ensure compliance with the airblast standards. The Commission may require airblast measurement of any or all blasts, and may specify the locations at which the measurements are to be taken.

(B) The measuring systems shall have an upper-end flat frequency response of at least 200 Hz.

(g) Flyrock. Flyrock traveling in the air or along the ground shall not be cast from the blasting site:

(1) more than one half the distance to the nearest dwelling or other occupied structure;

(2) beyond the area of control required under subsection (e) of this section; or

(3) beyond the permit boundary.

(h) Ground vibration.

(1) General. In all blasting operations, except as otherwise authorized in subsection (i) of this section, the maximum ground vibration shall not exceed the values approved in the blasting plan required under §12.141 of this title (relating to Operation Plan: Blasting). The maximum ground vibration for protected structures listed in paragraph (2)(A) of this subsection shall be established in accordance with the maximum peak-particle-velocity limits of paragraph (2) of this subsection, the scaled-distance equation of paragraph (3) of this subsection, the blasting-level chart of paragraph (4) of this subsection, or by the Commission under paragraph (5) of this subsection. All structures in the vicinity of the blasting area, not listed in paragraph (2)(A) of this subsection, such as water towers, pipelines and other utilities, tunnels, dams, impoundments, and underground mines, shall be protected from damage by establishment of a maximum allowable limit on the ground vibration, submitted by the operator in the blasting plan and approved by the Commission.

(2) Maximum peak particle velocity.

(A) The maximum ground vibration shall not exceed the following limits at the location of any dwelling, public building, school, church, or community or institutional building outside the permit area:

Figure: 16_0012_0360-2 [***See Figure at end of this document.***]

(B) A seismographic record shall be provided for each blast.

(3) Scaled-distance equation.

(A) An operator may use the scaled-distance equation, $W = (D/D_S)^2$, to determine the allowable charge weight of explosives to be detonated in any 8-millisecond period, without seismic monitoring; where W = the maximum weight of explosives, in pounds; D = the distance, in feet, from the blasting site to the nearest protected structure; and D_S = the scaled-distance factor, which may initially be approved by the Commission using the values for the scaled-distance factor listed in paragraph (2)(A) of this subsection.

(B) The development of a modified scaled-distance factor may be authorized by the Commission on receipt of a written request by the operator, supported by seismographic records of blasting at the mine site. The modified scaled-distance factor shall be determined such that the particle velocity of the predicted ground vibration will not exceed the prescribed maximum allowable peak particle velocity of paragraph (2)(A) of this subsection, at a 95% confidence level.

(4) Blasting-level chart.

(A) An operator may use the ground vibration limits in Figure 1 to determine the maximum allowable ground vibration.

Figure: 16_0012_0360-3 [***See Figure at end of this document.***]

(B) If the Figure 1 limits are used, a seismographic record, including both particle-velocity and vibration-frequency levels, shall be provided for each blast. The method for the analysis of the predominant frequency contained in the blasting records shall be approved by the Commission before application of this alternative blasting criterion.

(5) The maximum allowable ground vibration shall be reduced by the Commission beyond the limits otherwise provided by this section, if determined necessary to provide damage protection.

(6) The Commission may require an operator to conduct seismic monitoring of any or all blasts or may specify the locations at which the measurements are to be taken and the degree of detail necessary in the measurement.

(i) Exceptions. The maximum airblast and ground vibration standards of subsections (f) and (h) of this section shall not apply at the following locations:

(1) at structures owned by the permittee and not leased to another person; and

(2) at structures owned by the permittee and leased to another person, if a written waiver by the lessee is submitted to the Commission before blasting.

The provisions of this §12.360 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.362 Use of Explosives: Records of Blasting Operations

The operator shall retain a record of each blast, including seismograph reports, which shall be retained for at least three years and which shall be available for inspection by the Commission and the public on request. The record shall contain the following data:

(1) name of the operator conducting the blast;

(2) location, date, and time of blast;

(3) name, signature, and certification number of blaster conducting the blast;

(4) identification, direction, and distance, in feet, from to the nearest blast hole to the nearest dwelling, public building, school, church, community or institutional building located outside the permit area, except those described in §12.360(i) of this title (relating to Use of Explosives: Control of Adverse Effects);

(5) weather conditions, including those which may cause possible adverse blasting effects such as temperature, and wind direction and approximate velocity;

(6) type of material blasted;

(7) sketches of the blast pattern, including number of holes, burden, spacing, decks, and delay pattern;

(8) diameter and depth of holes;

(9) types of explosives used;

(10) total weight of explosives used per hole;

(11) maximum weight of explosives detonated within any 8-millisecond period;

(12) maximum number of holes detonated within any 8-millisecond period;

(13) initiation system;

(14) type and length of stemming;

(15) mats or other protections used;

(16) type of delay detonator and delay periods used;

(17) sketch of the delay pattern;

(18) number of persons in the blasting crew;

(19) seismographic and airblast records, where required, which shall include:

(A) type of instrument, sensitivity, seismographic reading, and calibration signal or certification of annual calibration;

(B) exact location of the instrument and the date, time, and distance from the blast;

(C) name of the person and firm taking the seismograph reading;

(D) name of the person and firm analyzing the seismographic record; and

(E) the vibration and airblast level recorded; and

(20) reasons and conditions for each unscheduled blast.

The provisions of this §12.362 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.363 Disposal of Excess Spoil: General Requirements

(a) Spoil not required to achieve the approximate original contour within the area where overburden has been removed shall be hauled or conveyed to and placed in designated disposal areas within a permit area, if the disposal areas are authorized for such purposes in the approved permit application in accordance with this section and §§12.364-12.366 of this title (relating to Disposal of Excess Spoil: Valley Fills, Disposal of Excess Spoil: Head-of-Hollow Fills, and to Disposal of Excess Spoil: Durable Rock Fills). The spoil shall be placed in a controlled manner to ensure:

(1) that leachate and surface runoff from the fill will not degrade surface or ground waters or exceed the effluent limitations referenced in §12.340 of this title (relating to Hydrologic Balance: Water-Quality Standards and Effluent Limitations);

(2) stability of the fill; and

(3) that the land mass designated as the disposal area is suitable for reclamation and revegetation compatible with the natural surroundings.

(b) The fill shall be designed using recognized professional standards, certified by a registered professional engineer, and approved by the Commission.

(c) All vegetative and organic materials shall be removed from the disposal area and the topsoil shall be removed, segregated, and stored or replaced under §§12.334-12.338 of this title (relating to Topsoil: General Requirements, to Topsoil: Removal, to Topsoil: Storage, to Topsoil: Redistribution, and to Topsoil: Nutrients and Soil Amendments). If approved by the Commission, organic material may be used as mulch or may be included in the topsoil to control erosion, promote growth of vegetation, or increase the moisture retention of the soil.

(d) Slope protection shall be provided to minimize surface erosion at the site. Diversion design shall conform with the requirements of §12.341 of this title (relating to Hydrologic Balance: Diversions). All disturbed areas, including diversion ditches that are not riprapped, shall be vegetated upon completion of construction.

(e) The disposal areas shall be located on the most moderately sloping and naturally stable areas available as approved by the Commission. If such placement provides additional stability and prevents mass movement, fill materials suitable for disposal shall be placed upon or above a natural terrace, bench, or berm.

(f) The spoil shall be hauled or conveyed and placed in horizontal lifts in a controlled manner, concurrently compacted as necessary to ensure mass stability and prevent mass movement, covered, and graded to allow surface and subsurface drainage to be compatible with the natural surroundings and ensure a long-term static safety factor of 1.5.

(g) The final configuration of the fill must be suitable for postmining land uses approved in accordance with §12.399 of this title (relating to Postmining Land Use), except that no depressions or impoundments shall be allowed on the completed fill.

(h) Terraces may be utilized to control erosion and enhance stability if approved by the Commission and consistent with §12.385(b) of this title (relating to Backfilling and Grading: General Grading Requirements).

(i) Where the slope in the disposal area exceeds 2.8h:1v (36%), or such lesser slope as may be designated by the Commission based on local conditions, keyway cuts (excavations to stable bedrock) or rock toe-buttresses shall be constructed to stabilize the fill. Where the toe of the spoil rests on a downslope, stability analyses shall be performed in accordance with §12.153(c) of this title (relating to Disposal of Excess Spoil) to determine the size of rock toe-buttresses and key-way cuts.

(j) The fill shall be inspected for stability by a registered professional engineer, or other qualified professional specialist under the direction of the professional engineer, experienced in the construction of earth and rockfill embankments, at least quarterly throughout construction and during the following critical construction periods:

(1) removal of all organic material and topsoil;

(2) placement of underdrainage systems and protective filter systems;

(3) installation of surface drainage systems;

(4) placement and compaction of fill materials; and

(5) revegetation.

(k) The registered professional engineer shall provide to the Commission a certified report, within 2 weeks after each inspection, that the fill has been constructed as specified in the design approved by the Commission. The certified report on the drainage system and protective filters shall include color photographs taken during and after construction, but before underdrains are covered with excess spoil. If the underdrain system is constructed in phases, each phase shall be certified separately. A copy of the report shall be retained at the minesite.

(l) Coal processing wastes shall not be disposed of in head-of-hollow or valley fills, and may only be disposed of in other excess spoil fills, if such waste is:

(1) placed in accordance with §12.371 of this title (relating to Coal Processing Waste Banks: General Requirements);

(2) demonstrated to be non-toxic and non-acid-forming; and

(3) demonstrated to be consistent with the design stability of the fill.

(m) If the disposal area contains springs, natural or manmade watercourses, or wet-weather seeps, an underdrain system consisting of durable rock shall be constructed from the wet areas in a manner that prevents infiltration of the water into the spoil material. The underdrain system shall be protected by an adequate filter and shall be designed and constructed using standard geotechnical engineering methods. Where excess durable rock spoil is placed in single or multiple lifts such that the underdrain system is constructed simultaneously with excess spoil placement by the natural segregation of dumped materials, color photographs shall be taken of the underdrain as the underdrain system is being formed.

(n) The foundation and abutments of the fill shall be stable under all conditions of construction and operation. Sufficient foundation investigation and laboratory testing of foundation materials shall be performed in order to determine the design requirements for stability of the foundation. Analyses of foundation conditions shall include the effect of underground mine workings, if any, upon the stability of the structure.

(o) Excess spoil may be returned to underground mine workings, but only in accordance with a disposal program approved by the Commission and MSHA upon the basis of a plan submitted under §12.193 of this title (relating to Underground Development Waste/Return of Coal Processing Waste to Abandoned Underground Workings).

(p) Excess spoil that is acid-forming or toxic-forming or combustible shall be adequately covered with non-acid, non-toxic and noncombustible material, or treated, to control the impact on surface and ground water in accordance with this chapter (relating to Coal Mining Regulations), to prevent sustained combustion and to minimize adverse effects on plant growth and the approved postmining land use.

(q) The photographs required by this section to accompany each certified report shall be taken in adequate size and number with enough terrain or other physical features of the site shown to provide a relative scale to the photographs and to specifically and clearly identify the site. *The provisions of this §12.363 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.*

§12.364 Disposal of Excess Spoil: Valley Fills

(a) Valley fills shall meet all of the requirements of §12.363 of this title (relating to Disposal of Excess Spoil: General Requirements) and the additional requirements of this section.

(b) The fill shall be designed to attain a long-term static safety factor of 1.5 based upon data obtained from subsurface exploration, geotechnical testing, foundation design, and accepted engineering analyses.

(c) A subdrainage system for the fill shall be constructed in accordance with the following:

(1) a system of underdrains constructed of durable rock shall meet the requirements of paragraph (4) of this subsection and:

(A) be installed along the natural drainage system;

(B) extend from the toe to the head of the fill; and

(C) contain lateral drains to each area of potential drainage or seepage;

(2) a filter system to ensure the proper functioning of the rock underdrain system shall be designed and constructed using standard geotechnical engineering methods;

(3) in constructing the underdrains, no more than 10% of the rock may be less than 12 inches in size, and no single rock may be larger than 25% of the width of the drain. Rock used in underdrains shall meet the requirements of paragraph (4) of this subsection. The minimum size of the main underdrain shall be:

Figure: 16 TAC §12.364(c)(3) [***See Figure at end of this document.***]

(4) underdrains shall consist of nondegradable, non-acid-forming and non-toxic-forming rock, such as natural sand and gravel, sandstone, limestone, or other durable rock that will not slake in water and will be free of coal, clay or shale.

(d) Spoil shall be hauled or conveyed and placed in a controlled manner and concurrently compacted as specified by the Commission, in lifts no greater than 4 feet, or less if required by the Commission, to:

(1) achieve the densities designed to ensure mass stability;

(2) prevent mass movements;

(3) avoid contamination of the rock underdrain or rock core; and

(4) prevent formation of voids.

(e) Surface-water runoff from the area above the fill shall be diverted away from the fill and into stabilized diversion channels designed to pass safely the runoff from a 100-year, 24-hour precipitation event or larger event specified by the Commission. Surface runoff from the fill surface shall be diverted to stabilized channels off the fill which will safely pass the runoff from a 100-year, 24-hour precipitation event. Diversion designs shall comply with the

requirements of §12.341(6) of this title (relating to Hydrologic Balance: Diversions).

(f) The tops of the fill and any terrace constructed to stabilize the face shall be graded no steeper than 20h:1v (5%). The vertical distance between terraces shall not exceed 50 feet.

(g) Drainage shall not be directed over the outslope of the fill.

(h) The outslope of the fill shall not exceed 2h:1v (50%). The Commission may require a flatter slope.

The provisions of this §12.364 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.365 Disposal of Excess Spoil: Head-of-Hollow Fills

(a) Disposal of spoil in the head-of-hollow fill shall meet all standards set forth in §§12.363 and 12.364 of this title (relating to Disposal of Excess Spoil: General Requirements, and to Disposal of Excess Spoil: Valley Fills) and the additional requirements of this section.

(b) The fill shall be designed to completely fill the disposal site to the approximate elevation of the ridgeline. A rock-core chimney drain may be utilized instead of the subdrain and surface diversion system required for valley fills. If the crest of the fill is not approximately at the same elevation as the low point of the adjacent ridgeline, the fill must be designed as specified in §12.364 of this title (relating to Disposal of Excess Spoil: Valley Fills) with diversion of runoff around the fill. A fill associated with contour mining and placed at or near the coal seam, and which does not exceed 250,000 cubic yards, may use the rock-core chimney drain.

(c) The alternative rock-core chimney-drain system shall be designed and incorporated into the construction of head-of-hollow fills as follows:

(1) the fill shall have, along the vertical projection of the main buried stream channel or rill a vertical core of durable rock at least 16 feet thick which shall extend from the toe of the fill to the head of the fill, and from the base of the fill to the surface of the fill. A system of lateral rock underdrains shall connect this rock core to each area of potential drainage or seepage in the disposal area. Rocks used in the rock core and underdrains shall meet the requirements of §12.364(c) of this title (relating to Disposal of Excess Spoil: Valley Fills);

(2) a filter system to ensure the proper functioning of the rock core shall be designed and constructed using standard geotechnical engineering methods; and

(3) the grading may drain surface water away from the outslope of the fill and toward the rock core. The maximum slope of the top of the fill shall be 33h:1v (3%). Instead of the requirements of §12.363(g) of this title (relating to Disposal of Excess Spoil: General Requirements), a drainage pocket may be maintained at the head of the fill during and after construction, to intercept surface runoff and discharge the runoff through or over the rock drain, if stability of the fill is not impaired. In no case shall this pocket or sump have a potential for impounding more than 10,000 cubic feet of water. Terraces on the fill shall be graded with a 3.0 to 5.0% grade toward the fill and a 1.0% slope toward the rock core.

(d) The drainage control system shall be capable of passing safely the runoff from a 100-year, 24-hour precipitation event, or larger event specified by the Commission.

The provisions of this §12.365 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.366 Disposal of Excess Spoil: Durable Rock Fills

(a) In lieu of the requirements of §§12.364 and 12.365 of this title (relating to Disposal of Excess Spoil: Valley Fills, and to Disposal of Excess Spoil: Head-of-Hollow Fills), the Commission may approve alternate methods for disposal of hard rock spoil, including fill placement of dumping in a single lift, on a site specific basis, provided the services of a registered professional engineer experienced in the design and construction of earth and rockfill embankments are utilized and provided the requirements of this section and §12.363 of this title (relating to Disposal of Excess Spoil: General Requirements) are met. For this section, "hard rock spoil" shall be defined as rockfill consisting of at least 80% by volume of sandstone, limestone, or other rocks that do not slake in water. Resistance of the hard rock spoil to slaking shall be determined by using the slake index and slake durability tests in accordance with guidelines and criteria established by the Commission.

(b) Spoil is to be transported and placed in a specified and controlled manner which will ensure stability of the fill.

(1) The method of spoil placement shall be designed to ensure mass stability and prevent mass movement in accordance with the additional requirements of this section.

(2) Loads of noncemented clay shale and/or clay spoil in the fill shall be mixed with hard rock spoil in a controlled manner to limit on a unit basis concentrations of noncemented clay shale and clay in the fill. Such materials shall comprise no more than 20% of the fill volume as determined by tests performed by a registered engineer and approved by the Commission.

(c) Requirements for design of earth and rockfill embankments shall include the following:

(1) stability analyses shall be made by the registered professional engineer. Parameters used in the stability analyses shall be based on adequate field reconnaissance, subsurface investigations, including borings, and laboratory tests; and

(2) the embankment which constitutes the valley fill or head-of-hollow fill shall be designed with the following factors of safety:

Figure: 16 TAC §12.366(c)(2) [***See Figure at end of this document.***]

(d) The design of a head-of-hollow fill shall include an internal drainage system which will ensure continued free drainage of anticipated seepage from precipitation and from springs or wet-weather seeps.

(1) Anticipated discharge from springs and seeps and due to precipitation shall be based on records and/or field investigations to determine seasonal variation. The design of the internal drainage system shall be based on the maximum anticipated discharge.

(2) All granular material used for the drainage system shall be free of clay and consist of durable particles such as natural sands and gravels, sandstone, limestone or other durable rock which will not slake in water.

(3) The internal drain shall be protected by a properly designed filter system.

(e) Surface water runoff from the areas adjacent to and above the fill shall not be allowed to flow onto the fill and shall be diverted into stabilized channels which are designed to pass safely the runoff from a 100-year, 24-hour

precipitation event. Diversion design shall comply with the requirements of §12.341(6) of this title (relating to Hydrologic Balance: Diversions).

(f) The top surface of the completed fill shall be graded such that the final slope after settlement will be no steeper than 20h:1v (5%) toward properly designed drainage channels in natural ground along the periphery of the fill. Surface runoff from the top surface of the fill shall not be allowed to flow over the outslope of the fill.

(g) Surface runoff from the outslope of the fill shall be diverted off the fill to properly designed channels which will pass safely a 100-year, 24-hour precipitation event. Diversion design shall comply with the requirements of §12.341(6) of this title (relating to Hydrologic Balance: Diversions).

(h) Terraces shall be constructed on the outslope if required for control of erosion or for roads included in the approved postmining land-use plan. Terraces shall meet the following requirements:

(1) the slope of the outslope between terrace benches shall not exceed 2h:1v (50%);

(2) to control surface runoff, each terrace bench shall be graded to a slope of 20h:1v (5.0%) toward the embankment. Runoff shall be collected by a ditch along the intersection of each terrace bench and the outslope; and

(3) terrace ditches shall have a 5.0% slope toward the channels specified in subsection (g) of this section, unless steeper slopes are necessary in conjunction with approved roads.

The provisions of this §12.366 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.367 Protection of Underground Mining

(a) No surface coal mining activities shall be conducted closer than 500 feet to any point of either an active or abandoned underground mine, except to the extent that:

(1) the nature, timing, and sequence of the operations are jointly approved by the Commission, the Mine Safety and Health Administration, and the state agency, if any, responsible for the safety of mine workers; and

(2) the activities result in improved resource recovery, abatement of water pollution, or elimination of hazards to the health and safety of the public.

(b) Surface mining activities shall be designed to protect disturbed surface areas, including spoil disposal sites, so as not to endanger any present or future operations of either surface or underground mining activities.

The provisions of this §12.367 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.368 Coal Processing Waste Banks: General Requirements

(a) All coal processing waste shall be hauled or conveyed and placed in new and existing disposal areas approved by the Commission for this purpose. These areas shall be within a permit area. The disposal area shall be designed, constructed, and maintained:

(1) in accordance with §§12.363 and 12.364 of this title (relating to Disposal of Excess Spoil: General Requirements, and Disposal of Excess Spoil: Valley Fills), this section, and §§12.369-12.374 of this title (relating to Coal Processing Waste Banks: Site Inspection, to Coal Processing Waste Banks: Water Control Measures, to Coal Processing Waste Banks: Construction Requirements, to Coal Processing Waste: Burning, to Coal Processing Waste: Burned Waste Utilization, and to Coal Processing Waste: Return to Underground Workings); and

(2) to prevent combustion.

(b) Coal processing waste materials from activities located outside a permit area, such as those activities at other mines or abandoned mine waste piles may be disposed of in the permit area only if approved by the Commission. Approval shall be based on the showing by the person who conducts surface mining activities in the permit area, using hydrologic, geotechnical, physical, and chemical analyses, that disposal of these materials does not:

(1) adversely affect water quality, water flow, or vegetation;

(2) create public health hazards; or

(3) cause instability in the disposal areas.

(c) The disposal facility shall be designed using current, prudent engineering practices and shall meet any design criteria established by the Commission. A qualified registered professional engineer, experienced in the design of similar earth and waste structures, shall certify the design of the disposal facility.

The provisions of this §12.368 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.369 Coal Processing Waste Banks: Site Inspection

(a) All coal processing waste banks shall be inspected by a qualified registered professional engineer, or other qualified professional specialist under the direction of the professional engineer. The professional engineer or specialist shall be experienced in the construction of similar earth and waste structures.

(1) Such inspections shall be made at least quarterly throughout construction and during critical construction periods, beginning within 7 days after preparation of the disposal area begins. The Commission may require more frequent inspection based upon an evaluation of the potential danger to the health or safety of the public and the potential harm to land, air and water resources. Inspections may terminate when the coal processing waste bank has been graded, covered in accordance with §12.371 of this title (relating to Coal Processing Waste Banks: Construction Requirements), topsoil has been distributed on the bank in accordance with §12.337 of this title (relating to Topsoil: Redistribution), or at such a later time as the Commission may require. Critical construction periods shall include at a minimum:

(A) foundation preparation including the removal of all organic material and topsoil;

(B) placement of underdrains and protective filter systems;

(C) installation of final surface drainage systems; and

(D) the final graded and revegetated facility.

(2) Regular inspections shall also be conducted during placement and compaction of coal mine waste materials. More frequent inspections shall be conducted if a danger of harm exists to the public health and safety or to the environment. Inspections shall include such observations and tests as may be necessary to evaluate the potential hazard to human life and property, to ensure that all organic material and topsoil have been removed and that proper construction and maintenance are occurring in accordance with the plan submitted under §12.148 of this title (relating to Reclamation Plan: Ponds, Impoundments, Banks, Dams, and

Embankments) and approved by the Commission.

(3) The engineer or other approved inspector shall consider steepness of slopes, seepage, and other visible factors which could indicate potential failure, and the results of failure with respect to the threat to human life and property.

(4) The qualified registered professional engineer shall provide a certified report to the Commission promptly after each inspection that the refuse pile has been constructed and maintained as designed and in accordance with the approved plan and this chapter (relating to Coal Mining Regulations). The report shall include any appearance of instability, structural weakness, and other hazardous conditions.

(5) The certified report on the drainage system and protective filters shall include color photographs taken during and after construction, but before underdrains are covered with coal mine waste. If the underdrain system is constructed in phases, each phase shall be certified separately. The photographs accompanying each certified report shall be taken in adequate size and number and with enough terrain or other physical features of the site shown to provide a relative scale to the photographs and to specifically and clearly identify the site.

(6) Copies of each inspection report shall be maintained at the mine site.

(b) If any inspection discloses that a potential hazard exists, the Commission shall be informed promptly of the finding and of the emergency procedures formulated for public protection and remedial action. If adequate procedures cannot be formulated or implemented, the Commission shall be notified immediately. The Commission shall then notify the appropriate emergency agencies that other emergency procedures are required to protect the public from the coal processing waste area.

The provisions of this §12.369 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.370 Coal Processing Waste Banks: Water Control Measures

(a) A properly designed subdrainage system shall be provided, which shall:

(1) intercept all ground-water sources;

(2) be protected by an adequate filter; and

(3) be covered so as to protect against the entrance of surface water or leachate from the coal processing waste.

(b) All surface drainage from the area above the coal processing waste bank and from the crest and face of the waste disposal area shall be diverted, in accordance with §12.364(e) of this title (relating to Disposal of Excess Spoil: Valley Fills).

(c) Slope protection shall be provided to minimize surface erosion at the site. All disturbed areas, including diversion ditches that are not riprapped shall be vegetated upon completion of construction.

(d) All water discharged from a coal processing waste bank shall comply with §§12.339, 12.340, 12.343, 12.344, 12.350, and 12.353 of this title (relating to Hydrologic Balance: General Requirements, to Hydrologic Balance: Water-Quality Standards and Effluent Limitations, to Hydrologic Balance: Sediment Control Measures, to Hydrologic Balance: Siltation Structures, to Hydrologic Balance: Surface and Ground-Water Monitoring, and to Hydrologic Balance: Discharge of Water Into an Underground Mine).

The provisions of this §12.370 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.371 Coal Processing Waste Banks: Construction Requirements

(a) Coal processing waste banks shall be constructed in compliance with §§12.363 and 12.364 of this title (relating to Disposal of Excess Spoil: General Requirements, and to Disposal of Excess Spoil: Valley Fills), except to the extent that the requirements of those sections are varied in this section.

(b) Coal processing waste banks shall have a minimum static safety factor of 1.5.

(c) Compaction requirements during construction or modification of all coal processing waste banks shall meet the requirements of this subsection, instead of those specified in §12.364(d) of this title (relating to Disposal of Excess Spoil: Valley Fills). The coal processing waste shall be:

(1) spread in layers no more than 24 inches in thickness; and

(2) compacted to attain 90% of the maximum dry density to prevent spontaneous combustion and to provide the strength required for stability of the coal processing waste bank. Dry densities shall be determined in accordance with the American Association of State Highway and Transportation Officials (AASHTO) Specification T99-74 (Twelfth Edition) (July 1978) or an equivalent method. AASHTO T99-74 is on file and available for inspection at the office of the Commission, 1701 North Congress Avenue, Austin, Texas.

(d) Following grading of the coal processing waste bank, the site shall be covered with a minimum of 4 feet of the best available non-toxic and non-combustible material, in accordance with §12.335(e) of this title (relating to Topsoil: Removal), and in a manner that does not impede flow from subdrainage systems. The coal processing waste bank shall be revegetated in accordance with §§12.390-12.393 and 12.395 of this title (relating to Revegetation: General Requirement, to Revegetation: Use of Introduced Species, to Revegetation: Timing, to Revegetation: Mulching and Other Soil Stabilizing Practices, and to Revegetation: Standards for Success). The Commission may allow less than 4 feet of cover material based on physical and chemical analyses which show that the requirements of §§12.390-12.393 and 12.395 of this title will be met.

The provisions of this §12.371 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective December 29, 1998, 23 TexReg 13041.

§12.372 Coal Processing Waste: Burning

Coal processing waste fires shall be extinguished by the person who conducts the surface mining activities in accordance with a plan approved by the Commission and the Mine Safety and Health Administration. The plan shall contain, at a minimum, provisions to ensure that only those persons authorized by the operator, and who have an understanding of the procedures to be used, shall be involved in the extinguishing operations.

The provisions of this §12.372 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.373 Coal Processing Waste: Burned Waste Utilization

Before any burned coal processing waste, other

materials, or refuse is removed from a disposal area, approval shall be obtained from the Commission. A plan for the method of removal, with maps and appropriate drawings to illustrate the proposed sequence of the operation and method of compliance with §§12.330-12.372, this section, and §§12.374-12.403 of this title (relating to Permanent Program Performance Standards--Surface Mining Activities), shall be submitted to the Commission. Consideration shall be given in the plan to potential hazards, which may be created by removal, to persons working or living in the vicinity of the structure. The plan shall be certified by a qualified registered professional engineer.
The provisions of this §12.373 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.374 Coal Processing Waste: Return to Underground Workings

Coal processing waste may be returned to underground mine workings only in accordance with the waste disposal program approved by the Commission and MSHA under §12.193 of this title (relating to Underground Development Waste/Return of Coal Processing Waste to Abandoned Underground Workings).
The provisions of this §12.374 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.375 Disposal of Noncoal Wastes

(a) Noncoal wastes including, but not limited to, grease, lubricants, paints, flammable liquids, garbage, abandoned mining machinery, lumber, and other combustibles generated during surface mining activities shall be placed and stored in a controlled manner in a designated portion of the permit area. Placement and storage shall ensure that leachate and surface runoff do not degrade surface or ground water, fires are prevented, and that the area remains stable and suitable for reclamation and revegetation compatible with the natural surroundings.

(b) Final disposal of noncoal wastes shall be in a designated disposal site in the permit area. Disposal sites shall be designed and constructed with appropriate water barriers on the bottom and sides of the designated site. Wastes shall be routinely compacted and covered to prevent combustion and wind-born waste. When the disposal is completed a minimum of 2 feet of soil cover shall be placed over the site, slopes stabilized, and revegetation accomplished in accordance with §§12.390-12.393 and 12.395 of this title (relating to Revegetation: General Requirements, to Revegetation: Use of Introduced Species, to Revegetation: Timing, to Revegetation: Mulching and Other Stabilizing Practices, and to Revegetation: Standards for Success). Operation of the disposal site shall be conducted in accordance with all local, State, and Federal requirements.

(c) At no time shall any solid waste material be deposited at refuse embankments or impoundment sites, nor shall any excavation for solid waste disposal be located within 8 feet of any coal outcrop or coal storage area.

(d) Notwithstanding any other provision in this chapter (relating to Coal Mining Regulations), any noncoal mine waste defined as "hazardous" under Section 3001 of the Resource Conservation and Recovery Act (RCRA) (Pub. L. 94-580, as amended) and 40 CFR Part 261 shall be handled in accordance with the requirements of Subtitle C of RCRA and any implementing regulations.
The provisions of this §12.375 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640; amended to be effective December 29, 1998, 23 TexReg 13041.

§12.376 Coal Mine Waste: Dams and Embankments: General Requirements

(a) This section and §12.377 and §12.378 of this title (relating to Coal Mine Waste: Dams and Embankments: Site Preparation, and to Coal Mine Waste: Dams and Embankments: Design and Construction) apply to dams and embankments, constructed of coal mine waste or intended to impound coal mine waste, whether they were completed before adoption of the regulatory program or are intended to be completed thereafter.

(b) Coal mine waste shall not be used in the construction of dams and embankments unless it has been demonstrated to the Commission that the stability of such a structure conforms with the requirements of this section. It shall also be demonstrated that the use of coal mine waste shall not have a detrimental effect on downstream water quality or the environment due to acid seepage through the dam or embankment. The stability of the structure and the potential impact of acid mine seepage through the impounding structure shall be discussed in detail in the design plan submitted to the Commission in accordance with this chapter (relating to Coal Mining Regulations). All demonstrations shall be submitted to and approved by the Commission.

(c) Each impounding structure constructed of coal mine waste or intended to impound coal mine waste shall be designed, constructed and maintained in accordance with this chapter (relating to Coal Mining Regulations). Such structures may not be retained permanently as part of the approved postmining land use.

(d) If an impounding structure constructed of coal mine waste or intended to impound coal mine waste meets the criteria of the Mine Safety and Health Administration, 30 CFR 77.216(a), the combination of principal and emergency spillways shall be able to safely pass the probable maximum precipitation of a 6-hour precipitation event, or greater event as specified by the Commission.
The provisions of this §12.376 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.377 Coal Mine Waste: Dams and Embankments: Site Preparation

Before coal mine waste is placed at a dam or embankment site:

(1) all trees, shrubs, grasses, and other organic material shall be cleared and grubbed from the site, and all combustibles shall be removed and stockpiled in accordance with the requirements of §§12.330-2.403 of this title (relating to Permanent Program Performance Standards--Surface Mining Activities); and

(2) surface drainage that may cause instability or erosion to the embankment area or the embankment features, whether during construction or after completion, shall be diverted away from the embankment by diversion ditches that comply with the requirements of §12.341 of this title (relating to Hydrologic Balance: Diversions). Adequate outlets for discharge from these diversions shall be in accordance with §12.345 of this title (relating to Hydrologic Balance: Discharge Structures). Diversions that are designed to divert drainage from the upstream area or drainage from the surface of the facility away from the impoundment area

shall be designed to carry the peak runoff from a 100-year, 6-hour precipitation event. The diversion shall be maintained to prevent blockage, and the discharge shall be in accordance with §12.345 of this title (relating to Hydrologic Balance: Discharge Structures). Sediment control measures shall be provided at the discharge of each diversion ditch before entry into natural watercourses in accordance with §§12.339-12.341, 12.343, and 12.344 of this title (relating to Hydrologic Balance: General Requirements, to Hydrologic Balance: Water-Quality Standards and Effluent Limitations, to Hydrologic Balance: Diversions, to Hydrologic Balance: Sediment Control Measures, and to Hydrologic Balance: Siltation Structures).

The provisions of this §12.377 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.378 Coal Mine Waste: Dams and Embankments: Design and Construction

(a) The design of each dam and embankment constructed of coal mine waste or intended to impound such waste shall comply with the requirements of §12.347(a) and (c) of this title (relating to Hydrologic Balance: Permanent and Temporary Impoundments), modified as follows:

(1) the design freeboard between the lowest point on the embankment crest and the maximum water elevation shall be at least 3 feet. The maximum water elevation shall be that determined by the freeboard hydrograph criteria contained in the U.S. Natural Resources Conservation Service criteria referenced in §12.347 of this title (relating to Hydrologic Balance: Permanent and Temporary Impoundments).

(2) the dam and embankment shall have a minimum safety factor of 1.5 for the partial pool with steady seepage saturation conditions, and the seismic safety factor shall be at least 1.2; and

(3) the dam or embankment foundation and abutments shall be designed to be stable under all conditions of construction and operation of the impoundment. Sufficient foundation investigations and laboratory testing shall be performed to determine the safety factors of the dam or embankment for all loading conditions appearing in subsection (a)(2) of this section or the publications referred to in §12.347 of this title (relating to Hydrologic Balance: Permanent and Temporary Impoundments) and for all increments of construction.

(b) Spillways and outlet works shall be designed to provide adequate protection against erosion and corrosion. Inlets shall be protected against blockage.

(c) For an impounding structure constructed of or impounding coal mine waste, at least 90% of the water stored during the design precipitation event shall be removed within the 10-day period following the design precipitation event.

The provisions of this §12.378 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.380 Protection of Fish, Wildlife, and Related Environmental Values

(a) Any person conducting surface mining activities shall, to the extent possible using the best technology currently available, minimize disturbances and adverse impacts of the activities on fish, wildlife, and related environmental values, and achieve enhancement of such resources where practicable.

(b) No surface mining activity shall be conducted which is likely to jeopardize the continued existence of endangered or threatened species or which is likely to result in the destruction or adverse modification of designated critical habitats of such species in violation of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.). The operator shall promptly report to the Commission the presence in the permit area of any critical habitat of a threatened or endangered species listed by the Secretary, any plant or animal listed as threatened or endangered under state or federal law, or any bald or golden eagle, of which the operator becomes aware and which was not previously reported to the Commission by that person. Upon notification, the Commission shall consult with appropriate state and federal fish and wildlife agencies and, after consultation, shall identify whether, and under what conditions, the operator may proceed.

(c) No surface mining activity shall be conducted in a manner which would result in the unlawful taking of a bald or golden eagle, its nest, or any of its eggs. The operator shall promptly report to the Commission any golden or bald eagle nest discovered within the permit area. The operator shall make a survey to determine whether nest sites have eagles present, the range and habitat used by eagles at occupied sites, and to determine whether other nesting sites are present. Upon notification, the Commission shall consult with the U.S. Fish and Wildlife Service and the Texas Parks and Wildlife Department. After consultation, the Commission shall determine whether, and under what conditions the operator may proceed.

(d) A person who conducts surface mining activities shall ensure that the design and construction of electric power lines and other transmission facilities used for or incidental to the surface mining activities on the permit area are in accordance with the guidelines set forth in Environmental Criteria for Electric Transmission Systems (USDI, USDA (1970)), or in alternative guidance manuals approved by the Commission. Distribution lines shall be designed and constructed in accordance with REA Bulletin 61-10, Powerline Contacts by Eagles and Other Large Birds, or in alternative guidance manuals approved by the Commission. For informational purposes, these two documents are available at the office of the Commission, 1701 N. Congress Avenue, Austin, Texas.

(e) Each person who conducts surface mining activities shall, to the extent possible using the best technology currently available:

(1) locate and operate haul and access roads so as to avoid or minimize impacts to important fish and wildlife species or other species protected by state or federal law;

(2) fence roadways where specified by the Commission to guide locally important wildlife to roadway underpasses. No new barrier shall be created in known and important wildlife migration routes;

(3) fence, cover, or use other appropriate methods to exclude wildlife from ponds which contain hazardous concentrations of toxic-forming materials;

(4) restore, enhance where practicable or avoid disturbance to habitats of unusually high value for fish and wildlife;

(5) restore, enhance where practicable, or maintain natural riparian vegetation on the banks of streams, lakes, and other wetland areas;

(6) afford protection to aquatic communities by

avoiding stream channels as required in §12.355 of this title (relating to Hydrologic Balance: Stream Buffer Zones) or restoring stream channels as required in §12.341 of this title (relating to Hydrologic Balance: Diversions);

(7) not use persistent pesticides on the area during surface mining and reclamation activities, unless approved by the Commission;

(8) to the extent possible prevent, control, and suppress range, forest, and coal fires which are not approved by the Commission as part of a management plan;

(9) if fish and wildlife habitat is to be a primary or secondary postmining land use, the operator shall in addition to the requirements of §§12.390-12.393 and 12.395 of this title (relating to Revegetation: General Requirements, to Revegetation: Use of Introduced Species, to Revegetation: Timing, to Revegetation: Mulching and Other Stabilizing Practices, and to Revegetation: Standards for Success):

(A) select plant species to be used on reclaimed areas, based on the following criteria:

(i) their proven nutritional value for fish and wildlife;

(ii) their uses as cover for fish and wildlife; and

(iii) their ability to support and enhance fish and wildlife habitat after release of bonds; and

(B) distribute plant groupings to maximize benefit to fish and wildlife. Plants should be grouped and distributed in a manner which optimize edge effect, cover, and other benefits for fish and wildlife;

(10) where cropland is to be the postmining land use and where appropriate for wildlife and crop management practices, intersperse the fields with trees, hedges, or fence rows throughout the harvested area to break up large blocks of monoculture and to diversify habitat types for birds and other animals. Wetlands shall be preserved or created rather than drained or otherwise permanently abolished; and

(11) where the primary land use is to be residential, public service, or industrial land use, intersperse reclaimed lands with greenbelts utilizing species of grass, shrubs and trees useful as food and cover for birds and small animals, unless such green belts are inconsistent with the approved postmining land use

The provisions of this §12.380 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.381 Slides and Other Damage

(a) An undisturbed natural barrier shall be provided beginning at the elevation of the lowest coal seam to be mined and extending from the outslope for such distance as may be determined by the Commission as is needed to assure stability. The barrier shall be retained in place to prevent slides and erosion.

