

TITLE 31 NATURAL RESOURCES AND CONSERVATION

PART 1 GENERAL LAND OFFICE

CHAPTER 29 PROCEDURES FOR STATE CONSISTENCY WITH COASTAL MANAGEMENT PROGRAM GOALS AND POLICIES

SUBCHAPTER A PURPOSE AND SCOPE

§29.10 Purpose and Policy

(a) The purpose of this chapter is to ensure that state agency actions, subdivision actions and general plans subject to the Texas Coastal Management Program (CMP) are consistent with the CMP goals and policies. The commissioner of the General Land Office (commissioner) intends to use the consistency process to:

- (1) adequately identify, address, and resolve consistency issues to the maximum extent practicable prior to final agency action;
- (2) minimize the number of actions referred to the commissioner for review or study by ensuring adequate review at the agency level and by referring to the commissioner only those actions that present unique or significant consistency issues;
- (3) avoid the creation of an additional layer of bureaucracy;
- (4) avoid subjecting to regulation actions not currently subject to regulation; and
- (5) provide procedural safeguards to ensure proper notice, opportunity for hearing, and fairness in decision-making.

(b) Accordingly, it is the intent of the commissioner that consistency be achieved primarily through individual agency rules that will reflect the CMP goals and policies.

§29.11 Actions and Rules Subject to the Coastal Management Program

(a) For purposes of this chapter and Chapter 501 of this title (relating to Coastal Management Program), the following is an exclusive list of proposed individual agency actions that may adversely affect a coastal natural resource area (CNRA) and that therefore must be consistent with the CMP goals and policies:

- (1) for the General Land Office (GLO), the School Land Board, or a board for lease of state-owned lands when issuing or approving:
 - (A) a mineral lease plan of operations;
 - (B) a geophysical or geochemical permit;
 - (C) a miscellaneous easement;
 - (D) a surface lease;
 - (E) a structure registration;

- (F) a coastal easement;
 - (G) a coastal lease;
 - (H) a cabin permit;
 - (I) a navigation district lease;
 - (J) certification of a subdivision beach access or dune protection plan or plan amendments; or
 - (K) an agency or subdivision wetlands mitigation bank.
- (2) for the Public Utility Commission of Texas (PUC) when issuing a certificate of convenience and necessity.
- (3) for the Railroad Commission of Texas (RRC) when issuing:
- (A) a wastewater discharge permit;
 - (B) a waste disposal storage pit permit; or
 - (C) a certification of a federal permit for the discharge of dredge or fill material.
- (4) for the Texas Transportation Commission when approving:
- (A) an acquisition of a site for the placement or disposal of dredge material from, or the expansion, relocation, or alteration of, the Gulf Intracoastal Waterway; or
 - (B) an environmental document for a transportation construction project or maintenance program.
- (5) for the Texas Historical Commission (THC) when issuing:
- (A) a permit for destruction, alteration, or taking of a coastal historic area; or
 - (B) a review of a federal undertaking affecting a coastal historic area.
- (6) for the Texas Commission on Environmental Quality (TCEQ) when issuing or approving:
- (A) a wastewater discharge permit;
 - (B) a permit for a new concentrated animal feeding operation located one mile or less from a critical area or coastal waters;
 - (C) a permit for solid or hazardous waste treatment, storage, or disposal;
 - (D) creation of a special purpose district or approval of bonds to construct infrastructure on coastal barriers;
 - (E) levee improvement or flood control projects;
 - (F) a certification of a federal permit for the discharge of dredge or fill material;
 - (G) a declaration of an emergency and request for an emergency release of water;

(H) a new permit for an annual appropriation of:

(i) 5,000 or more acre-feet of water within the program boundary; or

(ii) 10,000 or more acre-feet of water outside the program boundary but within 200 stream miles of the coast;

(I) an amendment to a water permit for an increase in the annual appropriation of:

(i) 5,000 or more acre-feet of water within the program boundary; or

(ii) 10,000 or more acre-feet of water outside the program boundary but within 200 stream miles of the coast;

(J) a change in the purpose of use of an annual appropriation of water to a more consumptive use of:

(i) 5,000 or more acre-feet of water within the program boundary; or

(ii) 10,000 or more acre-feet of water outside the program boundary but within 200 stream miles of the coast.

