

TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 1. GENERAL LAND OFFICE

CHAPTER 15. COASTAL AREA PLANNING

SUBCHAPTER A. MANAGEMENT OF THE BEACH/DUNE SYSTEM

31 TAC §15.33

The General Land Office (GLO) adopts amendments to 31 TAC §15.33 relating to Certification Status of Nueces County Dune Protection and Beach Access Plan (Plan) with changes to the text as proposed in the November 10, 2006, issue of the Texas Register (31 TexReg 9207). The changes to the text as proposed add new subsections (h) through (j) to address clarifications provided by Nueces County to address in part some of the public comments received concerning the Plan amendments.

The GLO adopts amendments to 31 TAC §15.33 to the certification status of the Plan, adopted on August 25, 1995, and amended by order of the Commissioners' Court of Nueces County, Texas (County), on October 23, 1996 (1996 Plan). The amendments to 31 TAC §15.33 add a new subsection (f) to certify as consistent with state law the amendments to the Nueces County Plan that were adopted by the Nueces County Commissioners' Court on December 7, 2005 (2005 Plan Amendments). In addition, a new subsection (g) is added to certify as consistent with state law a variance from the requirements of 31 TAC § 15.6(f)(3) in the County's Plan that allows a permittee to alter or pave the ground in the area between 350 feet and 200 feet landward of the vegetation line for recreational amenities such as pools separate from habitable structures, so long as residential or commercial structures are located at least 350 feet landward from the line of vegetation and the applicant demonstrates that every attempt has been made to minimize the use of impervious surfaces in the area between 350 feet and 200 feet landward of the vegetation line. New subsection (h) establishes a rebuttable presumption that the permittee has followed the mitigation sequence requirements in 31 TAC § 15.4(f) for avoidance and minimization of effects on dunes and dune vegetation, if the applicant complies with the special erosion and flood protection requirements for dune protection permits specified in subsection (g). New subsection (i) provides that the special erosion and flood protection requirements specified in subsection (g) do not apply to a previously platted subdivision lot that was the subject of a prior dune protection permit, or that was part of a master planned development, the plans for which were previously approved and adopted by the Commissioners' Court, provided that the construction authorized by a new permit is consistent with the prior permit or master plan. Finally, new subsection (j) provides that the special erosion and flood protection requirements specified in subsection (g) shall not apply to areas within the jurisdiction of the City of Port Aransas.

The 1996 Plan may be viewed on the [County's web site](#) Copies of the local government dune protection and beach access plan and any amendments to the Plan are

available from Nueces County Department of Public Works, 901 Leopard St., Suite 103, Corpus Christi, Texas 78401-3697, phone number (361) 888-0490, and from the General Land Office's Archives Division, Texas General Land Office, P.O. Box 12873, Austin, TX 78711-2873, phone number (512) 463-5277.

BACKGROUND

Pursuant to the Open Beaches Act (Texas Natural Resources Code, Chapter 61), the Dune Protection Act (Texas Natural Resources Code, Chapter 63), and the Beach/Dune Rules (31 TAC §§ 15.1 through 15.12, 15.21 through 15.36), a local government with jurisdiction over Gulf Coast beaches must submit its dune protection and beach access plan and any amendments to such a plan to the GLO for certification. 31 TAC §15.3(o). The GLO reviews a local beach access and dune protection plan and, if appropriate, certifies that the plan is consistent with state law by adoption or amendment of a rule as authorized in Texas Natural Resources Code §§ 61.011(d)(5), 61.015(b), and 63.054(c). The certification by rule reflects the state's approval of the plan, but the text of the plan is not adopted by the GLO as provided by 31 TAC §15.3(o)(4).

Nueces County is a coastal county consisting of areas bordering Redfish Bay, Corpus Christi Bay, and the Laguna Madre. The County also borders the Gulf of Mexico to the southeast, extending from the southernmost boundary of Aransas County south to the northernmost boundary of Kleberg County. The County includes barrier islands consisting of a portion of North Padre Island accessible from the east via the John F. Kennedy Causeway (Park Road 22) and Mustang Island, which is accessible from the east via ferry at Port Aransas.

The Gulf beaches and adjacent areas governed by the Plan are those unincorporated areas within the County and the Gulf beaches within the corporate limits of the City of Corpus Christi with respect to administration of the Dune Protection Act. The County has delegated authority to the City of Port Aransas for administration of the Dune Protection Act pursuant to Texas Natural Resources Code § 63.011(a), but has not delegated such authority to the City of Corpus Christi. With respect to administration of the Open Beaches Act, the Gulf beaches within the corporate limits of the City of Corpus Christi are governed by the City of Corpus Christi Dune Protection and Beach Access Plan (City's Plan), certified as consistent with state law in 31 TAC §15.31. The Gulf beaches within the corporate limits of the City of Port Aransas are governed by the City of Port Aransas Dune Protection and Beach Access Plan, certified as consistent with state law in 31 TAC §15.24.

THE 2005 NUECES COUNTY PLAN AMENDMENTS

On December 7, 2005, the Commissioners' Court of Nueces County adopted amendments to the 1996 Plan and submitted those amendments to the GLO with a request for certification. The 2005 Plan Amendments included, among other changes, amendments relating to the Designation of Access Ways, Parking Areas, and Beaches Closed to Motor Vehicles. A detailed designation of the beach access ways can be found

in Section VI(B)(1) of the Plan as amended. It also included amended provisions concerning dune protection permit application fees, provisions establishing a building set-back line, amendments to traffic regulations, and changes in criminal penalties for prohibitions against littering.