(b) At any time a slide occurs which may have a potential adverse affect on public property, health, safety, or the environment, the person who conducts the surface mining activities shall notify the Commission by the fastest available means and comply with any remedial measures required by the Commission.

The provisions of this §12.381 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.382 Pipelines

With respect to pipelines transmitting crude oil, liquid petroleum, natural gas, toxic or flammable substances:

(1) identify and describe pipelines located in the permit area and within 100 feet thereof in the application for a surface mining permit;

(2) visibly mark the location of pipelines at 200-foot intervals throughout the permit area;

(3) ensure a minimum of six feet of compacted material between the pipeline and any haul road or access road within the permit area which crosses over it;

(4) not create a cut within one hundred feet or one times the depth of the cut (whichever is greater) of any pipeline;

(5) conduct blasting operations in accordance with state and federal laws; but, in no case shall blasting be conducted within 500 feet of a pipeline;

(6) comply with rules and regulations pursuant to TEXAS REVISED CIVIL STATUTES ANNOTATED, ARTICLE 6053-1; Railroad Commission of Texas, Pipeline Safety Rules (16 Texas Administrative Code §§7.70 et seq.); 49 CFR 191, 192, and 199; and

(7) at the discretion of the Commission, variances to paragraphs (2)-(5) of this section may be granted by the Commission. Variances to paragraphs (3)-(5) of this section will be granted if, in the opinion of the Commission, the structural integrity of the pipeline will be maintained and if agreed to by the owner of the pipeline.

The provisions of this §12.382 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.383 Contemporaneous Reclamation

Reclamation efforts, including, but not limited to, backfilling, grading, topsoil replacement and revegetation, of all land that is disturbed by surface mining activities shall occur as contemporaneously as practicable with mining operations.

The provisions of this §12.383 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.384 Backfilling and Grading: General Requirements

(a) Timing of backfilling and grading.

(1) Contour mining. Rough backfilling and grading shall follow coal removal by not more than 60 days or 1,500 linear feet. The Commission may grant additional time for rough backfilling and grading if the permittee can demonstrate, through a detailed written analysis under §12.145(b)(3) of this title (relating to Reclamation Plan: General Requirements), that additional time is necessary.

(2) Open pit mining with thin overburden. Rough backfilling and grading shall occur in accordance with the time schedule approved by the Commission, on the basis of the materials submitted under §12.145(b)(3) of this title (relating to Reclamation Plan: General Requirements), which shall specifically establish in stated increments the period between removal of coal and completion of backfilling and grading.

(3) Area strip mining (cyclic excavation). Rough backfilling and grading shall be completed within 180 days following coal removal and shall not be more than four spoil ridges behind the pit being worked, the spoil from the active pit being considered the first ridge. The Commission may grant additional time and/or distance for rough backfilling and grading if the permittee can demonstrate, through a detailed written analysis under §12.145(b)(3) of this title (relating to Reclamation Plan: General Requirements), that additional time and/or distance is necessary.

(4) Area strip mining (continuous excavation).

Rough backfilling and grading shall occur in accordance with the time schedule approved by the Commission, on the basis of a detailed written analysis by the permittee under §12.145(b)(3) of this title (relating to Reclamation Plan: General Requirements) and any additional information which the Commission may require.

(b) Method of backfilling and grading.

(1) Except as specifically exempted in this subchapter (relating to Permanent Program Performance Standards), all disturbed areas shall be returned to their approximate original contour. All spoil shall be transported, backfilled, compacted (where advisable to insure stability or to prevent leaching) and graded to eliminate all highwalls, spoil piles, and depressions.

(2) Backfilled material shall be placed to minimize erosion, to minimize water pollution both on and off the site, and to support the approved postmining land use.

(3) The postmining graded slopes need not be of uniform slope.

(4) Cut-and-fill terraces may be used only in those situations expressly identified in §12.385 of this title (relating to Backfilling and Grading: General Grading Requirements).

The provisions of this §12.384 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.385 Backfilling and Grading: General Grading Requirements

(a) The final graded slopes shall not exceed in grade either the approximate premining slopes, or any lesser slopes approved by the Commission based on consideration of soil, climate, or other characteristics of the surrounding area. Postmining final graded slopes need not be uniform but shall approximate the general nature of the premining topography. The person who conduct surface mining activities shall, at a minimum:

(1) retain all overburden and spoil on the solid portion of existing or new benches; and

(2) backfill and grade to the most moderate slope possible to eliminate the highwall which does not exceed either the angle of repose or such lesser slope as is necessary to achieve a minimum static safety factor of 1.3. In all cases the highwall shall be eliminated.

(b) On approval by the Commission in order to conserve soil moisture, ensure stability, and control erosion on final graded slopes, cut-and-fill terraces may be allowed, if the terraces are compatible with the approved postmining land use and are appropriate substitutes for construction of lower grades on the reclaimed lands. The terraces shall meet the following requirements:

(1) the width of the individual terrace bench shall not exceed 20 feet, unless specifically approved by the Commission as necessary for stability, erosion control, or roads included in the approved postmining land-use plan;

(2) the vertical distance between terraces shall be as specified by the Commission, to prevent excessive erosion and to provide long-term stability;

(3) the slope of the terrace outslope shall not exceed 2h:1v (50%). In no case may highwalls be left as part of terraces; and

(4) culverts and underground rock drains shall be used on the terrace only when approved by the Commission.

(c) Small depressions may be constructed, if they:

(1) are approved by the Commission to minimize erosion, conserve soil moisture, or promote vegetation;

(2) do not restrict normal access; and

(3) are not inappropriate substitutes for lower grades on the reclaimed lands.

(d) All final grading, preparation of overburden before replacement of topsoil, and placement of topsoil, shall be done along the contour to minimize subsequent erosion and instability. If such grading, preparation, or placement along the contour is hazardous to equipment operators, then grading, preparation, or placement in a direction other than generally parallel to the contour may be used. In all cases, grading, preparation, or placement shall be conducted in a manner which minimizes erosion and provides a surface for replacement of topsoil which will minimize slippage.

(e) Backfilling and grading of previously mined areas shall be subject to the following requirements:

(1) remining operations on previously mined areas that contain a preexisting highwall shall comply with the requirements of §12.384 of this title (relating to Backfilling and Grading: General Requirements), this section, and §§12.386-12.388 of this title (relating to Backfilling and Grading: Covering Coal and Acid- and Toxic-Forming Materials, to Backfilling and Grading: Thin Overburden, and to Backfilling and Grading: Thick Overburden), except as provided in this subsection; and

(2) the requirements of §12.384(b)(1) requiring the elimination of highwalls shall not apply to remining operations where the volume of all reasonably available spoil is demonstrated in writing to the Commission to be insufficient to completely backfill the reaffected or enlarged highwall. The highwall shall be eliminated to the maximum extent technically practical in accordance with the following criteria:

(A) all spoil generated by the remining operation and any other reasonably available spoil shall be used to backfill the area. Reasonably available spoil in the immediate vicinity of the remining operation shall be included within the permit area;

(B) the backfill shall be graded to a slope which is compatible with the approved postmining land use and which provides adequate drainage and long-term stability;

(C) any highwall remnant shall be stable and not pose a hazard to the public health and safety or to the environment. The operator shall demonstrate, to the satisfaction of the Commission, that the highwall remnant is stable; and

(D) spoil placed on the outslope during previous mining operations shall not be disturbed if such disturbances will cause instability of the remaining spoil or otherwise increase the hazard to the public health and safety or to the environment.

The provisions of this §12.385 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640; amended to be effective June 12, 2001, 26 TexReg 4090.

§12.386 Backfilling and Grading: Covering Coal and Acid- and Toxic-forming Materials

(a) Cover.

(1) A person who conducts surface mining activities shall cover, with a minimum of 4 feet of the best available nontoxic and noncombustible material, all exposed coal seams remaining after mining, and all acid-forming materials, toxic-forming materials, combustible materials, or any other materials identified by the Commission, as exposed, used, or produced during mining.

(2) If necessary, these materials shall be treated to neutralize toxicity, in order to prevent water pollution and sustained combustion and minimize adverse effects on plant growth and land uses.

(3) Where necessary to protect against upward migration of salts, exposure by erosion, formation of acid or toxic seeps, to provide an adequate depth for plant growth, or otherwise to meet local conditions, the Commission shall specify thicker amounts of cover using nontoxic material, or special compaction and isolation from ground-water contact.

(4) Acid-forming or toxic-forming material shall not be buried or stored in proximity to a drainage course so as to cause or pose a threat of water pollution.

(b) Stabilization. Backfilled materials shall be selectively hauled or conveyed and compacted, wherever necessary to prevent leaching of acid-forming and toxic-forming materials into surface or ground waters and wherever necessary to insure stability of the backfilled materials. The method and design specifications of compacting material shall be approved by the Commission before acid-forming or toxic-forming materials are covered.

The provisions of this §12.386 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.387 Backfilling and Grading: Thin Overburden

Where thin overburden occurs within the permit area, the permittee, at a minimum, shall:

(1) use all spoil and other waste materials available from the entire permit area to attain the lowest practicable grade, but not more than the angle of repose; and

(2) meet the requirements of §12.385 and §12.386 of this title (relating to Backfilling and Grading: General Grading Requirements, and to Backfilling and Grading: Covering Coal and Acid- and Toxic-Forming Materials).

The provisions of this §12.387 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640; amended to be effective December 29, 1998, 23 TexReg 13041.

§12.388 Backfilling and Grading: Thick Overburden

Where thick overburden occurs within the permit area, the permittee at a minimum shall:

(1) restore the approximate original contour and then use the remaining spoil and other waste materials to attain the lowest practicable grade, but not more than the angle of repose;

(2) meet the requirements of §12.385 and §12.386 of this title (relating to Backfilling and Grading: General Requirements, and to Backfilling and Grading: Covering Coal and Acid- and Toxic-Forming Materials); and

(3) dispose of any excess spoil in accordance with §§12.363-12.366 of this title (relating to Disposal of Excess Spoil: General Grading Requirements, to Disposal of Excess Spoil: Valley Fills, to Disposal of Excess Spoil: Head-of-Hollow Fills, and to Disposal of Excess Spoil: Durable Rock Fills).

The provisions of this §12.388 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640; amended to be effective December 29, 1998, 23 TexReg 13041.

§12.389 Stabilization of Surface Areas for Surface Mining

(a) All exposed surface areas shall be protected and stabilized to effectively control erosion and air pollution attendant to erosion.

(b) Rills and gullies which form in areas that have been regraded and topsoiled and which either disrupt the approved postmining land use or the reestablishment of the vegetative cover or cause or contribute to a violation of water-quality standards for receiving streams shall be filled, regraded, or otherwise stabilized. Topsoil shall be replaced and the areas shall be reseeded or replanted.

The provisions of this §12.389 adopted to be effective September 14, 1999, 24 TexReg 7223.

§12.390 Revegetation: General Requirements

(a) The permittee shall establish on regraded areas and on all other disturbed areas except water areas and surface areas of roads that are approved as part of the postmining land use, a vegetative cover that is in accordance with the approved permit and reclamation plan and that is:

(1) diverse, effective, and permanent;

(2) comprised of species native to the area, or of introduced species where desirable and necessary to achieve the approved postmining land use and approved by the Commission;

(3) at least equal in extent of cover to the natural vegetation of the area; and

(4) capable of stabilizing the soil surface from erosion.

(b) The reestablished plant species shall:

(1) be compatible with the approved postmining land use;

(2) have the same seasonal characteristics of growth as the original vegetation;

(3) be capable of self-regeneration and plant succession;

(4) be compatible with the plant and animal species of the area; and

(5) meet the requirements of applicable state and federal seed, poisonous and noxious plant, and introduced species laws or regulations.

(c) The Commission may grant exception to the requirements of subsection (b)(2) and (3) of this section when the species are necessary to achieve a quick-growing, temporary, stabilizing cover, and measures to establish permanent vegetation are included in the approved permit and reclamation plan.

(d) When the Commission approves a cropland postmining land use, the Commission may grant exception to the requirements of subsections (a)(1), (a)(3), (b)(2), and (b)(3) of this section. The requirements of §§12.620-12.622, 12.624, and 12.625 of this title (relating to Special Permanent Program Performance Standards--Operations on Prime Farmland) apply to areas identified as prime farmland.

The provisions of this §12.390 adopted to be effective November 4, 1997, 22 TexReg 10640.

§12.391 Revegetation: Use of Introduced Species

Introduced species may be substituted for native species only if approved by the Commission under the following conditions:

(1) after appropriate field trials have demonstrated that the introduced species are desirable and necessary to achieve the approved postmining land use;

(2) the species are necessary to achieve a quick, temporary, and stabilizing cover that aids in controlling erosion; and measures to establish permanent vegetation are included in the approved plan submitted under

§§12.145(b)(5) and 12.147 of this title (relating to Reclamation Plan: General Requirements, and to Reclamation Plan: Postmining Land Uses);

(3) the species are compatible with the plant and animal species of the region; and

(4) the species meet the requirements of applicable state and federal seed or introduced species statutes, and are not poisonous or noxious.

The provisions of this §12.391 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.392 Revegetation: Timing

Seeding and planting of disturbed areas shall be conducted during the first normal period for favorable planting conditions after final preparation. The normal period for favorable planting shall be that planting time generally accepted locally for the type of plant materials selected. When necessary to effectively control erosion, any disturbed area shall be seeded and planted, as contemporaneously as practicable with the completion of backfilling and grading, with a temporary cover of small grains, grasses, or legumes until a permanent cover is established.

The provisions of this §12.392 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.393 Revegetation: Mulching and Other Soil Stabilizing Practices

(a) Suitable mulch and other soil stabilizing practices shall be used on all regraded and topsoiled areas to control erosion, promote germination of seeds, or increase the moisture retention capacity of the soil. The Commission may, on a case-by-case basis, suspend the requirement for mulch, if the permittee can demonstrate that alternative procedures will achieve the requirements of §12.395 of this title (relating to Revegetation: Standards for Success) and do not cause or contribute to air or water pollution.

(b) When required by the Commission, mulches shall be mechanically or chemically anchored to the soil surface to assure effective protection of the soil and vegetation.

(c) Annual grasses and grains may be used alone, as in situ mulch, or in conjunction with another mulch, when the Commission determines that they will provide adequate soil erosion control and will later be replaced by perennial species approved for the postmining land use.

(d) Chemical soil stabilizers alone, or in combination with appropriate mulches, may be used in conjunction with vegetative covers approved for the postmining land use.

The provisions of this §12.393 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.395 Revegetation: Standards for Success

(a) Comparison to an established standard. Success of revegetation shall be judged on the effectiveness of the vegetation for the approved postmining land use, the extent of cover compared to the cover occurring in natural vegetation of the area, and the general requirements of §12.390 and §12.391 of this title (relating to Revegetation: General Requirements; and Revegetation: Use of Introduced Species).

(1) Standards for success and statistically valid sampling techniques for measuring success shall be selected by the Commission, described in writing, and made available to the public.

(2) Standards for success shall include criteria representative of unmined lands in the area being reclaimed to evaluate the appropriate vegetation parameters of ground cover, production, or stocking. Ground cover, production, or stocking shall be considered equal to the approved success standard when they are not less than 90% of the success standard. The sampling techniques for measuring success shall use a 90% statistical confidence interval (i.e., one-sided test with a 0.10 alpha error).

(b) Standard for revegetated success. Standards for success shall be applied in accordance with the approved postmining land use and, at a minimum, the following conditions:

(1) for areas developed as grazingland or pastureland, the ground cover and production of living plants on the revegetated area shall be at least equal to that of a reference area or such other success standards approved by the Commission;

(2) for areas developed for use as cropland, crop production on the revegetated area shall be at least equal to that of a reference area or such other success standards approved by the Commission;

(3) for areas to be developed for fish and wildlife habitat, recreation, undeveloped land, or forest products, success of vegetation shall be determined on the basis of tree and shrub stocking and vegetative ground cover. Such parameters are described as follows:

(A) minimum stocking and planting arrangements shall be specified by the Commission on the basis of local and regional conditions and after consultation with and approval by the state agencies responsible for the administration of forestry and wildlife programs. Consultation and approval may occur on either a program wide or permit-specific basis;

(B) trees and shrubs that will be used in determining the success of stocking and the adequacy of the plant arrangement shall have utility for the approved postmining land use. Trees and shrubs counted in determining such success shall be healthy and have been in place for not less than two growing seasons. At the time of bond release, at least 80% of the trees and shrubs used to determine such success shall have been in place for 60% of the applicable minimum period of responsibility. The requirements of this section apply to trees and shrubs that have been seeded or transplanted and can be met when records of woody vegetation planted show that no woody plants were planted during the last two growing seasons of the responsibility period and, if any replanting of woody plants took place during the responsibility period, the total number planted during the last 60% of that period is less than 20% of the total number of woody plants required. Any replanting must be by means of transplants to allow for adequate accounting of plant stocking. This final accounting may include volunteer trees and shrubs of approved species. Volunteer trees and shrubs of approved species shall be deemed equivalent to planted specimens two years of age or older and can be counted towards success. Suckers on shrubby vegetation can be counted as volunteer plants when it is evident the shrub community is vigorous and expanding; and

(C) vegetative ground cover shall not be less than that required to achieve the approved postmining land use;

(4) for areas to be developed for industrial/commercial or residential land use less than two years after regrading is completed, the vegetative ground cover shall not be less than that required to control erosion;

and

(5) for areas previously disturbed by mining that were not reclaimed to the requirements of this subchapter and that are remined or otherwise redisturbed by surface coal mining operations, as a minimum, the vegetative ground cover shall be not less than the ground cover existing before redisturbance and shall be adequate to control erosion.

(c) Extended responsibility period.

(1) The period of extended responsibility for successful revegetation shall begin after the last year of augmented seeding, fertilizing, irrigation, or other work, excluding husbandry practices that are approved by the Commission in accordance with paragraph (4) of this subsection.

(2) In areas of more than 26.0 inches of annual average precipitation, the period of responsibility shall continue for a period of not less than:

(A) five full years, except as provided in subparagraph (B) of this paragraph. The vegetation parameters identified in subsection (b) of this section for grazingland, pastureland, or cropland shall equal or exceed the approved success standard during the growing season of any 2 years of the responsibility period, except the first year. Areas approved for the other uses identified in subsection (b) of this section shall equal or exceed the applicable success standard during the growing season of the last year of the responsibility period; or

(B) two full years for lands eligible for remining included in a permit for which a finding has been made under §12.216(16) of this title (relating to Criteria for Permit Approval or Denial). To the extent that the success standards are established by subsection (b)(5) of this section, the lands must equal or exceed the standards during the growing season of the last year of the responsibility period.

(3) In areas of 26.0 inches or less average annual precipitation, the period of responsibility shall continue for a period of not less than:

(A) ten full years, except as provided in subparagraph (B) of this paragraph. The vegetation parameters identified in subsection (b) of this section for grazingland, pastureland, or cropland shall equal or exceed the approved success standard during the growing season of any two years after year six of the responsibility period. Areas approved for the other uses identified in subsection (b) of this section shall equal or exceed the applicable success standard during the growing season of the last year of the responsibility period; or

(B) five full years for lands eligible for remining included in a permit for which a finding has been made under §12.216(16) of this title. To the extent that the success standards are established by subsection (b)(5) of this section, the lands must equal or exceed the standards during the growing seasons of the last two consecutive years of the responsibility period.

(4) The Commission may approve selective husbandry practices, excluding augmented seeding, fertilization, or irrigation, provided it obtains prior approval from the Director, Office of Surface Mining Reclamation and Enforcement in accordance with 30 CFR 732.17 that the practices are normal husbandry practices, without extending the period of responsibility for revegetation success and bond liability if such practices can be expected to continue as part of the postmining land use or if the discontinuance of the practices after the liability period expires will not reduce the probability of permanent revegetation success. Approved practices shall be normal husbandry practices within the region for unmined land having land uses similar to the approved postmining land use of the disturbed area, including such practices as disease, pest, and vermin control; and any pruning, reseeding, and transplanting specifically necessitated by such actions.

The provisions of this §12.395 adopted to be effective November 4, 1997, 22 TexReg 10640; amended to be effective November 12, 2007, 32 TexReg 8124; amended to be effective February 24, 2014, 39 TexReg 1121.

§12.397 Cessation of Operations: Temporary

(a) Each person who conducts surface mining activities shall effectively secure surface facilities in areas in which there are no current operations, but in which operations are to be resumed under an approved permit. Temporary abandonment shall not relieve a person of their obligation to comply with any provisions of the approved permit.

(b) Before temporary cessation of mining and reclamation operations for a period of thirty days or more, or as soon as it is known that a temporary cessation will extend beyond 30 days, persons who conduct surface mining activities shall submit to the Commission a notice of intention to cease or abandon mining and reclamation operations. This notice shall include a statement of the exact number of acres which will have been affected in the permit area, prior to such temporary cessation, the extent and kind of reclamation of those areas which will have been accomplished and identification of the backfilling, regrading, revegetation, environmental monitoring, and water treatment activities that will continue during the temporary cessation.

The provisions of this §12.397 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.398 Cessation of Operations: Permanent

(a) Persons who cease surface mining activities permanently shall close or backfill or otherwise permanently reclaim all affected areas, in accordance with this chapter (relating to Coal Mining Regulations) and the permit approved by the Commission.

(b) All underground openings, equipment, structures, or other facilities not required for monitoring, unless approved by the Commission as suitable for the postmining land use or environmental monitoring, shall be removed and the affected land reclaimed.

The provisions of this §12.398 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.399 Postmining Land Use

(a) General. All affected areas shall be restored in a timely manner:

(1) to conditions that are capable of supporting the uses which they were capable of supporting before any mining; or

(2) to higher or better uses achievable under criteria and procedures of this section.

(b) Determining premining use of land. The premining uses of land to which the postmining land use is compared shall be those uses which the land previously supported, if the land had not been previously mined and had been properly managed.

(1) The postmining land use for land that has been previously mined and not reclaimed shall be judged on the basis of the highest and best use that can be achieved and is compatible with surrounding areas.

(2) The postmining land use for land that has received improper management shall be judged on the basis of the premining use of surrounding lands that have received proper management.

(3) If the premining use of the land was changed within 5 years of the beginning of mining, the comparison of postmining use to premining use shall include a comparison with the historic use of the land as well as its use immediately preceding mining.

(c) Alternative land uses. Prior to the release of lands from the permit area in accordance with §12.313 of this title (relating to Criteria and Schedule for Release of Performance Bond), the permit area shall be restored, in a timely manner, either to conditions capable of supporting the uses they were capable of supporting before any mining, or to conditions capable of supporting approved alternative land uses. Alternative land uses may be approved by the Commission after consultation with the landowner or the land management agency having jurisdiction over the lands, if the following criteria are met:

(1) the proposed postmining land use is compatible with adjacent land use and, where applicable, with existing local, state, or federal land-use policies and plans: A written statement of the views of the authorities with statutory responsibilities for land use policies and plans is submitted to the Commission within 60 days of notice by the Commission and before surface mining activities begin. Any required approval, including any necessary zoning or other changes required for land use by local, state, or federal land-management agencies, is obtained and remains valid throughout the surface mining activities;

(2) specific plans are prepared and submitted to the Commission which show the feasibility of the postmining land use as related to projected land-use trends and markets and that include a schedule showing how the proposed use will be developed and achieved within a reasonable time after mining and will be sustained. The Commission may require appropriate demonstrations to show that the planned procedures are feasible, reasonable, and integrated with mining and reclamation, and that the plans will result in successful reclamation;

(3) provision of any necessary public facilities is ensured as evidenced by letters of commitment from parties other than the person who conducts surface mining activities, as appropriate, to provide the public facilities in a manner compatible with the plans submitted under §12.147 of this title (relating to Reclamation Plan: Postmining Land Uses). The letters shall be submitted to the Commission before surface mining activities begin;

(4) specific and feasible plans are submitted to the Commission which show that financing, attainment and maintenance of the postmining land use are feasible and, if appropriate, are supported by letters of commitment from parties other than the person who conducts the surface mining activities;

(5) plans for the postmining land use are designed under the general supervision of a registered professional engineer, who will ensure that the plans conform to applicable accepted standards for adequate land stability, drainage, vegetative cover, and aesthetic design appropriate for the postmining use of the site;

(6) the proposed use will present neither actual nor probable hazard to public health or safety, nor will it pose any actual or probable threat of water flow-diminution or pollution;

(7) the use will not involve unreasonable delays in reclamation;

(8) necessary approval of measures to prevent or mitigate adverse effects on fish, wildlife, and related environmental values and threatened or endangered plants is obtained from the Commission and appropriate state and federal fish and wildlife management agencies have been provided a 60-day period in which to review the plan before surface mining activities begin; and

(9) proposals to change premining land uses of range, fish and wildlife habitat, forestland, hayland, or pasture to a postmining cropland use, where the cropland would require continuous maintenance such as seeding, plowing, cultivation, fertilization, or other similar practices to be practicable or to comply with applicable federal, state, and local laws, are reviewed by the Commission to ensure that:

(A) there is a firm written commitment by the person who conducts surface mining activities or by the landowner or land manager to provide sufficient crop management after release of applicable performance bonds under Subchapter J of this Chapter (relating to Bond and Insurance Requirements for Surface Coal Mining and Reclamation Operations) and §§12.390-12.393 and 12.395 of this title (relating to Revegetation: General Requirements, to Revegetation: Use of Introduced Species, to Revegetation: Timing, to Revegetation: Mulching and Other Soil Stabilizing Practices, and to Revegetation: Standards for Success), to assure that the proposed postmining cropland use remains practical and reasonable;

(B) there is sufficient water available and committed to maintain crop production; and

(C) topsoil quality and depth are sufficient to support the proposed use.

The provisions of this §12.399 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective December 29, 1998, 23 TexReg 13041.

§12.400 Roads: General

(a) Road classification system.

(1) Each road, as defined in §12.3 of this title (relating to Definitions), shall be classified as either a primary road or an ancillary road.

(2) A primary road is any road which is:

(A) used for transporting coal or spoil;

(B) frequently used for access or other purposes for a period in excess of six months; or

(C) to be retained for an approved postmining land use.

(3) An ancillary road is any road not classified as a primary road.

(b) Performance standards. Each road shall be located, designed, constructed, reconstructed, used, maintained, and reclaimed so as to:

(1) control or prevent erosion, siltation, and the air pollution attendant to erosion, including road dust as well as dust occurring on other exposed surfaces, by measures such as vegetating, watering, using chemical or other dust suppressants, or otherwise stabilizing all exposed surfaces in accordance with current, prudent engineering practices;

(2) control or prevent damage to fish, wildlife, or their habitat and related environmental values;

(3) control or prevent additional contributions of suspended solids to stream flow or runoff outside the permit area;

(4) neither cause nor contribute to, directly or indirectly, the violation of state or federal water-quality standards applicable to receiving waters;

(5) refrain from seriously altering the normal flow of water in streambeds or drainage channels;

(6) prevent or control damage to public or private property, including the prevention or mitigation of adverse effects on lands within the boundaries of units of the National Park System, the National Wildlife Refuge System, the National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers System, including designated study rivers, and National Recreation Areas designated by Act of Congress; and

(7) use nonacid- and nontoxic-forming substances in road surfacing.

(c) Design and construction limits and establishment of design criteria. To ensure environmental protection appropriate for their planned duration and use, including consideration of the type and size of equipment used, the design and construction or reconstruction of roads shall incorporate appropriate limits for grade, width, surface materials, surface drainage control, culvert placement, and culvert size, in accordance with current, prudent engineering practices, and any necessary design criteria established by the Commission.

(d) Location.

(1) No part of any road shall be located in the channel of an intermittent or perennial stream unless specifically approved by the Commission in accordance with applicable §§12.339-12.341 and §§12.343-12.355 of this title (relating to Hydrologic Balance: General Requirements, to Hydrologic Balance: Water-Quality Standards and Effluent Limitations, to Hydrologic Balance: Diversions, to Hydrologic Balance: Sediment Control Measures, to Hydrologic Balance: Siltation Structures, to Hydrologic Balance: Discharge Structures, to Hydrologic Balance: Acid-Forming and Toxic-Forming Spoil, to Hydrologic Balance: Permanent and Temporary Impoundments, to Hydrologic Balance: Ground-Water Protection, to Hydrologic Balance: Surface-Water Protection, to Hydrologic Balance: Surface and Ground-Water Monitoring, to Hydrologic Balance: Transfer of Wells, to Hydrologic Balance: Water Rights and Replacement, to Hydrologic Balance: Discharge of Water Into an Underground Mine, to Hydrologic Balance: Postmining Rehabilitation of Sedimentation Ponds, Diversions, Impoundments, and Treatment Facilities, and to Hydrologic Balance: Stream Buffer Zones).

(2) Roads shall be located to minimize downstream sedimentation and flooding.

(e) Maintenance.

(1) A road shall be maintained to meet the performance standards of this section and §12.401 of this title (relating to Primary Roads) and any additional criteria specified by the Commission.

(2) A road damaged by a catastrophic event, such as a flood or earthquake, shall be repaired as soon as is practicable after the damage has occurred.

(f) Reclamation. A road not to be retained under an approved postmining land use shall be reclaimed in accordance with the approved reclamation plan as soon as practicable after it is no longer needed for mining and reclamation operations. This reclamation shall include:

(1) closing the road to traffic;

(2) removing all bridges and culverts unless approved as part of the postmining land use;

(3) removing or otherwise disposing of road-surfacing materials that are incompatible with the postmining land use and revegetation requirements;

(4) reshaping cut and fill slopes as necessary to be compatible with the postmining land use and to complement the natural drainage pattern of the surrounding terrain;

(5) protecting the natural drainage patterns by installing dikes or cross drains as necessary to control surface runoff and erosion; and

(6) scarifying or ripping the roadbed; replacing topsoil or substitute material, and revegetating disturbed surfaces in accordance with §§12.334-12.338 of this title (relating to Topsoil: General Requirements, to Topsoil: Removal, to Topsoil: Storage, to Topsoil: Redistribution, and to Topsoil: Nutrients and Soil Amendments), and §§12.390-12.393 and 12.395 of this title (relating to Revegetation: General Requirements, to Revegetation: Use of Introduced Species, to Revegetation: Timing, to Revegetation: Mulching and Other Stabilizing Practices, and to Revegetation: Standards for Success).

The provisions of this §12.400 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.401 Primary Roads

Primary roads shall meet the requirements of §12.400 of this title (relating to Roads: General) and the additional requirements of this section.

(1) Certification. The construction or reconstruction of primary roads shall be certified in a report to the Commission by a qualified registered professional engineer. The report shall indicate that the primary road has been constructed or reconstructed as designed and in accordance with the approved plan.

(2) Safety Factor. Each primary road embankment shall have a minimum static factor of 1.3.

(3) Location.

(A) To minimize erosion, a primary road shall be located, insofar as is practicable, on the most stable available surface;

(B) Fords of perennial or intermittent streams by primary roads are prohibited unless they are specifically approved by the Commission as temporary routes during periods of road construction.

(4) Drainage control. In accordance with the approved plan:

(A) each primary road shall be constructed or reconstructed, and maintained to have adequate drainage control, using structures such as, but not limited to bridges, ditches, cross drains, and ditch relief drains. The drainage-control system shall be designed to safely pass the peak runoff from a 10-year, 6-hour precipitation event, or greater event as specified by the Commission;

(B) drainage pipes and culverts shall be installed as designed, and maintained in a free and operating condition and to prevent or control erosion at inlets and outlets;

(C) drainage ditches shall be constructed and maintained to prevent uncontrolled drainage over the road surface and embankment;

(D) culverts shall be installed and maintained to sustain the vertical soil pressure, the passive resistance of the foundation, and the weight of vehicles using the road;

(E) natural stream channels shall not be altered or relocated without the prior approval of the Commission in

accordance with applicable §§12.339-12.341 and §§12.343-12.355 of this title (relating to Hydrologic Balance: General Requirements, to Hydrologic Balance: Water-Quality Standards and Effluent Limitations, to Hydrologic Balance: Diversions, to Hydrologic Balance: Sediment Control Measures, to Hydrologic Balance: Siltation Structures, to Hydrologic Balance: Discharge Structures, to Hydrologic Balance: Acid-Forming and Toxic-Forming Spoil, to Hydrologic Balance: Permanent and Temporary Impoundments, to Hydrologic Balance: Ground-Water Protection, to Hydrologic Balance: Surface-Water Protection, to Hydrologic Balance: Surface and Ground-Water Monitoring, to Hydrologic Balance: Transfer of Wells, to Hydrologic Balance: Water Rights and Replacement, to Hydrologic Balance: Discharge of Water Into an Underground Mine, to Hydrologic Balance: Postmining Rehabilitation of Sedimentation Ponds, Diversions, Impoundments, and Treatment Facilities, and to Hydrologic Balance: Stream Buffer Zones); and

(F) except as provided in paragraph (3)(B) of this section, structures for perennial or intermittent stream-channel crossings shall be made using bridges, culverts, low-water crossings, or other structures designed, constructed, and maintained using current, prudent engineering practices. The Commission shall ensure that low-water crossings are designed, constructed, and maintained to prevent erosion of the structure or stream bed and additional contributions of suspended solids to stream flow.

(5) Surfacing. Primary roads shall be surfaced with material approved by the Commission as being sufficiently durable for the anticipated volume of traffic and the weight and speed of vehicles using the road.

The provisions of this §12.401 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.402 Utility Installations

All surface coal mining operations shall be conducted in a manner which minimizes damage, destruction, or disruption of services provided by oil, gas, and water wells; oil, gas, and coal-slurry pipelines; railroads; electric and telephone lines; and water and sewage lines which pass over, under, or through the permit area, unless otherwise approved by the owner of those facilities and the Commission.

The provisions of this §12.402 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.403 Support Facilities

(a) Support facilities shall be operated in accordance with a permit issued for the mine or coal preparation operation to which it is incident or from which its operation results.

(b) In addition to the other provisions of §§12.330-12.402 of this title (relating to Permanent Program Performance Standards--Surface Mining Activities), support facilities shall be located, maintained, and used in a manner that:

(1) prevents or controls erosion and siltation, water pollution, and damage to public or private property; and

(2) to the extent possible using the best technology currently available:

(A) minimizes damage to fish, wildlife, and related environmental values; and

(B) minimizes additional contributions of suspended solids to streamflow or runoff outside the permit area. Any such contributions shall not be in excess of limitations of state or federal law.

The provisions of this §12.403 adopted to be effective April 7, 1997, 22 TexReg 3093.

DIVISION 3 PERMANENT PROGRAM PERFORMANCE STANDARDS--UNDERGROUND MINING ACTIVITIES

§12.500 Signs and Markers

(a) Specifications. Signs and markers required under this section and §§12.501-12.572 of this title (relating to Permanent Program Performance Standards--Underground Mining Activities) shall:

(1) be posted, maintained, and removed by the person who conducts the underground mining activities;

(2) be of a uniform design throughout the activities that can be easily seen and read;

(3) be made of durable material; and

(4) conform to local laws and regulations.

(b) Duration of maintenance. Signs and markers shall be maintained during all activities to which they pertain.

(c) Mine and permit identification signs.

(1) Identification signs shall be displayed at each point of access from public roads to areas of surface operations and facilities on permit areas for underground mining activities.

(2) Signs will show the name, business address, and telephone number of the person who conducts underground mining activities and the identification number of the current permit authorizing underground mining activities.

(3) Signs shall be retained and maintained until after the release of all bonds for the permit area.

(d) Perimeter markers. Each person who conducts underground mining activities shall clearly mark the perimeter of all areas affected by surface operations or facilities before beginning mining activities.

(e) Buffer zone markers. Buffer zones required by §12.524 of this title (relating to Hydrologic Balance: Stream Buffer Zones) shall be clearly marked to prevent disturbance by surface operations and facilities.

(f) Blasting signs. Persons who conduct surface blasting incidental to underground mining activities shall provide warning signs as required by §12.528 of this title (relating to Use of Explosives: Control of Adverse Effects).

(g) Topsoil markers. Where topsoil or other vegetation-supporting material is segregated and stockpiled as required under §12.506 of this title (relating to Topsoil: Storage), the stockpiled material shall be clearly marked.

The provisions of this §12.500 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.501 Casing and Sealing of Exposed Underground Openings: General Requirements

Each exploration hole, other drill hole or borehole, shaft, well, or other exposed underground opening shall be cased, lined, or otherwise managed as approved by the Commission to prevent acid or other toxic drainage from entering ground and surface waters, to minimize disturbance to the prevailing hydrologic balance and to ensure the safety of people, livestock, fish and wildlife, and machinery in the mine-plan and adjacent area. Each exploration hole, drill hole, or borehole or well that is uncovered or exposed by mining activities within the permit area shall be permanently closed, unless approved for water monitoring or otherwise managed

in a manner approved by the Commission. Use of a drilled hole or monitoring well as a water well must meet the provisions of §12.520 of this title (relating to Hydrologic Balance: Transfer of Wells). This section does not apply to holes drilled and used for blasting in the area affected by surface operations.

The provisions of this §12.501 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.502 Casing and Sealing of Underground Openings: Temporary

(a) Each mine entry which is temporarily inactive, but has a further projected useful service under the approved permit application, shall be protected by barricades or other covering devices, fenced, and posted with signs, to prevent access into the entry and to identify the hazardous nature of the opening. These devices shall be periodically inspected and maintained in good operating condition by the person who conducts the underground mining activities.