(7) for the Texas Parks and Wildlife Department (TPWD) when issuing or approving:

(A) an oyster lease;

(B) a permit for taking, transporting, or possessing threatened or endangered species;

(C) a permit for disturbing marl, sand, shell, or gravel on state-owned land; or

(D) development by a person other than the TPWD that requires the use or taking of any public land in a state park, wildlife management area or preserve.

(b) For purposes of this chapter and Chapter 501 of this title (relating to Coastal Management Program), the following is an exclusive list of proposed agency rulemaking actions that must be consistent with the CMP goals and policies:

(1) a GLO rule governing the prevention of, response to, or remediation of a coastal oil spill;

(2) TCEQ rules governing air pollutant emissions, on-site sewage disposal systems, or underground storage tanks;

(3) a State Soil and Water Conservation Board rule governing agricultural or silvicultural nonpoint source pollution;

(4) any rule governing an individual action described in subsection (a) of this section, including thresholds for referral.

(c) An agency's promulgation of rules governing or authorizing actions listed in subsection (a) or (b) of this section constitutes an action subject to the CMP as provided in Subchapter B of this chapter (relating to Commissioner Review and Certification of Agency Rules).

(d) An action to renew, amend, or modify an existing permit, certificate, lease, easement, approval or other action is not an action under this section if the action is taken pursuant to rules that the commissioner has certified as consistent under Subchapter B of this chapter (relating to Commissioner Review and Certification of Agency Rules) and:

- (1) for a wastewater discharge permit, if the action is not a major permit modification that would increase pollutant loads to coastal waters or would result in relocation of an outfall to a critical area;
 - (2) for solid and hazardous waste permits, if the action is not a Class III modification as defined in TCEQ rules; or
 - (3) for any other action, if the action only extends the time period of the existing authorization without authorizing new or additional work or activities or is not directly relevant to the CMP goals and policies.
- (e) Whenever more than one state agency is involved in issuing a consistency determination for a single project, consideration should be given to the preparation of one consistency determination for all state agencies involved.

(1) Where multiple state consistency determinations are required, state agencies should consider coordinated preparation of the consistency determinations or designation of a lead agency for development of a single consistency determination. In the case where a single consistency determination will be prepared, such determination must be completed before final action is taken on any permit or authorization listed in subsection (a) of this section and required for the project. The single consistency determination must indicate whether each of the proposed actions listed in subsection (a) of this section and required for the project is consistent with the CMP goals and policies and must include information on each proposed action sufficient to support the consistency determination.

(2) An applicant, project sponsor, or other entity undertaking a project which requires more than one action listed in subsection (a) of this section may request in writing to the CMP coordinator either coordinated preparation of the consistency determinations or designation of a lead agency for development of a single consistency determination.

(3) To avoid duplication and time delays, it is the intent of the commissioner, whenever possible, to provide for coordinated consistency determinations where multiple determinations are required. The commissioner may direct the CMP coordinator to respond to the request and facilitate coordinated consistency determinations or preparation of a single determination by a lead agency, under guidance issued by the commissioner.

§29.12 Definitions

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

(1) Agency--Any state agency, department, board, or commission of the state.

(2) Coastal natural resource area (CNRA)--Any area defined in Texas Natural Resources Code, §33.203(1) that is located with the coastal zone.

(3) Commissioner--Commissioner of the GLO.

(4) Committee--Coastal Coordination Advisory Committee.

(5) CMP coordinator--The GLO staff member designated by the commissioner.

(6) CMP goals and policies--The goals and policies set forth in Chapter 501 of this title.

(7) Program boundary--The CMP boundary established in §503.1 of this title.

(8) Subdivision--A local government or any political subdivision of the state.

(b) To the extent that reference is made to statutory or regulatory terms or phrases which are not defined in this chapter, such terms and phrases shall retain the meaning provided in the pertinent agency or political subdivision policies or regulations. **SUBCHAPTER B COMMISSIONER REVIEW AND CERTIFICATION OF AGENCY RULES**

§29.20 Commissioner Review and Certification of Agency Rules and Rule Amendments

(a) Upon adoption of a rule or amendment to a rule listed in §505.11(b) of this chapter (relating to Actions and Rules Subject to the Coastal Management Program), an agency may seek certification from the commissioner that the rule or rule amendment is consistent with the CMP goals and policies by filing a written Request for Certification with the CMP coordinator. The request shall include a copy of the rule or rule amendment for which the agency seeks certification and a reasoned statement supporting the agency's determination that the rule or rule amendment is consistent with the CMP goals and policies.