The approved changes to Section II (J) of the Plan allow the County Commissioners' Court to establish reasonable fees for dune protection permit applications. The amendment removes language that established the specific amounts for the fees in the Plan. This proposed plan amendment is consistent with state law. Texas Natural Resources Code § 63.053 specifically authorizes the commissioners' court to require a reasonable fee to accompany an application for a dune protection permit. Review and approval by the GLO of the reasonableness of fees charged for dune protection permit applications is not required by the Dune Protection Act or the Beach/Dune Rules.

The County approved changes to Section VII of its Plan relating to Beach Traffic Orders to provide that traffic regulations adopted in the Plan apply only to Gulf beaches within County parks and County property. This approved plan amendment is consistent with state law. Texas Natural Resources Code § 61.122(a) specifically authorizes the commissioners' court of a county bordering on the Gulf of Mexico or its tidewater limits, to regulate motor vehicle traffic on any beach within the boundaries of the county. The limitation of traffic regulations to County-owned parks and property does not impair the existing right of the public to use and have access to and from the public beach.

The County adopted changes to Section XI of its Plan to increase the penalty for violation of the prohibition against littering in Section VI (F) of the Plan by doubling the fines. For a first offense, a fine of \$100 to \$200 is authorized. For a second offense, a fine of \$200 to \$400 is authorized. For a third or subsequent offense, a fine of \$400 to \$1,000 is authorized. This approved plan amendment is consistent with state law. Texas Natural Resources Code § 61.122(a) specifically authorizes the commissioners' court of a county bordering on the Gulf of Mexico or its tidewater limits, to prohibit littering of any beach within the boundaries of the county and to define the term "littering."

The County also adopted changes to Section III (I) of the Plan concerning General Erosion and Flood Protection Requirements. Specifically, the County proposed to add new subsection "i" to require residential and commercial structures permitted after May, 2000, to be located at least 350 feet landward of the vegetation line unless no practicable development alternatives are possible. The amendment also added new subsection "j" to restrict development permitted after May, 2000, in the area between 350 feet and 200 feet landward of the vegetation line to recreational amenities such as pools and picnic areas. In any case, applicants must demonstrate that every attempt has been made to minimize use of impervious surfaces in this zone.

The new requirement that residential and commercial structures be located at least 350 feet landward of the line of vegetation imposes a stricter standard than that required by the Open Beaches Act (OBA), Texas Natural Resources Code §§ 61.001 – 61.026; the Dune Protection Act (DPA), Texas Natural Resources Code §§ 63.001 – 63.181; and the

Beach/Dune Rules. Local governments are permitted to adopt standards that meet or exceed the requirements of state law. Therefore, the provisions of new subsection “i” are certified as consistent with the OBA, the DPA, and the Beach/Dune Rules.

However, § 15.6(f)(3) of the Beach/Dune Rules concerning construction in eroding areas allows a permittee to alter or pave only the ground within the footprint of the habitable structure only if the alteration or paving will be entirely undertaken, constructed, and located landward of 200 feet from the line or vegetation or landward of an eroding area boundary established in the local beach/dune plan. The definition of “habitable structure perimeter or footprint” at § 15.2(37) of the Beach/Dune Rules specifically excludes ground-level paving, landscaping, open recreational facilities (for example pools and tennis courts), or other similar features. To the extent that new subsection “j” allows a permittee in an eroding area to alter or pave the ground in the area between 350 feet and 200 feet landward of the vegetation line for recreational amenities such as pools and picnic tables outside the footprint of a habitable structure, it is not consistent with § 15.6(f)(3) of the Beach/Dune Rules.

VARIANCE

A local government requesting certification of a plan or plan amendment that includes a variance of any requirement or prohibition in the GLO’s Beach/Dune Rules is required by 31 TAC §15.3(o)(6) to submit to the GLO a reasoned justification demonstrating how the variance provides equal or better protection of dunes, dune vegetation, and public access to and use of the public beach than is provided by the Beach/Dune Rules. <p>The GLO conducted several field inspections of critical dune areas in the County and considered the Memorandum of Response dated July 26, 2006, from Nueces County in support of its 2005 Plan Amendment authorizing the construction of recreational amenities separate from habitable structures between 350 feet and 200 feet landward of the vegetation line. The reasoned justification submitted by the County suggests that it provides an equal or better level of protection of dunes, dune vegetation, and public access to and use of the beach in that: (1) the County has in place a more stringent standard, 350 feet landward of the line of vegetation for all construction, than is mandated by the Beach/Dune Rules; (2) much of the construction that would be allowed seaward of the 350’ line are small structures such as pools, decks and gazebos; (3) each applicant would be evaluated on a case-by-case basis and would have to demonstrate an attempt to avoid or minimize the amount of impervious surface, thereby minimizing impacts to critical dunes, dune vegetation and dune hydrology; (4) most pools and back yard amenities would have some type of irrigation system to encourage vegetative growth thereby reducing maintenance from wind blown sand; and (5) these types of allowable structures would not be exempt from mitigation requirements. The primary dune complex on Mustang and North Padre Islands extends as far landward as 350 feet from the line of vegetation, and Nueces County represented that the protection of the primary dune complex is critical to the success of their dune protection efforts.

The GLO also considered action by the County on April 4, 2007, approving the recommendations of the Nueces County Beach Management Advisory Committee contained in a memorandum dated March 29, 2007, pursuant to a request by the GLO for clarifications responding to public comments regarding application of the special erosion and flood protection requirements. The memorandum approved by the County provides as follows:

“(1) Due to decades-old development of Mustang and North Padre Islands, some lots have been previously platted and have received a dune permit or master plan authorization to develop. The Committee has continuously expressed its intent to exempt previously platted subdivision lots that were the subject of a previous dune permit or master plan development from the 350 rule. So far as the future development remains consistent with the prior permit or master plan adopted by the Commissioners Court, the Committee confirms that this exemption should continue to apply. This should be the Commissioner Court’s continuing intent, and action, with regard to those properties.