(b) Each exploration hole, other drill hole or borehole, shaft, well, and other exposed underground opening which has been identified in the approved permit application for use to return underground development waste, coal processing waste or water to underground workings, or to be used to monitor ground-water conditions, shall be temporarily sealed until actual use.

The provisions of this §12.502 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.503 Casing and Sealing of Underground Openings: Permanent

When no longer needed for monitoring or other use approved by the Commission upon a finding of no adverse environmental or health and safety effects, or unless approved for transfer as a water well under §12.520 of this title (relating to Hydrologic Balance: Transfer of Wells), each shaft, drift, adit, tunnel, exploratory hole, entryway or other opening to the surface from underground shall be capped, sealed, backfilled, or otherwise properly managed, as required by the Commission in accordance with §§12.501 and 12.518 of this title (relating to Casing and Sealing of Underground Openings: General Requirements, and to Hydrologic Balance: Underground Mine Entry and Access Discharges) and consistent with 30 CFR 75.1711. Permanent closure measures shall be designed to prevent access to the mine workings by people, livestock, fish and wildlife, machinery and to keep acid or other toxic drainage from entering ground or surface waters.

The provisions of this §12.503 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.504 Topsoil: General Requirements

(a) Before disturbance of areas affected by surface operations, topsoil and subsoils to be saved under §12.505 of this title (relating to Topsoil: Removal) shall be separately removed and segregated from other material.

(b) After removal, topsoil shall be immediately redistributed in accordance with §12.507 of this title (relating to Topsoil: Redistribution), stockpiled pending redistribution under §12.506 of this title (relating to Topsoil: Storage), or if the permittee can demonstrate that an alternative procedure will provide equal or more protection for the topsoil, the Commission, may, on a case-by-case basis, approve an alternative.

The provisions of this §12.504 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.505 Topsoil: Removal

(a) Timing. Topsoil shall be removed from areas to be affected by surface operations or major structures, after vegetative cover that would interfere with the use of the topsoil is cleared from portions of those areas that will be disturbed, but before any drilling for blasting, mining, or other surface disturbance of surface lands.

(b) Materials to be removed. Topsoil shall be removed in a separate layer from the areas to be disturbed, unless use of substitute or supplemental materials is approved by the Commission in accordance with subsection (e) of this section. If use of substitute or supplemental materials is approved, all materials to be redistributed shall be removed.

(c) Material to be removed in thin topsoil situations. If the topsoil is less than 6 inches, a 6-inch layer that includes the A horizon and the unconsolidated materials immediately below the A horizon or the A horizon and all unconsolidated material if the total available is less than 6 inches, shall be removed and the mixture segregated and redistributed as the surface soil layer, unless topsoil substitutes are approved by the Commission pursuant to subsection (e) of this section.

(d) Subsoil segregation. The B horizon and portions of the C horizon, or other underlying layers demonstrated to have qualities for comparable root development, shall be segregated and replaced as subsoil, if the Commission determines that either of these is necessary or desirable to ensure soil productivity consistent with the approved postmining land use.

(e) Topsoil substitutes and supplements.

(1) Selected overburden materials may be substituted for, or used as a supplement to, topsoil, if the Commission determines that the resulting soil medium is equal to or more suitable for sustaining the vegetation than is the available topsoil and the substitute material is the best available to support the vegetation. This determination shall be based on the results of chemical and physical analysis of overburden and topsoil. These analyses shall include determinations of pH, net acidity or alkalinity, phosphorus, potassium, texture class, and other analyses as required by the Commission. The Commission may also require that results of field-site trials or greenhouse tests be used to demonstrate the feasibility of using these overburden materials.

(2) Results of analyses, trials, and tests shall be submitted to the Commission. Certification of trials and tests shall be made by a laboratory approved by the Commission stating that:

(A) the proposed substitute material is equal to or more suitable for sustaining the vegetation than is the available topsoil;

(B) the substitute material is the best available material to support the vegetation; and

(C) the trials and tests were conducted using standard testing procedures.

(3) Substituted or supplemental material shall be removed, segregated, and replaced in compliance with the requirements for topsoil under this section.

(f) Limits on topsoil removal area. Where the removal of vegetative material, topsoil, or other materials may result in erosion which may cause air or water pollution:

(1) the size of the area from which topsoil is removed at any one time shall be limited;

(2) the surface soil layer shall be redistributed at a

time when the physical and chemical properties of topsoil can be protected and erosion can be minimized; and

(3) such other measures shall be taken as the Commission may approve or require to control erosion.

The provisions of this §12.505 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.506 Topsoil: Storage

(a) Topsoil and other materials removed under §12.505 of this title (relating to Topsoil: Removal) shall be stockpiled only when it is impractical to promptly redistribute such materials on regraded areas.

(b) Stockpiled materials shall be selectively placed on a stable surface area within the permit area, not disturbed, and protected from wind and water erosion, unnecessary compaction, and contaminants which lessen the capability of the materials to support vegetation when redistributed.

(1) Protection measures shall be accomplished either by:

(A) an effective cover of non-noxious, quick-growing annual and perennial plants, seeded or planted during the first normal period after removal for favorable planting conditions; or

(B) other methods demonstrated to and approved by the Commission to provide equal protection.

(2) Unless approved by the Commission, stockpiled topsoil and other materials shall not be moved until required for redistribution on a disturbed area.

The provisions of this §12.506 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.507 Topsoil: Redistribution

(a) After final grading and before the replacement of topsoil and other materials segregated in accordance with §12.505 of this title (relating to Topsoil: Removal), regraded land shall be scarified or otherwise treated as required by the Commission to eliminate slippage surfaces and to promote root penetration. If the person who conducts underground mining activities shows, through appropriate tests, and the Commission approves, that no harm will be caused to the topsoil and vegetation, scarification may be conducted after topsoiling.

(b) Topsoil and other materials shall be redistributed in a manner that:

(1) achieves an approximate uniform, stable thickness consistent with the postmining land uses, slopes, and surface-drainage system;

(2) prevents excess compaction of the topsoil; and

(3) protects the topsoil from wind and water erosion before and after it is seeded and planted.

The provisions of this §12.507 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.508 Topsoil: Nutrients and Soil Amendments

Nutrients and soil amendments in the amounts determined by soil tests shall be applied to the redistributed surface soil layer so that it supports the postmining land use approved by the Commission and meets the revegetation requirements of §§12.555-12.560 of this title (relating to Revegetation: General Requirements, to Revegetation: Use of Introduced Species, to Revegetation: Timing, to Revegetation: Mulching and Other Stabilizing Practices, to Revegetation: Grazing, and to Revegetation: Standards for Success). All soil tests shall be performed by a qualified laboratory using standard methods approved by the Commission.

The provisions of this §12.508 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective December 29, 1998, 23 TexReg 13041.

§12.509 Hydrologic Balance: General Requirements

(a) Underground mining activities shall be planned and conducted to minimize disturbance of the hydrologic balance within the permit and adjacent areas, to prevent material damages to the hydrologic balance outside the permit area, to assure the protection or replacement of water rights, and to support approved postmining land uses in accordance with the terms and conditions of the approved permit and the performance standards of §§12.500-12.508, this section, and §§12.510-12.572 of this title (relating to Permanent Program Performance Standards--Underground Mining Activities). The Commission may require additional preventative, remedial, or monitoring measures to assure that material damage to the hydrologic balance outside the permit area is prevented. Mining and reclamation practices that minimize water pollution and changes in flow shall be used in preference to water treatment.

(b) Changes in water quality and quantity, in the depth to ground water, and in the location of surface-water drainage channels shall be minimized so that the approved postmining land use of the permit area is not adversely affected.

(c) In no case shall federal and state water-quality statutes, regulations, standards or effluent limitations be violated.

(d) Operations shall be conducted to minimize water pollution and, where necessary, treatment methods shall be used to control water pollution.

(1) Each person who conducts underground mining activities shall emphasize mining and reclamation practices that prevent or minimize water pollution. Changes in flow shall be used in preference to the use of water treatment facilities.

(2) Acceptable practices to control and minimize water pollution include, but are not limited to:

(A) stabilizing disturbed areas through land-shaping;

(B) diverting runoff;

(C) achieving quickly germinating and growing stands of temporary vegetation;

(D) regulating channel velocity of water;

(E) lining drainage channels with rock or vegetation;

(F) mulching;

(G) selectively placing and sealing acid-forming and toxic-forming materials;

(H) designing mines to prevent gravity drainage of acid waters;

(I) sealing;

(J) controlling subsidence; and

(K) preventing acid mine drainage.

(3) If the practices listed at subsection (d)(2) of this section are not adequate to meet the requirements of §§12.500-12.508, this section, and §§12.510-12.572 of this title (relating to Permanent Program Performance Standards--Underground Mining Activities), the person who conducts underground mining activities shall operate and maintain the necessary water-treatment facilities for as long as treatment

is required under §§12.500-12.508, this section, and §§12.510-12.572 of this title (relating to Permanent Program Performance Standards--Underground Mining Activities).
The provisions of this §12.509 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.510 Hydrologic Balance: Water-Quality Standards and Effluent Limitations

Discharge of water from areas disturbed by underground mining activities shall be made in compliance with all applicable state and federal water-quality laws and regulations and with the effluent limitations for coal mining promulgated by the U.S. Environmental Protection Agency set forth in 40 CFR 434.
The provisions of this §12.510 adopted to be effective November 4, 1997, 22 TexReg 10640.

§12.511 Hydrologic Balance: Diversions

(a) General Requirements.

(1) With the approval of the Commission, any flow from mined areas abandoned before May 3, 1978, and any flow from undisturbed areas or reclaimed areas, after meeting the criteria of §12.514 of this title (relating to Hydrologic Balance: Siltation Structures) for siltation-structure removal, may be diverted from disturbed areas by means of temporary or permanent diversions. All diversions shall be designed to minimize adverse impacts to the hydrologic balance within the permit and adjacent areas, to prevent material damage outside the permit area and to assure the safety of the public. Diversions shall not be used to divert water into underground mines without approval of the Commission under §12.522 of this title (relating to Hydrologic Balance: Discharge of Water Into an Underground Mine).

(2) The diversion and its appurtenant structures shall be designed, located, constructed, maintained and used to:

(A) be stable;

(B) provide protection against flooding and resultant damage to life and property;

(C) prevent, to the extent possible using the best technology currently available, additional contributions of suspended solids to streamflow outside the permit area; and

(D) comply with all applicable local, state, and federal laws and regulations.

(3) Temporary diversions shall be removed when no longer needed to achieve the purpose for which they were authorized. The land disturbed by the removal process shall be restored in accordance with §§12.500-12.510, this section, and §§12.513-12.572 of this title (relating to Permanent Program Performance Standards--Underground Mining Activities). Before diversions are removed, downstream water-treatment facilities previously protected by the diversion shall be modified or removed, as necessary, to prevent overtopping or failure of the facilities. This requirement shall not relieve the operator from maintaining water-treatment facilities as otherwise required. A permanent diversion or a stream channel reclaimed after the removal of a temporary diversion shall be designed and constructed so as to restore or approximate the premining characteristics of the original stream channel, including the natural riparian vegetation to promote the recovery and the enhancement of aquatic habitat.

(4) Diversion designs shall incorporate the following:

(A) be constructed with gentle sloping banks that are stabilized by vegetation. Asphalt, concrete or other similar linings shall be used only when approved by the Commission to prevent seepage or to provide stability. Channel linings shall be designed using standard engineering practices to pass safely the design velocities and shall be approved for permanent diversions only where they are stable and will require infrequent maintenance;

(B) erosion protection shall be provided for transition of flows and for critical areas such as swales and curves;

(C) energy dissipators shall be installed when necessary at discharge points, where diversions intersect with natural streams and exit velocities of the diversion ditch flow is greater than that of the receiving stream;

(D) excess excavated material not necessary for diversion channel geometry or regrading of the channel shall be disposed of in accordance with §§12.531-12.534 of this title (relating to Disposal of Underground Development Waste and Excess Spoil: General Requirements, to Disposal of Underground Development Waste and Excess Spoil: Valley Fills, to Disposal of Underground Development Waste and Excess Spoil: Head-of-Hollow Fills, and to Disposal of Underground Development Waste and Excess Spoil: Durable Rock Fills); and

(E) topsoil shall be handled in compliance with §§12.504-12.508 of this title (relating to Topsoil: General Requirements, to Topsoil: Removal, to Topsoil: Storage, to Topsoil: Redistribution, and to Topsoil: Nutrients and Soil Amendments).

(b) Diversions of Perennial and Intermittent Streams.

(1) Diversions of perennial and intermittent streams within the permit area may be approved by the Commission after making the finding relating to stream buffer zones called for in §12.524 of this title (relating to Hydrologic Balance: Stream Buffer Zones) that the diversion will not adversely affect the water quantity and quality and related environmental resources of the stream.

(2) The design capacity of channels for temporary and permanent stream channel diversions shall be at least equal to the capacity of the unmodified stream channel immediately upstream and downstream from the diversion.

(3) The requirements of subsection (a)(2)(B) of this section shall be met when the temporary and permanent diversions for perennial and intermittent streams are designed so that the combination of channel, bank and floodplain configuration is adequate to pass safely the peak runoff of a 10-year, 6-hour precipitation event for a temporary diversion, and a 100-year, 6-hour precipitation event for a permanent diversion.

(4) The design and construction of all stream channel diversions of perennial and intermittent streams shall be certified by a qualified registered professional engineer as meeting the performance standards of §§12.500-12.572 of this title (relating to Permanent Program Performance Standards--Underground Mining Activities) and any design criteria set by the Commission.

(c) Diversion of Miscellaneous Flows.

(1) Miscellaneous flows, which consists of all flows except for perennial and intermittent streams, may be diverted away from disturbed areas if required and approved by the Commission. Miscellaneous flows shall include ground-water discharges and ephemeral streams.

(2) The design, location, construction, maintenance, and removal of diversions of miscellaneous flows shall meet all of the performance standards set forth in subsection (a) of this section.

(3) The requirements of subsection (a)(2)(B) of this section shall be met when the temporary and permanent diversions for miscellaneous flows are designed so that the combination of channel, bank and flood-plain configuration is adequate to pass safely the peak runoff of a 2-year, 6-hour precipitation event for a temporary diversion, and a 10-year, 6-hour precipitation event for a permanent diversion.

The provisions of this §12.511 adopted to be effective November 4, 1997, 22 TexReg 10640.

§12.513 Hydrologic Balance: Sediment Control Measures

(a) Appropriate sediment control measures shall be designed, constructed, and maintained using the best technology currently available to:

(1) prevent, to the extent possible, additional contributions of sediment to streamflow or to runoff outside the permit area;

(2) meet the more stringent of applicable state or federal effluent limitations; and

(3) minimize erosion to the extent possible.

(b) Sediment control measures include practices carried out within and adjacent to the disturbed area. The sedimentation storage capacity of practices in and downstream from the disturbed areas shall reflect the degree to which successful mining and reclamation techniques are applied to reduce erosion and control sediment. Sediment control measures consist of the utilization of proper mining and reclamation methods and sediment control practices, singly or in combination. Sediment control methods include, but are not limited to:

(1) disturbing the smallest practicable area at any one time during the mining operation through progressive backfilling, grading, and prompt revegetation as required in §12.555(b) of this title (relating to Revegetation: General Requirements);

(2) stabilizing the backfilled material to promote a reduction of the rate and volume of runoff in accordance with the requirements of §12.551 of this title (relating to Backfilling and Grading: General Requirements);

(3) retaining sediment within disturbed areas;

(4) diverting runoff away from disturbed areas;

(5) diverting runoff using protected channels or pipes through disturbed areas so as not to cause additional erosion;

(6) using straw dikes, riprap, check dams, mulches, vegetative sediment filters, dugout ponds, and other measures that reduce overland-flow velocity, reduce runoff volume, or trap sediment;

(7) treating with chemicals; and

(8) treating mine drainage in underground sumps.

The provisions of this §12.513 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.514 Hydrologic Balance: Siltation Structures

(a) Scope. For the purposes of this section only, disturbed areas shall not include those areas:

(1) in which the only underground mining activities include diversion ditches, siltation structures, or roads that are designed, constructed and maintained in accordance with §§12.500-12.513, this section, and §§12.515-12.572 of this title (relating to Permanent Program Performance Standards--Underground Mining Activities); and

(2) for which the upstream area is not otherwise disturbed by the operator.

(b) General requirements.

(1) Additional contributions of suspended solids sediment to streamflow or runoff outside the permit area shall be prevented to the extent possible using the best technology currently available.

(2) All surface drainage from the disturbed area shall be passed through a siltation structure before leaving the permit area, except as provided in paragraph (5) of this subsection or in subsection (e) of this section.

(3) Siltation structures for an area shall be constructed before beginning any underground mining activities in that area, and upon construction shall be certified by a qualified registered professional engineer to be constructed as designed and as approved in the reclamation plan.

(4) Any siltation structure which impounds water shall be designed, constructed and maintained in accordance with §12.517 of this title (relating to Hydrologic Balance: Permanent and Temporary Impoundments).

(5) Siltation structures shall be maintained until the disturbed area has been stabilized and revegetated and removal is authorized by the Commission. In no case shall the structure be removed sooner than two years after the last augmented seeding.

(6) When a siltation structure is removed, the land on which the siltation structure was located shall be regraded and revegetated in accordance with the reclamation plan and §§12.555-12.560 of this title (relating to Revegetation: General Requirements, to Revegetation: Use of Introduced Species, to Revegetation: Timing, to Revegetation: Mulching and Other Soil Stabilizing Practices, to Revegetation: Grazing, and to Revegetation: Standards for Success). Sedimentation ponds approved by the Commission for retention as permanent impoundments may be exempted from this requirement.

(c) Sedimentation ponds.

(1) When used, sedimentation ponds shall:

(A) be used individually or in series;

(B) be located as near as possible to the disturbed area and out of perennial streams unless approved by the Commission; and

(C) be designed, constructed, and maintained to:

(i) provide adequate sediment storage volume. The minimum sediment storage volume shall be equal to the three year accumulated sediment volume from the drainage area to the pond. The sediment volume shall be determined using the Universal Soil Loss Equation, gully erosion rates, and the sediment delivery ratio converted to sediment volume, using either the sediment density or other empirical methods approved by the Commission;

(ii) provide adequate detention time to allow the effluent from the ponds to meet state and federal effluent limitations. The minimum detention time without a chemical treatment process shall be 10 hours;

(iii) contain or treat the 10-year, 24-hour precipitation event ("design event") unless a lesser design event is approved by the Commission based on terrain, climate, other site-specific conditions and on a demonstration by the operator that the effluent limitations of §12.510 of this title (relating to Hydrologic Balance: Water-Quality Standards and Effluent Limitations) will be met;

(iv) provide a nonclogging dewatering device adequate to maintain the detention time required under clause (ii) of this subparagraph;

(v) minimize, to the extent possible, short circuiting;

(vi) provide periodic sediment removal sufficient to maintain adequate volume for the design event;

(vii) ensure against excessive settlement;

(viii) be free of sod, large roots, frozen soil, and acid- or toxic-forming coal mine waste; and

(ix) be compacted properly.

(2) A sedimentation pond shall include either a combination of principal and emergency spillways or single spillway configured as specified in §12.517(a)(9) of this title (relating to Hydrologic Balance: Permanent and Temporary Impoundments).

(d) Other treatment facilities.

(1) Other treatment facilities shall be designed to treat the 10-year, 24-hour precipitation event unless a lesser design event is approved by the Commission based on terrain, climate, other site-specific conditions and a demonstration by the operator that the effluent limitations of §12.510 of this title (relating to Hydrologic Balance: Water-Quality Standards and Effluent Limitations) will be met.

(2) Other treatment facilities shall be designed in accordance with the applicable requirements of subsection (c) of this section.

(e) Exemptions. Exemptions to the requirements of this section may be granted if:

(1) The disturbed drainage area within the total disturbed area is small; and

(2) The operator demonstrates that siltation structures and alternate sediment control measures are not necessary for drainage from the disturbed area to meet the effluent limitations under §12.510 of this title (relating to Hydrologic Balance: Water-Quality Standards and Effluent Limitations) and the applicable state and federal water-quality standards for the receiving waters.

The provisions of this §12.514 adopted to be effective November 4, 1997, 22 TexReg 10640.

§12.515 Hydrologic Balance: Discharge Structures

Discharge from sedimentation ponds, permanent and temporary impoundments, coal processing waste dams and embankments and diversions shall be controlled by energy dissipators, riprap channels, and other devices, where necessary, to reduce erosion to prevent deepening or enlargement of stream channels, and to minimize disturbance to the hydrologic balance. Discharge structures shall be designed according to standard engineering-design procedures.

The provisions of this §12.515 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.516 Hydrologic Balance: Acid-Forming and Toxic-Forming Materials

Drainage from acid-forming and toxic-forming underground development waste and spoil, if any, into ground and surface waters shall be avoided by:

(1) identifying, burying, and treating, where necessary, waste and spoil which, in the judgment of the Commission, may be detrimental to vegetation or may adversely affect water quality, if not treated or buried;

(2) preventing water from coming into contact with acid-forming and toxic-forming materials in accordance with §12.553 of this title (relating to Backfilling and Grading: Covering Coal and Acid- and Toxic-Forming Materials), and other measures required by the Commission; and

(3) burying or otherwise treating all acid-forming or toxic-forming underground development waste and spoil within 30 days after they are first exposed on the mine site, or within a lesser period required by the Commission. Temporary storage of such materials may be approved by the Commission upon a finding that burial or treatment within 30 days is not feasible and will not result in any material risk of water pollution or other environmental damage. Storage shall be limited to the period until burial or treatment first becomes feasible. Acid-forming and toxic-forming underground development waste and spoil to be stored shall be placed on impermeable material and protected from erosion and contact with surface water.

The provisions of this §12.516 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.517 Hydrologic Balance: Permanent and Temporary Impoundments

(a) General Requirements. The requirements of this subsection apply to both temporary and permanent impoundments.

(1) Impoundments meeting the Class B or C criteria of dams in the U.S. Department of Agriculture, Natural Resources Conservation Service Technical Release No. 60 (210-VI-TR60, Oct. 1985), Earth Dams and Reservoirs, shall comply with Minimum Emergency Spillway Hydrologic Criteria table in TR-60 and the requirements of this section. The Technical Release No. 60 is hereby incorporated by reference. Copies may be obtained from the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161, Order No. PB 87-157509/AS. Copies can be inspected at the Commission's Surface Mining and Reclamation Division Office at 1701 North Congress Avenue, Austin, Texas.

(2) An impoundment meeting the size or other criteria of 30 CFR 77.216(a) shall comply with the requirements of 30 CFR 77.216 and of this section.

(3) The design of impoundments shall be certified in accordance with §12.190(a) of this title (relating to Reclamation Plan: Ponds, Impoundments, Banks, Dams, and Embankments) as designed to meet the requirements of this part using current, prudent, engineering practices and any design criteria established by the Commission. The qualified, registered professional engineer shall be experienced in the design and construction of impoundments.

(4) Stability.

(A) An impoundment meeting the Class B or C criteria for dams in TR-60, or the size or other criteria of 30 CFR 77.216(a) shall have a minimum static factor of 1.5 for a normal pool with steady state seepage saturation conditions, and a seismic safety factor of at least 1.2.

(B) An impoundment not included in subparagraph (A) of this paragraph, except for a coal mine waste impounding structure, shall have a minimum static safety factor of 1.3 for a normal pool with steady-state seepage saturation conditions or meet the requirements of §12.190(c) of this title (relating to Reclamation Plan: Ponds, Impoundments, Banks, Dams, and Embankments).

(5) Impoundments shall have adequate freeboard to resist overtopping by waves and by sudden increases in storage volume. Impoundments meeting the Class B or C criteria for dams in TR-60 shall comply with the freeboard

hydrograph criteria in the Minimum Emergency Spillway Hydrologic Criteria table in TR-60.

(6) Foundations.

(A) Foundations and abutments for an impounding structure shall be stable during all phases of construction and operation and shall be designed based on adequate and accurate information on the foundation conditions. For an impoundment meeting the Class B or C criteria for dams in TR-60, or the size or other criteria of 30 CFR 77.216(a), foundation investigation, as well as any necessary laboratory testing of foundation material, shall be performed to determine the design requirements for foundation stability.

(B) All vegetative and organic materials shall be removed and foundations excavated and prepared to resist failure. Cutoff trenches shall be installed if necessary to ensure stability.

(7) Slope protection shall be provided to protect against surface erosion at the site and protect against sudden drawdown.

(8) Faces of embankments and surrounding areas shall be vegetated, except that faces where water is impounded may be riprapped or otherwise stabilized in accordance with accepted design practices.

(9) An impoundment shall include either a combination of principal and emergency spillways or a single spillway configured as specified in subparagraph (A) of this paragraph, designed and constructed to safely pass the applicable design precipitation event specified in subparagraph (B) of this paragraph.

(A) The Commission may approve a single open-channel spillway that is of nonerodible construction and designed to carry sustained flows or earth- or grass-lined and designed to carry short-term, infrequent flows at non-erosive velocities where sustained flows are not expected.

(B) Except as specified in subsection (c)(2) of this section, the required design precipitation event for an impoundment meeting the spillway requirements of this paragraph is:

(i) for an impoundment meeting the Class B or C criteria for dams in TR-60, the emergency spillway hydrograph criteria in the Minimum Emergency Spillway Hydrologic Criteria table in TR-60, or greater event as specified by the Commission;

(ii) for an impoundment meeting or exceeding the size or other criteria of 30 CFR 77.216(a), a 100-year, 6-hour event, or greater event as specified by the Commission; and

(iii) for an impoundment not included in subparagraphs (A) and (B) of this paragraph, a 25-year, 6-hour event, or greater event as specified by the Commission.

(10) The vertical portion of any remaining highwall shall be located far enough below the low-water line along the full extent of the highwall to provide adequate safety and access for the proposed water users.

(11) A qualified registered professional engineer or other qualified professional specialist under the direction of a professional engineer, shall inspect each impoundment as provided in subparagraph (A) of this paragraph. The professional engineer or specialist shall be experienced in the construction of impoundments.

(A) Inspections shall be made regularly during construction, upon completion of the construction, and at least yearly until removal of the structure or release of the performance bond.

(B) The qualified registered professional engineer shall promptly after each inspection required in subparagraph (A) of this paragraph provide the Commission a certified report that the impoundment has been constructed and/or maintained as designed and in accordance with the approved plan and this chapter. The report shall include discussion of any appearance of instability, structural weakness or other hazard condition, depth and elevation of any impounded waters, existing storage capacity, any existing or required monitoring procedures and instrumentation, and any other aspects of the structure affecting stability.

(C) A copy of the report shall be retained at or near the minesite.

(12) Impoundments meeting the NRCS Class B or C criteria for dams in TR-60, or the size or other criteria of 30 CFR 77.216 must be examined in accordance with 30 CFR 77.216-3. Impoundments not meeting the NRCS Class B or C criteria for dams in TR-60, or subject to 30 CFR 77.216, shall be examined at least quarterly. A qualified person designated by the operator shall examine impoundments for the appearance of structural weakness and other hazardous conditions.

(13) If any examination or inspection discloses that a potential hazard exists, the person who examined the impoundment shall promptly inform the Commission of the finding and of the emergency procedures formulated for public protection and remedial action. If adequate procedures cannot be formulated or implemented, the Commission shall be notified immediately. The Commission shall then notify the appropriate agencies that other emergency procedures are required to protect the public.

(b) Permanent Impoundments. A permanent impoundment of water may be created, if authorized by the Commission in the approved permit based upon the following demonstration:

(1) the size and configuration of such impoundment will be adequate for its intended purposes;

(2) the quality of impounded water will be suitable on a permanent basis for its intended use and, after reclamation, will meet applicable state and federal water-quality standards, and discharges from the impoundment will meet applicable effluent limitations and will not degrade the quality of receiving water below applicable state and federal water-quality standards;

(3) the water level will be sufficiently stable and be capable of supporting the intended use;

(4) final grading will provide for adequate safety and access for proposed users;

(5) the impoundment will not result in the diminution of the quality and quantity of water utilized by adjacent or surrounding landowners for agricultural, industrial, recreational, or domestic uses; and

(6) the impoundment will be suitable for the approved postmining land use.

(c) Temporary Impoundments.

(1) The Commission may authorize the construction of temporary impoundments as part of an underground coal mining operation.

(2) In lieu of meeting the requirements of subsection (a)(9)(A) of this section, the Commission may approve an impoundment that relies primarily on storage to control the runoff from the design precipitation event when it is demonstrated by the operator and certified by a qualified registered professional engineer that the impoundment will

safely control the design precipitation event, the water from which shall be safely removed in accordance with current, prudent engineering practices. Such an impoundment shall be located where failure would not be expected to cause loss of life or serious property damage, except where:

(A) impoundments meeting the NRCS Class B or C criteria for dams in TR-60, or the size or other criteria of 30 CFR 77.216(a), shall be designed to control the precipitation of the probable maximum precipitation of a 6-hour event, or greater event as specified by the Commission; and

(B) impoundments not included in subparagraph (A) of this paragraph shall be designed to control the precipitation of the 100-year, 6-hour event, or greater event as specified by the Commission.

The provisions of this §12.517 adopted to be effective November 4, 1997, 22 TexReg 10640.

§12.518 Hydrologic Balance: Underground Mine Entry and Access Discharges

(a) Surface entries and accesses to underground workings, including adits and slopes, shall be located, designed, constructed, and utilized to prevent or control gravity discharge of water from the mine.

(b) Gravity discharge of water from an underground mine, other than a drift mine subject to subsection (c) of this section, may be allowed by the Commission, if it is demonstrated that:

(1) the discharge:

(A) satisfies the water effluent limitations referenced in §12.510 of this title (relating to Hydrologic Balance: Water-Quality Standards and Effluent Limitations) and all applicable state and federal water-quality standards without treatment; and

(B) will result in changes in the prevailing hydrologic balance that are minimal, and approved postmining land uses will not be adversely affected; or

(2) discharges:

(A) are conveyed to a treatment facility in the permit area in accordance with §12.510 of this title (relating to Hydrologic Balance: Water-Quality Standards and Effluent Limitations); and

(B) for all water from the underground mine discharged from the treatment facility, the effluent limitations referenced in §12.510 of this title (relating to Hydrologic Balance: Water-Quality Standards and Effluent Limitations) and all other applicable state and federal statutes and regulations are met; and

(C) consistent maintenance of the treatment facility will occur throughout the anticipated period of gravity discharge.

(c) Notwithstanding anything to the contrary in subsections (a) and (b) of this section, for a drift mine first used after the implementation of a state, federal, or federal lands program and located in acid-producing or iron-producing coal seams, surface entries and accesses shall be located in such a manner as to prevent any gravity discharge from the mine.

The provisions of this §12.518 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.519 Hydrologic Balance: Surface and Ground-Water Monitoring

(a) Ground water.

(1) Ground-water monitoring shall be conducted according to the ground-water monitoring plan approved under §12.188(b) of this title (relating to Reclamation Plan: Protection of Hydrologic Balance). The Commission may require additional monitoring when necessary.

(2) Ground-water monitoring data shall be submitted every three months to the Commission or more frequently as prescribed by the Commission. Monitoring reports shall include analytical results from each sample taken during the reporting period. When the analysis of any ground-water sample indicates noncompliance with the permit conditions, then the operator shall promptly notify the Commission and immediately take the action provided for in §12.221(a) and §12.188(a) of this title (relating to Conditions of Permits: Environment, Public Health, and Safety, and to Reclamation Plan: Protection of Hydrologic Balance).

(3) Ground-water monitoring shall proceed through mining and continue during reclamation until bond release. Consistent with the procedures of §§12.207-12.221 of this title (relating to Review, Public Participation, and Approval of Permit Applications and Permit Terms and Conditions), the Commission may modify the monitoring requirements, including the parameters covered and the sampling frequency, if the operator demonstrates, using the monitoring data obtained under this subsection, that:

(A) the operation has minimized disturbance to the hydrologic balance in the permit and adjacent areas and prevented material damage to the hydrologic balance outside the permit area; water quantity and quality are suitable to support approved postmining land uses; and the water rights of other users have been protected or replaced; or

(B) monitoring is no longer necessary to achieve the purposes set forth in the monitoring plan approved under §12.188(b) of this title (relating to Reclamation Plan: Protection of Hydrologic Balance).

(4) Equipment, structures, and other devices used in conjunction with monitoring the quality and quantity of ground water onsite and offsite shall be properly installed, maintained, and operated and shall be removed when no longer needed.

(b) Surface water.

(1) Surface-water monitoring shall be conducted according to the surface-water monitoring plan approved under §12.188(c) of this title (relating to Reclamation Plan: Protection of Hydrologic Balance). The Commission may require additional monitoring when necessary.

(2) Surface-water monitoring data shall be submitted every three months to the Commission or more frequently as prescribed by the Commission. Monitoring reports shall include analytical results from each sample taken during the reporting period. When the analysis of any surface-water sample indicates noncompliance with the permit conditions, then the operator shall promptly notify the Commission and immediately take the action provided for in §12.221(a) and §12.188(a) of this title (relating to Conditions of Permits: Environment, Public Health, and Safety, and to Reclamation Plan: Protection of Hydrologic Balance). The reporting requirements of this paragraph do not exempt the operator from meeting any National Pollutant Discharge Elimination System (NPDES) requirements.

(3) Surface-water monitoring shall proceed through mining and continue during reclamation until bond release. Consistent with the procedures of §§12.207-12.221 of this title (relating to Review, Public Participation, and Approval of Permit Applications and Permit Terms and Conditions), the Commission may modify the monitoring requirements,

except those required by the NPDES permitting authority, including the parameters covered and the sampling frequency, if the operator demonstrates, using the monitoring data obtained under this subsection, that:

(A) the operation has minimized disturbance to the hydrologic balance in the permit and adjacent areas and prevented material damage to the hydrologic balance outside the permit area; water quantity and quality are suitable to support approved postmining land uses; and the water rights of other users have been protected or replaced; or

(B) monitoring is no longer necessary to achieve the purposes set forth in the monitoring plan approved under §12.188(c) of this title (relating to Reclamation Plan: Protection of Hydrologic Balance).

(4) Equipment, structures, and other devices used in conjunction with monitoring the quality and quantity of surface water onsite and offsite shall be properly installed, maintained, and operated and shall be removed when no longer needed.

The provisions of this §12.519 adopted to be effective November 4, 1997, 22 TexReg 10640.

§12.520 Hydrologic Balance: Transfer of Wells

(a) An exploratory or monitoring well may only be transferred by the person who conducts underground mining activities for further use as a water well with the prior approval of the Commission. That person and the surface owner of the lands where the well is located shall jointly submit a written request to the Commission for that approval.

(b) Upon an approved transfer of a well, the transferee shall:

(1) assume primary liability for damages to persons or property from the well;

(2) plug the well when necessary, but in no case later than abandonment of the well; and

(3) assume primary responsibility for compliance with §§12.501-12.503 of this title (relating to Casing and Sealing of Exposed Underground Openings: General Requirements, to Casing and Sealing of Exposed Underground Openings: Temporary, and to Casing and Sealing of Exposed Underground Openings: Permanent) with respect to the well.

(c) Upon an approved transfer of a well, the transferor shall be secondarily liable for the transferee's obligation under subsection (b) of this section, until release of the bond or other equivalent guarantee required by Subchapter J of this chapter (relating to Bond and Insurance Requirements for Surface Coal Mining and Reclamation Operations) for the area in which the well is located.

The provisions of this §12.520 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.521 Hydrologic Balance: Water Rights and Replacement

Any person who conducts underground mining activities shall replace the water supply of an owner of interest in real property who obtains all or part of his or her supply of water for domestic, agricultural, industrial, or other legitimate use from an underground or surface source, where the water supply has been affected by contamination, diminution, or interruption proximately resulting from the underground mining activities.

The provisions of this §12.521 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.522 Hydrologic Balance: Discharge of Water into an Underground Mine

Water from the surface or from an underground mine shall not be diverted or discharged into other underground mine workings, unless the person who conducts the underground mining activities demonstrates to the Commission that the discharge will:

(1) abate water pollution or otherwise eliminate public hazards resulting from underground mining activities;

(2) be discharged as a controlled flow;

(3) meet the effluent limitations referenced in §12.510 of this title (relating to Hydrologic Balance: Water-Quality Standards and Effluent Limitations) for pH and total suspended solids, except that the pH and total suspended solid limitations may be exceeded, if approved by the Commission, and the discharge is limited to:

(A) coal processing waste;

(B) underground mine development waste;

(C) fly ash from a coal-fired facility;

(D) sludge from an acid mine drainage treatment facility;

(E) flue-gas desulfurization sludge; or

(F) inert materials used for stabilizing underground mines;

(4) continue as a controlled and identifiable flow and is ultimately treated by an existing treatment facility;

(5) in any event not cause, result in, or contribute to a violation of applicable water-quality standards or effluent limitations due to discharge from underground mines to surface waters;

(6) minimize disturbance to the hydrologic balance of the permit area, prevent material damage outside the permit area, and otherwise eliminate public hazards resulting from underground mining activities; and

(7) meet with the approval of the Mine Safety and Health Administration.

The provisions of this §12.522 adopted to be effective November 4, 1997, 22 TexReg 10640.

§12.523 Hydrologic Balance: Postmining Rehabilitation of Sedimentation Ponds, Diversions, Impoundments, and Treatment Facilities

Before abandoning the permit area, the person who conducts the underground mining activities shall renovate all permanent sedimentation ponds, diversions, impoundments and treatment facilities to meet criteria specified in the detailed design plan for the permanent structures and impoundments.

The provisions of this §12.523 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.524 Hydrologic Balance: Stream Buffer Zones

(a) No land within 100 feet of a perennial stream or an intermittent stream shall be disturbed by underground mining activities, unless the Commission specifically authorizes underground mining activities closer to, or through, such a stream. The Commission may authorize such activities only upon finding that:

(1) underground mining activities will not cause or contribute to the violation of applicable state or federal water-quality standards, and will not adversely affect the water quantity and quality or other environmental resources of the stream; and

(2) if there will be a temporary or permanent stream-channel diversion, it will comply with §12.511 of this

title (relating to Hydrologic Balance: Diversions).

(b) The area not to be disturbed shall be designated as a buffer zone, and the operator shall mark it as specified in §12.500 of this title (relating to Signs and Markers).

The provisions of this §12.524 adopted to be effective November 4, 1997, 22 TexReg 10640.

§12.525 Coal Recovery

Underground mining activities shall be conducted so as to maximize the utilization and conservation of the coal, while utilizing the best technology currently available to maintain environmental integrity, so that reaffecting the land in the future through surface coal mining operations is minimized.