(b) The CMP coordinator shall distribute copies of the Request for Certification, including all supporting information, to all committee members. The CMP coordinator shall publish in the *Texas Register* a notice of availability and request public comment on the Request for Certification.

(c) The commissioner shall make a determination as to whether the rule or rule amendment should be certified as consistent with the CMP goals and policies on or before the 90th day after the CMP coordinator received the Request for Certification.

(d) If the commissioner finds that the rule or rule amendment incorporates or otherwise requires the agency to comply with all applicable goals and policies of the program, the commissioner shall issue a written certification of the rule.

(e) If the commissioner finds that the rule does not incorporate or otherwise require the agency to comply with all applicable goals and policies of the program, the commissioner shall issue a written statement denying certification of the rule. The denial shall explain the basis for such denial, and recommend rule revisions necessary to obtain certification. The agency may amend the rule and resubmit it for certification.

§29.21 Effect of Commissioner Certification of Agency Rules and Rule Amendments

(a) Upon the commissioner's certification of an agency's rules or rule amendments pursuant to §505.20 of this chapter (relating to Commissioner Review and Certification of Agency Rules and Rule Amendments) or §505.23 of this chapter (relating to Expedited Certification of Rules and Rule Amendments), the agency's rules are incorporated into the CMP goals and policies, and any threshold for referral approved pursuant to §505.26 of this chapter (relating to Approval of Thresholds for Referral) that applies to actions under those rules shall become operative and limit the commissioner's authority to review individual actions of the agency, as provided in §505.32 of this chapter (relating to Requirements for Referral of a Proposed Agency Action).

(b) After an agency's rules are certified and an agency's thresholds are approved, the agency's consistency determination for an action is final and is not subject to referral and review, except as provided by §505.32 of this chapter (relating to Requirements for Referral of a Proposed Agency Action).

(c) Where commissioner certification of a rule or rule amendment takes place after the effective date of a rule or rule amendment, the provisions of §503.32 of this chapter (relating to Requirements for Referral of a Proposed Agency Action) will be considered to be in effect to limit commissioner review of an agency action listed in §505.11(a) of this chapter provided:

- (1) the agency files a request for certification of the rule or rule amendment within seven days of the date of adoption;
- (2) the action is undertaken pursuant to the rule or rule amendment for which certification is sought; and
- (3) the action was initiated after the rule or rule amendment was adopted and before the commissioner acted on the request for certification.

§29.22 Consistency Required for New Rules and Rule Amendments Subject to the Coastal Management Program

(a) When proposing to adopt or amend a rule listed in §505.11(b) of this chapter an agency shall include in the preamble to the proposed rule as published in the *Texas Register* the following:

- (1) a statement that the proposed rule or rule amendment is subject to the Coastal Management Program and must be consistent with all applicable CMP policies;
 - (2) a reasoned justification explaining the basis upon which the agency concluded the proposed rule is consistent with each applicable CMP policy; and
 - (3) a request for public comment on the consistency of the proposed rule or rule amendment.
- (b) Simultaneously with the filing of a proposed rule or rule amendment with the *Texas Register*, the agency shall submit a copy of the proposed rule or rule amendment to the CMP coordinator, who shall distribute it to all committee members.
- (c) During the comment period provided by the agency, committee members should comment on the consistency of the proposed rule or rule amendment. As provided in the Administrative Procedure Act, the agency shall consider and respond to the comments of the public and committee members on the consistency of the proposed rule or rule amendment.
- (d) Upon adoption of the rule or rule amendment, an agency shall affirm that it has taken into account the goals and policies of the CMP by issuing a reasoned determination that the rule or rule amendment is consistent with the CMP goals and policies.

§29.23 Expedited Certification of Rules and Rule Amendments

(a) In accordance with this section, the commissioner may provide expedited certification of a rule or rule amendment. An agency may request and the commissioner may provide expedited certification of an agency's rule or rule amendment only if:

- (1) the agency has included in the preamble to the proposed rule or rule amendment published in the *Texas Register* notice that the agency will seek expedited certification upon adoption of the rule;
- (2) the agency has filed with the CMP coordinator at the time the rule or rule amendment is proposed a Notice of Intent to Seek Expedited Certification and attached a copy of the proposed rule or rule amendment; and
- (3) the agency submitted the draft rule or draft rule amendment to the CMP coordinator for pre-certification review pursuant to §505.24 of this chapter (relating to Pre-Certification Review of Draft Rules or Draft Rule Amendments).