“(2) As noted above in the “Background” section of this memorandum, the 350 rule arose out of a procedural application of the beach/dune rules, primarily the requirement that impacts to dunes be avoided to the maximum extent practicable. Under this procedural rule, if an applicant stays landward of 350 feet from the line of vegetation, the Committee recognizes a rebuttable presumption is established that the applicant has adequately avoided and minimized the impacts on dunes and dune vegetation for the entire property. In certain instances, this general presumption may not be appropriate. However, this approach may also allow for more development activity landward of 350 feet.

“(3) The Committee has applied its procedural rule requiring limitations on structures seaward of 350 feet only to the areas of Nueces County over which the County currently has dune protection authority. These areas exempt Mustang Island State Park, the North Padre Island seawall area, and the City of Port Aransas. Therefore, it is urged that the Commissioner’s Court express that it is not the County’s intention to apply the 350 rule to areas within the jurisdiction of the City of Port Aransas.”

The reasoned justification submitted by the County in support of its request for approval of Plan amendments in new subsection “j” that allows a permittee to alter or pave the ground in the area between 350 feet and 200 feet landward of the vegetation line for recreational amenities such as pools separate from habitable structures demonstrates that the 2005 Plan Amendments will advance the public interest and provide an equal or better level of protection of dunes, dune vegetation, and public access to and use of the beach. The clarification regarding establishment of a rebuttable presumption that the permittee has followed the mitigation sequence requirements in 31 TAC § 15.4(f) for avoidance and minimization of effects on dunes and dune vegetation demonstrates that the variance will also advance the public interest and provide an equal or better procedure for evaluating impacts in an application for a dune protection permit. The variance affords an appropriate level of protection for the natural beach/dune system and limits the

application to a case-by-case determination with the protection of the beach/dune system, including appropriate mitigation procedures.

Accordingly, the GLO hereby certifies as consistent with state law the County's 2005 Plan Amendment with a variance from the provisions of § 15.6(f)(3) of the Beach/Dune Rules that allows a permittee to alter or pave the ground in the area between 350 feet and 200 feet landward of the vegetation line for recreational amenities such as pools separate from habitable structures, so long as residential or commercial structures are located at least 350 feet landward from the line of vegetation and the applicant demonstrates that every attempt has been made to minimize the use of impervious surfaces in the area between 350 feet and 200 feet landward of the vegetation line.

Although the provisions of new subsections "i" and "j" of the County's Plan address and establish a rebuttable presumption of compliance with the first two steps of the dune mitigation sequence established in § 15.4(f) of the Beach/Dune Rules (avoidance of impacts or minimization of impacts by limiting its degree or magnitude), the special erosion and flood protection requirements do not otherwise exempt a permit applicant from compliance with compensatory mitigation requirements for unavoidable adverse effects on dunes and dune vegetation.

SUMMARY AND RESPONSE TO COMMENTS

The GLO conducted a public hearing to receive public comment on the proposed amendments to 31 TAC §15.33 at the Briscoe King Pavilion, Padre Bali Park, 15820 Park Road 22 Corpus Christi, Texas, on January 31, 2007. In addition to comments received at the public hearing, numerous written comments were received during the thirty-day comment period specified in the notice of proposed rulemaking published in the November 10, 2006 issue of the Texas Register. The GLO gave due consideration to all comments received by the agency during the thirty day comment period and at the public hearing.

Representatives of the following organizations provided comments opposed to the proposed rulemaking, largely because of the expressed need for clarification as to how the rules would be applied to proposed construction within the City of Port Aransas and the City of Corpus Christi. The City of Port Aransas; The City of Corpus Christi; Naismith Engineering; Braselton Homes / Braselton Land Ventures; PV Mustang Island Group, LLC; Urban Engineering; Newport Realty RE/MAX; Milan & Co., P.C.; Facey Enterprises VN., Ltd, a Delaware Corporation; Sea Oats Development Group; Port Aransas Realty; Grosse Real Estate; and several La Concha Estates lot owners.

Several commenters objected to the requirement that residential and commercial structures be located at least 350 feet landward of the natural line of vegetation, unless no practicable alternative exists, in that the prohibition may constitute a taking that requires real property owners to be compensated as provided by federal and state constitutions, as well as Chapter 2007 of the Texas Government Code. The GLO disagrees with the commenters. In the controlling legal authority on the issue, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1991), the U.S. Supreme Court found a constitutional taking

where a set back line “denies all economically beneficial or productive use of land.” The regulation proposed by the County allows a property owner to construct between 350 feet and 200 feet landward of the line of vegetation if it can be shown that “no practicable development alternatives are available.” In addition the regulation allows some beneficial use of the property seaward of the line for recreational amenities. Therefore, there is no unconstitutional taking. Under Chapter 2007 of the Texas Government Code, a statutory taking action requiring compensation arises only where a regulation results in a reduction of at least 25% in the market value of affected private real property. The County regulation by its terms allows an exception to the prohibition of construction between 350 feet and 200 feet landward of the line of vegetation if it can be shown that “no practicable development alternatives are available.” The definition of the term “practicable” in § 15.2(55) of the Beach/Dune Rules allows a local government to consider the cost of implementing a technique such as the set-back provisions in determining whether it is “practicable” in a particular application for development. In applying its regulation, the County could determine on a case-by-case basis to permit construction of residential and commercial structures between 350 feet and 200 feet landward of the line of vegetation if it caused severe and unavoidable economic impacts and thus avoid a statutory taking requiring compensation. No change was made based on these comments.