The provisions of this §12.525 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.526 Use of Explosives: General Requirements

(a) This section and §§12.527-12.530 of this title (relating to Use of Explosives) apply only to surface blasting activities incident to underground mining, including, but not limited to, initial rounds of slopes and shafts.

(b) Each operator shall comply with all applicable state and federal laws and regulations in the use of explosives.

(c) All surface blasting operations incident to underground mining shall be conducted by experienced, trained, and competent persons who understand the hazards involved. A blaster and at least one other person shall be present at the firing of a blast. Each person responsible for blasting operations shall possess a valid certification as required by §§12.700-12.710 of this title (relating to Training, Examination, and Certification of Blasters) and:

(1) be familiar with the site-specific performance standards; and

(2) give direction and on-the-job training to persons who are not certified and who are assigned to the blasting crew to assist in the use of explosives.

(d) Blast-design requirements shall include the following:

(1) the operator shall submit to the Commission an anticipated blast design if blasting operations will be conducted within:

(A) 1,000 feet of any building used as a dwelling, public building, school, church, hospital, nursing facility, or community or institutional building outside the permit area; or

(B) 500 feet of facilities including, but not limited to, disposal wells, petroleum or gas storage facilities, active or abandoned underground mines, fluid-transmission pipelines, gas or oil-collection lines, or water and sewage lines;

(2) the blast design may be presented as part of a permit application or at a time, before the blast, approved by the Commission;

(3) the blast design shall contain sketches of the drill patterns, delay periods, and decking and shall indicate the type and amount of explosives to be used, critical dimensions, and the location and general descriptions of structures to be protected, as well as a discussion of design factors to be used, which protect the public and meet the applicable airblast, flyrock, and ground-vibration standards in §12.528 of this title (relating to Use of Explosive: Control of Adverse Effects);

(4) the blast design shall be prepared and signed by a certified blaster; and

(5) the Commission may require changes to the design submitted.

The provisions of this §12.526 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.527 Use of Explosives: Pre-Blasting Survey

(a) At least 30 days before initiation of a blasting program, the operator shall notify, in writing, all residents or owners of dwellings or other structures located within 1/2 mile of any part of the permit area regarding how to request a pre-blasting survey. The request shall be made, in writing, directly to the operator or to the Commission who shall promptly notify the operator. The operator shall promptly conduct a pre-blasting survey of the dwelling or structure and promptly submit a report of the survey to the Commission and to the person requesting the survey. If a structure is renovated or modified subsequent to a pre-blast survey, then upon request a survey of such additions and renovations shall be performed by the operator in accordance with this section.

(b) The operator shall determine the condition of the dwelling or structure and shall document any pre-blasting damage and other physical factors that could reasonably be affected by the blasting. Assessments of structures such as pipelines, pipes, cables, transmission lines, cisterns, and wells and other water systems may be limited to surface conditions and other readily available data. Special attention shall be given to the pre-blasting condition of wells and other water systems used for human, animal, or agricultural purposes and to the quantity and quality of the water.

(c) A written report of the survey shall be prepared and signed by the person who conducted the survey. The report may include recommendations for any special conditions or proposed adjustments to the blasting procedure which should be incorporated into the blasting plan to prevent damage. Copies of the report shall be promptly provided to the person requesting the survey and to the Commission. If the person requesting the survey disagrees with the results of the survey, he or she may notify, in writing, both the operator and the Commission of the specific areas of disagreement.

(d) Any pre-blasting surveys requested before the 10th day before the planned initiation of blasting shall be completed by the operator before the initiation of blasting.

The provisions of this §12.527 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.528 Use of Explosives: Control of Adverse Effects

(a) General requirements.

(1) Blasting shall be conducted in a manner that will prevent injury to persons, damage to public or private property outside the permit area, adverse impacts on any underground mine, and change in the course, channel, or availability of ground or surface waters outside the permit area.

(2) Except where lesser distances are approved by the Commission, based upon a pre-blasting survey, seismic investigation, and an approved blast design submitted in accordance with the requirements of §12.526(d) of this title (relating to Use of Explosives: General Requirements), blasting shall not be conducted within:

(A) 1,000 feet of any building used as a dwelling, public building, school, church, hospital, nursing

facility, or community or institutional building outside the permit area; or

(B) 500 feet of facilities including, but not limited to, disposal wells, petroleum or gas storage facilities, active and abandoned underground mines, fluid-transmission pipelines, gas or oil-collection lines, or water and sewage lines.

(b) Scheduled blasting. All blasting shall be conducted between sunrise and sunset, unless otherwise approved by the Commission upon a showing by the operator that the public will be protected from adverse noise and other impacts.

(1) The Commission may limit the area covered, timing and sequence of blasting as listed in the blasting schedule if such limitations are reasonable and necessary in order to protect the public health, safety or welfare.

(2) Blasting may be conducted between sunset and sunrise if:

(A) a blast that has been prepared during the afternoon must be delayed due to the occurrence of an unavoidable hazardous condition and cannot be delayed until the next day because a potential safety hazard would result that cannot be adequately mitigated;

(B) in addition to the required warning signals, oral notices are provided to persons within 1/2 mile of the blasting site; and

(C) a complete written report of blasting at night is filed by the operator with the Commission not later than 3 days after the night blasting. The report shall include a description in detail of the reason for the delay in blasting including why the blasting could not be held over to the next day, when the blast was actually conducted, the warning notices given, and a copy of the blast report required by §12.530 of this title (relating to Use of Explosives: Records of Blasting Operations).

(c) Unscheduled blasting. Unscheduled blasting may be conducted only where public or operator health and safety so require, and for emergency blasting actions. The operator shall use audible signals to notify residents within 1/2 mile of the blasting site prior to conducting unscheduled blasting, and shall document the reason for the unscheduled blasting in accordance with §12.530 of this title (relating to Use of Explosives: Records of Blasting Operations).

(d) Warnings. All blasting shall require blasting signs, warnings, and access control.

(1) Blasting signs shall meet the specifications of §12.500 of this title (relating to Signs and Markers). The operator shall:

(A) conspicuously place signs reading, "Blasting Area", along the edge of any blasting area that comes within 100 feet of any public road right-of-way, and at the point where any other road provides access to the blasting area; and

(B) conspicuously place at all entrances to the permit area from the public roads or highways, signs reading, "Warning! Explosives in Use". The signs shall clearly list and describe the meaning of the audible blast warning and all-clear signals that are in use, and shall explain the marking of the blasting areas and charged holes awaiting firing within the permit area.

(2) Warning and all-clear signals of different character or pattern that are audible within a range of 1/2 mile from the blasting site shall be given. The operator shall notify each person within the permit area and each person who resides or regularly works within 1/2 mile of the permit area regarding the meaning of the signals in the blasting schedule.

(e) Access control. Access to the blasting area shall be controlled to prevent the presence of livestock or unauthorized persons during blasting until an authorized representative of the operator has reasonably determined that:

(1) no unusual hazards, such as imminent slides or undetonated charges, exist; and

(2) access to and travel within the blasting area can be safely resumed.

(f) Airblast.

(1) Limits.

(A) Airblasts shall not exceed the maximum limits specified below at the location of any dwelling, public building, school, church, or community or institutional building outside the permit area, except as provided in subsection (i) of this section.

Figure: 16_0012_0528-1 [***See Figure at end of this document.***]

(B) In all cases except the C-weighted, slow response, the measuring systems used must have a flat frequency response of at least 200 Hz at the upper end. The C-weighted shall be measured with a Type 1 sound-level meter that meets the standard American National Standards Institute ANSI S1.4-1971 specifications. ANSI S1.4-1971 is on file and available for inspection at the office of the Commission, 1701 North Congress Avenue, Austin, Texas.

(C) If necessary to prevent damage, the Commission shall specify lower maximum allowable airblast levels than those of subparagraph (A) of this paragraph for use in the vicinity of a specific blasting operation.

(2) Monitoring.

(A) The operator shall conduct periodic monitoring to ensure compliance with the airblast standards. The Commission may require airblast measurement of any or all blasts, and may specify the locations at which the measurements are to be taken.

(B) The measuring systems shall have an upper-end flat frequency response of at least 200 Hz.

(g) Flyrock. Flyrock traveling in the air or along the ground shall not be cast from the blasting site:

(1) more than 1/2 the distance to the nearest dwelling or other occupied structure;

(2) beyond the area of control required under subsection (i) of this section; or

(3) beyond the permit boundary.

(h) Ground vibration.

(1) General. In all blasting operations, except as otherwise authorized in subsection (h) of this section, the maximum ground vibration shall not exceed the values approved by the Commission. The maximum ground vibration for protected structures listed in paragraph (2)(A) of this subsection shall be established in accordance with the maximum peak-particle-velocity limits of paragraph (2) of this subsection, the scaled-distance equation of paragraph (3) of this subsection, the blasting-level chart of paragraph (4) of this subsection, or by the Commission under paragraph (5) of this subsection. All structures in the vicinity of the blasting area, not listed in paragraph (2)(A) of this subsection, such as water towers, pipelines and other utilities, tunnels, dams, impoundments, and underground mines, shall be protected from damage by establishment of a maximum allowable limit on ground vibration, submitted by the operator and approved by the Commission.

(2) Maximum peak particle velocity.

(A) The maximum ground vibration shall not exceed the following limits at the location of any dwelling, public building, school, church, or community or institutional building outside the permit area:

Figure: 16_0012_0528-2 [***See Figure at end of this document.***]

(B) A seismographic record shall be provided for each blast.

(3) Scaled-distance equation.

(A) An operator may use the scaled-distance equation, $W = (D/D_S)^2$, to determine the allowable charge weight of explosives to be detonated in any 8-millisecond period, without seismic monitoring; where W = the maximum weight of explosives, in pounds; D = the distance, in feet, from the blasting site to the nearest protected structure; and D_S = the scaled-distance factor, which may initially be approved by the Commission using the values for the scaled-distance factor listed in paragraph (2)(A) of this subsection.

(B) The development of a modified scaled-distance factor may be authorized by the Commission on receipt of a written request by the operator, supported by seismographic records of blasting at the mine site. The modified scaled-distance factor shall be determined such that the particle velocity of the predicted ground vibration will not exceed the prescribed maximum allowable peak particle velocity of paragraph (2)(A) of this subsection, at a 95% confidence level.

(4) Blasting-level chart.

(A) An operator may use the ground vibration limits in Figure 1 to determine the maximum allowable ground vibration.

Figure: 16_0012_0528-3 [***See Figure at end of this document.***]

(B) If the Figure 1 limits are used, a seismographic record, including both particle-velocity and vibration-frequency levels, shall be provided for each blast. The method for the analysis of the predominant frequency contained in the blasting records shall be approved by the Commission before application of this alternative blasting criterion.

(5) The maximum allowable ground vibration shall be reduced by the Commission beyond the limits otherwise provided by this section, if determined necessary to provide damage protection.

(6) The Commission may require an operator to conduct seismic monitoring of any or all blasts or may specify the locations at which the measurements are taken and the degree of detail necessary in the measurement.

(i) The maximum airblast and ground vibration standards of subsections (f) and (h) of this section shall not apply at the following locations:

(1) at structures owned by the permittee and not leased to another person; and

(2) at structures owned by the permittee and leased to another person, if a written waiver by the lessee is submitted to the Commission before blasting.

The provisions of this §12.528 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.530 Use of Explosives: Records of Blasting Operations

As in effect on January 6, 2020.

The operator shall retain a record of each blast, including seismograph reports, which shall be retained for at least three years and which shall be available for inspection by the Commission and the public on request. The record shall contain the following data:

(1) name of the operator conducting the blast;

(2) location, date, and time of blast;

(3) name, signature, and certification number of blaster conducting the blast;

(4) identification, direction, and distance, in feet, from the nearest blast hole to the nearest dwelling, public building, school, church, community or institutional building located outside the permit area, except those described in §12.528(i) of this title (relating to Use of Explosives: Control of Adverse Effects);

(5) weather conditions, including those which may cause possible adverse blasting effects such as temperature, and wind direction and approximate velocity;

(6) type of material blasted;

(7) sketches of the blast pattern, including number of holes, burden, spacing, decks, and delay pattern;

(8) diameter and depth of holes;

(9) types of explosives used;

(10) total weight of explosives used per hole;

(11) maximum weight of explosives detonated within any 8-millisecond period;

(12) maximum number of holes detonated within any 8-millisecond period;

(13) initiation system;

(14) type and length of stemming;

(15) mats or other protections used;

(16) type of delay detonator and delay periods used;

(17) sketch of the delay pattern;

(18) number of persons in the blasting crew;

(19) seismographic and airblast records, where required, which shall include:

(A) type of instrument, sensitivity, seismographic reading, and calibration signal or certification of annual calibration;

(B) exact location of the instrument and the date, time, and distance from the blast;

(C) name of the person and firm taking the seismograph reading;

(D) name of the person and firm analyzing the seismographic record; and

(E) the vibration and airblast level recorded; and

(20) reasons and conditions for each unscheduled blast.

The provisions of this §12.530 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.531 Disposal of Underground Development Waste and Excess Spoil: General Requirements

(a) Underground development waste and spoil not required to achieve the approximate original contour and which is not used as backfill shall be hauled or conveyed to and placed in designated disposal areas within a permit area if the disposal areas are authorized for such purposes in the approved permit application in accordance with this section and §§12.532-12.534 of this title (relating to Disposal of Underground Development Waste and Excess Spoil: Valley Fills, to Disposal of Underground Development Waste and Excess Spoil: Head-of-Hollow fills, and to Disposal of

Underground Development Waste and Excess Spoil: Durable Rock Fills). The material shall be placed in a controlled manner to ensure:

(1) that leachate and surface runoff from the fill will not degrade surface or ground waters or exceed the effluent limitations referenced in §12.510 of this title (relating to Hydrologic Balance: Water-Quality Standards and Effluent Limitations);

(2) stability of the fill; and

(3) that the land mass designated as the disposal area is suitable for reclamation and revegetation compatible with the natural surroundings.

(b) The fill shall be designed using recognized professional standards, certified by a registered professional engineer, and approved by the Commission.

(c) All vegetative and organic materials shall be removed from the disposal area and the topsoil shall be removed, segregated and stored or replaced in accordance with §§12.504-12.508 of this title (relating to Topsoil: General Requirements, to Topsoil: Removal, to Topsoil: Storage, to Topsoil: Redistribution, and to Topsoil: Nutrients and Soil Amendments). If approved by the Commission, organic material may be used as mulch or may be included in the topsoil to control erosion, promote growth of vegetation, or increase the moisture retention of the soil.

(d) Slope protection shall be provided to minimize surface erosion at the site. Diversion design shall conform with the requirements of §12.511 of this title (relating to Hydrologic Balance: Diversions). All disturbed areas, including diversion ditches that are not riprapped, shall be vegetated upon completion of construction.

(e) The disposal areas shall be located on the most moderately sloping and naturally stable areas available as approved by the Commission. If such placement provides additional stability and prevents mass movement, fill materials suitable for disposal shall be placed upon or above a natural terrace, bench, or berm.

(f) The fill materials shall be hauled or conveyed and placed in horizontal lifts in a controlled manner, concurrently compacted as necessary to ensure mass stability and prevent mass movement, covered, and graded to allow surface and subsurface drainage to be compatible with the natural surroundings and ensure a long-term static safety factor of 1.5.

(g) The final configuration of the fill must be suitable for postmining land uses approved in accordance with §12.568 of this title (relating to Postmining Land Use), except that no depressions or impoundments shall be allowed on the completed fill.

(h) Terraces may be utilized to control erosion and enhance stability if approved by the Commission and consistent with §12.552(b) of this title (relating to Backfilling and Grading: General Grading Requirements).

(i) Where the slope in the disposal area exceeds 2.8h:1v (36%), or such lesser slope as may be designated by the Commission based on local conditions, keyway cuts (excavations to stable bedrock) or rock toe-buttresses shall be constructed to stabilize the fill. Where the toe of the spoil rests on a downslope, stability analyses shall be performed in accordance with §12.183 of this title (relating to Cross Sections, Maps, and Plans) to determine the size of the rock toe-buttresses or keyway cuts.

(j) The fill shall be inspected for stability by a registered professional engineer experienced in the construction of earth and rockfill embankments at least quarterly throughout construction, and during the following critical construction periods:

(1) removal of all organic material and topsoil;

(2) placement of underdrainage systems and protective filter systems;

(3) installation of surface drainage systems;

(4) placement and compaction of fill materials; and

(5) revegetation.

(k) The registered professional engineer shall provide to the Commission a certified report, within two weeks after each inspection that the fill has been constructed as specified in the design approved by the Commission. The certified report on the drainage system and protective filters shall include color photographs taken during and after construction, but before underdrains are covered with excess spoil. If the underdrain system is constructed in phases, each phase shall be certified separately. A copy of the report shall be retained at the minesite.

(l) Coal mine waste shall not be disposed of in valley or head-of-hollow fills and may only be disposed of with underground development waste, or in other excess spoil fills, if such waste is:

(1) placed in accordance with §12.538 of this title (relating to Coal Mine Waste Banks: Construction Requirements);

(2) demonstrated to be non-toxic and non-acid forming; and

(3) demonstrated to be consistent with the design stability of the fill.

(m) If the disposal area contains springs, natural or manmade watercourses, or wet-weather seeps, an underdrain system consisting of durable rock shall be constructed from the wet areas in a manner that prevents infiltration of the water into the spoil material. The underdrain system shall be protected by an adequate filter and shall be designed and constructed using standard geotechnical engineering methods. Where excess durable rock spoil is placed in single or multiple lifts such that the underdrain system is constructed simultaneously with excess spoil placement by the natural segregation of dumped materials, color photographs shall be taken of the underdrain as the underdrain system is being formed.

(n) The foundation and abutments of the fill shall be stable under all conditions of construction and operation. Sufficient foundation investigations and laboratory testing of foundation materials shall be performed in order to determine the design requirements for stability of the foundation. Analyses of foundation conditions shall include the effect of underground mine workings, if any, upon the stability of the structure.

(o) Underground development waste and excess spoil may be returned to underground workings only in accordance with the disposal plans submitted under §12.193 of this title (relating to Underground Development Waste/Return of Coal Processing Waste to Abandoned Underground Workings) and approved by the Commission and MSHA.

(p) Excess spoil that is acid-forming or toxic-forming or combustible shall be adequately covered with non-acid, non-toxic and noncombustible material, or treated, to control the impact on surface and ground water in accordance with this chapter (relating to Coal Mining Regulations), to prevent sustained combustion, and to minimize adverse effects on plant growth and the approved postmining land use.

(q) The photographs required by this section to

accompany each certified report shall be taken in adequate size and number, with enough terrain or other physical features of the site shown, to provide a relative scale to the photographs and to specifically and clearly identify the site.
The provisions of this §12.531 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.532 Disposal of Underground Development Waste and Excess Spoil: Valley Fills

(a) Valley fills shall meet all of the requirements of §12.531 of this title (relating to Disposal of Underground Development Waste and Excess Spoil: General Requirements) and the additional requirements of this section.

(b) The fill shall be designed to attain a long-term static safety factor of 1.5, based upon data obtained from subsurface exploration, geotechnical testing, foundation design, and accepted engineering analyses.

(c) A sub-drainage system for the fill shall be constructed in accordance with the following:

(1) a system of underdrains constructed of durable rock shall meet the requirements of paragraph (4) of this subsection, and:

(A) be installed along the natural drainage system;

(B) extend from the toe to the head of the fill; and

(C) contain lateral drains to each area of potential drainage or seepage;

(2) a filter system to ensure the proper functioning of the rock underdrain system shall be designed and constructed using standard geotechnical engineering methods;

(3) in constructing the underdrains, no more than 10% of the rock may be less than 12 inches in size and no single rock may be larger than 25% of the width of the drain. Rock used in underdrains shall meet the requirements paragraph (4) of this subsection. The minimum size of the main underdrain shall be:
Figure: 16 TAC §12.532(c)(3) [***See Figure at end of this document.***]

(4) underdrains shall consist of nondegradable, non-acid forming and non-toxic forming rock such as natural sand and gravel, sandstone, limestone, or other durable rock that will not slake in water and will be free of coal, clay, or shale.

(d) Underground development waste and excess spoil shall be hauled or conveyed and placed in a controlled manner and concurrently compacted as specified by the Commission, in lifts no greater than four feet, or less if required by the Commission, to:

(1) achieve the densities designed to ensure mass stability;

(2) prevent mass movement;

(3) avoid contamination of the rock underdrain or rock core; and

(4) prevent formation of voids.

(e) Surface-water runoff from the area above the fill shall be diverted away from the fill and into stabilized diversion channels designed to pass safely the runoff from the 100-year, 24-hour precipitation event, or larger event specified by the Commission. Surface runoff from the fill surface shall be diverted to stabilized channels off the fill which will safely pass runoff from a 100-year, 24-hour precipitation event. Diversion design shall comply with the requirements of §12.511(6) of this title (relating to Hydrologic Balance: Diversions).

(f) The tops of the fill and any terrace constructed to stabilize the face shall be graded no steeper than 20h:1v (5%). The vertical distance between terraces shall not exceed 50 feet.

(g) Drainage shall not be directed over the outslope of the fill.

(h) The outslope of the fill shall not exceed 2h:1v (50%). The Commission may require a flatter slope.
The provisions of this §12.532 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.533 Disposal of Underground Development Waste and Excess Spoil: Head-of-Hollow Fills

Disposal of underground development waste and excess spoil in the head-of-hollow fill shall meet all standards set forth in §12.531 and §12.532 of this title (relating to Disposal of Underground Development Waste and Excess Spoil: General Requirements, and to Disposal of Underground Development Waste and Excess Spoil: Valley Fills) and the additional requirements of this section.

(1) The fill shall be designed to completely fill the disposal site to the approximate elevation of the ridgeline. A rock-core chimney drain may be utilized instead of the subdrain and surface diversion system required for valley fills. If the crest of the fill is not approximately at the same elevation as the low point of the adjacent ridgeline, the fill must be designed as specified in §12.532 of this title (relating to Disposal of Underground Development Waste and Excess Spoil: Valley Fills), with diversion of runoff around the fill.

(2) The alternative rock-core chimney drain system shall be designed and incorporated into the construction of head-of-hollow fills as follows:

(A) the fill shall have, along the vertical projection of the main buried stream channel or rill, a vertical core of durable rock at least 16 feet thick which shall extend from the toe of the fill to the head of the fill, and from the base of the fill to the surface of the fill. A system of lateral rock underdrains shall connect this rock core to each area of potential drainage or seepage in the disposal area. Rocks used in the rock core and underdrains shall meet the requirements of §12.532(2) of this title (relating to Disposal of Underground Development Waste and Excess Spoil: Valley Fills);

(B) a filter system to ensure the proper functioning of the rock core shall be designed and constructed using standard geotechnical engineering methods; and

(C) the grading may drain surface water away from the outslope of the fill and toward the rock core. The maximum slope of the top of the fill shall be 33h:1v (3%). Instead of the requirements of §12.531(g) of this title (relating to Disposal of Underground Development Waste and Excess Spoil: General Requirements), a drainage pocket may be maintained at the head of the fill during and after construction, to intercept surface runoff and discharge the runoff through or over the rock drain, if stability of the fill is not impaired. In no case shall this pocket or sump have a potential for impounding more than 10,000 cubic feet of water. Terraces on the fill shall be graded with a 3% to 5% grade toward the fill and a 1% slope toward the rock core.

(3) The drainage control system shall be capable of safely passing the runoff from a 100-year, 24-hour precipitation event, or larger event specified by the Commission.

The provisions of this §12.533 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.534 Disposal of Underground Development Waste and Excess Spoil: Durable Rock Fills

(a) In lieu of the requirements of §12.532 and §12.533 of this title (relating to Disposal of Underground Development Waste and Excess Spoil: Valley Fills, and to Disposal of Underground Development Waste and Excess Spoil: Head-of-Hollow Fills), the Commission may approve alternate methods for disposal of hard rock spoil, including fill placement by dumping in a single lift, on a site-specific basis, provided the services of a registered professional engineer experienced in the design and construction of earth and rockfill embankments are utilized, and provided the requirements of this section and §12.531 of this title (relating to Disposal of Underground Development Waste and Excess Spoil: General Requirements) are met. For this section, hard rock spoil shall be defined as rockfill consisting of at least 80% by volume of sandstone, limestone, or other rocks that do not slake in water. Resistance of the hard rock waste or spoil to slaking shall be determined by using the slake index and slake durability tests in accordance with guidelines and criteria established by the Commission.

(b) Waste or spoil is to be transported and placed in a specified and controlled manner which will ensure stability of the fill.

(1) The method of waste spoil placement shall be designed to ensure mass stability and prevent mass movement in accordance with the additional requirements of this section.

(2) Loads of noncemented clay shale and/or clay spoil in the fill shall be mixed with hard rock waste spoil in a controlled manner to limit, on a unit basis, concentrations of noncemented clay shale and clay in the fill. Such materials will comprise no more than 20% of the fill volume as determined by tests performed by a registered engineer and approved by the Commission.

(c) Requirements for design of earth and rockfill embankments shall include the following:

(1) stability analyses shall be made by the registered professional engineer. Parameters used in the stability analyses shall be based on adequate field reconnaissance, subsurface investigations including borings, and laboratory tests; and

(2) the embankment which constitutes the valley fill or head-of-hollow fill shall be designed with the following factors of safety:

Figure: 16 TAC §12.534(c)(2) [**See Figure at end of this document**.]

(d) The design of a head-of-hollow fill shall include an internal drainage system which will ensure continued free drainage of anticipated seepage from precipitation and from springs or wet-weather seeps.

(1) Anticipated discharge from springs and seeps and due to precipitation shall be based on records and/or field investigations to determine seasonal variation. The design of the internal drainage system shall be based on the maximum anticipated discharge.

(2) All granular material used for the drainage system shall be free of clay and consist of durable particles such as natural sands and gravels, sandstone, limestone or other durable rock which will not slake in water.

(3) The internal drain shall be protected by a properly designed filter system.

(e) Surface-water runoff from the areas adjacent to and above the fill shall not be allowed to flow onto the fill, and shall be diverted into stabilized channels which are designed to safely pass the runoff from a 100-year, 24-hour precipitation event. Diversion design shall comply with the requirements of §12.511(6) of this title (relating to Hydrologic Balance: Diversions).

(f) The top surface of the completed fill shall be graded such that the final slope after settlement will be no steeper than 20h:1v (5%) toward properly designed drainage channels in natural ground along the periphery of the fill. Surface runoff from the top surface of the fill shall not be allowed to flow over the outslope of the fill.

(g) Surface runoff from the outslope of the fill shall be diverted off the fill to properly designed channels which will safely pass a 100-year, 24-hour precipitation event. Diversion design shall comply with the requirements of §12.511(6) of this title (relating to Hydrologic Balance: Diversions).

(h) Terraces shall be constructed on the outslope if required for control of erosion or for roads included in the approved postmining land-use plan. Terraces shall meet the following requirements:

(1) the slope of the outslope between terrace benches shall not exceed 2h:1v (50%);

(2) to control surface runoff, each terrace bench shall be graded to a slope of 20h:1v (5%) toward the embankment. Runoff shall be collected by a ditch along the intersection of each terrace bench and the outslope; and

(3) terrace ditches shall have a 5% slope toward the channels specified in subsection (g) of this section, unless steeper slopes are necessary in conjunction with approved roads.

The provisions of this §12.534 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.535 Coal Mine Waste Banks: General Requirements

(a) All coal mine waste shall be hauled or conveyed and placed in new and existing disposal areas approved by the Commission for this purpose. These areas shall be within a permit area. The disposal area shall be designed, constructed and maintained:

(1) in accordance with §12.531 and §12.532 of this title (relating to Disposal of Underground Development Waste and Excess Spoil: General Requirements, and to Disposal of Underground Development Waste and Excess Spoil: Valley Fills), this section, and §§12.536-12.541 of this title (relating to Coal Mine Waste Banks: Site Inspection, to Coal Mine Waste Banks: Water-Control Measures, to Coal Mine Waste Banks: Construction Requirements, to Coal Mine Waste: Burning, to Coal Mine Waste: Burned-Waste Utilization, and to Coal Mine Waste: Return to Underground Workings); and

(2) to prevent combustion.

(b) Coal mine waste materials from activities located outside a permit area, such as those activities at other mines or abandoned mine-waste piles, may be disposed of in the permit area only if approved by the Commission. Approval shall be based on a showing by the person who conducts

underground mining activities in the permit area, using hydrologic, geologic, geotechnical, physical, and chemical analyses, that disposal of these materials does not:

(1) adversely affect water quality, water flow, or vegetation;

(2) create public health hazards; or

(3) cause instability in the disposal areas.

(c) The disposal facility shall be designed using current, prudent engineering practices and shall meet any design criteria established by the Commission. A qualified registered professional engineer experienced in the design of similar earth and waste structures shall certify the design of the disposal facility.

The provisions of this §12.535 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.536 Coal Mine Waste Banks: Site Inspection

(a) All coal mine waste banks shall be inspected, on behalf of the person conducting underground mining activities, by a qualified registered engineer or other person approved by the Commission.

(1) Inspections shall occur at least quarterly, beginning within seven days after preparation of the disposal area begins. The Commission may require more frequent inspections based upon an evaluation of the potential danger to the health or safety of the public and the potential harm to land, air and water resources. Inspections may terminate when the coal mine waste bank has been graded, covered in accordance with §12.538 of this title (relating to Coal Mine Waste Banks: Construction Requirements), topsoil has been distributed on the bank in accordance with §12.507 of this title (relating to Topsoil: Redistribution), or at such a later time as the Commission may require.

(2) Inspections shall include such observations and tests as may be necessary to evaluate the potential hazard to human life and property, ensure that all organic material and topsoil have been removed and that proper construction and maintenance are occurring in accordance with the plan submitted under §§12.190-12.193 of this title (relating to Reclamation Plan: Ponds, Impoundments, Banks, Dams, and Embankments, to Protection of Public Parks and Historic Places, to Relocation or Use of Public Roads, and to Underground Development Waste/Return of Coal Processing Waste to Abandoned Underground Workings) and approved by the Commission.

(3) The engineer or other approved inspector shall consider steepness of slopes, seepage, and other visible factors which could indicate potential failure, and the results of failure with respect to the threat to human life and property.

(4) Copies of the inspection findings shall be maintained at the mine site.

(b) If any inspection discloses that a potential hazard exists, the Commission shall be informed promptly of the finding and of the emergency procedures formulated for public protection and remedial action. If adequate procedures cannot be formulated or implemented, the Commission shall be notified immediately. The Commission shall then notify the appropriate emergency agencies that other emergency procedures are required to protect the public from the coal mine waste area.

The provisions of this §12.536 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.537 Coal Mine Waste Banks: Water-control Measures

(a) A properly designed subdrainage system shall be provided, which shall:

(1) intercept all ground-water sources;

(2) be protected by an adequate filter; and

(3) be covered so as to protect against the entrance of surface water or leachate from the coal mine waste.

(b) All surface drainage from the area above the coal mine waste bank and from the crest and face of the waste disposal area shall be diverted in accordance with §12.532(e) of this title (relating to Disposal of Underground Development Waste and Excess Spoil: Valley Fills).

(c) Slope protection shall be provided to minimize surface erosion at the site. All disturbed areas, including diversion ditches that are not riprapped, shall be vegetated upon completion of construction.

(d) Discharges of all water from a coal mine waste bank shall comply with §§12.509, 12.510, 12.513, 12.514, 12.519, and 12.522 of this title (relating to Hydrologic Balance: General Requirements, to Hydrologic Balance: Water-Quality Standards and Effluent Limitations, to Hydrologic Balance: Sediment Control Measures, to Hydrologic Balance: Siltation Structures, to Hydrologic Balance: Surface and Ground-Water Monitoring, and to Hydrologic Balance: Discharge of Water Into an Underground Mine).

The provisions of this §12.537 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.538 Coal Mine Waste Banks: Construction Requirements

(a) Coal mine waste banks shall be constructed in compliance with §12.531 and §12.532 of this title (relating to Disposal of Underground Development Waste and Excess Spoil: General Requirements, and to Disposal of Underground Development Waste and Excess Spoil: Valley Fills), except to the extent the requirements of those sections are specifically varied in this section.

(b) Coal mine waste banks shall have a minimum static factor of safety of 1.5.

(c) Compaction requirements during construction or modification of all coal mine waste banks shall meet the requirements of this subsection, instead of those specified in §12.532(d) of this title (relating to Disposal of Underground Development Waste and Excess Spoil: Valley Fills). The coal mine waste shall be:

(1) spread in layers no more than 24 inches in thickness; and

(2) compacted to attain 90% of the maximum dry density in order to prevent spontaneous combustion and to provide the strength required for stability of the coal processing waste bank. Dry densities shall be determined in accordance with the American Association of State Highway and Transportation Officials (AASHTO) Specification T99-74 (Twelfth Edition) (July, 1978) or an equivalent method. AASHTO T99-74 is on file and available for inspection at the Commission office, 1701 N. Congress Avenue, Austin, Texas.

(d) Following grading of the coal mine waste bank, the site shall be covered with a minimum of 4 feet of the best available non-toxic and non-combustible material, in accordance with §12.505(e) of this title (relating to Topsoil: Removal), and in a manner that does not impede flow from

subdrainage systems. The coal mine waste bank shall be revegetated in accordance with §§12.555-12.560 of this title (relating to Revegetation: General Requirements, to Revegetation: Use of Introduced Species, to Revegetation: Timing, to Revegetation: Mulching and Other Soil Stabilizing Practices, to Revegetation: Grazing, and to Revegetation: Standards for Success). The Commission may allow less than 4 feet of cover material based on physical and chemical analyses which show that the requirements of §§12.555-12.560 of this title (relating to Revegetation: General Requirements, to Revegetation: Use of Introduced Species, to Revegetation: Timing, to Revegetation: Mulching and Other Soil Stabilizing Practices, to Revegetation: Grazing, and to Revegetation: Standards for Success) will be met.

The provisions of this §12.538 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.539 Coal Mine Waste: Burning

Coal mine waste fires shall be extinguished by the person who conducts the underground mining activities in accordance with a plan approved by the Commission and the Mine Safety and Health Administration. The plan shall contain, at a minimum, provisions to ensure that only those persons authorized by the operator, and who have an understanding of the procedure to be used, shall be involved in the extinguishing operations.

The provisions of this §12.539 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.540 Coal Mine Waste: Burned-Waste Utilization

Before any burned coal mine waste or other materials or refuse is removed from a disposal area, approval shall be obtained from the Commission. A plan for the method of removal, with maps and appropriate drawings to illustrate the proposed sequence of the operation and methods of compliance with §§12.500-12.539, this section, and §§12.541-12.572 of this title (relating to Permanent Program Performance Standards--Underground Mining Activities), shall be submitted to the Commission. Consideration shall be given in the plan to potential hazards, which may be created by removal, to persons working or living in the vicinity of the structure. The plan shall be certified by a qualified registered professional engineer.

The provisions of this §12.540 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.541 Coal Mine Waste: Return to Underground Workings

Coal mine waste may be returned to underground mine workings only in accordance with the waste disposal program approved by the Commission and MSHA under §12.193 of this title (relating to Underground Development Waste/Return of Coal Processing Waste to Abandoned Underground Workings).

The provisions of this §12.541 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.542 Disposal of Noncoal Wastes

(a) Noncoal wastes including, but not limited to, grease, lubricants, paints, flammable liquids, garbage, abandoned mining machinery, timber and other combustibles generated during underground mining activities, shall be placed and stored in a controlled manner in a designated portion of the permit area. Placement and storage shall ensure that leachate and surface runoff do not degrade surface or ground water, fires are prevented, and that the area remains stable and suitable for reclamation and revegetation compatible with the natural surroundings.

(b) Final disposal of noncoal wastes shall be in a designated disposal site in the permit area. Disposal sites shall be designed and constructed with appropriate water barriers on the bottom and sides of the designated site. Wastes shall be routinely compacted and covered to prevent combustion and wind-borne waste. When disposal is completed, a minimum of 2 feet of soil cover shall be placed over the site, slopes stabilized, and revegetation accomplished in accordance with §§12.555-12.560 of this title (relating to Revegetation: General Requirements, to Revegetation: Use of Introduced Species, to Revegetation: Timing, to Revegetation: Mulching and Other Soil Stabilizing Practices, to Revegetation: Grazing, and to Revegetation: Standards for Success). Operation of the disposal site shall be conducted in accordance with all local, state, and federal requirements.

(c) At no time shall any solid waste material be deposited at refuse embankments or impoundment sites, nor shall any solid waste disposal excavation be placed within 8 feet of any coal outcrop or coal storage area.

The provisions of this §12.542 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.543 Coal Mine Waste: Dams and Embankments: General Requirements

(a) This section, and §12.544 and §12.545 of this title (relating to Coal Mine Waste: Dams and Embankments: Site Preparation, and to Coal Mine Waste: Dams and Embankments: Design and Construction) apply to dams and embankments constructed of coal mine waste or intended to impound coal mine waste, whether they were completed before adoption of the Commission regulatory program or are intended to be completed thereafter.

(b) Waste shall not be used in the construction of dams and embankments unless it has been demonstrated to the Commission that the stability of such a structure conforms with the requirements of §§12.500-12.542, this section, and §§12.544-12.572 of this title (relating to Permanent Program Performance Standards--Underground Mining Activities). It shall also be demonstrated that the use of coal mine waste material shall not have a detrimental effect on downstream water quality or the environment due to acid seepage through the dam or embankment. The stability of the structure and the potential impact of acid mine seepage through the impounding structure shall be discussed in detail in the design plan submitted to the Commission in accordance with this chapter (relating to Coal Mining Regulations). All demonstrations shall be submitted to and approved by the Commission.

(c) Each impounding structure constructed of coal mine waste or intended to impound coal mine waste shall be designed, constructed and maintained in accordance with this chapter (relating to Coal Mining Regulations). Such structures may not be retained permanently as part of the approved postmining land use.

(d) If an impounding structure constructed of coal mine

waste or intended to impound coal mine waste meets the criteria of the Mine Safety and Health Administration, 30 CFR 77.216(a), the combination of principal and emergency spillways shall be able to safely pass the probable maximum precipitation of a 6-hour precipitation event, or greater event as specified by the Commission.