(b) When an agency requests an expedited certification in accordance with this section, the commissioner shall make a determination as to whether the rule or rule amendment should be certified as consistent with the CMP goals and policies within 26 days of the date the rule or rule amendment was adopted, or before the effective date of the rule or rule amendment, whichever is later.

(c) If the commissioner finds that the rule or rule amendment incorporates or otherwise requires the agency to comply with all applicable goals and policies of the program, the commissioner shall issue a written certification of the rule.

(d) If the commissioner finds that the rule does not incorporate or otherwise require the agency to comply with all applicable goals and policies of the program, the commissioner shall issue a written statement denying certification of the rule. The denial shall explain the basis for such denial, and recommend rule revisions necessary to obtain certification. The agency may amend the rule and resubmit it for certification.

§29.24 Pre-Certification Review of Draft Rules and Draft Rule Amendments

(a) Prior to the publication in the *Texas Register* of a proposed rule or amendment to a rule listed in §505.11(b) of this chapter (relating to Actions and Rules Subject to the Coastal Management Program), an agency may seek pre-certification review by filing a Request for Pre-certification Review with the CMP coordinator. The request shall include a copy of the draft rule or draft rule amendment and any information the agency wishes the commissioner to consider. This request shall allow the commissioner a minimum of 30 days to review and comment on the draft rule or rule amendment.

(b) The CMP coordinator shall distribute copies of the Request for Pre-certification Review, including all supporting information, to all committee members.

(c) The commissioner may review and comment in writing within 30 days of the date the request was received by the CMP coordinator, unless a longer time is provided in the agency's request. The commissioner's comments should identify applicable CMP goals and policies and potential inconsistencies with such goals and policies in the draft rule or rule amendment. The commissioner may make recommendations to the agency on how to correct any inconsistencies. The agency shall consider the commissioner's comments and any comments from the committee members.

(d) Agencies are encouraged to seek pre-certification review to maximize opportunities to coordinate agency rules, facilitate effective and efficient implementation of the CMP, and to identify and correct possible inconsistencies in the draft rule or draft rule amendment prior to publication of the proposal in the *Texas Register*.

§29.25 Revocation of Certification

The commissioner may issue a Notice of Program Deficiency if the commissioner finds that the agency has implemented its rules in a manner that is inconsistent with the CMP goals and policies, or has amended certified rules in a manner inconsistent with the CMP goals and policies. The notice shall set forth the specific findings of deficiency, the basis for such findings, and include recommendations to correct the deficiencies within a reasonable period established in the notice. If the agency fails to correct the deficiencies as provided in the notice and within the time allowed, the commissioner may, after notice and opportunity for public comment, revoke certification of the agency's rules. Upon revocation of certification, §505.21 of this chapter (relating to Effect of Commissioner Certification of Agency Rules and Rule Amendments) shall not apply to limit commissioner review of any agency actions.

§29.26 Approval of Thresholds for Referral

As applicable, the provisions of §505.20 of this chapter (relating to Commissioner Review and Certification

of Agency Rules and Rule Amendments) or §505.23 of this chapter (relating to Expedited Certification of Rule and Rule Amendments) shall be applied in requesting and responding to a request for approval of thresholds. Notwithstanding any other provision of this section to the contrary, when applying §505.20 or §505.23 to thresholds, the term "threshold" or "thresholds" shall be substituted for the term "rule" or "rules" and the term "approval" shall be substituted for the term "certified" or "certification." Thresholds for referral shall be set a level consistent with the standard in §501.13(b) of this title (relating to Administrative Policies).