Several commenters objected to the retroactive application of the amendment, specifically, the provision that subjected residential and commercial structures permitted after May 2000 to be located 350 feet landward of the line of vegetation. These comments were provided by several landowners with previous construction on the affected properties, individuals representing the real estate industry, individuals representing architectural/engineering firms, and the cities of Corpus Christi and Port Aransas representatives. The commenters stated that the requirement would create a number of non-conforming structures, create confusion applying for future construction permits, and generally not provide any additional protection to the public and dune structures since mitigation measures had already been implemented under the original permits. The commenters said that the retroactive nature of the rule was seen to be in violation of the provisions of Chapter 245, Texas Local Government Code, that prohibits a local government from applying new regulations to previously permitted construction. GLO disagrees with the commenters’ objection to the retroactive application of the new regulations. Section 5 of HB 1704, which enacted Chapter 245, Local Government Code (the state’s vesting law), provides that the chapter does not apply to a permit, order, rule, regulation, or other action issued, adopted, or undertaken by a municipality, a county, another political subdivision, the state, or an agency of the state in connection with Chapter 61 (OBA) and Chapter 63 (DPA), Natural Resources Code. However, in response to these comments, GLO sought clarification from the County as to its intention regarding the application of the new requirements to previously platted subdivisions, the subject of an expired permit or master plan. The County affirmed its intention to exempt previously platted subdivision lots that were the subject of a previous dune permit or master plan development from the 350-foot rule, provided that the future development remains consistent with the prior permit or master plan adopted by the Commissioners

Court. The text of the certification rule was changed in response to public comment to reflect this exemption.

One commenter objected to the 350-foot set-back line on the basis that while the previous voluntary application of the line worked satisfactorily in most cases for large tracts of land, the practical application of the set-back line would prevent permitting of smaller properties and infrastructure projects. The GLO disagrees with the commenter. Specifically, the developer of a smaller tract has the ability to demonstrate that “no practicable development alternatives are possible,” in order to allow residential or commercial structures less than 350 feet landward of the vegetation line. In addition, the new regulation allows the construction of infrastructure such as recreational amenities in the area 350 feet and 200 feet landward of the line of vegetation. Finally, Nueces County clarified its intent to exempt previously platted subdivision lots that were the subject of a previous dune permit or master plan development from the 350-foot rule, provided that the future development remains consistent with the prior permit or master plan adopted by the Commissioners’ Court. This exemption will allow the development of smaller tracts that were previously permitted. The text of the certification rule was changed in response to public comment to reflect this exemption.

The Cities of Port Aransas and Corpus Christi and one commenter objected to the application of the new requirement that residential and commercial structures be located at least 350 feet landward of the line of vegetation to accreting areas. Noting that at least half of the area affected by the new requirements on Mustang and Padre Islands were in stable or accreting areas, these commenters stated that the new requirements should be applicable only to construction in eroding areas. The GLO disagrees with the commenters. Local governments are permitted to adopt standards that meet or exceed the requirements of state law. The new requirement that residential and commercial structures be located at least 350 feet landward of the line of vegetation imposes a stricter standard than that required by the Open Beaches Act (OBA), Texas Natural Resources Code §§61.001 - 61.026; the DPA; and the Beach/Dune Rules. Additionally, even though all of the area subject to the provisions of the proposed amendment may not be eroding areas, the local government is justified in adopting the stricter standard. Documented relative sea level rise data for the Texas coastline show that at the current rate, the sea level will rise one meter this century aggravating erosion even in stable and accreting areas. (Innovations Report – Forum for Science, Industry and Business, Sept. 11, 2004, Look at Past Sea Level Rise Points to Troubling, Future by Dr. John Anderson). Extreme storm events affect all Gulf fronting beaches including stable and accreting beaches. Fore dune ridges on northern Mustang Island were cut back 150 – 300 feet by Hurricane Carla during 1961. During Hurricane Alicia (1983), vegetation line retreat and landward extent of storm washover deposits were greater for developed areas than for natural areas (Bureau of Economic Geology Circular 85-5). No change was made based on these comments.

Several commenters argued that Nueces County had in part justified the 350-foot set-back as a predetermined measure for avoidance and minimization of dune impacts, and therefore additional avoidance and minimization beyond 350 feet was not necessary. The

GLO conditionally agrees with the commenters. If an applicant stays landward of 350 feet from the line of vegetation, a rebuttable presumption is established that the applicant has adequately avoided and minimized the impacts on dunes and dune vegetation for the entire property. This approach may facilitate development activity landward of 350 feet. Significant time and resources often are devoted by an applicant to development of the portion of dune mitigation plans to demonstrate avoidance and minimization of dune impacts. The rebuttable presumption streamlines the permitting process where an applicant has complied with the 350-foot rule. In certain instances, however, this general presumption may be rebutted if the County determined that the application for the proposed construction authorized a prohibited activity under § 15.4(c) of the Beach/Dune Rules or failed to meet the technical standards for material weakening of dunes in § 15.4(d) of the Beach/Dune Rules. The text of the certification rule was changed in response to public comment to reflect this presumption.