The provisions of this §12.543 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.544 Coal Mine Waste: Dams and Embankments: Site Preparation

Before coal mine waste is placed at a dam or embankment site:

(1) all trees, shrubs, grasses, and other organic material shall be cleared and grubbed from the site, and all combustibles shall be removed and stockpiled in accordance with the requirements of §§12.500-12.543, this section, and §§12.545-12.572 of this title (relating to Permanent Program Performance Standards--Underground Mining Activities); and

(2) surface drainage that may cause erosion to the embankment area or the embankment features, whether during construction or after completion, shall be diverted away from the embankment by diversion ditches that comply with the requirements of §12.511 of this title (relating to Hydrologic Balance: Diversions). Adequate outlets for discharge from these diversions shall be in accordance with §12.515 of this title (relating to Hydrologic Balance: Discharge Structures). Diversions that are designed to divert drainage from the upstream area away from the impoundment area shall be designed to carry the peak runoff from a 100-year, 24-hour precipitation event. The diversion shall be maintained to prevent blockage, and the discharges shall be in accordance with §12.515 of this title (relating to Hydrologic Balance: Discharge Structures). Sediment-control measures shall be provided at the discharge of each diversion ditch before entry into natural watercourses in accordance with §§12.509-12.511, 12.513, and 12.514 of this title (relating to Hydrologic Balance: General Requirements, to Hydrologic Balance: Water-Quality Standards and Effluent Limitations, to Hydrologic Balance: Diversions, to Hydrologic Balance: Sediment Control Measures, and to Hydrologic Balance:Siltation Structures).

The provisions of this §12.544 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.545 Coal Mine Waste: Dams and Embankments: Design and Construction

(a) The design of each dam and embankment constructed of coal mine waste or intended to impound such waste shall comply with the requirements of §12.517(a) and (c) of this title (relating to Hydrologic Balance: Permanent and Temporary Impoundments), modified as follows:

(1) the design freeboard between the lowest point on the embankment crest and the maximum water elevation shall be at least 3 feet. The maximum water elevation shall be that determined by the freeboard hydrograph criteria contained in the U.S. Natural Resources Conservation Service criteria referenced in §12.517 of this title (relating to Hydrologic Balance: Permanent and Temporary Impoundments);

(2) the dam and embankment shall have a minimum safety factor of 1.5 for the partial pool with steady seepage saturation conditions, and the seismic safety factor shall be at least 1.2; and

(3) the dam or embankment foundation and abutments shall be designed to be stable under all conditions of construction and operation of the impoundment. Sufficient foundation investigations and laboratory testing shall be performed to determine the safety factors of the dam or embankment for all loading conditions appearing in paragraph (2) of this subsection or the publications referred to in §12.517 of this title (relating to Hydrologic Balance: Permanent and Temporary Impoundments), and for all increments of construction.

(b) Spillways and outlet works shall be designed to provide adequate protection against erosion and corrosion. Inlets shall be protected against blockage.

(c) For an impounding structure constructed of or impounding coal mine waste, at least 90% of the water stored during the design precipitation event shall be removed within the 10-day period following the design precipitation event.

The provisions of this §12.545 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.547 Protection of Fish, Wildlife, and Related Environmental Values

(a) Any person conducting underground mining activities shall, to the extent possible using the best technology currently available, minimize the disturbances and adverse impacts of the activities on fish, wildlife, and related environmental values, and achieve enhancement of such resources where practicable.

(b) No underground mining activity shall be conducted which is likely to jeopardize the continued existence of endangered or threatened species or which is likely to result in the destruction or adverse modification of designated critical habitats of such species in violation of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.). The operator shall promptly report to the Commission the presence in the permit area of any critical habitat of a threatened or endangered species listed by the Secretary, any plant or animal listed as threatened or endangered under state or federal law, or any bald or golden eagle, of which the operator becomes aware and which was not previously reported to the Commission by that person. Upon notification, the Commission shall consult with appropriate state and federal fish and wildlife agencies and, after consultation, shall identify whether, and under what conditions, the operator may proceed.

(c) No underground mining activity shall be conducted in a manner which would result in the unlawful taking of a bald or golden eagle, its nest, or any of its eggs. The operator shall promptly report to the Commission any golden or bald eagle nest discovered within the permit area during the months of October, November, and December. The operator shall make a survey to determine the range and habitat and whether other nesting sites are present. Upon notification, the Commission shall consult with the U.S. Fish and Wildlife Service and, where appropriate, with the state fish and wildlife agency. After consultation, the Commission shall determine whether, and under what conditions, the operator may proceed.

(d) A person who conducts underground mining activities shall ensure that the design and construction of electric power lines and other transmission facilities used for

or incidental to the underground mining activities in the permit area shall be designed and constructed in accordance with the guidelines set forth in Environmental Criteria for Electric Transmission Systems (USDI, USDA (1970)), or in alternative guidance manuals approved by the Commission. Distribution lines shall be designed and constructed in accordance with REA Bulletin 61-10, Powerline Contacts by Eagles and Other Large Birds, or in alternative guidance manuals approved by the Commission. For informational purposes, these two documents are available at the Commission office, 1701 North Congress Avenue, Austin, Texas.

(e) Each person who conducts underground mining activities shall to the extent possible using the best technology currently available:

(1) locate and operate haul and access roads so as to avoid or minimize impacts to important fish and wildlife species or other species protected by state or federal law;

(2) fence roadways where specified by the Commission to guide locally important wildlife to roadway underpasses or overpasses and construct the necessary passages. No new barrier shall be located in known and important wildlife migration routes;

(3) fence, cover, or use other appropriate methods to exclude wildlife from ponds which contain hazardous concentrations of toxic-forming materials;

(4) restore, enhance where practicable, or avoid disturbances to habitats of unusually high value for fish and wildlife;

(5) restore, enhance where practicable, or maintain natural riparian vegetation on the banks of streams, lakes, and other wetland areas;

(6) afford protection to aquatic communities by avoiding stream channels as required in §12.524 and §12.565 of this title (relating to Hydrologic Balance: Stream Buffer Zones, and to Subsidence Control: Buffer Zones) or restoring stream channels as required in §12.511 of this title (relating to Hydrologic Balance: Diversions);

(7) not use persistent pesticides on the area during underground mining and reclamation activities unless approved by the Commission;

(8) to the extent possible prevent, control, and suppress range forest and coal fires which are not approved by the Commission as part of a management plan;

(9) if fish and wildlife habitat is to be a primary or secondary post-mining land use, the operator shall, in addition to the requirements of §§12.555-12.560 of this title (relating to Revegetation: General Requirements, to Revegetation: Use of Introduced Species, to Revegetation: Timing, to Revegetation: Mulching and Other Soil Stabilizing Practices, to Revegetation: Grazing, and to Revegetation: Standards for Success):

(A) select plant species to be used on reclaimed areas, based on the following criteria:

(i) their proven nutritional value for fish and wildlife;

(ii) their uses as cover for fish and wildlife; and

(iii) their ability to support and enhance fish and wildlife habitat after release of ponds; and

(B) distribute plant groupings to maximize benefit to fish and wildlife. Plants should be grouped and distributed in a manner which optimizes edge effect, cover, and other benefits for fish and wildlife;

(10) where cropland is to be the postmining land use and where appropriate for wildlife and crop management practices, intersperse the fields with trees, hedges, or fence rows throughout the harvested area to break up large blocks of monoculture and to diversify habitat types for birds and other animals; and

(11) where the primary land use is to be residential, public service, or industrial land use, intersperse reclaimed lands with greenbelts, utilizing species of grass, shrubs and trees useful as food and cover for birds and small animals.

The provisions of this §12.547 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.548 Slides And Other Damage

At any time a slide occurs which may have a potential adverse effect on public property, health, safety, or the environment, the person who conducts the underground mining activities shall notify the Commission by the fastest available means and comply with any remedial measures required by the Commission.

The provisions of this §12.548 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.549 Pipelines

With respect to pipelines transmitting crude oil, liquid petroleum, natural gas, toxic or flammable substances:

(1) identify and describe pipelines located in the permit area, and within 100 feet thereof, in the application for a surface mining permit;

(2) visibly mark the location of pipelines at 200 foot intervals throughout the permit area;

(3) ensure a minimum of six feet of compacted material between the pipeline and any haul road or access road within the permit area which crosses over it;

(4) not create a cut within 100 feet or one times the depth of the cut (whichever is greater) of any pipeline;

(5) conduct blasting operations in accordance with state and federal laws; but, in no case shall blasting be conducted within 500 feet of a pipeline;

(6) comply with rules and regulations pursuant to TEXAS REVISED CIVIL STATUTES ANNOTATED, ARTICLE 6053-1; Railroad Commission of Texas, Pipeline Safety Rules (16 Texas Administrative Code §§7.70 et seq.); 49 CFR 191, 192, and 199; and

(7) at the discretion of the Commission, variances to paragraphs (2)-(5) of this section may be granted by the Commission. Variances to paragraphs (3)-(5) of this section will be granted if, in the opinion of the Commission, the structural integrity of the pipeline will be maintained and if agreed to by the owner of the pipeline.

The provisions of this §12.549 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.550 Contemporaneous Reclamation

Reclamation efforts, including, but not limited to, backfilling, grading, topsoil replacement and revegetation, of all areas affected by surface operations shall occur as contemporaneously as practicable with mining operations.

The provisions of this §12.550 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.551 Backfilling and Grading: General Requirements

(a) Timing. Surface areas disturbed incident to underground mining activities shall be backfilled and graded

in accordance with the time schedule approved by the Commission as a condition of the permit.

(b) Backfilling and grading.

(1) All areas affected by surface operations shall be returned to approximate original contour. All spoil shall be transported, backfilled, and compacted (where advisable to ensure stability or to prevent leaching) and graded to eliminate all highwalls, spoil piles, and depressions.

(2) Backfilled material shall be placed to minimize erosion, to minimize water pollution both on and off the site, and to support the approved postmining land use.

(3) The postmining graded slopes need not be uniform.

(4) Cut-and-fill terraces may be used only in those situations expressly identified in §12.552(b) of this title (relating to Backfilling and Grading: General Grading Requirements).

The provisions of this §12.551 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.552 Backfilling and Grading: General Grading Requirements

(a) The final graded slopes shall not exceed in grade either the approximate premining slopes, or any lesser slopes approved by the Commission based on consideration of soil, climate, or other characteristics of the surrounding area. Postmining final graded slopes need not be uniform but shall approximate the general nature of the premining topography. The person who conducts underground mining activities shall, at a minimum:

(1) retain all overburden and spoil on the solid portion of existing or new benches; and

(2) backfill and grade to the most moderate slope possible, to eliminate the highwall which does not exceed either the angle of repose or such lesser slope as is necessary to achieve a minimum static safety factor of 1.3. In all cases the highwall shall be eliminated.

(b) On approval by the Commission and in order to conserve soil moisture, ensure stability, and control erosion on final graded slopes, cut-and-fill terraces may be allowed, if the terraces are compatible with the approved postmining land use and are appropriate substitutes for construction of lower grades on the reclaimed lands. The terraces shall meet the following requirements:

(1) the width of the individual terrace bench shall not exceed 20 feet unless specifically approved by the Commission as necessary for stability, erosion control, or roads included in the approved postmining land-use plan;

(2) the vertical distance between terraces shall be as specified by the Commission, to prevent excessive erosion and to provide long-term stability;

(3) the slope of the terrace outslope shall not exceed 2h:1v (50%). In no case may highwalls be left as part of terraces; and

(4) culverts and underground rock drains shall be used on the terrace only when approved by the Commission.

(c) Small depressions may be constructed if they:

(1) are approved by the Commission to minimize erosion, conserve soil moisture or promote vegetation;

(2) do not restrict normal access; and

(3) are not inappropriate substitutes for lower grades on the reclaimed lands.

(d) All final grading, preparation of overburden before replacement of topsoil, and placement of topsoil shall be done along the contour to minimize subsequent erosion and instability. If such grading, preparation or placement along the contour is hazardous to equipment operators, then grading, preparation or placement in a direction other than generally parallel to the contour may be used. In all cases, grading, preparation, or placement shall be conducted in a manner which minimizes erosion and provides a surface for replacement of topsoil which will minimize slippage.

(e) Backfilling and grading of previously mined areas shall be subject to the following requirements:

(1) remining operations on previously mined areas that contain a preexisting highwall shall comply with the requirements of §12.551 of this title (relating to Backfilling and Grading: General Requirements), this section, and §12.553 of this title (relating to Backfilling and Grading: Covering Coal and Acid- and Toxic-Forming Materials), except as provided in this subsection; and

(2) the requirements of §12.551(b)(1) requiring the elimination of highwalls shall not apply to remining operations where the volume of all reasonably available spoil is demonstrated in writing to the Commission to be insufficient to completely backfill the reaffected or enlarged highwall. The highwall shall be eliminated to the maximum extent technically practical in accordance with the following criteria:

(A) all spoil generated by the remining operation and any other reasonably available spoil shall be used to backfill the area. Reasonably available spoil in the immediate vicinity of the remining operation shall be included within the permit area;

(B) the backfill shall be graded to a slope which is compatible with the approved postmining land use and which provides adequate drainage and long-term stability;

(C) any highwall remnant shall be stable and not pose a hazard to the public health and safety or to the environment. The operator shall demonstrate, to the satisfaction of the Commission, that the highwall remnant is stable; and

(D) spoil placed on the outslope during previous mining operations shall not be disturbed if such disturbances will cause instability of the remaining spoil or otherwise increase the hazard to the public health and safety or to the environment.

The provisions of this §12.552 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640; amended to be effective June 12, 2001, 26 TexReg 4090.

§12.553 Backfilling and Grading: Covering Coal and Acid- and Toxic-forming Materials

(a) Cover.

(1) A person who conducts underground mining activities shall cover, with a minimum of 4 feet of the best available non-toxic and non-combustible material, all exposed coal seams remaining after mining and all acid-forming materials, toxic-forming materials, combustible materials, or any other materials identified by the Commission as exposed, used, or produced during mining.

(2) If necessary, these materials shall be treated to neutralize toxicity, in order to prevent water pollution and sustained combustion and minimize adverse effects on plant growth and land uses.

(3) Where necessary to protect against upward migration of salts, exposure by erosion, to provide an adequate depth for plant growth, or to otherwise meet local conditions, the Commission shall specify thicker amounts of

cover using non-toxic material.

(4) Acid-forming or toxic-forming material shall not be buried or stored in proximity to a drainage course so as to cause or pose a threat of water pollution.

(b) Stabilization. Backfilled material shall be selectively hauled or conveyed and compacted, wherever necessary to prevent leaching of acid-forming and toxic-forming materials into surface or ground waters and wherever necessary to ensure the stability of backfilled materials. The method and design specifications of compacting material shall be approved by the Commission before acid-forming and toxic-forming materials are covered.

The provisions of this §12.553 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.554 Stabilization of Surface Areas for Underground Mining

(a) All exposed surface areas shall be protected and stabilized to effectively control erosion and air pollution attendant to erosion.

(b) Rills and gullies which form in areas that have been regraded and topsoiled and which either disrupt the approved postmining land use or the reestablishment of the vegetative cover or cause or contribute to a violation of water-quality standards for receiving streams shall be filled, regraded, or otherwise stabilized. Topsoil shall be replaced and the areas shall be reseeded or replanted.

The provisions of this §12.554 adopted to be effective September 14, 1999, 24 TexReg 7223.

§12.555 Revegetation: General Requirements

(a) The permittee shall establish on regraded areas and on all other disturbed areas except water areas and surface areas of roads that are approved as part of the postmining land use, a vegetative cover that is in accordance with the approved permit and reclamation plan and that is:

(1) diverse, effective, and permanent;

(2) comprised of species native to the area, or of introduced species where desirable and necessary to achieve the approved postmining land use and approved by the Commission;

(3) at least equal in extent of cover to the natural vegetation of the area; and

(4) capable of stabilizing the soil surface from erosion.

(b) The reestablished plant species shall:

(1) be compatible with the approved postmining land use;

(2) have the same seasonal characteristics of growth as the original vegetation;

(3) be capable of self-regeneration and plant succession;

(4) be compatible with the plant and animal species of the area; and

(5) meet the requirements of applicable state and federal seed, poisonous and noxious plant, and introduced species laws or regulations.

(c) The Commission may grant exception to the requirements of subsections (b)(2) and (b)(3) of this section when the species are necessary to achieve a quick-growing, temporary, stabilizing cover, and measures to establish permanent vegetation are included in the approved permit and reclamation plan.

(d) When the Commission approves a cropland postmining land use, the Commission may grant exceptions to the requirements of subsections (a)(1), (a)(3), (b)(2), and (b)(3) of this section. The requirements of §§12.620-12.625 of this title (relating to Special Permanent Program Performance Standards--Operations on Prime Farmland) apply to areas identified as prime farmland.

The provisions of this §12.555 adopted to be effective November 4, 1997, 22 TexReg 10640.

§12.556 Revegetation: Use of Introduced Species

Introduced species may be used if approved by the Commission under the following conditions:

(1) after appropriate field trials have demonstrated that the introduced species can establish a diverse, effective, and permanent cover capable of achieving the approved postmining land use;

(2) the species are necessary to achieve a quick, temporary, and stabilizing cover that aids in controlling erosion; and measures to establish permanent vegetation are included in the approved plan;

(3) the species are compatible with the plant and animal species of the region; and

(4) the species meet the requirements of applicable state and federal seed or introduced species statutes, and are not poisonous or noxious.

The provisions of this §12.556 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.557 Revegetation: Timing

Seeding and planting of disturbed areas shall be conducted during the first normal period for favorable planting conditions after final preparation. The normal period for favorable planting shall be that planting time generally accepted locally for the type of plant materials selected. When necessary to effectively control erosion, any disturbed area shall be seeded, as contemporaneously as practicable, with a temporary cover of small grains, grasses, or legumes until a permanent cover is established.

The provisions of this §12.557 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.558 Revegetation: Mulching and Other Soil Stabilizing Practices

(a) Suitable mulch or other soil stabilizing practices shall be used on all regraded and topsoiled areas to control erosion, to promote germination of seeds, or to increase the moisture retention of the soil. The Commission may, on a case-by-case basis, suspend the requirement for mulch if the permittee can demonstrate that alternative procedures will achieve the requirements of §12.560 of this title (relating to Revegetation: Standards for Success) and do not cause or contribute to air or water pollution.

(b) Mulches shall be mechanically or chemically anchored to the soil surface to assure effective protection of the soil and vegetation when required by the Commission.

(c) Annual grasses and grains may be used alone, as in situ mulch, or in conjunction with another mulch, when the Commission determines they will provide adequate soil erosion control and will later be replaced by perennial species approved for the postmining land use.

(d) Chemical soil stabilizers alone or in combination with appropriate mulches may be used in conjunction with vegetative covers approved for the postmining land use.

The provisions of this §12.558 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.559 Revegetation: Grazing

When the approved postmining land use is range or pasture land, the reclaimed land shall be used for livestock grazing at a grazing capacity approved by the Commission approximately equal to that for similar non-mined lands, for at least the last two full years of liability required under §12.560(b) of this title (relating to Revegetation: Standards for Success).

The provisions of this §12.559 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.560 Revegetation: Standards for Success

(a) Comparison to an established standard. Success of revegetation shall be judged on the effectiveness of the vegetation for the approved postmining land use, the extent of cover compared to the cover occurring in natural vegetation of the area, and the general requirements of §12.555 and §12.556 of this title (relating to Revegetation: General Requirements; and Revegetation: Use of Introduced Species).

(1) Standards for success and statistically valid sampling techniques for measuring success shall be selected by the Commission.

(2) Standards for success shall include criteria representative of unmined lands in the area being reclaimed to evaluate the appropriate vegetation parameters of ground cover, production, or stocking. Ground cover, production, or stocking shall be considered equal to the approved success standard when they are not less than 90% of the success standard. The sampling techniques for measuring success shall use a 90% statistical confidence interval (i.e., one-sided test with a 0.10 alpha error).

(b) Ground cover and productivity standards. Standards for success shall be applied in accordance with the approved postmining land use and, at a minimum, the following conditions:

(1) for areas developed for use as grazingland or pastureland, the ground cover and production of living plants on the revegetated area shall be at least equal to that of a reference area or such other success standards approved by the Commission;

(2) for areas developed for use as cropland, crop production on the revegetated area shall be at least equal to that of a reference area or such other success standards approved by the Commission;

(3) for areas to be developed for fish and wildlife habitat, recreation, shelter belts, or forest products, success of vegetation shall be determined on the basis of tree and shrub stocking and vegetative ground cover. Such parameters are described as follows:

(A) minimum stocking and planting arrangements shall be specified by the Commission on the basis of local and regional conditions and after consultation with and approval by the state agencies responsible for the administration of forestry and wildlife programs;

(B) trees and shrubs that will be used in determining the success of stocking and the adequacy of the plant arrangement shall have utility for the approved postmining land use. Trees and shrubs counted in determining such success shall be healthy and have been in place for not less than two growing seasons. At the time of bond release, at least 80% of the trees and shrubs used to determine such success shall have been in place for 60% of the applicable minimum period of responsibility; and

(C) vegetative ground cover shall not be less than that required to achieve the approved postmining land use;

(4) for areas to be developed for industrial/commercial or residential land use less than two years after regrading is completed, the vegetative ground cover shall not be less than that required to control erosion; and

(5) for areas previously disturbed by mining that were not reclaimed to the requirements of this subchapter and that are remined or otherwise redisturbed by surface coal mining operations, as a minimum, the vegetative ground cover shall be not less than the ground cover existing before redisturbance and shall be adequate to control erosion.

(c) Maintenance and data collection.

(1) The period of extended responsibility for successful revegetation shall begin after the last year of augmented seeding, fertilizing, irrigation, or other work, excluding husbandry practices that are approved by the Commission in accordance with paragraph (4) of this subsection.

(2) In areas of more than 26.0 inches of annual average precipitation, the period of responsibility shall continue for a period of not less than:

(A) five full years, except as provided in subparagraph (B) of this paragraph. The vegetation parameters identified in subsection (b) of this section for grazingland, pastureland, or cropland shall equal or exceed the approved success standard during the growing season of any 2 years of the responsibility period, except the first year. Areas approved for the other uses identified in subsection (b) of this section shall equal or exceed the applicable success standard during the growing season of the last year of the responsibility period; or

(B) two full years for lands eligible for remining included in a permit for which a finding has been made under §12.216(16) of this title (relating to Criteria for Permit Approval or Denial). To the extent that the success standards are established by subsection (b)(5) of this section, the lands must equal or exceed the standards during the growing season of the last year of the responsibility period.

(3) In areas of 26.0 inches or less average annual precipitation, the period of responsibility shall continue for a period of not less than:

(A) ten full years, except as provided in subparagraph (B) of this paragraph. The vegetation parameters identified in subsection (b) of this section for grazingland, pastureland, or cropland shall equal or exceed the approved success standard during the growing season of any two years after year six of the responsibility period. Areas approved for the other uses identified in subsection (b) of this section shall equal or exceed the applicable success standard during the growing season of the last year of the responsibility period; or

(B) five full years for lands eligible for remining included in a permit for which a finding has been made under §12.216(16) of this title. To the extent that the success standards are established by subsection (b)(5) of this section, the lands must equal or exceed the standards during the growing seasons of the last two consecutive years of the responsibility period.

(4) The Commission may approve selective husbandry practices, excluding augmented seeding, fertilization, or irrigation, provided it obtains prior approval from the Director in accordance with 30 CFR 732.17 that the practices are normal husbandry practices, without extending

the period of responsibility for revegetation success and bond liability if such practices can be expected to continue as part of the postmining land use or if the discontinuance of the practices will not reduce the probability of permanent revegetation success. Approved practices shall be normal husbandry practices within the region for unmined land uses similar to the approved postmining land use of the disturbed area, including such practices as disease, pest, and vermin control; and any pruning, reseeding, and transplanting, specifically necessary by such actions.

The provisions of this §12.560 adopted to be effective November 4, 1997, 22 TexReg 10640; amended to be effective February 24, 2014, 39 TexReg 1121.

§12.562 Subsidence Control: General Requirements

(a) Underground mining activities shall be planned and conducted so as to prevent subsidence from causing material damage to the surface, to the extent technologically and economically feasible, and so as to maintain the value and reasonably foreseeable use of surface lands. This may be accomplished by leaving adequate coal in place, backfilling, or other measures to support the surface, or by conducting underground mining in a manner that provides for planned and controlled subsidence. Nothing in this chapter (relating to Coal Mining Regulations) shall be construed to prohibit the standard method of room and pillar mining.

(b) The person engaged in underground mining activities shall comply with all provisions of the subsidence-control plan prepared pursuant to §12.194 of this title (relating to Subsidence Control Plan) and approved by the Commission.

(c) Within a schedule approved by the Commission, the operator shall submit a detailed plan of the underground workings. The detailed plan shall include maps and descriptions, as appropriate, of significant features of the underground mine, including the size, configuration, and approximate location of pillars and entries, extraction ratios, measures taken to prevent or minimize subsidence and related damage, areas of full extraction, and other information required by the Commission. Upon request of the operator, information submitted with the detailed plan may be held as confidential, in accordance with the requirements of this chapter (relating to Coal Mining Regulations).

The provisions of this §12.562 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.563 Subsidence Control: Public Notice

The mining schedule shall be distributed by mail to all owners of property and residents within the area above the underground workings and adjacent areas. Each such person shall be notified by mail at least six months prior to mining beneath his or her property or residence. The notification shall contain, as a minimum:

(1) identification of specific areas in which mining will take place;

(2) dates of mining activities that could cause subsidence and affect specific structures; and

(3) measures to be taken to prevent or control adverse surface effects.

The provisions of this §12.563 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.564 Subsidence Control: Surface-Owner Protection

(a) Each person who conducts underground mining activities shall adopt all measures approved by the Commission under §12.194 of this title (relating to Subsidence Control Plan) to reduce the likelihood of subsidence, to prevent subsidence-causing material damage or reducing the value or reasonably foreseeable use of surface lands, and to mitigate the effects of any such damage or reduction which may occur.

(b) Each person who conducts underground mining which results in subsidence that causes material damage or reduces the value or reasonably foreseeable use of the surface lands shall, with respect to each surface area affected by subsidence:

(1) restore, rehabilitate, or remove and replace each damaged structure, feature or value promptly after the damage is suffered, to the condition it would be in if no subsidence had occurred, and restore the land to a condition capable of supporting reasonably foreseeable uses it was capable of supporting before subsidence; or

(2) purchase the damaged structure or feature for its fair market, pre-subsidence value, and shall promptly, after subsidence occurs, to the extent technologically and economically feasible, restore the land surface to a condition capable of and appropriate for supporting the purchased structure and other foreseeable uses it was capable of supporting before mining. Nothing in this paragraph shall be deemed to grant or authorize an exercise of the power of condemnation or the right of eminent domain by any person engaged in underground mining activities; or

(c) Each person who conducts underground mining activities will compensate the owner of any surface structure in the full amount of the diminution in value resulting from subsidence, by purchase prior to mining of a noncancellable, premium-prepaid insurance policy, or other means approved by the Commission as assuring before mining begins that payment will occur; indemnify every person with an interest in the surface for all damages suffered as a result of the subsidence; and, to the extent technologically and economically feasible, fully restore the land to a condition capable of maintaining reasonably foreseeable uses which it could support before subsidence.

The provisions of this §12.564 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.565 Subsidence Control: Buffer Zones

(a) Underground mining activities shall not be conducted beneath or adjacent to any perennial stream, or impoundment having a storage volume of 20 acre-feet or more, unless the Commission, on the basis of detailed subsurface information, determines that subsidence will not cause material damage to streams, water bodies and associated structures. If subsidence causes material damage, then measures will be taken to the extent technologically and economically feasible to correct the damage and to prevent additional subsidence from occurring.

(b) Underground mining activities beneath any aquifer that serves as a significant source of water supply to any public water system shall be conducted so as to avoid disruption of the aquifer and consequent exchange of ground water between the aquifer and other strata. The Commission may prohibit mining in the vicinity of the aquifer or may limit the percentage of coal extraction to protect the aquifer and water supply.

(c) Underground mining activities shall not be conducted beneath or in close proximity to any public buildings including, but not limited to, churches, schools, hospitals, courthouses and government offices, unless the

Commission, on the basis of detailed subsurface information, determines that subsidence from those activities will not cause material damage to these structures, and specifically authorizes the mining activities.

(d) The Commission shall suspend underground coal mining under urbanized areas, cities, towns, and communities, and adjacent to industrial or commercial buildings, major impoundments or permanent streams, if imminent danger is found to inhabitants of the urbanized areas, cities, towns, or communities.

(e) If subsidence causes material damage to any of the features or facilities covered by this section, the Commission may suspend mining under or adjacent to such features or facilities until the subsidence control plan is modified to ensure prevention of further material damage to such features or facilities.

The provisions of this §12.565 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.566 Cessation of Operations: Temporary

(a) Each person who conducts underground mining activities shall effectively support and maintain all surface-access openings to underground operations, and secure surface facilities in areas in which there are no current operations but operations are to be resumed under an approved permit. Temporary abandonment shall not relieve a person of his or her obligation to comply with any provisions of the approved permit.

(b) Before temporary cessation of mining and reclamation operations for a period of thirty days or more, or as soon as it is known that a temporary cessation will extend beyond 30 days, each person who conducts underground mining activities shall submit to the Commission a notice of intention to cease or abandon operations. This notice shall include a statement of the exact number of surface acres and the horizontal and vertical extent of subsurface strata which have been in the permit area prior to cessation or abandonment, the extent and kind of reclamation of surface area which will have been accomplished, and identification of the backfilling, regrading, revegetation, environmental monitoring, underground-opening closures and water treatment activities that will continue during the temporary cessation.

The provisions of this §12.566 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.567 Cessation of Operations: Permanent

(a) The person who conducts underground mining activities shall close or backfill or otherwise permanently reclaim all affected areas, in accordance with this chapter (relating to Coal Mining Regulations) and according to the permit approved by the Commission.

(b) All surface equipment, structures, or other facilities not required for continued underground mining activities and monitoring, unless approved as suitable for the postmining land use or environmental monitoring, shall be removed and the affected lands reclaimed.

The provisions of this §12.567 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.568 Postmining Land Use

(a) General. Surface land areas affected by mining activities shall be restored in a timely manner:

(1) to conditions that are capable of supporting the uses which they were capable of supporting before any mining; or

(2) to higher or better uses achievable under criteria and procedures of this section.

(b) Determining premining use of land. The premining uses of land to which the postmining land use is compared shall be those uses which the land previously supported, if the land had not been previously mined and had been properly managed.

(1) The postmining land use for land that has been previously mined and not reclaimed shall be judged on the basis of the highest and best use that can be achieved and is compatible with surrounding areas.

(2) The postmining land use for land that has received improper management shall be judged on the basis of the premining use of surrounding lands that have received proper management.

(3) If the premining use of the land was changed within 5 years of the beginning of mining, the comparison of postmining use to premining use shall include a comparison with the historic use of the land as well as its use immediately preceding mining.

(c) Alternative land uses. Prior to the release of lands from the permit area in accordance with §12.313 of this title (relating to Criteria and Schedule for Release of Performance Bond), the permit area shall be restored in a timely manner, either to conditions capable of supporting the uses they were capable of supporting before any mining or to conditions capable of supporting approved alternative land uses. Alternative land uses may be approved by the Commission after consultation with the landowner or the land management agency having jurisdiction over the lands, if the following criteria are met:

(1) the proposed postmining land use is compatible with adjacent land use and, where applicable, with existing local, state, or federal land-use policies and plans; a written statement of the views of the authorities with statutory responsibilities for land-use policies and plans shall have been submitted to the Commission within 60 days of notice by the Commission before underground mining activities begin. Any required approval of local, state, or federal land-management agencies, including any necessary zoning or other changes required for the land use, shall have been obtained and shall remain valid throughout the underground mining activities;

(2) specific plans shall be prepared and submitted to the Commission which show the feasibility of the postmining land use as related to projected land-use trends and markets, and that include a schedule showing how the proposed use will be developed and achieved within a reasonable time after mining and be sustained. The Commission may require appropriate demonstrations to show that the planned procedures are feasible, reasonable, and integrated with mining and reclamation, and that the plans will result in successful reclamation;

(3) provision of any necessary public facilities shall be ensured as evidenced by letters of commitment from parties other than the person who conducts underground mining activities, as appropriate, to provide them in a manner compatible with the plans submitted under §12.189 of this title (relating to Reclamation Plan: Postmining Land Uses). The letters shall be submitted to the Commission before underground mining activities begin;

(4) specific and feasible plans are submitted to the Commission which show that financing and attainment and maintenance of the postmining land use are feasible and, if

appropriate, are supported by letters of commitment from parties other than the person who conducts the underground mining activities;

(5) plans for the postmining land use shall have been designed under the general supervision of a registered professional engineer, or other appropriate professional, who will ensure that the plans conform to applicable accepted standards for adequate land stability, drainage, vegetative cover, and aesthetic design appropriate for the postmining use of the site;

(6) the proposed use or uses will present neither actual nor probable hazard to public health or safety, nor will they pose any actual or probable threat of water flow-diminution or pollution;

(7) the use or uses will not involve unreasonable delays in reclamation;

(8) necessary approval of measures to prevent or mitigate adverse effects on fish, wildlife, and related environmental values and threatened or endangered plants shall have been obtained from the Commission, and appropriate state and federal fish and wildlife management agencies have been provided a 60-day period in which to review the plan before underground mining activities begin; and

(9) proposals to change premining land uses of range, fish and wildlife habitat, forestland, hayland, or pasture to a postmining cropland use, where the cropland would require continuous maintenance such as seeding, plowing, cultivation, fertilization, or other similar practices to be practicable or to comply with applicable federal, state, and local laws, have been reviewed by the Commission to ensure that:

(A) there is a firm written commitment by the person who conducts underground mining activities or by the landowner or land manager to provide sufficient crop management after release of applicable performance bonds under Subchapter J of this Chapter (relating to Bond and Insurance Requirements for Surface Coal Mining and Reclamation Operations) and §§12.555-12.560 of this title (relating to Revegetation: General Requirements, to Revegetation: Use of Introduced Species, to Revegetation: Timing, to Revegetation: Mulching and Other Soil Stabilizing Practices, to Revegetation: Grazing, and to Revegetation: Standards for Success), to assure that the proposed postmining cropland use remains practical and reasonable;

(B) there is sufficient water available and committed to maintain crop production; and

(C) topsoil quality and depth are sufficient to support the proposed use.

The provisions of this §12.568 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective December 29, 1998, 23 TexReg 13041.

§12.569 Roads: General

(a) Road classification system.

(1) Each road, as defined in §12.3 of this title (relating to Definitions), shall be classified as either a primary road or an ancillary road.

(2) A primary road is any road which is:

(A) used for transporting coal or spoil;

(B) frequently used for access or other purposes for a period in excess of six months; or

(C) to be retained for an approved postmining land use.

(3) An ancillary road is any road not classified as a primary road.

(b) Performance standards. Each road shall be located, designed, constructed, reconstructed, used, maintained, and reclaimed so as to:

(1) control or prevent erosion, siltation, and the air pollution attendant to erosion, including road dust and dust occurring on other exposed surfaces, by measures such as vegetating, watering, using chemical or other dust suppressants, or otherwise stabilizing all exposed surfaces in accordance with current, prudent engineering practices;

(2) control or prevent damage to fish, wildlife, or other habitat and related environmental values;

(3) control or prevent additional contributions of suspended solids to streamflow or runoff outside the permit area;

(4) neither cause nor contribute to, directly or indirectly, the violation of state or federal water-quality standard applicable to receiving waters;

(5) refrain from seriously altering the normal flow of water in streambeds or drainage channels;

(6) prevent or control damage to public or private property, including the prevention or mitigation of adverse effects on lands within the boundaries of units of the National Park System, the National Wildlife Refuge System, the National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers System, including designated study rivers, and National Recreation Areas designated by Act of Congress; and

(7) use nonacid- and nontoxic-forming substances in road surfacing.

(c) Design and construction limits and establishment of design criteria. To ensure environmental protection appropriate for their planned duration and use, including consideration of the type and size of equipment used, the design and construction or reconstruction of roads shall incorporate appropriate limits for grade, width, surface materials, surface drainage control, culvert placement, and culvert size, in accordance with current, prudent engineering practices, and any necessary design criteria established by the Commission.

(d) Location.

(1) No part of any road shall be located in the channel of an intermittent or perennial stream unless specifically approved by the Commission in accordance with applicable §§12.509-12.511 and §§12.513-12.524 of this title (relating to Hydrologic Balance: General Requirements, to Hydrologic Balance: Water-Quality Standards and Effluent Limitations, to Hydrologic Balance: Diversions, to Hydrologic Balance: Sediment Control Measures, to Hydrologic Balance: Siltation Structures, to Hydrologic Balance: Discharge Structures, to Hydrologic Balance: Acid-Forming and Toxic-Forming Materials, to Hydrologic Balance: Permanent and Temporary Impoundments, to Hydrologic Balance: Underground Mine Entry and Access Discharges, to Hydrologic Balance: Surface- and Ground-Water Monitoring, to Hydrologic Balance: Transfer of Wells, to Hydrologic Balance: Water Rights and Replacement, to Hydrologic Balance: Discharge of Water Into an Underground Mine, to Hydrologic Balance: Postmining Rehabilitation of Sedimentation Ponds, Diversions, Impoundments, and Treatment Facilities, and to Hydrologic Balance: Stream Buffer Zones).

(2) Roads shall be located to minimize downstream sedimentation and flooding.

(e) Maintenance.

(1) A road shall be maintained to meet the performance standards of §12.570 of this title (relating to Primary Roads) and this section, and any additional criteria specified by the Commission.

(2) A road damaged by a catastrophic event, such as a flood or earthquake, shall be repaired as soon as is practicable after the damage has occurred.

(f) Reclamation. A road not to be retained under an approved postmining land use shall be reclaimed in accordance with the approved reclamation plan as soon as practicable after it is no longer needed for mining and reclamation operations. This reclamation shall include:

(1) closing the road to traffic;

(2) removing all bridges and culverts unless approved as part of the postmining land use;

(3) removing or otherwise disposing of road-surfacing materials that are incompatible with the postmining land use and revegetation requirements;

(4) reshaping cut and fill slopes as necessary to be compatible with the postmining land use and to complement the natural drainage pattern of the surrounding terrain;

(5) protecting the natural drainage patterns by installing dikes or cross drains as necessary to control surface runoff and erosion; and

(6) scarifying or ripping the roadbed, replacing topsoil or substitute material and revegetating disturbed surfaces in accordance with §§12.504-12.508 of this title (relating to Topsoil: General Requirements, to Topsoil: Removal, to Topsoil: Storage, to Topsoil: Redistribution, and to Topsoil: Nutrients and Soil Amendments), and §§12.555-12.560 of this title (relating to Revegetation: General Requirements, to Revegetation: Use of Introduced Species, to Revegetation: Timing, to Revegetation: Mulching and Other Soil Stabilizing Practices, to Revegetation: Grazing, and to Revegetation: Standards for Success).