SUBCHAPTER C CONSISTENCY AND COMMISSIONER REVIEW OF PROPOSED STATE AGENCY ACTIONS

§29.30 Agency Consistency Determination

- (a) An agency, when proposing an action listed in §505.11(a) of this chapter (relating to Actions and Rules Subject to the Coastal Management Program) that may adversely affect a coastal natural resource area (CNRA), shall comply with the CMP goals and policies.
- (b) An agency subject to subsection (a) of this section shall affirm that it has taken into account the CMP goals and policies by issuing a written determination that a proposed action is consistent with the CMP goals and policies or will not have any direct and significant impacts on applicable CNRAs. For purposes of these determinations, "direct" refers to impacts that are causally linked to an activity; "significant" refers to appreciable impacts on CNRAs. The agency shall include in its written determination one of the following statements:
- (1) Consistency Determination. The (State Agency Name) has reviewed this proposed action for consistency with the Texas Coastal Management Program (CMP) goals and policies and has determined that the proposed action is consistent with the applicable CMP goals and policies.
- (2) Determination of No Direct and Significant Adverse Effect. The (State Agency Name) has reviewed this proposed action for consistency with the CMP goals and policies and has determined that the proposed action will not have a direct and significant adverse effect on the coastal natural resource areas (CNRAs) identified in the applicable policies.
- (c) For actions that exceed the thresholds for referral, the agency shall provide a written explanation supporting the determination made under subsection (b) of this section. The explanation shall describe the basis for the agency's determination, include a description of the proposed action and its probable impacts on CNRAs, identify the CMP goals and policies applied to the proposed action, and explain how the proposed action is consistent with the applicable goals and policies or why the proposed action does not adversely affect any CNRAs.
- (d) When publishing notice of receipt of an application or request for agency proposed action, the agency shall include a statement that the application or requested action is subject to the CMP and must be consistent with the CMP goals and policies.
- (e) Agencies shall maintain a record of all proposed actions that are subject to the CMP and provide such record to the CMP coordinator on a quarterly basis.

§29.31 Preliminary Consistency Review of a Proposed Agency Action

- (a) An agency or permit applicant may request and receive a preliminary consistency review of any action listed in §505.11(a) of this chapter (relating to Actions and Rules Subject to the Coastal Management Program) or §505.60 of this chapter (relating to Subdivision Actions Subject to the Coastal Management Program) prior to the agency's proposed action.
- (b) A request for preliminary consistency review shall be submitted and processed pursuant to Chapter 504 of

this title (relating to Permitting Assistance and Preliminary Consistency Review).

§29.32 Requirements for Referral of a Proposed Agency Action

(a) A proposed action of an agency listed in §505.11(a) of this chapter (relating to Actions and Rules Subject to the Coastal Management Program) may be referred to the commissioner for review to determine consistency with the CMP goals and policies only if:

(1) the agency has proposed the action for which referral is sought;

(2) the consistency determination for the proposed action was contested by:

(A) a committee member or an agency that was a party in a formal hearing under Government Code, Chapter 2001, or in an alternative dispute resolution process; or

(B) a committee member or other person by the filing of written comments with the agency before the action was proposed if the proposed action is one for which a formal hearing under Government Code, Chapter 2001, is not available;

(3) a person described by subsection (a)(2) of this section files a request for referral within ten days of the date the action is proposed alleging a significant unresolved dispute regarding the proposed action's consistency with the CMP goals and policies; and

(4) any three committee members other than the representative of the Texas Sea Grant College Program agree within 13 days of the date the action is proposed that there is a significant unresolved dispute regarding the proposed action's consistency with the CMP goals and policies and the matter is referred to the commissioner for review.

(b) If consistency review thresholds are in effect under §505.26 of this chapter (relating to Approval of Thresholds for Referral), the commissioner may not review a proposed action for consistency with the CMP goals and policies unless the requirements of subsection (a) of this section are satisfied and:

(1) if the proposed action is one for which a formal hearing under Government Code, Title 10, Subtitle A, Chapter 2001, is available:

(A) the action exceeds the applicable thresholds and the agency's consistency determination was contested in a formal hearing or an alternative dispute resolution process; or

(B) the action does not exceed the applicable thresholds but may directly and adversely affect a critical area, critical dune area, coastal park, wildlife management area or preserve, or Gulf beach and a state agency contested the agency's consistency determination in a formal hearing; or

(2) if the proposed action is one for which a formal hearing under Government Code, Chapter 2001, is not available to contest the agency's determination, the action exceeds the applicable thresholds.

(c) For purposes of this subchapter, an action subject to the contested case provisions of Government Code, Chapter 2001, is proposed when a notice of a decision or order is issued under Government Code, §2001.142.

(d) The commissioner must consider and act on a matter referred under this section before the 26th day after the date the agency or subdivision proposed the action.

§29.33 Filing of Request for Referral

(a) To seek commissioner review of a proposed agency action listed in §505.11(a) of this chapter, a person described in §505.32(a)(2) of this chapter must file a written Request for Referral with the CMP coordinator. The request must be filed no later than ten days after the agency has proposed the action for which consistency review is sought.