Several commenters stated that the proposed Nueces County amendment interferes with the authority of the City of Port Aransas and the City of Corpus Christi to regulate beachfront construction and that these municipalities, and not County, has jurisdiction under state statute for preventing the likelihood of structures ultimately ending up on the public beach within their respective jurisdictions. The GLO disagrees with the commenters. Municipalities do in fact have authority within their corporate limits and extraterritorial jurisdiction pursuant to Texas Natural Resources Code § 61.015(a) to adopt and apply ordinances for preserving and enhancing access to and use of public beaches. However, in findings of fact in § 63.001(7) of the Dune Protection Act, the legislature has determined that “vegetated stabilized dunes help protect state-owned beaches and shores by protecting against erosion of the shoreline.” The protective function of dunes with respect to public beaches recognized by the legislature can be taken into account by the County and the GLO in determining the public benefit of the proposed regulation. Counties have primary jurisdiction under the DPA (Texas Natural Resource Code §63.011(b)) for dune protection permitting and may delegate all or part of this authority to municipalities. Nueces County has delegated dune protection authority to the City of Port Aransas, but has not made a similar delegation to the City of Corpus Christi. However, pursuant to action on April 4, 2007, approving the recommendations of the Nueces County Beach Management Advisory Committee contained in a memorandum dated March 29, 2007, the County expressed its intention that the proposed Plan amendments concerning the 350-foot rule are not effective within the jurisdiction of the City of Port Aransas. The text of the certification rule was changed in response to public comment to reflect this limitation.

One commenter, the City of Corpus Christi and the City of Port Aransas objected to the Nueces County regulations governing beach access, parking, traffic, and littering rules. In their opinion, because of home rule statutes in the State of Texas, this regulatory authority is within the purview of the Cities and not within the authority of the Dune Protection Act or the Beach/Dune Rules. The GLO disagrees with the commenters. The County proposed changes concerning public vehicular access ways in Section VI. B. of the County’s Plan specifically state that the provisions are “subject to the terms of approved plans adopted by the cities with appropriate jurisdiction.” Also, the County

proposed changes to Section VII of its Plan relating to Beach Traffic Orders to provide that traffic regulations adopted in the Plan apply only to Gulf beaches within County parks and County property. Texas Natural Resources Code §61.122(a) specifically authorizes the commissioners' court of a county bordering on the Gulf of Mexico or its tidewater limits, to regulate motor vehicle traffic on any beach within the boundaries of the county. The limitation of traffic regulations to County-owned parks and property does not impair the existing right of the public to use and have access to and from the public beach and does not interfere with the authority of a home rule city. Texas Natural Resources Code §61.122(a) specifically authorizes the commissioners' court of a county bordering on the Gulf of Mexico or its tidewater limits, to prohibit littering of any beach within the boundaries of the county and to define the term "littering." No change was made based on these comments.

Several commenters, including representatives from the City of Corpus Christi and the City of Port Aransas, said that a substantial loss of taxable assets, and property devaluation would adversely affect the budgets for the cities, school and college districts. Furthermore the general economy would suffer as a result of lost jobs and decreased revenues for construction, development, tourism, and building materials. Representatives from the City of Corpus Christi said that because of these impacts, the proposed rulemaking was subject to Section 2001.0225 of the Texas Government Code (Regulatory Analysis of a Major Environmental Rule). The GLO disagrees with the commenters. Section 2001.0225(g)(3) defines a "major environmental rule" as "a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state." The adoption of the proposed amendments to the certification rule concerning the proposed Nueces County Plan is not intended to adopt the County's regulations. Rather, the GLO reviews a local beach access and dune protection plan and, if appropriate, certifies that the plan is consistent with state law by adoption or amendment of a rule as authorized in Texas Natural Resources Code §§ 61.011(d)(5), 61.015(b), and 63.054(c). The certification by rule reflects the state's approval of the plan, but the text of the plan is not adopted by the GLO, as provided by 31 TAC §15.3(o)(4). Further, the economic impact of the County's new regulations may have been overstated by some of the commenters. With respect to the 350-foot building set-back line, there will be no significant increase in the cost of compliance inasmuch as the County had previously implemented a voluntary 350-foot building set-back line in May, 2000, which has been generally observed by individuals and developers. Several large-scale developments that have completed permitting, or are well into the permitting process under the voluntary 350-foot set-back include Bella Vista II, a 6.24-acre tract containing more than 40 building lots, Mustang Island Resort, a 22.96-acre tract containing a multi-story condominium, and The Preserve at Mustang Island, a 137.19-acre tract containing more than 150 building lots. Moreover, developers actually benefit from the regulatory certainty provided by the Plan amendments which establish a rebuttable presumption that the permittee has followed the mitigation sequence requirements in § 15.4(f) of the Beach/Dune Rules for avoidance and minimization of effects on dunes and dune vegetation. Finally, the proposed Plan

amendment requires residential and commercial structures permitted after May, 2000, to be located at least 350 feet landward of the vegetation line “unless no practicable development alternatives are possible.” In applying its regulation, the County could determine on a case-by-case basis to permit construction between 350 feet and 200 feet landward of the line of vegetation if it would otherwise cause severe and unavoidable economic impacts, since “practicable” includes consideration of the cost of implementing the provisions. No change was made based on these comments.