The provisions of this §12.569 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.570 Primary Roads

Primary roads shall meet the requirements of §12.569 of this title (relating to Roads: General) and the additional requirements of this section.

(1) Certification. The construction or reconstruction of primary roads shall be certified in a report to the Commission by a qualified registered professional engineer with experience in the design and construction of roads. The report shall indicate that the primary road has been constructed or reconstructed as designed and in accordance with the approved plan.

(2) Safety Factor. Each primary road embankment shall have a minimum static factor of 1.3.

(3) Location.

(A) To minimize erosion, a primary road shall be located, insofar as is practicable, on the most stable available surface.

(B) Fords of perennial or intermittent streams by primary roads are prohibited unless they are specifically approved by the Commission as temporary routes during periods of road construction.

(4) Drainage control. In accordance with the approved plan:

(A) each primary road shall be constructed or reconstructed, and maintained to have adequate drainage control, using structures such as, but not limited to bridges, ditches, cross drains, and ditch relief drains. The drainage control system shall be designed to safely pass the peak runoff from a 10-year, 6-hour precipitation event, or greater event as specified by the Commission;

(B) drainage pipes and culverts shall be installed as designed, and maintained in a free and operating condition and to prevent or control erosion at inlets and outlets;

(C) drainage ditches shall be constructed and maintained to prevent uncontrolled drainage over the road surface and embankment;

(D) culverts shall be installed and maintained to sustain the vertical soil pressure, the passive resistance of the foundation, and the weight of vehicles using the road;

(E) natural stream channels shall not be altered or relocated without the prior approval of the Commission in accordance with applicable §§12.509-12.511 and §§12.513-12.524 of this title (relating to Hydrologic Balance: General Requirements, to Hydrologic Balance: Water-Quality Standards and Effluent Limitations, to Hydrologic Balance: Diversions, to Hydrologic Balance: Sediment Control Measures, to Hydrologic Balance: Siltation Structures, to Hydrologic Balance: Discharge Structures, to Hydrologic Balance: Acid-Forming and Toxic-Forming Materials, to Hydrologic Balance: Permanent and Temporary Impoundments, to Hydrologic Balance: Underground Mine Entry and Access Discharges, to Hydrologic Balance: Surface- and Ground-Water Monitoring, to Hydrologic Balance: Transfer of Wells, to Hydrologic Balance: Water Rights and Replacement, to Hydrologic Balance: Discharge of Water Into an Underground Mine, to Hydrologic Balance: Postmining Rehabilitation of Sedimentation Ponds, Diversions, Impoundments, and Treatment Facilities, and to Hydrologic Balance: Stream Buffer Zones); and

(F) except as provided in paragraph (3)(B) of this section, structures for perennial or intermittent stream channel crossings shall be made using bridges, culverts, low-water crossings, or other structures designed, constructed, and maintained using current, prudent engineering practices. The Commission shall ensure that low-water crossings are designed, constructed, and maintained to prevent erosion of the structure or stream bed and additional contributions of suspended solids to streamflow.

(5) Surfacing. Primary roads shall be surfaced with material approved by the Commission as being sufficiently durable for the anticipated volume of traffic and the weight and speed of vehicles using the road.

The provisions of this §12.570 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.571 Utility Installations

All underground mining activities shall be conducted in a manner which minimizes damage, destruction, or disruption of services provided by oil, gas, and water wells; oil, gas, and coal-slurry pipelines, railroads; electric and telephone lines; and water and sewage lines which pass over, under, or through the permit area, unless otherwise approved by the owner of those facilities and the Commission.

The provisions of this §12.571 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.572 Support Facilities

(a) Support facilities shall be operated in accordance

with a permit issued for the mine or coal preparation plant to which it is incident or from which its operation results.

(b) In addition to the other provisions of §§12.500-12.571 of this title (relating to Permanent Program Performance Standards--Underground Mining Activities), support facilities shall be located, maintained, and used in a manner that:

(1) prevents or controls erosion and siltation, water pollution, and damage to public or private property; and

(2) to the extent possible using the best technology currently available:

(A) minimizes damage to fish, wildlife, and related environmental values; and

(B) minimizes additional contributions of suspended solids to streamflow or runoff outside the permit area. Any such contributions shall not be in excess of limitations of state or federal law.

The provisions of this §12.572 adopted to be effective April 7, 1997, 22 TexReg 3093.

DIVISION 4 PERMANENT PROGRAM PERFORMANCE STANDARDS--AUGER MINING

§12.600 Auger Mining: Additional Performance Standards

(a) Any auger mining associated with surface mining activities shall be conducted to maximize recoverability of mineral reserves remaining after the mining activities are completed. Each person who conducts auger mining operations shall leave access for removal of those reserves by future underground mining activities, unless the Commission determines that the coal reserves have been depleted or are limited in thickness or extent to the point that it will not be practicable to recover the remaining coal reserves. The Commission shall make such determination only upon presentation of appropriate technical evidence by the operator. Undisturbed areas of coal shall be left in unmined sections which:

(1) are a minimum of 250 feet wide at any point between each group of auger openings to the full depth of the auger hole;

(2) are no more than 2,500 feet apart, measured from the center of one section to the center of the next section, unless a greater distance is set forth in the permit application under §12.203 of this title (relating to Augering) and approved by the Commission; and

(3) for multiple seam mining, shall have a width of at least 250 feet plus 50 feet for each subjacent workable coal seam. The centers of all unmined sections shall be aligned vertically.

(b) No auger hole shall be made closer than 500 feet in horizontal distance to any abandoned or active underground mine workings, except as approved in accordance with §12.367 of this title (relating to Protection of Underground Mining).

(c) In order to prevent pollution of surface and ground water and to reduce fire hazards, each auger hole, except as provided in subsection (d) of this section, shall be plugged so as to prevent the discharge of water from the hole and access of air to the coal, as follows:

(1) each auger hole discharging water containing toxic-forming or acid-forming material shall be plugged within 72 hours after completion by backfilling and compacting noncombustible and impervious material into the hole to a depth sufficient to form a water-tight seal. If sealing is not possible within 72 hours, the discharge shall be treated commencing within 72 hours after completion to meet applicable effluent limitations and water-quality standards, until the hole is properly sealed; and

(2) each auger hole not discharging water shall be sealed as in subsection (c)(1) of this section, to close the opening within 30 days following completion.

(d) An auger hole need not be plugged, if the Commission finds:

(1) impoundment of the water which would result from plugging the hole may create a hazard to the environment or public health or safety; and

(2) drainage from the auger hole will not pose a threat of pollution to surface water and will comply with the requirements of §12.339 and §12.340 of this title (relating to Hydrologic Balance: General Requirements, and to Hydrologic Balance: Water-Quality Standards and Effluent Limitations).

(e) The Commission shall prohibit auger mining, if it determines that:

(1) adverse water-quality impacts cannot be prevented or corrected;

(2) fill stability cannot be achieved;

(3) the prohibition is necessary to maximize the utilization, recoverability or conservation of the solid-fuel resources; or

(4) subsidence resulting from auger mining may disturb or damage powerlines, pipelines, buildings, or other facilities.

The provisions of this §12.600 adopted to be effective April 7, 1997, 22 TexReg 3093.

DIVISION 5 SPECIAL PERMANENT PROGRAM PERFORMANCE STANDARDS--OPERATIONS IN ALLUVIAL VALLEY FLOORS

§12.610 Alluvial Valley Floors: Essential Hydrologic Functions

(a) Surface coal mining and reclamation operations shall be conducted to preserve, throughout the mining and reclamation process, the essential hydrologic functions of alluvial valley floors not within an affected area. These functions shall be preserved by maintaining those geologic, hydrologic and biologic characteristics that support those functions.

(b) Surface coal mining and reclamation operations shall be conducted to reestablish, throughout the mining and reclamation process, the essential hydrologic functions of alluvial valley floors within an affected area. These functions shall be reestablished by reconstructing those geologic, hydrologic and biologic characteristics that support those functions.

(c) The characteristics that support the essential hydrologic functions of alluvial valley floors are those in §12.202(b)(3) of this title (relating to Surface Coal Mining and Reclamation Operations on Areas or Adjacent to Areas Including Alluvial Valley Floors in the Arid or Semiarid Areas West of the 100th Meridian) and those other geologic, hydrologic, or biologic characteristics identified during premining investigations, or monitoring conducted during the surface coal mining and reclamation operation.

The provisions of this §12.610 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.611 Alluvial Valley Floors: Protection of Farming

and Water Supplies

(a) Surface coal mining and reclamation operations shall not interrupt, discontinue, or preclude farming on alluvial valley floors, unless:

(1) the premining land use is undeveloped rangeland which is not significant to farming; or

(2) the area of affected alluvial valley floor is small and provides or may provide negligible support for production from one or more farms.

(b) If environmental monitoring shows that a surface coal mining operation is interrupting, discontinuing, or precluding farming on alluvial valley floors, the operation shall cease until remedial measures are taken by the person who conducts the operation. The remedial measures shall be approved by the Commission prior to the resumption of mining.

(c) Surface coal mining and reclamation operations shall not cause material damage to the quality or quantity of water in surface or underground water systems that supply alluvial valley floors. If environmental monitoring shows that the surface coal mining operation is causing material damage to water that supplies alluvial valley floors, the mining operations shall cease until remedial measures are taken by the person who conducts the operation. The remedial measures shall be approved by the Commission prior to the resumption of mining operations.

(d) Subsections (a) and (b) of this section do not apply to those lands which were identified in a reclamation plan approved by Texas prior to August 3, 1977, for any surface coal mining and reclamation operation that, in the year preceding August 3, 1977:

(1) produced coal in commercial quantities and was located within or adjacent to an alluvial valley floor; or

(2) obtained specific permit approval from the Commission to conduct surface coal mining and reclamation operations within an alluvial valley floor.

The provisions of this §12.611 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.612 Alluvial Valley Floors: Protection of Agricultural Uses

Surface coal mining and reclamation operations shall be conducted to ensure that the agricultural utility and the level of productivity of alluvial valley floors in affected areas are reestablished.

The provisions of this §12.612 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.613 Alluvial Valley Floors: Monitoring

(a) An environmental monitoring system shall be installed, maintained and operated by the permittee on all alluvial valley floors during surface coal mining and reclamation operations and continued until all bonds are released in accordance with §12.312 and §12.313 of this title (relating to Procedures, Criteria, and Schedule for Release of Performance Bond). The monitoring system shall provide sufficient information to allow the Commission to determine that:

(1) the agricultural utility and production of the alluvial valley floor not within the affected area is being preserved;

(2) the potential agricultural utility and production on the alluvial valley floor within the affected area has been reestablished;

(3) the important characteristics supporting the essential hydrologic functions of the alluvial valley floor in the affected area have been reestablished after mining; and

(4) the important characteristics supporting the essential hydrologic functions of any alluvial valley floor in areas not affected are preserved during and after mining.

(b) Monitoring shall be performed at adequate frequencies, to indicate long-term trends that could affect agricultural use of the alluvial valley floors.

(c) Monitoring shall be performed during operations, to identify characteristics of the alluvial valley floor not identified in the permit application and to evaluate the importance of all characteristics.

(d) All monitoring data collected, and analyses thereof, shall routinely be made available to the Commission.

The provisions of this §12.613 adopted to be effective April 7, 1997, 22 TexReg 3093.

DIVISION 6 SPECIAL PERMANENT PROGRAM PERFORMANCE STANDARDS--OPERATIONS ON PRIME FARMLAND

§12.620 Prime Farmland: Applicability and Special Requirements

(a) The requirements of this section and §§12.621, 12.622, 12.624, and 12.625 of this title (relating to Special Permanent Program Performance Standards--Operations on Prime Farmland) shall not apply to:

(1) coal processing plants and roads of underground mines that are actively used over extended periods of time and where such uses affect a minimal amount of land. Such uses shall meet the requirements of §§12.500-12.572 of this title (relating to Permanent Program Performance Standards --Underground Mining Activities) for underground mining activities; or

(2) prime farmland that has been excluded in accordance with §12.201(a) of this title (relating to Prime Farmland).

(b) Surface coal mining and reclamation operations conducted on prime farmland shall meet the following requirements:

(1) a permit shall be obtained for those operations under §12.201 of this title (relating to Prime Farmland); and

(2) soil materials to be used in reconstruction of the prime farmland soil shall be removed before drilling, blasting, or mining, in accordance with §12.621 of this title (relating to Prime Farmland: Soil Removal) and in a manner that prevents mixing or contaminating these materials with undesirable material. Where removal of soil materials results in erosion that may cause air and water pollution, the Commission shall specify methods to control erosion of exposed overburden.

The provisions of this §12.620 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.621 Prime Farmland: Soil Removal

(a) Surface coal mining and reclamation operations on prime farmland shall be conducted to:

(1) separately remove the topsoil, or remove other suitable soil materials which will create a final soil having a greater productive capacity than that which existed prior to mining; and

(2) separately remove the B or C horizon or other suitable soil material to provide the thickness of suitable soil required by §12.624 of this title (relating to Prime Farmland: Soil Replacement).

(b) The minimum depth of soil and soil material to be removed and stored for use in reconstruction of prime farmland shall be sufficient to meet the soil replacement requirements of §12.624(b) of this title (relating to Prime Farmland: Soil Replacement).

The provisions of this §12.621 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.622 Prime Farmland: Soil Stockpiling

(a) If not utilized immediately, the topsoil or other suitable soil materials specified in §12.621(a)(1) of this title (relating to Prime Farmland: Soil Removal) shall be placed in stockpiles separate from the spoil and all other excavated materials.

(b) If not utilized immediately, each horizon or other material specified in §12.621(a)(2) of this title (relating to Prime Farmland: Soil Removal) shall be stockpiled separately from the spoil and all other excavated materials. Where combinations of such soil materials created by mixing have been shown to be equally or more favorable for plant growth than the B horizon, separate handling is not necessary.

(c) Stockpiles shall be placed within the permit area where they will not be disturbed or be subject to excessive erosion. If left in place for more than 30 days, stockpiles shall meet the requirements of §12.336 or §12.506 of this title (relating to Topsoil: Storage).

The provisions of this §12.622 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.624 Prime Farmland: Soil Replacement

(a) Soil reconstruction specifications established by the U.S. Natural Resources Conservation Service are based upon the standards of the National Cooperative Soil Survey and include, as a minimum, physical and chemical characteristics of reconstructed soils and soil descriptions containing soil-horizon depths, soil densities, soil pH, and other specifications such that reconstructed soils will have the capability of achieving levels of yield equal to, or higher than, those of nonmined prime farmland in the surrounding area.

(b) The minimum depth of soil and substitute soil material to be reconstructed for prime farmland shall be 48 inches, or a lesser depth equal to the depth to a subsurface horizon in the natural soil that inhibits or prevents root penetration, or a greater depth if determined necessary to restore the original soil productive capacity. Soil horizons shall be considered as inhibiting or preventing root penetration if their physical or chemical properties or water-supplying capacities cause them to restrict or prevent penetration by roots of plants common to the vicinity of the permit area and if these properties or capacities have little or no beneficial effect on soil productive capacity.

(c) The operator shall replace soil material only on land which has been first returned to final grade and scarified according to §§12.384-12.388 of this title (relating to Backfilling and Grading: General Requirements, to Backfilling and Grading: General Grading Requirements, to Backfilling and Grading: Covering Coal and Acid- and Toxic-Forming Materials, to Backfilling and Grading: Thin Overburden, and to Backfilling and Grading: Thick Overburden) or §§12.551-12.553 of this title (relating to Backfilling and Grading: General Requirements, to Backfilling and Grading: General Grading Requirements, and to Backfilling and Grading: Covering Coal and Acid- and Toxic-Forming Materials), unless site-specific evidence is provided and approved by the Commission showing that scarification will not enhance the capability of the reconstructed soil to achieve equivalent or higher levels of yield.

(d) The operator shall replace and regrade the soil horizons or other root-zone material with proper compaction and uniform depth.

(e) The operator shall replace the B horizon, C horizon, or other suitable material specified in §12.621(a)(2) of this title (relating to Prime Farmland: Soil Removal) to the thickness needed to meet the requirements of subsection (b) of this section.

(f) The operator shall replace the topsoil or other suitable soil materials specified in §12.621(a)(1) of this title (relating to Prime Farmland: Soil Removal) as the final surface soil layer. This surface soil layer shall equal or exceed the thickness of the original surface soil layer, as determined by the soil survey in §12.201(b)(1) of this title (relating to Prime Farmland), and be replaced in a manner that protects the surface layer from wind and water erosion before it is seeded or planted.

(g) Apply nutrients and soil amendments as needed to quickly establish vegetative growth.

The provisions of this §12.624 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.625 Prime Farmland: Revegetation and Restoration of Soil Productivity

(a) Following soil replacement, the soil surface shall be stabilized with a vegetative cover or other means that effectively controls soil loss by wind and water erosion. All vegetation shall be in compliance with the plan approved by the Commission under §12.201 of this title (relating to Prime Farmland) and carried out in a manner that encourages prompt vegetative cover and recovery of productive capacity. The timing and mulching provisions of §12.392 and §12.393 (relating to Revegetation: Timing, and to Revegetation: Mulching and Other Soil Stabilizing Practices) or §12.557 and §12.558 of this title (relating to Revegetation: Timing, and to Revegetation: Mulching and Other Soil Stabilizing Practices) shall be met.

(b) Prime farmland soil productivity shall be restored in accordance with the following provisions:

(1) measurement of soil productivity shall be initiated within 10 years after completion of soil replacement;

(2) soil productivity shall be measured on a representative sample or on all of the mined and reclaimed prime farmland area using the reference crop determined under subsection (b)(6) of this section. A statistically valid sampling technique at a 90% or greater statistical confidence level shall be used as approved by the Commission in consultation with the U.S. Natural Resources Conservation Service;

(3) the measurement period for determining average annual crop production shall be a minimum of three crop years prior to release of the operator's performance bond according to §12.312 and §12.313 of this title (relating to Procedures, Criteria, and Schedule for Release of Performance Bond);

(4) the level of management applied during the measurement period shall be the same as the level of management used on nonmined prime farmland in the surrounding area;

(5) restoration of soil productivity shall be considered achieved when the average yield during the measurement period equals or exceeds the average yield of the reference crop established for the same period for nonmined soils of the same or similar texture or slope phase of the soil series in the surrounding area under equivalent management practices;

(6) the reference crop on which restoration of soil productivity is proven shall be selected from the crops most commonly produced on the surrounding prime farmland. Where row crops are the dominant crops grown on prime farmland in the area, the row crop requiring the greatest rooting depth shall be chosen as one of the reference crops;

(7) reference crop yields for a given crop season are to be determined from:

(A) the current yield records of representative local farms in the surrounding area, with concurrence by the U.S. Natural Resources Conservation Service; or

(B) the average county yields recognized by the U.S. Department of Agriculture, which have been adjusted by the U.S. Natural Resources Conservation Service for local yield variation within the county that is associated with differences between nonmined prime farmland and all other soils that produce the reference crop; and

(8) under either procedure in subsection (b)(7) of this section, the average reference crop yield may be adjusted, with the concurrence of the U.S. Natural Resources Conservation Service, for:

(A) Disease, pest, and weather-induced seasonal variations; or

(B) Differences in specific management practices where the overall management practices of the crops being compared are equivalent.

The provisions of this §12.625 adopted to be effective April 7, 1997, 22 TexReg 3093.

DIVISION 7 SPECIAL PERMANENT PROGRAM PERFORMANCE STANDARDS--COAL PROCESSING PLANTS AND SUPPORT FACILITIES NOT LOCATED AT OR NEAR THE MINESITE OR NOT WITHIN THE PERMIT AREA FOR A MINE

§12.650 Applicability

Each person who conducts surface coal mining and reclamation operations, which includes the operation of a coal processing plant or support facility which is not located within the permit area for a specific mine, shall obtain a permit in accordance with §12.204 of this title (relating to Coal Processing Plants or Support Facilities Not Located Within the Permit Area of a Specified Mine) to conduct those operations and comply with §12.651 of this title (relating to Coal Processing Plants: Performance Standards).

The provisions of this §12.650 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.651 Coal Processing Plants: Performance Standards

Construction, operation, maintenance, modification, reclamation, and removal activities at operations covered by §12.650 of this title (relating to Applicability) and this section shall comply with the following:

(1) signs and markers for the coal processing plant, coal processing waste disposal area, and water treatment facilities shall comply with §12.330 of this title (relating to Signs and Markers);

(2) roads, transport, and associated structures shall be constructed, maintained, and reclaimed in accordance with §12.400 and §12.401 of this title (relating to Roads: General, and to Primary Roads);

(3) any stream or channel realignment shall comply with §12.341 of this title (relating to Hydrologic Balance: Diversions);

(4) if required by the Commission any disturbed area related to the coal processing plant or associated facilities shall have sediment control structures, in compliance with §12.343 and §12.344 of this title (relating to Hydrologic Balance: Sediment Control Measures, and to Hydrologic Balance: Siltation Structures), and all discharges from these areas shall meet the requirements of §§12.339-12.341 of this title (relating to Hydrologic Balance: General Requirements, to Hydrologic Balance: Water-Quality Standards and Effluent Limitations, and to Hydrologic Balance: Diversions), and any other applicable state or federal law;

(5) permanent impoundments associated with coal processing plants shall meet the requirements of §12.347 and §12.354 of this title (relating to Hydrologic Balance: Permanent and Temporary Impoundments, and to Hydrologic Balance: Postmining Rehabilitation of Sedimentation Ponds, Diversions, Impoundments, and Treatment Facilities). Dams constructed of or impounding coal mine waste shall comply with §§12.376-12.378 of this title (relating to Coal Mine Waste: Dams and Embankments: General Requirements, to Coal Mine Waste: Dams and Embankments: Site Preparation, and to Coal Mine Waste: Dams and Embankments: Design and Construction);

(6) use of water wells shall comply with §12.351 of this title (relating to Hydrologic Balance: Transfer of Wells) and water rights shall be protected in accordance with §12.352 of this title (relating to Hydrologic Balance: Water Rights and Replacement);

(7) disposal of coal processing waste, solid waste, and any excavated materials shall comply with §§12.368-12.374, 12.375, and 12.363-12.366 of this title (relating to Coal Processing Waste Banks: General Requirements, to Coal Processing Waste Banks: Site Inspection, to Coal Processing Waste Banks: Water Control Measures, to Coal Processing Waste Banks: Construction Requirements, to Coal Processing Waste: Burning, to Coal Processing Waste: Burned Waste Utilization, to Coal Processing Waste: Return to Underground Workings, to Disposal of Noncoal Wastes, to Disposal of Excess Spoil: General Requirements, to Disposal of Excess Spoil: Valley Fills, to Disposal of Excess Spoil: Head-of-Hollow Fills, and to Disposal of Excess Spoil: Durable Rock Fills), respectively;

(8) discharge structures for diversions and sediment-control structures shall comply with §12.345 of this title (relating to Hydrologic Balance: Discharge Structures);

(9) erosion and pollution attendant to erosion shall be controlled in accordance with §12.389 of this title (relating to Stabilization of Surface Areas for Surface Mining);

(10) fish, wildlife and related environmental values shall be protected in accordance with §12.380 of this title (relating to Protection of Fish, Wildlife, and Related Environmental Values);

(11) slide areas and other surface areas shall comply with §12.381 of this title (relating to Slides and Other Damage);

(12) adverse effects upon or resulting from nearby underground coal mining activities shall be minimized by

appropriate measures including, but not limited to compliance with §12.353 and §12.367 of this title (relating to Hydrologic Balance: Discharge of Water Into and Underground Mine, and to Protection of Underground Mining);

(13) reclamation shall include proper topsoil-handling procedures, revegetation, and abandonment, in accordance with §§12.334-12.338 of this title (relating to Topsoil: General Requirements, to Topsoil: Removal, to Topsoil: Storage, to Topsoil: Distribution and to Topsoil: Nutrients and Soil Amendments), §12.354 of this title (relating to Hydrologic Balance: Postmining Rehabilitation of Sedimentation Ponds), §§12.383-12.389 of this title (relating to Contemporaneous Reclamation, to Backfilling and Grading: General Requirements, to Backfilling and Grading: General Grading Requirements, to Backfilling and Grading: Covering Coal and Acid- and Toxic-Forming Materials, to Backfilling and Grading: Thin Overburden, to Backfilling and Grading: Thick Overburden, and to Stabilization of Surface Areas for Surface Mining), §§12.390-12.393 and 12.395 of this title (relating to Revegetation: General Requirements, to Revegetation: Use of Introduced Species, to Revegetation: Timing, to Revegetation: Mulching and Other Soil Stabilizing Practices, and to Revegetation: Standards for Success) and §§12.397-12.399 of this title (relating to Cessation of Operations: Temporary, to Cessation of Operations: Permanent, and to Postmining Land Use);

(14) conveyors, buildings, storage bins or stockpiles, water treatment facilities, water storage facilities, and any structure or system related to the coal processing plant shall comply with §§12.330-12.403 of this title (relating to Permanent Program Performance Standards--Surface Mining Activities); and

(15) any coal processing plant or associated structures located on prime farmland shall meet the requirements of §§12.620-12.622, 12.624, and 12.625 of this title (relating to Special Permanent Program Performance Standards--Operations on Prime Farmland).

The provisions of this §12.651 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640; amended to be effective September 14, 1999, 24 TexReg 7223; amended to be effective June 12, 2001, 26 TexReg 4090.

DIVISION 8 SPECIAL PERMANENT PROGRAM PERFORMANCE STANDARDS--IN SITU PROCESSING

§12.660 In Situ Processing: Performance Standards

(a) The person who conducts in situ-processing activities shall comply with §§12.500-12.572 of this title (relating to Permanent Program Performance Standards--Underground Mining Activities) and this section.

(b) In situ-processing activities shall be planned and conducted to minimize disturbance to the prevailing hydrologic balance by:

(1) avoiding discharge of fluids into holes or wells, other than as approved by the Commission;

(2) injecting process recovery fluids only into geologic zones or intervals approved as production zones by the Commission;

(3) avoiding annular injection between the wall of the drill hole and the casing; and

(4) preventing discharge of process fluid into surface waters.

(c) Each person who conducts in situ-processing activities shall submit for approval as part of the application for permit under §12.205 of this title (relating to In Situ Processing Activities), and follow after approval, a plan that ensures that all acid-forming, toxic-forming, or radioactive gases, solids, or liquids constituting a fire, health, safety, or environmental hazard and caused by the mining and recovery process are promptly treated, confined, or disposed of in a manner that prevents contamination of ground and surface waters, damage to fish, wildlife and related environmental values, and threats to the public health and safety.

(d) Each person who conducts in situ-processing activities shall prevent flow of the process recovery fluid:

(1) horizontally beyond the affected area identified in the permit; and

(2) vertically into overlying or underlying aquifers.

(e) Each person who conducts in situ-processing activities shall restore the quality of affected ground water in the permit and adjacent areas, including ground water above and below the production zone, to the approximate premining levels or better, to ensure that the potential for use of the ground water is not diminished.

The provisions of this §12.660 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.661 In Situ Processing: Monitoring

(a) Each person who conducts in situ-processing activities shall monitor the quality and quantity of surface and ground water and the subsurface flow and storage characteristics, in a manner approved by the Commission under §12.519 of this title (relating to Hydrologic Balance: Surface and Ground-Water Monitoring), to measure changes in the quantity and quality of water in surface- and ground-water systems in the permit and adjacent areas.

(b) Air- and water-quality monitoring shall be conducted in accordance with monitoring programs approved by the Commission as necessary according to appropriate federal and state air- and water-quality standards.

The provisions of this §12.661 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

SUBCHAPTER L PERMANENT PROGRAM INSPECTION AND ENFORCEMENT PROCEDURES DIVISION 1 COMMISSION INSPECTION AND ENFORCEMENT

§12.670 Inspections by the Commission

(a) The Commission shall conduct an average of at least one partial inspection per month of each surface coal mining and reclamation operation under its jurisdiction. A "partial inspection" is an onsite review of a person's compliance with some of the permit conditions and requirements imposed under the state program. The inspector shall collect evidence of any violation of those conditions or requirements observed.

(b) The Commission shall conduct an average of at least one complete inspection per calendar quarter of each surface coal mining and reclamation operation under its jurisdiction. A "complete inspection" is an onsite review of a person's compliance with all permit conditions and requirements imposed under the state program, within the entire area disturbed or affected by surface coal mining and reclamation

operations. This includes collection of evidence with respect to every violation of those conditions or requirements.

(c) The Commission shall conduct periodic inspections of all coal exploration operations required to comply in whole or in part with the Act and this chapter (relating to Coal Mining Regulations). Such inspections shall include the collection of evidence with respect to every violation of any condition of the exploration approval or any requirement of the Act or this chapter (relating to Coal Mining Regulations).

(d) The inspections required under subsections (a), (b) and (c) of this section shall:

(1) be carried out on an irregular basis, so as to monitor compliance at all operations, including those which operate nights, weekends, or holidays;

(2) occur without prior notice to the person being inspected or any agent or employee of such person, except for necessary on-site meetings; and

(3) include the prompt filing of inspection reports adequate to enforce the requirements of and to carry out the terms and purposes of the Act, this chapter (relating to Coal Mining Regulations), the exploration approval and the permit.

(e) An authorized representative of the Commission shall:

(1) immediately conduct an inspection to enforce any requirement of the Act or this chapter (relating to Coal Mining Regulations), or any condition of a permit or an exploration approval imposed under the Act and this chapter (relating to Coal Mining Regulations), when the authorized representative has reason to believe, on the basis of information available to him or her (other than information resulting from a previous inspection), that there exists a violation of the Act, this chapter (relating to Coal Mining Regulations), or any condition of a permit or an exploration approval, or that there exists any condition, practice or violation which creates an imminent danger to the health or safety of the public or is causing or can reasonably be expected to cause a significant, imminent environmental harm to land, air or water resources and the person supplying the information provides adequate proof that an imminent danger to the public health and safety or a significant, imminent environmental harm to land, air or water resources exists; and

(2) have reason to believe that a violation, condition or practice exists if the facts alleged by the informant would, if true, constitute a condition, practice or violation referred to in subsection (e)(1) of this section.

The provisions of this §12.670 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.671 Right of Entry

(a) Within its jurisdiction, the Commission shall have a right of entry to, upon, and through any coal exploration or surface coal mining and reclamation operation without advance notice or search warrant, upon presentation of appropriate credentials.

(b) The Commission shall inspect any monitoring equipment or method of exploration or operation and to have access to and copy any records required under the Act, this chapter (relating to Coal Mining Regulations), the exploration approval, or the permit. The representatives of the Commission may exercise such rights at reasonable times, without advance notice, upon presentation of appropriate credentials. No search warrant shall be required, except that Texas may provide for its use with respect to entry into a building.

The provisions of this §12.671 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.672 Availability of Records

(a) The Commission shall make available to the Director and the Regional Director, upon request, copies of all documents relating to applications for and approvals of existing, new, or revised coal exploration approvals or surface coal mining and reclamation operations permits and all documents relating to inspection and enforcement actions.

(b) Except as provided in §12.115 and §12.210 of this title (relating to Public Availability of Information, and to Public Availability of Information in Permit Applications On File With the Commission) and subsection (c) of this section, copies of all records, reports, inspection materials, or information obtained by the Commission shall, in accordance with the Texas Open Records Act (Texas Government Code, Chapter 552), be made immediately available to the public in the area of mining so that they are conveniently available to residents of that area until at least 5 years after expiration of the period during which the subject surface coal mining and reclamation operation is active or is covered by any portion of a reclamation bond. For the purposes of this subsection, "immediately available" shall include providing copies of subject information promptly by mail.

(1) A description of the information available for mailing and the procedure for obtaining such information will be maintained for public inspection at a federal, state, or local government office in the county where the mining is occurring or proposed to occur.

(2) Copies of subject information may, at the option of the Commission, be provided promptly by mail to a requestor who is a resident of the area where the mining is occurring or is proposed to occur, at no expense to the resident.

(c) In order to protect preparation for hearings and enforcement proceedings, the Director and the Commission may enter into agreements regarding procedures for the special handling of investigative and enforcement reports and other such materials.

The provisions of this §12.672 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.673 Citizens' Requests for Inspections

(a) A citizen may request an inspection under §12.670(e) of this title (relating to Inspections by the Commission), by furnishing to an authorized representative of the Commission a signed, written statement (or an oral report followed by a signed, written statement) giving the authorized representative reason to believe that a violation, condition, or practice referred to in §12.670(e)(1) of this title (relating to Inspections by the Commission) exists and setting forth a phone number and address where the citizen can be contacted.

(b) The identity of any person supplying information to the Commission relating to a possible violation or imminent danger or harm shall remain confidential with the Commission, if requested by that person, unless that person elects to accompany the inspector on the inspection.

(c) If an inspection is conducted as a result of information provided to the Commission by a citizen as described in subsection (a) of this section, the citizen shall be notified as far in advance as practicable when the inspection is to occur and shall be allowed to accompany the authorized

representative of the Commission during the inspection. Such person has a right of entry to, upon and through the coal exploration or surface coal mining and reclamation operation about which he or she supplied information, but only if he or she is in the presence of and is under the control, direction and supervision of the authorized representative while on the mine property. Such right of entry does not include a right to enter buildings without consent of the person in control of the building or without a search warrant.

(d) Within 10 days of the inspection or, if there is no inspection, within 15 days of receipt of the citizen's written statement, the Commission shall send the citizen the following:

(1) if an inspection was made, a description of the enforcement action taken, which may consist of copies of the inspection report and all notices of violation and cessation orders issued as a result of the inspection or an explanation of why no enforcement action was taken;

(2) if no inspection was conducted, an explanation of the reason why; and

(3) an explanation of the citizen's right, if any, to informal review of the action or inaction of the Commission under §12.675 of this title (relating to Review of Decision Not to Inspect or Enforce).

(e) The Commission shall give copies of all materials in subsections (d)(1) and (2) of this section, within the time limits specified in those subsections, to the person alleged to be in violation, except that the name of the citizen shall be removed unless disclosure of the citizen's identity is permitted under subsection (b) of this section.

The provisions of this §12.673 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.674 Review of Adequacy and Completeness of Inspections

Any person who is or may be adversely affected by a surface coal mining and reclamation operation or a coal exploration operation may notify the Commission in writing of any alleged failure on the part of the Commission to make adequate and complete or periodic inspections as provided in §12.670(e)(1) of this title (relating to Inspections by the Commission). The notification shall include sufficient information to create a reasonable belief that §12.670(e)(1) of this title (relating to Inspections by the Commission) is not being complied with and to demonstrate that the person is or may be adversely affected. The Director of the Surface Mining and Reclamation Division shall, within 15 days of receipt of the notification, determine whether §12.670(e)(1) of this title (relating to Inspections by the Commission) is being complied with, and if not, shall immediately order an inspection to remedy the noncompliance. The Director of the Surface Mining and Reclamation Division shall also furnish the complainant with a written statement of the reasons for such determination and the actions, if any, taken to remedy the noncompliance.

The provisions of this §12.674 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.675 Review of Decision Not To Inspect or Enforce

(a) Any person who is or may be adversely affected by a coal exploration or surface coal mining and reclamation operation may ask the Commission to review informally an authorized representative's decision not to inspect or take appropriate enforcement action with respect to any violation alleged by that person in a request for inspection under §12.673 of this title (relating to Citizens' Requests for Inspections). The request for review shall be in writing and include a statement of how the person is or may be adversely affected and why the decision merits review.

(b) The Commission shall conduct the review and inform the person, in writing, of the results of the review within 30 days of his or her receipt of the request. The person alleged to be in violation shall also be given a copy of the results of the review, except that the name of the citizen shall not be disclosed unless confidentiality has been waived or disclosure is required.

(c) Informal review under this section shall not affect any right to formal review under §§134.058-134.064 of the Act or to a citizen's suit under §§134.182-134.187 of the Act.

The provisions of this §12.675 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.676 Alternative Enforcement

(a) General provisions.

(1) Whenever a court of competent jurisdiction enters a judgment against or convicts a person under the provisions of this section, the Commission will update AVS to reflect the judgment or conviction.

(2) The existence of a performance bond or bond forfeiture cannot be used as the sole basis for determining that an alternative enforcement action is unwarranted.

(3) Nothing in this part eliminates or limits any additional enforcement rights or procedures available to a permittee or an applicant under Federal or State law.

(b) Criminal penalties. Under §134.179 and §134.180 of the Act, the Commission may request the Texas Attorney General to pursue criminal penalties against any person who:

(1) willfully and knowingly violates a condition of the permit;

(2) willfully and knowingly fails or refuses to comply with:

(A) any order issued under Subchapter H of the Act (relating to Enforcement); or

(B) any order incorporated into a final decision issued by the Commission under the Act (except for those orders specifically excluded under §134.179 of the Act); or

(3) knowingly makes any false statement, representation, or certification, or knowingly fails to make any statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under the Commission's regulatory program or any order or decision issued by the Commission under the Act.

(c) Civil actions for relief.

(1) Under §134.173 of the Act, the Commission may request the Texas Attorney General to institute a civil action for relief whenever the permittee or an agent of the permittee:

(A) violates or fail or refuse to comply with any order or decision issues by the Commission under the Act or regulatory program;

(B) interferes with, hinders, or delays the Commission in carrying out the provisions of the Act or its implementing regulations;

(C) refuses to admit an authorized Commission representative onto the site of a surface coal mining and reclamation operation;

(D) refuses to allow an authorized Commission representative to inspect a surface coal mining and

reclamation operation;

(E) refuses to furnish any information or report that requested by the Commission under the Act or regulatory program; or

(F) refuse to allow access to, or copying of, those records that the Commission determines are necessary to carry out the provisions of the Act and its implementing regulations.

(2) A civil action for relief includes a permanent or temporary injunction, restraining order, or any other appropriate order by a district court of the United States for the district in which the surface coal mining and reclamation operation or the permittee's principal office is located.

(3) Temporary restraining orders will be issued in accordance with Rule 680 of the Texas Rules of Civil Procedure, as amended.

(4) Any relief the court grants to enforce an order under paragraph (2) of this subsection will continue in effect until completion or final termination of all proceedings for review of that order under the Act or its implementing regulations unless, beforehand, the district court granting the relief sets aside or modifies the order.