Several commenters including individual landowners, individuals representing the real estate industry, individuals representing architectural/engineering firms, and the City of Port Aransas said it was disputable that the Nueces County justification that the 350-foot set-back provides an equal or better level of protection for the dunes, dune vegetation, and public access to and use of the beach. Most of the comments against the new regulations questioned how well the GLO and County had demonstrated that the new restrictions would offer an improvement in benefits over the existing regulations. The GLO disagrees because it believes that 350-foot set-back provides an equal or better level of protection for the dunes, dune vegetation, and public access to and use of the beach due to: (1) the standard of limiting construction landward of 350 feet of the natural line of vegetation is more stringent than the Beach/Dune rules; (2) construction between 200 feet and 350 feet would be limited to small structures; (3) each application will be evaluated on a case-by-case basis and would have to demonstrate an attempt to minimize or avoid the amount of impervious surface, thereby minimizing impacts to critical dunes, dune vegetation, and dune hydrology; (4) most pools and backyard amenities would have some type of irrigation system to encourage vegetative growth, thereby promoting dune stabilization; and (5) allowable structures would not be exempt from mitigation requirements. Additionally, the GLO believes that the new provisions in the Nueces County amendment would: (1) provide better protection for critical dunes that serve to protect natural resources and public infrastructure, including storm evacuation routes; (2) protect the public’s right to access and use the public beach by reducing the likelihood that structures will become located on the public beach due to erosion; (3) clarify changes relating to access ways and traffic orders, thus enhancing public understanding of the requirements; and (4) deter littering by increasing authorized penalties for littering. No change was made based on these comments.

Two commenters, including a representative from the City of Port Aransas, asserted that the proposed Nueces County amendment is not consistent with the Coastal Management Plan. The City objected because the type of development in the City is different than the development in the County. One commenter said the County’s amendment was inconsistent with three of the Texas Coastal Management Plan (TCMP) goals, identified as follows: (1) to aid coastal landowners and local governments in using beachfront property in a manner compatible with preserving public and private property, protecting the public’s right to benefit from the protective and recreational functions of a healthy beach dune system, conserving the environment, conserving flora and fauna and their habitat, ensuring public safety, and minimizing the loss of life and property due to inappropriate coastal development and the destruction of protective natural features, (2) to foster mutual respect between public and private property owners and to assist local

governments in managing the Texas coasts so that the interests of both the public and private landowners are protected, and (3) to provide coordinated, consistent, responsive, timely, and predictable governmental decision making and permitting processes. The GLO disagrees with the commenters. The goals and policies cited by the commenter refer to goals identified by the GLO as a basis for managing and regulating human impacts on the beach/dune system in § 15.1 of the GLO's Beach/Dune Rules, and are not goals and policies of the TCMP. The proposed Plan amendment establishing a 350-foot set-back actually furthers the first goal cited by the commenter to "aid coastal landowners and local governments in using beachfront property in a manner compatible with preserving public and private property" by helping to preserve vegetated and unvegetated sand dunes, thus providing a natural protective barrier for adjacent land against the destruction of both private and public property from storm damage from hurricanes such as Hurricane Carla and Hurricane Alicia as previously noted. The proposed amendment further protects "the public's right to benefit from the protective and recreational functions of a healthy beach dune system, conserves the environment, flora and fauna and their habitat, ensuring public safety and minimizes the loss of life and property due to inappropriate coastal development and the destruction of protective natural features" by preserving the natural dune system within 350 feet of the line of vegetation and the natural dune system therein providing a stronger and more vibrant undisturbed dune system. As previously noted, during Hurricane Alicia, vegetation line retreat and landward extent of storm wash over deposits were greater for developed areas than for natural areas attributed in part to the fact that naturally occurring vegetated dunes are stronger than reconstructed dunes due to greater root depths (Bureau of Economic Geology Circular 85-5). The proposed Plan amendments further the second goal cited by the commenter to "foster mutual respect between public and private property owners" and to assist "local governments in managing the Texas coasts so that the interests of both the public and private landowners are protected" by exempting previously platted lots and lots within the City of Port Aransas and also by providing for the construction of certain amenities from 200 feet landward of the line of vegetation to 350 feet landward of the line of vegetation. The application of the new regulation, "unless no practicable development alternatives are possible," ensures that private property rights protected by state and federal constitutions as well as Chapter 2007 of the Texas Government Code are preserved. The proposed Plan amendments provide "coordinated, consistent, responsive, timely, and predictable governmental decision making and permitting processes" by establishing a rebuttable presumption the permittee has followed the mitigation sequence requirements in § 15.4(f) of the Beach/Dune Rules for avoidance and minimization of effects on dunes and dune vegetation. The mitigation sequence requires the applicant to provide substantial material demonstrating "avoidance" and "minimization" and also requires the local government to make findings that the applicant has demonstrated avoidance and minimization. The 350-foot set-back facilitates and streamlines the permitting process on both the local and state level by addressing the first two phases of the mitigation sequence. No change was made based on these comments.

One commenter disagreed with allowing the County to categorically set permit application fees. The GLO disagrees with the commenter because the Plan amendment does not directly result in an increase in application fees, and the Texas Natural

Resources Code §63.053 specifically authorizes the County Commissioner's Court to require a reasonable fee to accompany an application for a dune protection permit. Review and approval by the GLO as to the reasonableness of fees charged for dune protection permit applications is not required by the Dune Protection Act or the Beach/Dune Rules. No change was made based on these comments.

One commenter stated that The University of Texas Bureau of Economic Geology's (BEG) erosion-rate data are inaccurate and exaggerate the actual erosion rates by a factor of 100. The same commenter stated that there is no significant erosion occurring on the beaches of Nueces County since at least 1980. The GLO disagrees with this commenter because BEG's erosion rate data have been determined using available historic data, including aerial photos and surveys and newer LIDAR data. BEG uses a documented scientific process that digitizes and integrates historical shorelines so that Gulf shorelines will have data at least every 16 years dating back to the 1950s. The process also uses digital rectification of historical photographs to extract past shoreline positions, airborne topographic LIDAR surveys for acquiring new and future shoreline data, selection of ground topographic transects, and establishment of Global Positioning System (GPS) reference points to support the monitoring. (Texas Shoreline Change Project: <http://www.beg.utexas.edu/coastal/intro.htm>). The commenter provided only anecdotal evidence that the BEG data are inaccurate and exaggerated, and provided no countering scientifically validated data. The commenter did not cite the effects of major hurricanes such as Hurricane Carla and Hurricane Alicia, which produced profound erosion impacts in Nueces County. No change was made based on these comments.

One commenter said there should be restrictions on driving on the beach because it will aid in development and support property values. The GLO expresses no opinion with regard to these assertions, and also disagrees with the commenter based upon relevancy. The issue before the GLO was whether the Plan amendments as submitted by the County are consistent with the OBA, the Dune Protection Act, and the GLO's Beach/Dune Rules. The Plan amendments as submitted made no changes to vehicular restrictions. No change was made based on these comments.

One commenter stated that exceptions need to be readily accepted to the 350-foot set-back rule, and building in the dunes needs to be accepted. The GLO concurs with the commenter that some exceptions to the 300-foot rule need to be accepted. Some exceptions to the application of the 300-foot rule are needed to ensure the proposed amendment would not impose an unconstitutional taking of private property. The proposed amendment requires residential and commercial structures permitted after May 2000, to be located at least 350 feet landward of the vegetation line "unless no practicable development alternatives are possible." Since "practicable" includes economic impacts, the County could determine on a case-by-case basis to permit construction of residential and commercial structures between 350 feet and 200 feet landward of the line of vegetation if it caused severe and unavoidable economic impacts. The County's regulation provides exceptions, permitting recreational amenities to be built between 350 feet and 200 feet landward of the vegetation line. The GLO disagrees with the commenter's unqualified statement that building in the dunes needs to be accepted. The

Dune Protection Act, Chapter 63, Texas Natural Resources Code § 63.001 finds “ that it is necessary to protect these dunes as provided in this chapter because stabilized, vegetated dunes offer the best natural defense against storms and are areas of significant biological diversity; that vegetated stabilized dunes help preserve state-owned beaches and shores by protecting against erosion of the shoreline; and that different areas of the coast are characterized by dunes of various types and values, all of which should be afforded protection.” Impacts to dunes are only allowed, as a permitted action by the authorized local government, after it makes the findings required by § 15.4 of the Beach/Dune Rules. No change was made based on these comments.

Several individual commenters wrote or spoke in support of the proposed amendments, and representatives of the following organizations provided comments generally in favor of the proposed rulemaking: Coastal Bend Environmental Coalition; Coastal Bend Group of the Sierra Club; Beach Access Coalition; and Coastal Bend Chapter of Surfriders. One individual representing the Coastal Bend Sierra Club agreed that the new regulations would afford additional protection to the dune system and further limit the impacts of impervious cover. One individual representing an engineering firm cited numerous benefits that would accrue from the increased protection provided under the proposed county plan. No change was made based on these comments.

REASONED JUSTIFICATION AND FACTUAL BASIS

The GLO has determined that adoption of the amendments to 31 TAC §15.33 relating to Certification Status of Nueces County Dune Protection and Beach Access Plan (Plan) is justified by the public benefits that will result from approval of the 2005 Plan amendments. The 2005 Plan amendment concerning removal of language setting specific amounts for dune protection permit application fees in the Plan will allow the County to respond more efficiently to changes in the cost of administering the permits and ensure that such administrative costs are borne by developers and not the general public. The Plan changes relating to access ways and traffic orders provide clarification to the public. The increase in authorized penalties for littering will provide a better deterrence against violations. The Plan amendment concerning the 350-foot construction set-back line will provide better protection for critical dunes that serve to protect natural resources and public infrastructure, including storm evacuation routes, as well as a more efficient method of assessing impacts to dunes from proposed construction. In addition, the Plan amendment protects the public’s right to access and use the public beach by reducing the likelihood that structures will become located on the public beach due to erosion.

The adoption of the approval of the 2005 Plan amendments including the variance from the requirements of 31 TAC § 12.6(f)(3) is supported by the reasoned justification provided by the County in the Memorandum of Response dated July 26, 2006, from Nueces County in support of its 2005 Plan Amendment authorizing the construction of recreational amenities separate from habitable structures between 350 feet and 200 feet landward of the vegetation line and the March 29, 2007 memorandum approved by the Commissioners’ Court relating to clarifications requested by the GLO regarding application of the special erosion and flood protection requirements. In addition to the

information provided by the County, approval of the 2005 Plan amendments providing for a 350-foot construction set-back rule is justified by scientific studies and engineering studies considered by the GLO. For example, foredune ridges on northern Mustang Island were cut back 150 – 300 feet by Hurricane Carla during in 1961. During Hurricane Alicia in 1983, vegetation line retreat and landward extent of storm washover deposits were greater for developed areas than for natural areas (Bureau of Economic Geology Circular 85-5). This difference is attributed in part to the fact that naturally occurring vegetated dunes are stronger than reconstructed dunes due to greater root depths. (Circular 85-5). Other studies have shown that set-backs can reduce water pollution runoff from impervious surfaces and septic systems and also reduce the adverse impacts on dune and wetland ecology. (J.G. Titus. 1998. Maryland Law Review 57:4, pp. 1279-1399).