The provisions of this §12.676 adopted to be effective February 24, 2014, 39 TexReg 1121.

DIVISION 2 ENFORCEMENT

§12.677 Cessation Orders

(a) Conditions, practices, or violations warranting a cessation order.

(1) An authorized representative of the Commission shall immediately order a cessation of surface coal mining and reclamation operations or of the relevant portion thereof, if he or she finds, on the basis of any inspection, any condition or practice, or any violation of the Act, this chapter (relating to Coal Mining Regulations), or any condition of an exploration approval or permit imposed under the Act or this chapter (relating to Coal Mining Regulations), which:

(A) creates an imminent danger to the health or safety of the public; or

(B) is causing or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.

(2) Surface coal mining and reclamation operations conducted by any person without a valid surface coal mining permit constitute a condition or practice which causes or can be expected to cause significant, imminent environmental harm to land, air, or water resources.

(3) If the cessation ordered under subsection (a)(1) of this section will not completely abate the imminent danger or harm in the most expeditious manner physically possible, the authorized representative of the Commission shall impose affirmative obligations on the person to whom it is issued to abate the condition, practice, or violation. The order shall specify the time by which abatement shall be accomplished and may require, among other things, the use of existing or additional personnel and equipment.

(b) Failure to abate a notice of violation.

(1) An authorized representative of the Commission shall immediately order a cessation of coal exploration or surface coal mining and reclamation operations, or of the relevant portion thereof, when a notice of violation has been issued under §12.678(a) of this title (relating to Notices of Violation) and the person to whom it was issued fails to abate the violation within the abatement period fixed or subsequently extended by the authorized representative.

(2) A cessation order issued under this subsection shall require the person to whom it is issued to take all steps the authorized representative of the Commission deems necessary to abate the violations covered by the order in the most expeditious manner physically possible.

(c) Form of cessation order. A cessation order issued under subsections (a) or (b) of this section shall be in writing, signed by the authorized representative who issues it, and shall set forth with reasonable specificity:

(1) the nature of the violation;

(2) the remedial action or affirmative obligation required, if any, including interim steps, if appropriate;

(3) the time established for abatement, if appropriate, including the time for meeting any interim steps; and

(4) a reasonable description of the portion of the coal exploration or surface coal mining and reclamation operation to which it applies. The order shall remain in effect until the condition, practice or violation has been abated or until vacated, modified or terminated in writing by an authorized representative of the Commission. The Commission, within 60 days after issuing the cessation order, shall notify in writing any person who has been identified as owning or controlling the permittee, that the cessation order was issued and that the person has been identified as an owner or controller.

(d) Continuing activities during cessation. Reclamation operations and other activities intended to protect public health and safety and the environment shall continue during the period of any order unless otherwise provided in the order.

(e) Modification, termination, and vacation. An authorized representative of the Commission may modify, terminate or vacate a cessation order for good cause, and may extend the time for abatement if the failure to abate within the time previously set was not caused by lack of diligence on the part of the person to whom it was issued.

(f) Termination of cessation order. An authorized representative of the Commission shall terminate a cessation order, by written notice to the person to whom the order was issued, when he determines that all conditions, practices or violations listed in the order have been abated. Termination shall not affect the right of the Commission to assess civil penalties for those violations under §§12.686 - 12.694 of this title (relating to Civil Penalties).

(g) Notification. Within 60 days after issuing a cessation order, the Commission will notify in writing the permittee, the operator, and any person who has been listed or identified by the applicant, permittee, or OSM as an owner or a controller of the operation, as defined in §12.3 of this title (relating to Definitions).

The provisions of this §12.677 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective February 24, 2014, 39 TexReg 1121.

§12.678 Notices of Violation

(a) An authorized representative of the Commission shall issue a notice of violation if, on the basis of an inspection he finds a violation of the Act, this chapter (relating to Coal Mining Regulations), or any condition of a permit or an exploration approval imposed under such program, the Act, or this chapter (relating to Coal Mining Regulations), which does not create an imminent danger or harm for which a cessation order must be issued under

§12.677 of this title (relating to Cessation Orders).

(b) A notice of violation issued under this section shall be in writing, signed by the authorized representative who issues it, and shall set forth with reasonable specificity:

(1) the nature of the violation;

(2) the remedial action required, which may include interim steps;

(3) a reasonable time for abatement, which may include time for accomplishment of interim steps; and

(4) a reasonable description of the portion of the coal exploration or surface coal mining and reclamation operation to which it applies.

(c) An authorized representative of the Commission may extend the time set for abatement or for accomplishment of an interim step, if the failure to meet the time previously set was not caused by lack of diligence on the part of the person to whom it was issued. The total time for abatement under a notice of violation, including all extensions, shall not exceed 90 days from the date of issuance, except upon a showing by the permittee that it is not feasible to abate the violation within 90 calendar days due to one or more of the circumstances in subsection (f) of this section. An extended abatement date pursuant to this section shall not be granted when the permittee's failure to abate within 90 days has been caused by a lack of diligence or intentional delay by the permittee in completing the remedial action required.

(d) If the person to whom the notice was issued fails to meet any time set for abatement or for accomplishment of an interim step, the authorized representative shall issue a cessation order under §12.677 of this title (relating to Cessation Orders).

(e) An authorized representative of the Commission shall terminate a notice of violation by written notice to the person to whom it was issued, when he determines that all violations listed in the notice of violation have been abated. Termination shall not affect the right of the Commission to assess civil penalties for those violations under §§12.686-12.694 of this title (relating to Civil Penalties).

(f) Circumstances which may qualify a surface coal mining operation for an abatement period of more than 90 days are:

(1) where the permittee of an ongoing permitted operation has timely applied for and diligently pursued a permit renewal or other necessary approval of designs or plans but such permit or approval has not been or will not be issued within 90 days after a valid permit expires or is required, for reasons not within the control of the permittee;

(2) where there is a valid judicial order precluding abatement within 90 days as to which the permittee has diligently pursued all rights of appeal and as to which he or she has no other effective legal remedy;

(3) where the permittee cannot abate within 90 days due to a labor strike; or

(4) where climatic conditions preclude abatement within 90 days, or where, due to climatic conditions, abatement within 90 days clearly:

(A) would cause more environmental harm than it would prevent; or

(B) requires action that would violate safety standards established by statute or regulation under the Mine Safety and Health Act.

(g) Whenever an abatement time in excess of 90 days is permitted, interim abatement measures shall be imposed to the extent necessary to minimize harm to the public or the environment.

(h) If any of the conditions in subsection (f) of this section exist, the permittee may request the authorized representative to grant an abatement period exceeding 90 days. The authorized representative shall not grant such an abatement period without the concurrence of the Director of the Surface Mining and Reclamation Division or his or her designee, and the abatement period granted shall not exceed the shortest possible time necessary to abate the violation. The permittee shall have the burden of establishing by clear and convincing proof that he or she is entitled to an extension under the provisions of subsections (c) and (f) of this section. In determining whether or not to grant an abatement period exceeding 90 days the authorized representative may consider any relevant written or oral information from the permittee or any other source. The authorized representative shall promptly and fully document in the file his or her reasons for granting or denying the request. The authorized representative's immediate supervisor shall review this document before concurring in or disapproving the extended abatement date and shall promptly and fully document the reasons for his or her concurrence or disapproval in the file.

(i) Any determination made under subsection (h) of this section shall be in writing and shall contain a right of review in accordance with §12.682 of this title (relating to Review of Notice of Violation or Cessation Order).

(j) No extension granted under subsection (h) of this section may exceed 90 days in length. Where the condition or circumstance which prevented abatement within 90 days exists at the expiration of any such extension, the permittee may request a further extension in accordance with the procedures of subsection (h) of this section.

The provisions of this §12.678 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.679 Suspension or Revocation of Permits

(a) Pattern of violations.

(1) Except as provided in subsection (b) of this section, the Director of the Surface Mining and Reclamation Division shall issue an order to a permittee requiring him to show cause why his permit and right to mine under the Act should not be suspended or revoked, if he determines that a pattern of violations of any requirements of the Act, this chapter (relating to Coal Mining Regulations), or any permit condition required by the Act exists or has existed, and that the violations were caused by the permittee willfully or through unwarranted failure to comply with those requirements or conditions. Violations by any person conducting surface coal mining operations on behalf of the permittee shall be attributed to the permittee, unless the permittee establishes that they were acts of deliberate sabotage.

(2) The Director of the Surface Mining and Reclamation Division may determine that a pattern of violations exists or has existed, based on two or more inspections of the permit area within any 12-month period, after considering the circumstances, including:

(A) the number of violations, cited on more than one occasion, of the same or related requirements of the Act, this chapter (relating to Coal Mining Regulations), or the permit;

(B) the number of violations, cited on more than one occasion, of different requirements of the Act, this chapter (relating to Coal Mining Regulations), the applicable program, or the permit; and

(C) the extent to which the violations were isolated departures from lawful conduct.

(3) The Director of the Surface Mining and Reclamation Division shall determine that a pattern of violations exists, if he finds that there were violations of the same or related requirements of the Act, this chapter (relating to Coal Mining Regulations), or the permit during three or more inspections of the permit area within any 12-month period.

(b) Discretion of the Division Director. The Director of the Surface Mining and Reclamation Division may decline to issue a show cause order, or may vacate an outstanding show cause order, if he finds that, taking into account exceptional factors present in the particular case, it would be demonstrably unjust to issue or to fail to vacate the show cause order. The basis for this finding shall be fully explained and documented in the records of the case;

(c) Public notice requirements. At the same time as the issuance of the order, the Director of the Surface Mining and Reclamation Division shall:

(1) if practicable, publish notice of the order, including a brief statement of the procedure for intervention in the proceeding, in a newspaper of general circulation in the area of the surface coal mining and reclamation operations; and

(2) post the notice at the district or field office closest to the area of the surface coal mining and reclamation operations.

(d) Public hearing. Following issuance of a show cause order, the Commission shall hold a public hearing after appropriate written notice of the time, date and place of the hearing. The hearing shall be of record and subject to the APA.

(e) Determination after hearing. Within 60 days after the hearing, the Commission shall issue a written determination as to whether a pattern of violations exists and, if appropriate, an order. If the permit and the permittee's right to mine are revoked or suspended, the permittee shall immediately cease surface coal mining operations on the permit area and shall:

(1) if revoked, complete reclamation within the time frame specified in the order; or

(2) if suspended, complete all affirmative obligations to abate all conditions, practices or violations as specified in the order.

(f) Failure to abate. When a permittee fails to abate a violation contained in a notice of violation or cessation order within the abatement period set in the notice or order or as subsequently extended, the Director of the Surface Mining and Reclamation Division shall review the permittee's history of violations to determine whether a pattern of violations exists pursuant to this section, and shall issue an order to show cause as appropriate pursuant to §12.680 of this title (relating to Service of Notices of Violation, Cessation Orders, and Show Cause Orders).

The provisions of this §12.679 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.680 Service of Notices of Violation, Cessation Orders, and Show Cause Orders

(a) A notice of violation or cessation order shall be served on the person to whom it is directed or his designated agent promptly after issuance, as follows:

(1) by tendering a copy at the coal exploration or surface coal mining and reclamation operation to the designated agent or to the individual who, based upon reasonable inquiry by the authorized representative, appears to be in charge of the coal exploration or surface coal mining and reclamation operation referred to in the notice or order. If no such individual can be located at the site, a copy may be tendered to any individual at the site who appears to be an employee or agent of the person to whom the notice or order is issued. Service shall be complete upon tender of the notice or order and shall not be deemed incomplete because of refusal to accept; or

(2) as an alternative to paragraph (1) of this subsection, service may be made by sending a copy of the notice or order by certified mail or by hand to the person to whom it is issued or his designated agent. Service shall be complete upon tender of the notice or order or of the mail and shall not be deemed incomplete because of refusal to accept.

(b) A show cause order may be served on the person to whom it is issued in either manner provided in subsection (a) of this section.

(c) Designation by any person of an agent for service of notices and orders shall be made in writing to the Surface Mining and Reclamation Division, P.O. Box 12967, Austin, Texas 78711-2967.

(d) The Commission may furnish copies to any person having an interest in the coal exploration, surface coal mining and reclamation operation, or the permit area, such as the owner of the fee, a corporate officer of the permittee or entity conducting coal exploration, or the bonding company.

The provisions of this §12.680 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.681 Informal Public Hearing

(a) Except as provided in subsections (b) and (c) of this section, a notice of violation or cessation order which requires cessation of mining, expressly or by necessary implication, shall expire within 30 days after it is served unless an informal public hearing has been held within that time. The hearing shall be held at or reasonably close to the mine site so that it may be viewed during the hearing, or at any other location acceptable to the Commission and the person to whom the notice or order was issued. The field office of the Division nearest to the mine site shall be deemed to be reasonably close to the mine site unless a closer location is requested and agreed to by the Commission. Expiration of a notice or order shall not affect the Commission's right to assess civil penalties with respect to the period during which the notice or order was in effect for the violations mentioned in the notice or order under §§12.686 - 12.694 of this title (relating to Civil Penalties). No hearing will be required where the condition, practice, or violation in question has been abated or the hearing has been waived. For purposes of this section only, mining includes:

(1) extracting coal from the earth or coal waste piles and transporting it within or from the area; and

(2) the processing, cleaning, concentrating, preparing, or loading of the coal where such operations occur at a place other than at a mine site.

(b) A notice of violation or cessation order shall not expire as provided in subsection (a) of this section, if the informal public hearing has been waived, or if, with the consent of the person to whom the notice or order was issued, the informal public hearing is held later than 30 days after the notice or order was served. For purposes of this subsection:

(1) The informal public hearing will be deemed waived if the person to whom the notice or order was issued:

(A) is informed, by written notice served in a manner provided in paragraph (2) of this subsection, that he or she will be deemed to have waived an informal public hearing unless he or she requests one within 30 days after service of the notice; and

(B) fails to request an informal public hearing within that time.

(2) The written notice referred to in paragraph (1)(A) of this subsection shall be delivered to such person by an authorized representative or sent by certified mail to such person no later than five days after the notice or order is served on such person.

(3) The person to whom the notice or order was issued shall be deemed to have consented to an extension of the time for holding the informal public hearing if his or her request is received on or after the 21st day after service of the notice or order. The extension of time shall be equal to the number of days elapsed after the 21st day.

(c) The Commission shall give as much advance notice as is practicable of the time, place, and subject matter of the informal public hearing to:

(1) the person to whom the notice or order was issued; and

(2) any person who filed a report which led to that notice or order.

(d) The Commission shall also post notice of the hearing at the field office closest to the mine site, and publish it, where practicable, in a newspaper of general circulation in the area of the mine.

(e) The informal public hearing shall be conducted by a representative of the Commission, who may accept oral or written arguments and any other relevant information from any person attending.

(f) Within five days after the close of the informal public hearing, the Commission shall affirm, modify, or vacate the notice or order in writing. The decision shall be sent to:

(1) the person to whom the notice or order was issued; and

(2) any person who filed a report which led to the notice or order.

(g) The granting or waiver of the above informal public hearing shall not affect the right of any person to formal review under §134.175 and §134.176 of the Act and §§2001.141 - 2001.147 of the APA (relating to Contested Cases: Final Decisions and Orders; Motions for Rehearing). At such review proceedings, no evidence as to statements made or evidence produced at the informal public hearing pursuant to this section shall be introduced as evidence to impeach a witness.

(h) The person conducting the informal hearing for the Commission shall determine whether or not the mine site should be viewed during the hearing. In making this determination, the only consideration shall be whether viewing the mine site will assist the person conducting the hearing in reviewing the appropriateness of the enforcement action or of the required remedial action.

The provisions of this §12.681 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 12, 2007, 32 TexReg 8124.

§12.682 Formal Review of Notice of Violation or Cessation Order

(a) A person issued a notice of violation or cessation order under §12.677 or §12.678 of this title (relating to Cessation Orders, and Notices of Violation), or a person having an interest which may be adversely affected by the issuance, modification, vacation, or termination of a notice or order, may request review of that action by filing an application for review and request for a hearing pursuant to §§134.168 - 134.172 of the Act and the APA, within 30 days after receiving notice of the action.

(b) The filing of an application for review and request for a hearing under this section shall not operate as a stay of any notice or order, or any modification, termination or vacation, of either.

The provisions of this §12.682 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 12, 2007, 32 TexReg 8124.

§12.683 Inability To Comply

(a) No cessation order or notice of violation issued under §§12.677-12.684 of this title (relating to Enforcement) may be vacated because of inability to comply.

(b) Inability to comply may not be considered in determining whether a pattern of violations exists.

(c) Unless caused by lack of diligence, inability to comply may be considered only in mitigation of the amount of civil penalty under §§12.686-12.694 of this title (relating to Civil Penalties) and of the duration of the suspension of a permit.

The provisions of this §12.683 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.684 Injunctive Relief

The Commission may request the Attorney General of Texas to institute a civil action for relief, including a permanent or temporary injunction, restraining order or any other order, in the district court of Travis County, or in the district in which the coal exploration or surface coal mining and reclamation operation is located or in which the person to whom the notice of violation or order has been issued has his principal office, whenever that person or his or her agent, in violation of the Act, this chapter (relating to Coal Mining Regulations), or any condition of an exploration approval or permit imposed under the Act or this chapter (relating to Coal Mining Regulations):

(1) violates or fails or refuses to comply with any order or decision of the Commission;

(2) interferes with, hinders or delays the Commission in carrying out the provisions of the Act or this chapter (relating to Coal Mining Regulations);

(3) refuses to admit an authorized representative of the Commission to a mine;

(4) refuses to permit inspection of a mine by an authorized representative of the Commission;

(5) refuses to furnish any required information or report;

(6) refuses to permit access to or copying of any required records; or

(7) refuses to permit inspection of monitoring equipment.

The provisions of this §12.684 adopted to be effective April 7, 1997, 22 TexReg 3093.

DIVISION 3 CIVIL PENALTIES

§12.686 When Penalty Will Be Assessed

(a) The Commission shall assess a penalty for each

cessation order.

(b) The Commission shall assess a penalty for each notice of violation, if the violation is assigned 31 points or more under the point system described in §12.687 of this title (relating to Point System for Penalties).

(c) The Commission may assess a penalty for each notice of violation assigned 30 points or less under the point system described in §12.687 of this title (relating to Point System for Penalties). In determining whether to assess a penalty, the Commission shall consider the factors listed in §12.687(b) of this title (relating to Point System for Penalties).

The provisions of this §12.686 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.687 Point System for Penalties

(a) The Commission shall use the point system described in this section to determine the amount of the penalty and, in the case of notices of violation, whether a mandatory penalty should be assessed as provided in §12.686(b) of this title (relating to When Penalty Will Be Assessed).

(b) Points shall be assigned as follows:

(1) History of previous violations. The commission shall assign up to 30 points based on the history of previous violations. One point shall be assigned for each past violation contained in a notice of violation. Five points shall be assigned for each violation (but not a condition or practice) contained in a cessation order. The history of previous violations, for the purpose of assigning points, shall be determined and the points assigned with respect to a particular coal exploration or surface coal mining operation. Points shall be assigned as follows:

(A) a violation shall not be counted, if the notice or order is the subject of pending administrative or judicial review or if the time to request such review or to appeal any administrative or judicial decision has not expired, and thereafter it shall be counted for only one year;

(B) no violation for which the notice or order has been vacated shall be counted; and

(C) each violation shall be counted without regard to whether it led to a civil penalty assessment;

(2) Seriousness. The Commission shall assign up to 30 points based on the seriousness of the violation, as follows:

(A) Probability of occurrence. The Commission shall assign up to 15 points based on the probability of the occurrence of the event which a violated standard is designed to prevent. Points shall be assessed according to the following schedule:

Figure: 16 TAC §12.687(b)(2)(A) [***See Figure at end of this document.***]

(B) extent of potential or actual damage. The Commission shall assign up to 15 points, based on the extent of the potential or actual damage, in terms of area and impact on the public or environment, as follows:

(i) if the damage or impact which the violated standard is designed to prevent would remain within the coal exploration or permit area, the Commission shall assign zero to seven points, depending on the duration and extent of the damage or impact; and

(ii) if the damage or impact which the violated standard is designed to prevent would extend outside the coal exploration or permit area, the Commission shall assign eight to fifteen points, depending on the duration and extent of the damage or impact; and

(C) Alternative. In the case of a violation of an administrative requirement, such as a requirement to keep records, the Commission shall, in lieu of subparagraphs (A) and (B) of this paragraph, assign up to 15 points for seriousness, based upon the extent to which enforcement is obstructed by the violation;

(3) Negligence.

(A) The Commission shall assign up to 25 points based on the degree of fault of the person to whom the notice or order was issued in causing or failing to correct the violation, condition, or practice which led to the notice or order, either through act or omission. Points shall be assessed as follows:

(i) a violation which occurs through no negligence shall be assigned no penalty points for negligence;

(ii) a violation which is caused by negligence shall be assigned 12 points or less, depending on the degree of negligence;

(iii) a violation which occurs through a greater degree of fault than negligence shall be assigned 13 to 25 points, depending on the degree of fault;

(B) In determining the degree of negligence involved in a violation and the number of points to be assigned, the following definitions apply:

(i) No negligence--An inadvertent violation which was unavoidable by the exercise of reasonable care;

(ii) Negligence--The failure of a permittee to prevent the occurrence of any violation of his or her permit or any requirement of the Act or this chapter (relating to Coal Mining Regulations) due to indifference, lack of diligence, or lack of reasonable care, or the failure to abate any violation of such permit or the Act due to indifference, lack of diligence, or lack of reasonable care;

(iii) A greater degree of fault than negligence--Reckless, knowing, or intentional conduct; and

(C) In calculating points to be assigned for negligence, the acts of all persons working on the coal exploration or surface coal mining and reclamation site shall be attributed to the person to whom the notice or order was issued, unless that person establishes that they were acts of deliberate sabotage; and

(4) Good faith in attempting to achieve compliance.

(A) The Commission shall add points based on the degree of good faith of the person to whom the notice or order was issued in attempting to achieve rapid compliance after notification of the violation. Points shall be assigned as follows:

Figure: 16 TAC §12.687(b)(4) [***See Figure at end of this document.]***

(B) The following definitions shall apply under subsection (b)(4)(A) of this section:

(i) Rapid compliance--That the person to whom the notice or order was issued took extraordinary measures to abate the violation in the shortest possible time and that abatement was achieved before the time set for abatement;

(ii) Normal compliance--The person to whom the notice or order was issued abated the violation within the time given for abatement; and

(C) If the consideration of this criterion is impractical because of the length of the abatement period, the assessment may be made without considering this

criterion and may be reassessed after the violation has been abated.
The provisions of this §12.687 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.688 Determination of Amount of Penalty

The Commission shall determine the amount of any civil penalty by converting the total number of points assigned under §12.687 of this title (relating to Point System for Penalties) to a dollar amount, according to the following schedule:
Figure: 16 TAC §12.688 [***See Figure at end of this document.***]
The provisions of this §12.688 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 12, 2007, 32 TexReg 8124.

§12.689 Assessment of Separate Violations for Each Day

(a) The Commission may assess separately a civil penalty for each day from the date of issuance of the notice of violation or cessation order to the date set for abatement of the violation. In determining whether to make such an assessment, the Commission shall consider the factors listed in §12.687 of this title (relating to Point System for Penalties) and may consider the extent to which the person to whom the notice or order was issued gained any economic benefit as a result of a failure to comply. For any violation which continues for two or more days and which is assigned more than 70 points under §12.687(b) of this title (relating to Point System for Penalties), the Commission shall assess a civil penalty for a minimum of two separate days.

(b) In addition to the civil penalty provided for in subsection (a) of this section, whenever a violation contained in a notice of violation or cessation order has not been abated within the abatement period set in the notice or order or subsequently extended pursuant to §12.678 of this title (relating to Notices of Violation), a civil penalty of not less than $1,025 shall be assessed for each day during which such failure continues, except that, if the person to whom the notice or order was issued initiates review proceedings with respect to the violation, the abatement period shall be extended as follows:

(1) if suspension of the abatement requirements of the notice or order is ordered in a temporary relief proceeding pursuant to administrative review under §134.171 of the Act, after a determination that the person to whom the notice or order was issued will suffer irreparable loss or damage from the application of the requirements, the period permitted for abatement shall not end until the date on which the Commission issues a final order with respect to the violation in question; and

(2) if the person to whom the notice or order was issued initiates judicial review proceedings under §12.694 of this title (relating to Final Assessment and Payment of Penalty), with respect to the violation, in which the obligations to abate are suspended by the court, the daily assessment of a penalty shall not be made for any period before entry of a final order by the court.

(3) Such penalty for the failure to abate the violation shall not be assessed for more than 30 days for each such violation. If the permittee has not abated the violation within the 30-day period, the Commission shall take appropriate action pursuant to §§134.179, 134.181, 134.164 or 134.173 of the Act within 30 days to ensure that abatement occurs or to ensure that there will not be a reoccurrence of the failure to abate.
The provisions of this §12.689 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 12, 2007, 32 TexReg 8124.

§12.690 Waiver of Use of Formula To Determine Civil Penalty

(a) The Director of the Surface Mining and Reclamation Division, upon his own initiative or upon written request received within 15 days of issuance of a notice of violation or a cessation order, may waive the use of the formula contained in §12.687 of this title (relating to Point System for Penalties) to set the civil penalty, if he or she determines that, taking into account exceptional factors present in the particular case, the penalty is demonstrably unjust. However, he shall not waive the use of the formula or reduce the proposed assessment on the basis of an argument that a reduction in the proposed penalty could be used to abate violations of the Act, this chapter (relating to Coal Mining Regulations), or any condition of any permit or exploration approval. The basis for every waiver shall be fully explained and documented in the records of the case.

(b) If the Director of the Surface Mining and Reclamation Division waives the use of the formula, he or she shall use the criteria set forth in §12.687(b) of this title (relating to Point System for Penalties) to determine the appropriate penalty. When the Director of the Surface Mining and Reclamation Division has elected to waive the use of the formula, he or she shall give a written explanation of the basis for the assessment made to the person to whom the notice or order was issued.
The provisions of this §12.690 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.691 Procedures for Assessment of Civil Penalties

(a) Within 15 days of service of a notice or order, the person to whom it was issued may submit written information about the violation to the Commission and to the inspector who issued the notice of violation or cessation order. The Commission shall consider any information so submitted in determining the facts surrounding the violation and the amount of the penalty.

(b) The Commission shall serve a copy of the proposed assessment and of the worksheet showing the computation of the proposed assessment on the person to whom the notice or order was issued, by certified mail, within 30 days of the issuance of the notice or order. Unless otherwise proved by competent evidence, a pleading or other document shall be deemed to have been received by a party, on whom it has been served in accordance with these rules, three days after it was mailed or on the date received if delivered in person.

(1) If the mail is tendered at the address of that person set forth in the sign required under §12.330 of this title (relating to Signs and Markers), or at any address at which that person is in fact located, and he or she refuses to accept delivery of or to collect such mail, the requirements of this subsection shall be deemed to have been satisfied upon such tender.

(2) Failure of the Commission to serve any proposed assessment within 30 days shall not be grounds for dismissal unless the person against whom the proposed penalty has been assessed:

(A) proves actual prejudice as a result of the delay; and

(B) makes a timely objection to the delay. An

objection shall be timely only if made in the normal course of administrative review.

(c) Unless a conference has been requested, the Commission shall review and reassess any penalty if necessary to consider facts which were not reasonably available on the date of issuance of the proposed assessment because of the length of the abatement period. The Commission shall serve a copy of any such reassessment and of the worksheet showing the computation of the reassessment in the manner provided in subsection (b) of this section, within 30 days after the date the violation is abated.

The provisions of this §12.691 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.692 Procedures for Assessment Conference

(a) The Commission shall arrange for a conference to review the proposed assessment or reassessment, upon written request of the person to whom the notice or order was issued, if the request is received within 15 days from the date the proposed assessment or reassessment is mailed.

(b) Assessment conference procedures shall be as follows:

(1) the Commission shall assign an examiner to hold the assessment conference. The assessment conference shall be held within 60 days from the date of issuance of the proposed assessment or the end of the abatement period, whichever is later;

(2) the Commission shall post notice of the time and place of the conference at the field office closest to the mine at least 5 days before the conference. Any person shall have a right to attend and participate in the conference;

(3) the examiner shall consider all relevant information on the violation. Within 30 days after the conference is held, the examiner shall either:

(A) settle the issues, in which case a settlement agreement shall be prepared and signed by the examiner on behalf of the Commission and by the person assessed; or

(B) affirm, raise, lower, or vacate the penalty; and

(4) an increase or reduction of a proposed civil penalty assessment of more than 25% and more than $500.00 shall not be final and binding on the Commission until approved by the Director of the Surface Mining and Reclamation Division.

(c) The examiner shall promptly serve the person assessed with a notice of his or her action and shall include a worksheet if the penalty has been raised or lowered. The reasons for the examiner's action shall be fully documented in the file.

(d) The form of settlement agreements shall include the following:

(1) if a settlement agreement is entered into, the person assessed will be deemed to have waived all rights to further review of the violation or penalty in question, except as otherwise expressly provided for in the settlement agreement. The settlement agreement shall contain a clause to this effect; and

(2) if full payment of the amount specified in the settlement agreement is not received by the Commission within 30 days after the date of signing, the Commission may enforce the agreement or rescind it and proceed according to subsection (b)(3)(B) of this section within 30 days from the date of the rescission.

(e) The examiner may terminate the conference when he determines that the issues cannot be resolved or that the person assessed is not diligently working toward resolution of the issues.

(f) At formal review proceedings under the Act, no evidence as to statements made or evidence produced by one party at a conference shall be introduced as evidence by another party or to impeach a witness.

The provisions of this §12.692 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.693 Request for Hearing

The person charged with the violation may contest the proposed penalty or the fact of the violation by submitting a petition and an amount equal to the proposed penalty or, if an assessment conference has been held, the reassessed or affirmed penalty to the Commission, to be held in escrow, within 30 days from receipt of the proposed assessment or reassessment or 30 days from the date of service of the assessment conference examiners action, whichever is later. The fact of the violation may not be contested if it has been decided in a review proceeding commenced under §12.682 of this title (relating to Formal Review of Notice of Violation or Cessation Order).

The provisions of this §12.693 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 12, 2007, 32 TexReg 8124.

§12.694 Final Assessment and Payment of Penalty

(a) If the person to whom a notice of violation or cessation order is issued fails to request a hearing as provided in §12.693 of this title (relating to Request for Hearing), the proposed assessment shall become a final order of the Commission and the penalty assessed shall become due and payable upon expiration of the time allowed to request a hearing.

(b) If any party requests judicial review of a final order of the Commission, the proposed penalty shall continue to be held in escrow until completion of the review. Otherwise, subject to subsection (c) of this section, the escrowed funds shall be transferred to the Commission in payment of the penalty, and the escrow shall end.

(c) If the final decision in the administrative and judicial review results in an order reducing or eliminating the proposed penalty assessed under §§12.686-12.694 of this title (relating to Civil Penalties), the Commission shall within 30 days of receipt of the order refund to the person assessed all or part of the escrowed amount, with interest from the date of payment into escrow to the date of the refund at the prevailing Department of the Treasury rate.

(d) If the review results in an order increasing the penalty, the person to whom the notice or order was issued shall pay the difference to the Commission within 15 days after the order is mailed to such person.

The provisions of this §12.694 adopted to be effective April 7, 1997, 22 TexReg 3093.

DIVISION 4 INDIVIDUAL CIVIL PENALTIES

§12.696 When an Individual Civil Penalty May Be Assessed

(a) Except as provided in subsection (b) of this section, the Commission may assess an individual civil penalty against any corporate director, officer, or agent of a corporate permittee who knowingly and willfully authorized, ordered, or carried out a violation, failure, or refusal.

(b) The Commission shall not assess an individual civil

penalty in situations resulting from a permit violation by a corporate permittee until a cessation order has been issued by the Commission to the corporate permittee for the violation, and the cessation order has remained unabated for 30 days.
The provisions of this §12.696 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.697 Amount of Individual Civil Penalty

(a) In determining the amount of an individual civil penalty assessed under §12.696 of this title (relating to When an Individual Civil Penalty May Be Assessed), the Commission shall consider the criteria specified in §§134.174-134.181 of the Act, including:

(1) the individual's history of authorizing, ordering, or carrying out previous violations, failures, or refusals at the particular surface coal mining operation;

(2) the seriousness of the violation, failure, or refusal (as indicated by the extent of damage and/or the cost of reclamation), including any irreparable harm to the environment and any hazard to the health or safety of the public; and

(3) the demonstrated good faith of the individual charged in attempting to achieve rapid compliance after notice of the violation, failure, or refusal.

(b) The penalty shall not exceed $5,000 for each violation. Each day of a continuing violation may be deemed a separate violation and the Commission may assess a separate individual civil penalty for each day the violation, failure, or refusal continues, from the date of service of the underlying notice of violation, cessation order, or other order incorporated in a final decision issued by the Commission, until abatement or compliance is achieved.
The provisions of this §12.697 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.698 Procedure for Assessment of Civil Individual Penalty

(a) Notice. The Commission shall serve on each individual to be assessed an individual civil penalty a notice of proposed individual civil penalty assessment, including a narrative explanation of the reasons for the penalty, the amount to be assessed, and a copy of any underlying notice of violation and cessation order.

(b) Final order and opportunity for review. The notice of proposed individual civil penalty assessment shall become a final order of the Commission 30 days after service upon the individual unless:

(1) the individual files within 30 days of service of the notice of proposed individual civil penalty assessment a request for a hearing in accordance with §12.693 of this title (relating to Request For Hearing); or

(2) the Commission and the individual or responsible corporate permittee agree within 30 days of service of the notice of proposed individual civil penalty assessment to a schedule or plan for the abatement or correction of the violation, failure, or refusal.

(c) Service. For purposes of this section, service shall be performed on the individual to be assessed an individual civil penalty by certified mail, or by any alternative means consistent with the rules governing service of a summons and complaint under Texas Rules of Civil Procedure 21a. Service shall be complete upon tender of the notice of proposed assessment and included information or of the certified mail and shall not be deemed incomplete because of refusal to accept.

The provisions of this §12.698 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.699 Payment of Penalty

(a) No abatement or appeal. If a notice of proposed individual civil penalty assessment becomes a final order in the absence of a petition for review or abatement agreement, the penalty shall be due upon issuance of the final order.

(b) Requests for appeal. If an individual named in a notice of proposed individual civil penalty assessment files a request for a hearing in accordance with §12.693 of this title (relating to Request for Hearing), the penalty shall be due upon the issuance of a final order affirming, increasing, or decreasing the proposed penalty.

(c) Abatement agreement. Where the Commission and the corporate permittee or individual have agreed in writing on a plan for the abatement of or compliance with the unabated order, an individual named in a notice of proposed individual civil penalty assessment may postpone payment until receiving either a final order from the Commission stating that the penalty is due on the date of such final order, or written notice that abatement or compliance is satisfactory and the penalty has been withdrawn.
The provisions of this §12.699 adopted to be effective April 7, 1997, 22 TexReg 3093.

SUBCHAPTER M TRAINING
DIVISION 1 TRAINING, EXAMINATION, AND CERTIFICATION OF BLASTERS

§12.700 Purpose and Scope

(a) The purpose of this section and §§12.702-12.710 of this title (relating to Training, Examination, and Certification of Blasters) is to provide procedures for the training, examination, and certification of blasters for mining operations regulated by the Commission.

(b) The scope of this section and §§12.702-12.710 of this title (relating to Training, Examination, and Certification of Blasters) includes the training and examination of blasters; the issuance, renewal, reissuance, suspension and revocation of Commission blaster certificates; and the replacement of lost or destroyed certificates. It governs the reciprocity rights extended by the Commission to the holders of valid blaster certificates issued by other qualified jurisdictions.

(c) The adoption and implementation of this section and §§12.702-12.710 of this title (relating to Training, Examination, and Certification of Blasters) are not intended to and shall not in any manner subject the Commission, its agents, or persons who may contract with the Commission, to liability for the actions or negligence of individuals trained, examined, or certified as blasters by the Commission.
The provisions of this §12.700 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.702 General Requirements

To qualify for blaster certification by the Commission, a person must satisfy the following requirements:

(1) Age.

(A) An applicant may not be younger than 20 years of age; and

(B) an applicant may not be younger than 21 years of age at the time of blaster certification.

(2) Knowledge.

(A) An applicant shall be competent, possess practical knowledge of blasting techniques, and understand the hazards associated with the handling, transportation, storage and use of explosives; and

(B) an applicant shall have a history of conduct consistent with the acceptance of responsibility for blasting operations.

(3) Experience.

(A) In the 3 years prior to application, an applicant shall have been qualified and worked as a blaster or as a member of a blasting crew under the direction of a blaster for the following cumulative lengths of time:

(i) 24 months, for certificate issuance; or

(ii) 12 months, for certificate renewal or reissuance; and

(B) an applicant shall not be subject to suspension, revocation or other action by any qualified blaster certification justification or by any other jurisdiction that issues blaster licenses or permits.

(4) Training. An applicant shall have received on-the-job training, completed a qualified training course, and obtained satisfactory evidence of having completed the training requirements specified in §12.703 of this title (relating to Training).

The provisions of this §12.702 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.703 Training

(a) On-the-job training. Except as provided in §12.706 of this title (relating to Examination) for reexamination, each applicant who does not qualify as a blaster shall have:

(1) received on-the-job training, including practical field experience in blasting operations, from a blaster for 2 out of 3 years preceding the submission of his or her application; and

(2) obtained from the blaster satisfactory evidence of the required on-the-job training.

(b) Training Course.

(1) Except as provided in §12.706 of this title (relating to Examination) for reexamination, each applicant for the issuance of a Commission Blaster Certificate shall, within 2 years prior to application, have completed a training course as follows:

(A) for certificate issuance, the course shall cover the technical aspects of blasting operations and state and federal laws governing the storage, use and transportation of explosives, including the topics specified in §12.704 of this title (relating to Training Courses); or

(B) for certificate reissuance, the course shall cover any significant changes that have occurred in the topics specified in §12.704 of this title (relating to Training Courses) since the applicant last completed a course that was accepted by the Commission for the issuance or reissuance of a Commission blaster certificate. The Commission may waive this requirement if it determines that no significant changes have occurred.

(2) The applicant shall provide satisfactory evidence of the required completed training.