CONSISTENCY WITH CMP

The adopted amendment to 31 TAC §15.33 concerning Certification Status of Nueces County Dune Protection and Beach Access Plan is subject to the Coastal Management Program (CMP), 31 TAC §505.11(a)(1)(J), relating to the Actions and Rules Subject to the CMP. The Land Office has reviewed this adopted action for consistency with the CMP's goals and policies in accordance with the regulations of the Coastal Coordination Council (Council). The applicable policies are found at 31 TAC §501.26, relating to Policies for Construction in the Beach/Dune System, and §501.27, relating to Policies for Development in Coastal Hazard Areas. With the exception of the variance concerning special erosion and flood protection requirements specified in new subsection 15.33(g), the proposed actions are consistent with the GLO's Beach/Dune Rules, which the Council has determined to be consistent with the CMP. The variance affords an appropriate level of protection for the natural beach/dune system and limits the application to a case-by-case determination with the protection of the beach/dune system, including appropriate mitigation procedures. Consequently, the Land Office has determined that the proposed actions are consistent with applicable CMP goals and policies.

The adopted rulemaking furthers several goals of the CMP identified in 31 TAC § 501.12 including: § 501.12(1) to “protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs)” by enhancing dune protection; § 501.12(2) to “ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone” by providing clarification and certainty for areas where construction of residential and commercial structures are allowed consistent with dune protection; § 501.12(3) to “minimize loss of human life and property due to the impairment and loss of protective features of CNRAs” by enhancing the preservation of natural dunes and the protection they provide against destructive storms and erosion; § 501.12(5) to “balance the benefits from economic development and multiple human uses of the coastal zone, the benefits from protecting, preserving, restoring, and enhancing CNRAs, the benefits from minimizing loss of human life and property, and the benefits from public access to and enjoyment of the coastal zone” as discussed in the response to comments; and §

501.12(6) to “coordinate agency and subdivision decision-making affecting CNRAs by establishing clear, objective policies for the management of CNRAs”, as illustrated by the rebuttable presumption that a permittee has followed the mitigation sequence requirements in 31 TAC § 15.4(f) for avoidance and minimization of effects on dunes and dune vegetation if the 350-foot set-back rule is observed.

There were no comments from the public or council members on the consistency of the adopted rule during the comment period. The only comment of the public regarding consistency is discussed in the Summary and Response to Comments.

STATUTORY AUTHORITY.

The amendments are adopted under the Texas Natural Resources Code §§ 61.011, 61.015(b), and 61.022(c), and 61.070, which provide the GLO with the authority to adopt rules to preserve and enhance the public’s right to use and have access to and from the public beaches of Texas and to certify that plans to impose or increase public beach access, parking, or use fees are consistent with state law. In addition, Texas Natural Resources Code §63.121 provides the Texas General Land Office with authority to adopt rules for protection of critical dune areas.

Texas Natural Resources Code §§61.011, 61.015, 61.022, 61.070, and 63.121 are affected by the adopted amendments.

§15.33. Certification Status of Nueces County Dune Protection and Beach Access Plan.

(a) Nueces County has submitted to the General Land Office a dune protection and beach access plan which is certified as consistent with state law. The county's plan was adopted on March 25, 1992 and amended on October 23, 1996.

(b) The General Land Office certifies that the dune protection portion of the La Concha master plan adopted by the Nueces County Commissioners Court on March 20, 1996, is consistent with state law.

(c) The General Land Office certifies that the dune protection portion of the Palms at Waters Edge master plan adopted by the Nueces County Commissioners Court on December 27, 1996, is consistent with state law.

(d) The General Land Office certifies that the dune protection section of the Mustang Island Episcopal Conference Center master plan adopted by the Nueces County Commissioner's Court on January 31, 2000 is consistent with state law.

(e) The General Land Office certifies as consistent with state law the amendment to Nueces County plan that was adopted by the Nueces County Commissioners Court on March 16, 2005, Order No. 20050032. The order amended the plan to increase the beach user fees imposed for parking on the beach in fee areas designated in the plan.

(f) The General Land Office certifies as consistent with state law the amendments to the Nueces County plan that were adopted by the Nueces County Commissioners Court on December 7, 2005.

(g) The General Land Office certifies as consistent with state law the following variances from §15.6(f)(3) of this title (relating to Concurrent Dune Protection and Beachfront

Construction Standards) in the County's plan as amended on December 7, 2005. The plan establishes special erosion and flood protection requirements for dune protection permits providing that a permittee shall:

(1) locate residential and commercial structures permitted after May 2000 at least 350 feet landward of the vegetation line unless no practicable development alternatives are possible; and

(2) restrict development permitted after May 2000 in the area between 350 feet and 200 feet landward of the vegetation line to recreational amenities such as pools and picnic areas. In any case, applicants must demonstrate that every attempt has been made to minimize use of impervious surfaces in this zone.

(h) Compliance with the special erosion and flood protection requirements for dune protection permits specified in subsection (g) of this section establishes a rebuttable presumption that the permittee has followed the mitigation sequence requirements in § 15.4(f) of this title for avoidance and minimization of effects on dunes and dune vegetation. The variance certified in subsection (g) of this section does not exempt a permittee from compliance with compensatory mitigation requirements for unavoidable adverse effects on dunes and dune vegetation.

(i) The special erosion and flood protection requirements for dune protection permits specified in subsection (g) of this section shall not apply to a previously platted subdivision lot that was the subject of a prior dune protection permit, or that was part of a master planned development, the plans for which were previously approved and adopted by the Commissioners' Court, provided that the construction authorized by a new permit is consistent with the prior permit or master plan.

(j) The special erosion and flood protection requirements for dune protection permits specified in subsection (g) of this section shall not apply to areas within the jurisdiction of the City of Port Aransas.