The provisions of this §12.703 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.704 Training Courses

(a) The Commission shall offer or contract for courses of instruction for the purpose of providing training under §§12.700, 12.702, and 12.703, this section, and §§12.705-12.710 of this title (relating to Training, Examination, and Certification of Blasters) to qualified persons, including study of the following:

(1) Explosives.

(A) Selection of the type of explosive to be used;

(B) Determination of the properties of explosives which will produce desired results at an acceptable level of risk; and

(C) Handling, transportation and storage of explosives.

(2) Blast designs.

(A) Geologic and topographic considerations;

(B) Design of blasthole, with critical dimensions;

(C) Pattern design, field layout, and timing of blastholes; and

(D) Field applications.

(3) Loading blastholes.

(A) Priming; and

(B) Boostering.

(4) Initiation systems.

(5) Blasting machines.

(6) Blasting vibrations, airblast and flyrock.

(A) Monitoring techniques; and

(B) Methods to control adverse effects.

(7) Secondary blasting applications.

(8) Current state and federal regulations.

(9) Blasting records.

(10) Blasting schedules.

(11) Pre-blasting surveys.

(A) Availability;

(B) Coverage; and

(C) Use of in-blast design.

(12) Blasting-plan requirements.

(13) Training and certification.

(14) Signs, warning signals, and site control.

(15) Unpredictable hazards.

(A) Lightning;

(B) Stray currents;

(C) Radio waves; and

(D) Misfires.

(b) For the purposes of §§12.700, 12.702, and 12.703, this section, and §§12.705-12.710 of this title (relating to Training, Examination, and Certification of Blasters), the Commission may recognize pertinent training courses provided by other qualified jurisdictions or by accredited agencies or schools. These training courses must provide and require completion of the subjects listed in subsection (a) of this section.

The provisions of this §12.704 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.705 Application

(a) The Surface Mining and Reclamation Division shall make available to persons seeking Commission blaster certification or training an application form and instructions for its completion.

(b) Completed application forms, including required fees and any applicable supporting evidence or other attachments, shall be received by the Director of the Surface Mining and Reclamation Division in accordance with the following

schedules:

(1) for certificate issuance, not less than 60 days before the date on which the applicant desires to take a previously scheduled examination;

(2) for certificate renewal, not less than 60 days before the expiration date of the applicant's current certificate;

(3) for certificate reissuance, not less than 60 days before the date on which the applicant desires to take a previously scheduled examination;

(4) for certificate issuance or renewal under reciprocity, not less than 90 days before the expiration date of the applicant's current certificate issued by another qualified jurisdiction; or

(5) for blaster training courses, not less than 30 days before the first day of a course.

(6) for good cause shown by an applicant, the Commission may consider a waiver of a time schedule required by this subsection, upon the recommendation of the Director of the Surface Mining and Reclamation Division.

(c) (Reserved.)

(d) Upon receiving and reviewing an application, the Director of the Surface Mining and Reclamation Division shall:

(1) notify the applicant of the receipt of the application and any deficiency noted;

(2) notify the applicant that a request for admission to a scheduled examination is granted or denied; and

(3) notify the applicant regarding a failure to qualify for blaster certification under §12.700, §§12.702-12.704, this section, and §§12.706-12.710 of this title (relating to Training, Examination, and Certification of Blasters).

The provisions of this §12.705 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.706 Examination

(a) Each applicant for the issuance or reissuance of a Commission Blaster Certificate shall pass a written examination of the technical aspects of blasting operations and state and federal laws and regulations governing the storage, use, and transportation of explosives.

(1) The examination shall be periodically scheduled and administered by the Surface Mining and Reclamation Division, or by persons or agencies contracted to provide such services for the Commission.

(2) The examination shall, at a minimum, cover the topics specified in §12.704 of this title (relating to Training Courses) and shall include:

(A) objective questions;

(B) blasting log problems; and

(C) initiation-system and delay-sequence problems.

(b) Any person who fails to achieve a satisfactory score on the examination may apply for reexamination by submitting a new application.

(1) No person may take the examination more than 3 times in any 12-month period.

(2) The Commission may reject the pending application of any applicant who fails to take a scheduled examination, except where the applicant establishes good cause.

(3) Any person who fails to achieve a satisfactory score on the examination and submits a new application within 2 years of completing training as provided in §12.703 of this title (relating to Training) shall not be required to repeat the training.

The provisions of this §12.706 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective November 4, 1997, 22 TexReg 10640.

§12.707 Certification

(a) The Commission shall issue a Commission Blaster Certificate to those applicants examined and found to meet the requirements of §12.700, §§12.702-12.706, this section, and §§12.708-12.710 of this title (relating to Training, Examination, and Certification of Blasters) for accepting responsibility for blasting operations in mining operations regulated by the Commission. Blaster certifications shall expire as follows:

(1) certificate issuance--3 years after issue date;

(2) certificate renewal--3 years after the expiration date of the certificate being renewed;

(3) certificate reissuance--3 years after issue date;

(4) certificate replacement--Same expiration date as certificate being replaced; and

(5) certificate issued under reciprocity--Same expiration date as that of the qualified jurisdiction certification for which reciprocity rights are granted by the Commission.

(b) The conditions for maintaining blaster certification shall include:

(1) certified blasters shall not assign or transfer certifications;

(2) certified blasters shall immediately exhibit certifications to any authorized representative of the Commission upon request;

(3) certified blasters shall protect certifications from loss, theft or unauthorized duplication, and immediately report any such occurrences to the Director of the Surface Mining and Reclamation Division;

(4) certified blasters shall not delegate their responsibility for surface mining blasting operations to any individual who is not a certified blaster;

(5) certified blasters shall complete a Commission-administered refresher course at least once every three years;

(6) certified blasters shall notify the Commission in writing within 30 days of any change in address; and

(7) certified blasters shall immediately surrender Commission Blaster Certificates to an authorized representative of the Commission upon notice of suspension or revocation or other good cause.

(c) The Commission, when practicable, following written notice and opportunity for a hearing, may, and upon a finding of willful conduct, shall immediately suspend or revoke the certification of any blaster or take other necessary action for any of the following reasons:

(1) noncompliance with any order of the Commission;

(2) unlawful use in the work place of, or current addiction to, alcohol, narcotics, or other dangerous drugs;

(3) violation of any provision of state, federal or local explosives statutes or regulations; or

(4) providing false information or any misrepresentation of fact to obtain blaster certifications.

(d) If advance notice and opportunity for hearing cannot be provided, an opportunity for hearing shall be provided as soon as practical following the suspension, revocation, or other adverse action.

The provisions of this §12.707 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.708 Recertification

(a) The Commission may require the reexamination, training or other demonstration of competency under §12.700, §§12.702-12.707, this section, and §§12.709 and 12.710 of this title (relating to Training, Examination, and Certification of Blasters) upon a determination pursuant to an investigation of a blasting or blasting-related violation involving a certified blaster.

(b) The Commission may exchange information with other qualified jurisdictions regarding the status of blasters involved in any mining exploration or mining operation regulated by the Commission.

The provisions of this §12.708 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.709 Reciprocity

(a) The Commission may grant a Commission Blaster Certificate to any qualified applicant who demonstrates valid current blaster certification from another qualified jurisdiction.

(b) Any person who holds a valid Commission Blaster Certificate issued under reciprocity may qualify for a subsequent certificate either through reciprocity or by meeting the other applicable requirements of §12.700, §§12.702-12.708, this section, and §12.710 of this title (relating to Training, Examination, and Certification of Blasters).

(c) The conditions for maintaining certification through reciprocity shall be the same as those set out in §12.707 of this title (relating to Certification).

The provisions of this §12.709 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.710 Applicability

(a) Not later than 180 days after the effective date of this section, §12.700, and §§12.702-12.709 of this title (relating to Training, Examination, and Certification of Blasters), each person who is directly responsible for the use of explosives in mining operations regulated by the Commission shall possess a valid Commission Blaster Certificate as required by this chapter (relating to Coal Mining Regulations).

(b) Upon the adoption of this section, §12.700, and §§12.702-12.709 of this title (relating to Training, Examination, and Certification of Blasters) by the Commission, the Director of the Surface Mining and Reclamation Division shall compile a listing from permittees of the names and qualifications of persons directly responsible for the use of explosives in mining operations regulated by the Commission. The purpose of the listing is to facilitate statewide operator compliance with this section, §12.700, and §§12.702-12.709 of this title (relating to Training, Examination, and Certification of Blasters).

(c) The Director of the Surface Mining and Reclamation Division is authorized to consider the feasibility of making the services of this section, §§12.700, and §§12.702-12.709 of this title (relating to Training, Examination, and Certification of Blasters) available at reasonable cost to other state agencies, municipalities, and individuals and industries involved with the use of explosives.

The provisions of this §12.710 adopted to be effective April 7, 1997, 22 TexReg 3093.

SUBCHAPTER R TEXAS ABANDONED MINE LAND RECLAMATION PROGRAM

As in effect on January 6, 2020.

§12.800 Responsibilities

The Commission shall:

(1) participate in the Abandoned Mine Land Reclamation Program through the establishment of the Texas Abandoned Mine Program;

(2) establish the Texas Abandoned Mine Reclamation Fund for use in conducting the Texas Abandoned Mine Program; and

(3) request, receive and administer grant monies for use in this program.

The provisions of this §12.800 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.801 Definitions

The following words and terms, when used in this subchapter (relating to the Texas Abandoned Mine Land Reclamation Program), shall have the following meanings unless the context clearly indicates otherwise:

(1) Abandoned Mine Reclamation Fund or Fund--A special fund established by the United States Treasury for the purpose of accumulating revenues designated for reclamation of abandoned mine lands and other activities authorized by Title IV of the Federal Act.

(2) Director--The Director of the Office of Surface Mining Reclamation and Enforcement, or the Director's representative.

(3) Eligible lands and water--Land and water eligible for reclamation or drainage abatement expenditures which were mined for coal or which were affected by such mining, wastebanks, coal processing, or other coal mining processes and left or abandoned in either an unreclaimed or inadequately reclaimed condition prior to August 3, 1977, and for which there is no continuing reclamation responsibility. Lands and water damaged by coal mining operations after August 3, 1977, and on or before November 5, 1990, may also be eligible for reclamation if they meet the requirements specified in §12.803 of this title (relating to Eligible Coal Lands and Water). Following certification of the completion of all known coal problems, eligible lands and water for noncoal reclamation purposes shall be those sites that meet the requirements specified in §§12.808, 12.809, 12.810, and 12.811 of this title (relating to Eligible Noncoal Lands and Water; Reclamation Priorities for Noncoal Program; Exclusion of Certain Noncoal Reclamation Sites; and Land Acquisition Authority - Noncoal, respectively). For additional eligibility requirements for water projects, see §12.805 of this title (relating to Water Supply Restoration), and for lands affected by remining operations, see Section 404 of the Federal Act.

(4) Emergency--A sudden danger or impairment that presents a high probability of substantial physical harm to the health, safety or general welfare of people before the danger can be abated under normal program operation procedures.

(5) Extreme danger--A condition that could reasonably be expected to cause substantial physical harm to persons, property, or the environment and to which persons or improvements on real property are currently exposed.

(6) Left or abandoned in either an unreclaimed or inadequately reclaimed condition--Lands and water:

(A) which were mined or which were affected by such mining, wastebanks, processing or other mining processes prior to August 3, 1977, or between August 3, 1977 and November 5, 1990, as authorized pursuant to Section

402(g)(4) of the Federal Act, and on which all mining has ceased;

(B) which continue in their present condition to substantially degrade the quality of the environment, prevent or damage the beneficial use of the land or water resources, or endanger the health or safety of the public; and

(C) for which there is no continuing reclamation responsibility under state or federal laws, except as provided in Sections 402(g)(4) and 403(b)(2) of the Federal Act.

(7) OSMRE--The Office of Surface Mining Reclamation and Enforcement.

(8) Permanent facility--Any structure that is built, installed, or established to serve a particular purpose, or any manipulation or modification of the surface that is designed to remain after the reclamation activity is completed, such as a relocated stream channel or diversion ditch.

(9) Project--A delineated area containing one or more abandoned mine land problems. A project may be a group of related reclamation activities with a common objective within a political subdivision of the state or within a logical, geographically defined area, such as a watershed, conservation district, or county planning area.

(10) Reclamation activity--The reclamation, abatement, control, or prevention of adverse effects of past mining.

(11) Secretary--The United States Secretary of the Interior.

(12) State reclamation program--A program established by the state in accordance with this chapter for reclamation of lands and water adversely affected by past mining, including the reclamation plan and annual applications for grants.

(13) Texas Abandoned Mine Reclamation Fund or State Fund--A separate account established by the state for the purpose of accounting for moneys granted by the Director under an approved state reclamation program and other moneys authorized by these regulations to be deposited in the Fund.

The provisions of this §12.801 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective August 17, 1999, 24 TexReg 6283; amended to be effective December 9, 2019, 44 TexReg 7534.

§12.802 Texas Abandoned Mine Reclamation Fund

Revenue to the Fund shall include:

(1) amounts granted to the state by OSMRE for the purpose of conducting the Texas Abandoned Mine Reclamation Plan;

(2) moneys collected by the state from charges for uses of land acquired or reclaimed with moneys from the Fund;

(3) moneys recovered by the state through the satisfaction of liens filed against privately owned lands reclaimed with moneys from the Fund;

(4) moneys recovered by the state from the sale of lands acquired with moneys from the Fund; and

(5) such other moneys as the state decides should be deposited in the Fund for use in carrying out the Texas Abandoned Mine Reclamation Program.

The provisions of this §12.802 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective December 9, 2019, 44 TexReg 7534.

§12.803 Eligible Coal Lands and Water

(a) Coal mined lands and associated waters shall be eligible for reclamation activities if:

(1) they were mined for coal or affected by coal mining processes;

(2) they were mined prior to August 3, 1977, and left or abandoned in either an unreclaimed or inadequately reclaimed condition;

(3) there is no continuing responsibility for reclamation by the operator, permittee, or agent of the permittee under statutes of the state or federal government, or the state as a result of bond forfeiture. Bond forfeiture shall render lands or water ineligible only if the amount forfeited is sufficient to pay the total cost of the necessary reclamation. In cases where the forfeited bond is insufficient to pay the total cost of reclamation, additional moneys from the Texas Abandoned Mine Land Fund or any prior balance replacement funds may be used.

(b) Notwithstanding subsection (a) of this section, coal lands and waters in the state damaged and abandoned after August 3, 1977, by coal mining processes shall also be eligible for funding if the Secretary finds in writing that:

(1) they were mined for coal or affected by coal mining processes; and

(2) the mining occurred and the site was left in either an unreclaimed or inadequately reclaimed condition between August 4, 1977, and either:

(A) the date on which the Secretary approved the state regulatory program pursuant to Section 503 of the Federal Act, and that any funds for reclamation or abatement that are available pursuant to a bond or other form of financial guarantee or from any other source are not sufficient to provide for adequate reclamation or abatement at the site; or

(B) November 5, 1990, and that the surety of the mining operator became insolvent during such period, and that, as of November 5, 1990, funds immediately available from proceedings relating to such insolvency or from any financial guarantee or other source are not sufficient to provide for adequate reclamation or abatement at the site; and

(3) the site qualifies as a priority 1 or 2 site pursuant to Section 403(a)(1) and (2) of the Federal Act. Priority shall be given to those sites that are in the immediate vicinity of a residential area or that have an adverse economic impact upon a community.

(c) The Commission may expend funds made available under paragraphs 402(g)(1) and (5) of the Federal Act for reclamation and abatement of any site eligible under subsection (b) of this section if the Commission, with the concurrence of the Secretary, makes the findings required in subsection (b) of this section and the Commission determines that the reclamation priority of the site is the same or more urgent than the reclamation priority for the lands and water eligible pursuant to subsection (a) of this section that qualify as a priority 1 or 2 site under Section 403(a) of the Federal Act.

(d) With respect to lands eligible pursuant to subsection (b) or (c) of this section, moneys available from sources outside the Abandoned Mine Reclamation Fund or that are ultimately recovered from responsible parties shall either be used to offset the cost of the reclamation or transferred to the Abandoned Mine Reclamation Fund if not required for further reclamation activities at the permitted site.

(e) If reclamation of a site covered by an interim or permanent program permit is carried out under the Abandoned Mine Land Program, the permittee of the site shall reimburse the Abandoned Mine Reclamation Fund for the cost of reclamation that is in excess of any bond forfeited to ensure reclamation. Neither the Secretary nor the

Commission performing reclamation under subsection (b) or (c) of this section shall be held liable for any violations of any performance standards or reclamation requirements specified in Title V of the Federal Act nor shall a reclamation activity undertaken on such lands or waters be held to any standards set forth in Title V of the Federal Act or Subchapter K of the State Act.

(f) Surface coal mining operations on lands eligible for remining pursuant to Section 404 of the Federal Act shall not affect the eligibility of such lands for reclamation activities after the release of the bonds or deposits posted by any such operation as provided by §12.312 and §12.313 of this title (relating to Procedure for Seeking Release of Performance Bond, and Criteria and Schedule for Release of Performance Bond). If the bond or deposit for a surface coal mining operation on lands eligible for remining is forfeited, funds available under this title may be used if the amount of such bond or deposit is not sufficient to provide for adequate reclamation or abatement.

The provisions of this §12.803 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective August 17, 1999, 24 TexReg 6283; amended to be effective December 9, 2019, 44 TexReg 7534.

§12.804 Reclamation Objectives and Priorities

(a) Reclamation projects should be accomplished in accordance with OSMRE's "Final Guidelines for Reclamation Programs and Projects" (66 *Federal Register* 31250, June 11, 2001).

(b) Reclamation project expenditures shall reflect the priorities of Section 403(a) of the Federal Act in the order stated:

(1) Priority 1: The protection of public health, safety, and property from extreme danger of adverse effects of coal mining practices, including the restoration of land and water resources and the environment that:

(A) have been degraded by the adverse effects of coal mining practices; and

(B) are adjacent to a site that has been or will be addressed to protect the public health, safety, and property from extreme danger of adverse effects of coal mining practices.

(2) Priority 2: The protection of public health and safety from adverse effects of coal mining practices, including the restoration of land and water resources and the environment that:

(A) have been degraded by the adverse effects of coal mining practices; and

(B) are adjacent to a site that has been or will be addressed to protect the public health and safety from adverse effects of coal mining practices.

(3) Priority 3: The restoration of land and water resources and the environment previously degraded by adverse effects of coal mining practices, including measures for the conservation and development of soil, water (excluding channelization), woodland, fish and wildlife, recreation resources, and agricultural productivity. Priority 3 land and water resources that are geographically contiguous with existing or remediated Priority 1 or 2 problems will be considered adjacent under paragraphs (1)(B) or (2)(B) of this subsection.

(c) Generally, projects lower than a Priority 2 should not be undertaken until all known higher priority coal projects either have been accomplished, are in the process of being reclaimed, or have been approved for funding by the Secretary, except in those instances where such lower priority projects may be undertaken in conjunction with a Priority 1 or 2 site in accordance with OSMRE's "Final Guidelines for Reclamation Programs and Projects."

The provisions of this §12.804 adopted to be effective August 17, 1999, 24 TexReg 6283; amended to be effective December 9, 2019, 44 TexReg 7534.

§12.805 Utilities and Other Facilities

(a) Water supply restoration projects are those that protect, repair, replace, construct, or enhance facilities related to water supplies, including water distribution facilities and treatment plants that have been adversely affected by coal mining practices. If the adverse effect on water supplies referred to in this section occurred both prior to and after August 3, 1977, the project shall remain eligible, notwithstanding the criteria specified in §12.803 of this title (relating to Eligible Coal Lands and Water), if the Commission finds in writing, as part of its eligibility opinion, that such adverse effects are due predominately to effects of mining processes undertaken and abandoned prior to August 3, 1977.

(b) Enhancement of facilities or utilities under this section shall include upgrading necessary to meet any local, state, or federal public health or safety requirement. Enhancement shall not include any service area expansion of a utility or facility not necessary to address a specific abandoned mine land problem.

The provisions of this §12.805 adopted to be effective August 17, 1999, 24 TexReg 6283; amended to be effective December 9, 2019, 44 TexReg 7534.

§12.806 Limited Liability

The Commission shall not be liable under any provision of federal law for any costs or damages as a result of action taken or omitted in the course of carrying out an approved Commission abandoned mine reclamation plan. This section shall not preclude liability for costs or damages as a result of gross negligence or intentional misconduct by the Commission. For purposes of this section, reckless, willful, or wanton misconduct shall constitute gross negligence or intentional misconduct.

The provisions of this §12.806 adopted to be effective August 17, 1999, 24 TexReg 6283; amended to be effective December 9, 2019, 44 TexReg 7534 .

§12.807 Contractor Responsibility

To receive abandoned mine land (AML) funds, every successful bidder for an AML contract must be eligible under §12.215 of this title (relating to Review of Permit Applications) at the time of contract award to receive a permit or conditional permit to conduct surface coal mining operations. Bidder eligibility must be confirmed by OSMRE's automated Applicant/Violator System for each contract to be awarded.

The provisions of this §12.807 adopted to be effective August 17, 1999, 24 TexReg 6283; amended to be effective December 9, 2019, 44 TexReg 7534.

§12.808 Eligible Noncoal Lands and Water

(a) Following certification by the Commission of the completion of all known coal projects and the Director's concurrence in such certification, eligible noncoal lands, waters, and facilities shall be those:

(1) which were mined or processed for minerals or which

were affected by such mining or processing, and abandoned or left in an inadequate reclamation status prior to August 3, 1977; and

(2) for which there is no continuing reclamation responsibility under state or other federal laws.

(b) If eligible coal problems are found or occur after certification, the Commission shall submit to OSMRE a plan that describes the approach and funds that will be used to address those problems in a timely manner. Any coal projects shall be subject to the coal provisions specified in Sections 401 through 410 of the Federal Act.

The provisions of this §12.808 adopted to be effective August 17, 1999, 24 TexReg 6283; amended to be effective December 9, 2019, 44 TexReg 7534.

§12.809 Reclamation Priorities for Noncoal Program

(a) This section applies to reclamation projects involving the restoration of lands and water adversely affected by past mineral mining; projects involving the protection, repair, replacement, construction, or enhancement of utilities (such as those relating to water supply, roads, and other such facilities serving the public adversely affected by mineral mining and processing practices); and the construction of public facilities in communities impacted by coal or other mineral mining and processing practices.

(b) Following certification by the Commission of the completion of all known coal projects, the projects and construction of public facilities identified in subsection (a) of this section shall reflect the following priorities in the order stated:

(1) the protection of public health, safety, general welfare, and property from the extreme danger of adverse effects of mineral mining and processing practices;

(2) the protection of public health, safety, and general welfare from the adverse effects of mineral mining and processing practices; and

(3) the restoration of land and water resources and the environment previously degraded by the adverse effects of mineral mining and processing practices.

(c) Enhancement of facilities or utilities shall include upgrading necessary to meet local, state, or federal public health or safety requirements. Enhancement shall not include any service area expansion of a utility or facility not necessary to address a specific abandoned mine land problem.

(d) Notwithstanding subsection (a) of this section, if the governor determines that there is a need for activities or construction of specific public facilities related to the coal or minerals industry, and the governor or the Commission at the governor's request submits a grant application as specified in subsection (e) of this section and the Director concurs with the application submitted under subsection (e) of this section, the Director may grant funds made available under Section 402(g)(1) of the Federal Act, 30 U.S.C. 1232, to carry out such activities or construction.

(e) To qualify for funding pursuant to the authority in subsection (d) of this section, the governor, or the Commission at the governor's request, must submit a grant application that specifically sets forth:

(1) the need or urgency for the activity or the construction of the public facility;

(2) the expected impact the project will have on the coal or minerals industry in the state;

(3) the availability of funding from other sources and, if other funding is provided, its percentage of the total costs involved;

(4) documentation from other local, state, and federal agencies with oversight for such utilities or facilities regarding what funding resources they have available and why this specific project is not being fully funded by those agencies;

(5) the impact on the state, the public, and the minerals industry if the activity or facility is not funded;

(6) the reason why this project should be selected before a priority project relating to the protection of the public health and safety or the environment from the damages caused by past mining activities; and

(7) an analysis and review of the procedures used by the Commission to notify and involve the public in this funding request and a copy of all comments received and their resolution by the Commission.

The provisions of this §12.809 adopted to be effective August 17, 1999, 24 TexReg 6283; amended to be effective December 9, 2019, 44 TexReg 7534.

§12.810 Exclusion of Certain Noncoal Reclamation Sites

Money from the Fund shall not be used for the reclamation of sites and areas designated for remedial action pursuant to the Uranium Mill Tailings Radiation Control Act of 1978 (42 U.S.C. 7901, et seq.) or that have been listed for remedial action pursuant to the Comprehensive Environmental Response Compensation and Liability Act of 1980 (42 U.S.C. 9601, et seq.).

The provisions of this §12.810 adopted to be effective August 17, 1999, 24 TexReg 6283.

§12.811 Land Acquisition Authority - Noncoal

The requirements specified in §§12.813, 12.814, and 12.818 - 12.823 of this title (relating to Written Consent for Entry; Entry and Consent to Reclaim; Entry for Emergency Reclamation; Land Eligible for Acquisition; Procedures for Acquisition; Acceptance of Gifts of Land; Management of Acquired Land; and Disposition of Reclaimed Lands, respectively) shall apply to the Commission's noncoal program except that, for purposes of this section, the references to coal shall not apply. In lieu of the term coal, the word noncoal should be used.

The provisions of this §12.811 adopted to be effective August 17, 1999, 24 TexReg 6283; amended to be effective December 9, 2019, 44 TexReg 7534.

§12.812 Lien Requirements

The lien requirements in §§12.815 - 12.817 of this title (relating to Appraisals; Liens; and Satisfaction of Liens, respectively), shall apply to the Commission's noncoal reclamation program under §12.808 of this title (relating to Eligible Noncoal Lands and Water), except that for purposes of this section, references made to coal shall not apply. In lieu of the term coal, the word noncoal should be used.

The provisions of this §12.812 adopted to be effective August 17, 1999, 24 TexReg 6283; amended to be effective December 9, 2019, 44 TexReg 7534.

§12.813 Written Consent for Entry

Written consent from the owner of record and lessee, or their authorized agents, is the preferred means for obtaining agreements to enter lands in order to carry out reclamation activities. Nonconsensual entry by exercise of the police power shall be undertaken only after reasonable efforts have been made to obtain written consent.

The provisions of this §12.813 adopted to be effective August 17, 1999, 24 TexReg 6283.

§12.814 Entry and Consent to Reclaim

(a) The Commission, its agents, employees, or contractors may enter land to perform reclamation activities or conduct studies or exploratory work to determine the existence of the adverse effects of past coal mining if consent from the owner is obtained pursuant to §12.813 of this title (relating to Written Consent for Entry).

(b) The Commission shall be entitled to enter any property to conduct studies or exploratory work to determine:

(1) the existence of adverse effects of past coal mining practices; and

(2) the feasibility of restoration, reclamation, abatement, control, or prevention of those adverse effects.

(c) The Commission shall be entitled to enter property adversely affected by past coal mining practices or other property necessary to have access to that property to perform the activities necessary or expedient to restore, reclaim, abate, control, or prevent the adverse effects if the Commission:

(1) makes a finding of fact that:

(A) land or water resources have been adversely affected by past coal mining practices;

(B) the adverse effects are at a stage at which action to restore, reclaim, abate, control, or prevent the adverse effects of past coal mining practices should be taken to protect the public interest; and

(C) the owners of the land or water resources where entry must be made to restore, reclaim, abate, control, or prevent the adverse effects of past coal mining practices either are not known or readily available or will not permit this state or a political subdivision to enter the property to restore, reclaim, abate, control, or prevent the adverse effects of past coal mining practices; and

(2) gives written notice of intent to enter at least 30 days prior to entering the property:

(A) to the owner, if known, by certified mail, return receipt requested. A copy of the findings required under paragraph (1) shall be included with the notice; or

(B) if the owner is not known, or if the current mailing address of the owner is not known, notice shall be posted in one or more places on the property to be entered where the notice is readily visible to the public and advertised once in a newspaper of general circulation in the locality in which the land is located. The notice posted on the property and advertised in the newspaper shall include a statement of where the findings required under paragraph (1) of this subsection may be inspected or obtained.

The provisions of this §12.814 adopted to be effective August 17, 1999, 24 TexReg 6283; amended to be effective December 9, 2019, 44 TexReg 7534.

§12.815 Appraisals

(a) A notarized appraisal of the fair market value of private land to be reclaimed shall be obtained from an independent professional appraiser except as noted in subsection (d) of this section. Such appraisal shall meet the quality of appraisal practices found in the Uniform Appraisal Standards for Federal Land Acquisitions. The appraisal shall be obtained before any reclamation activities are started, unless the work must start without delay to abate an emergency. The appraisal shall state the estimated fair market value of the land as adversely affected by past mining and the estimated fair market value of the property as reclaimed. Where an emergency exists the appraisal shall be completed at the earliest practical time and before related nonemergency work is commenced.

(b) An appraisal of the fair market value of all land reclaimed shall be obtained after all reclamation activities have been completed. The appraisal shall comply with subsection (a) of this section and shall state the market value of the land reclaimed.

(c) The landowner shall receive a statement of the increase in market value, an itemized statement of reclamation expenses, and notices that a lien will or will not be filed against the property.

(d) Appraisals for privately owned land described in §12.816 of this title (relating to Liens) may be obtained from either an independent or staff professional appraiser.

The provisions of this §12.815 adopted to be effective April 7, 1997, 22 TexReg 3093; amended to be effective August 17, 1999, 24 TexReg 6283; amended to be effective December 9, 2019, 44 TexReg 7534.

§12.816 Liens

(a) Not later than six months after the date any projects to reclaim privately owned land are completed, the Commission:

(1) shall itemize the money spent; and

(2) may file a statement of the money spent with the clerk of the county in which the land lies, together with a notarized appraisal by an independent appraiser of the value of the land before the restoration, reclamation, abatement, control, or prevention of the adverse effects of past mining practices if the money spent will result in a significant increase in property value. However, prior to the time of the actual filing of a lien, the landowner shall be notified of the amount of the proposed lien and shall be allowed a reasonable time to repay that amount instead of allowing the lien to be filed against the property involved.

(b) The statement shall be a lien on the land second only to a property tax lien. The amount of the lien shall not exceed the amount determined by either of two appraisals, as provided under §12.815 of this title (relating to Appraisals), to be the increase in the market value of the land as a result of the restoration, reclamation, abatement, control, or prevention of the adverse effects of past mining practices.

(c) A lien shall not be filed under this section against the property of a person who did not consent to, participate in, or exercise control over the mining operation that necessitated the reclamation performed under this chapter.

(d) Not later than the 60th day after the date the lien is filed, an affected landowner may petition the Commission for a hearing on the amount of the lien. The hearing and any appeal shall be conducted pursuant to Chapter 2001, Government Code.

(e) The Commission may waive the lien if:

(1) the cost of filing it, including indirect costs, exceeds the increase in fair market value as a result of reclamation activities; or

(2) the reclamation work performed on private land primarily benefits health, safety, and environmental values of the grantee's community or area in which the land is located, or if reclamation is necessitated by an unforeseen occurrence and the work performed to restore the land will not result in a significant increase in the market value of the land as it existed immediately before the occurrence.

The provisions of this §12.816 adopted to be effective August

17, 1999, 24 TexReg 6283; amended to be effective November 12, 2007, 32 TexReg 8124; amended to be effective December 9, 2019, 44 TexReg 7534.

§12.817 Satisfaction of Liens

(a) A lien placed on private property shall be satisfied, to the extent of the value of the consideration received, at the time of transfer of ownership. Any unsatisfied portion shall remain as a lien on the property and shall be satisfied in accordance with this section. Testate and intestate transfers are excluded from this rule.

(b) The Commission shall maintain or renew liens from time to time as may be required.

(c) Moneys derived from the satisfaction of liens established under this subchapter (relating to Texas Abandoned Mine Land Reclamation Program) shall be deposited in the Texas Abandoned Mine Reclamation Fund.

The provisions of this §12.817 adopted to be effective April 7, 1997, 22 TexReg 3093.

§12.818 Entry for Emergency Reclamation

(a) The Commission may enter land where an emergency exists and other land necessary to have access to that land to:

(1) restore, reclaim, abate, control, or prevent the adverse effects of coal mining practices; and

(2) perform activities necessary or expedient to protect the public health, safety, or general welfare.

(b) Entry under this section shall be considered an exercise of the police power and not an act of condemnation of property or trespass.

The provisions of this §12.818 adopted to be effective August 17, 1999, 24 TexReg 6283; amended to be effective December 9, 2019, 44 TexReg 7534.

§12.819 Land Eligible for Acquisition

(a) This state may acquire by purchase, donation, or condemnation land that is adversely affected by past coal mining practices if:

(1) it is in the public interest; and

(2) the Commission determines and makes written findings that:

(A) acquiring the land is necessary for successful reclamation;

(B) the acquired land, after restoration, reclamation, abatement, control, or prevention of the adverse effects of past coal mining practices, will:

(i) serve recreational and historical purposes;

(ii) serve conservation and reclamation purposes; or

(iii) provide open space benefits; and

(C) permanent facilities such as a treatment plant or a relocated stream channel will be constructed on the land for the restoration, reclamation, abatement, control, or prevention of the adverse effects of past coal mining practices or public ownership is desirable to meet emergency situations and prevent recurrences of the adverse effects of past coal mining practices.

(b) OSMRE shall approve the acquisition by purchase or condemnation in advance. The Commission shall acquire only such interests in land under this subchapter as are necessary for the reclamation work planned or the postreclamation use of the land. Interests in improvements on the land, mineral rights, or associated water rights may be acquired if:

(1) such interests are necessary for the reclamation work planned or for the postreclamation use of the land; and

(2) adequate written assurances cannot be obtained from the owner of the severed interest that future use will not be in conflict with the reclamation to be accomplished.

(c) If approved in advance by OSMRE, this state may also acquire coal refuse disposal sites, including the coal refuse, with moneys from the Texas Abandoned Mine Reclamation Fund and with prior balance replacement funds and certified in lieu funds. Before the approval of the acquisition, the Commission shall make a written finding that the acquisition is necessary for successful reclamation and will serve the purposes of the reclamation program.

The provisions of this §12.819 adopted to be effective August 17, 1999, 24 TexReg 6283; amended to be effective December 9, 2019, 44 TexReg 7534.

§12.820 Procedures for Acquisition

(a) An appraisal of the fair market value of all land or interest in land to be acquired shall be obtained by the Commission. The appraisal shall state the fair market value of the land as adversely affected by past mining.

(b) When practical, acquisition shall be by purchase from a willing seller. The amount paid for land or interests in land acquired shall reflect the fair market value of the land or interests in land as adversely affected by past mining.

(c) When necessary, land or interests in land may be acquired by condemnation. Condemnation procedures shall not be started until all reasonable efforts have been made to purchase the land or interests in lands from a willing seller.

(d) The Commission, when acquiring land under this title, shall comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601 et seq., and 41 CFR Part 114-50.

The provisions of this §12.820 adopted to be effective August 17, 1999, 24 TexReg 6283; amended to be effective December 9, 2019, 44 TexReg 7534.

§12.821 Acceptance of Gifts of Land

(a) The Commission under an approved reclamation plan may accept donations of title to land or interests in land if the land proposed for donation meets the requirements set out in §12.819 of this title (relating to Land Eligible for Acquisition).

(b) Offers to make a gift of land or interest in land to the Commission shall be in writing and shall include:

(1) a statement of the interest which is being offered;

(2) a legal description of the land and a description of any improvements on it;

(3) a description of any limitations on the title or conditions as to the use or disposition of the land existing or to be imposed by the donor;

(4) a statement that:

(A) the donor is the record owner of the interest being offered;

(B) the interest offered is free and clear of all encumbrances except as clearly stated in the offer;

(C) there are no adverse claims against the interest offered;

(D) there are no unredeemed tax deeds outstanding against the interest offered; and

(E) there is no continuing responsibility by the operator under state or federal statutory law for reclamation; and

(5) an itemization of any unpaid taxes or assessments levied, assessed or due which could operate as a lien on the interest offered.

(c) If the offer is accepted, a deed of conveyance shall be executed, acknowledged, and recorded. The deed shall state that the conveyance is made "as a gift under the Texas Surface Coal Mining and Reclamation Act." Title to donated land shall be in the name of the State of Texas.
The provisions of this §12.821 adopted to be effective August 17, 1999, 24 TexReg 6283; amended to be effective December 9, 2019, 44 TexReg 7534.

§12.822 Management of Acquired Land

Land acquired under this subchapter may be used for any lawful purpose that is consistent with the necessary reclamation activities. Procedures for collection of user charges or the waiver of such charges by the Commission shall provide that all user fees collected shall be deposited in the Texas Abandoned Mine Reclamation Fund.
The provisions of this §12.822 adopted to be effective August 17, 1999, 24 TexReg 6283; amended to be effective December 9, 2019, 44 TexReg 7534.

§12.823 Disposition of Reclaimed Lands

(a) If land acquired under §12.819 of this title (relating to Land Eligible for Acquisition) is considered suitable for industrial, commercial, residential, or recreational development, this state may sell the land by public sale under a system of competitive bidding at not less than fair market value and under any rules adopted to ensure that the land is put to proper use consistent with local plans, if any, as determined by the Commission.

(b) The land may be sold only when authorized by the Secretary of the Interior if federal money was involved in the acquisition of the land to be sold.

(c) The Commission may transfer administrative responsibility for land acquired under this subchapter (relating to Texas Abandoned Mine Land Reclamation Program) to any agency or political subdivision of the state with or without cost to that agency. The agreement, including amendments, under which a transfer is made shall specify:

(1) the purposes for which the land may be used consistent with the authorization under which the land was acquired; and

(2) that the administrative responsibility for the land shall revert to the Commission if, at any time in the future, the land is not used for the purposes specified.

(d) The Commission, after appropriate public notice and on request, shall hold a public hearing in the county or counties in which land acquired under §12.819 of this title is located. Prior to the disposition of any land acquired under this subchapter, the Commission shall publish a notice of the proposed land disposition.

(e) The hearing shall be held at a time that gives residents and local governments maximum opportunity to participate in the decision about the use or disposition of the land after restoration, reclamation, abatement, control, or prevention of the adverse effects of past coal mining practices.

(f) All moneys received from disposal of land under this title shall be returned to OSMRE pursuant to 30 CFR §879.15.
The provisions of this §12.823 adopted to be effective August 17, 1999, 24 TexReg 6283; amended to be effective December 9, 2019, 44 TexReg 7534.