(b) The Request for Referral shall include:

(1) the names, addresses, and signatures of all persons joining in the request;

(2) a certificate of service indicating that copies of the request have been provided by hand delivery or certified mail to:

(A) the agency proposing the action for which review is sought;

(B) the applicant, if any, before the agency; and

(C) if the proposed action was the subject of a formal hearing under Government Code, Chapter 2001, all persons who were named as parties to the proceeding or their representatives;

(3) a description of the proposed action for which review is sought indicating the date of the agency's proposed action and a copy of the proposed order, permit, or other official agency decision document;

(4) a statement demonstrating, by reference to the requirements of §505.32 of this chapter (relating to Requirements for Referral of a Proposed Agency Action), that the proposed action is subject to referral; and

(5) a clear and concise statement of the significant unresolved dispute regarding the proposed action's consistency with the CMP goals and policies, including specific reference to the applicable goals and policies and to the applicable facts in the agency's decision record.

§29.34 Referral of a Proposed Agency Action to the Commissioner for Consistency Review

(a) Upon receipt of a timely Request for Referral which satisfies the requirements of §505.33 of this chapter (relating to Filing of Request for Referral), the CMP coordinator shall provide a copy to each committee member.

(b) The members of the committee shall consider the Request for Referral.

(c) For the commissioner to accept a Request for Referral, any three committee members other than the representative of the Texas Sea Grant College Program must agree that there is a significant unresolved dispute regarding the proposed action's consistency with the CMP goals and policies, and must submit the matter to the CMP coordinator in writing no later than 13 days after the agency has proposed the action for which referral has been requested.

(d) The adequacy or inadequacy of a Request for Referral shall not be a reviewable issue before the commissioner. The commissioner may exercise the discretion to accept a deficient Request for Referral.

(e) No right to commissioner review is created by this chapter. The decision to review a proposed action is within the commissioner's discretion.

§29.35 Procedures for Commissioner Review of a Proposed Agency Action

(a) The CMP coordinator shall, by certified mail or hand delivery, provide notice of the hearing at which the

commissioner will review a proposed action to:

- (1) the agency proposing the action under review;
 - (2) the applicant, if any, before the agency;
 - (3) the person(s) filing the Request for Referral; and
 - (4) if the action was the subject of a formal hearing under Government Code, Chapter 2001, before the agency, all persons who were named as parties to the proceeding or their representatives.
- (b) The notice to the applicant and the agency shall include a statement that no person may conduct activities authorized by the proposed agency action that would irreparably alter or damage the CNRA identified in the applicable policy.
- (c) In conducting reviews, the commissioner shall consider only:
- (1) the record before the agency proposing the action under review;
 - (2) the agency's findings;
 - (3) applicable laws and rules;
 - (4) any additional information provided by that agency; and
 - (5) the oral or written testimony of any person regarding the CMP as the testimony relates to the agency's proposed action under review. Notice of the period during which testimony will be received shall be published in the *Texas Register* and in a newspaper of general circulation in each county directly affected by the matter under review before the review period begins. The commissioner may reasonably limit the length and format of the testimony and the time at which it will be received.
- (d) If the agency did not hold a hearing, make a record, or make findings, the commissioner may hold a hearing and make findings necessary for a complete and thorough review.
- (e) The commissioner must consider and act on a matter referred before the 26th day after the date the agency proposed the action.
- (f) The commissioner may not review a consistency determination of the GLO, the commissioner, or the School Land Board. The commissioner shall refer a request for review of the consistency of an action by one of these entities to the attorney general not later than the second day after the date the commissioner receives the request. If the attorney general protests the action, such a protest has the same effect as a protest by the commissioner.

§29.36 Standard of Commissioner Review of a Proposed Agency Action

- (a) The only basis on which the commissioner may protest a proposed agency action is that the proposed action is inconsistent with the CMP goals and policies.
- (b) Following certification of an agency's rules as consistent with the CMP goals and policies pursuant to Subchapter B of this chapter:
 - (1) the commissioner shall presume that the agency's consistency determination is valid if it is supported by

the agency's findings of fact and conclusions of law;

(2) the burden shall be on the person filing the request for referral to demonstrate that the agency's proposed action is inconsistent with the CMP goals and policies; and

(3) any thresholds for referral approved pursuant to §505.26 of this chapter (relating to Approval of Thresholds for Referral) shall become operative and limit the commissioner's authority to review individual proposed actions of an agency as provided in §505.32 of this chapter (relating to Requirements for Referral of a Proposed Agency Action).

§29.37 Activities Pending Commissioner Review of a Proposed Agency Action

Pending the commissioner's review of an individual agency proposed action, no person may conduct activities authorized by the agency action that would irreparably alter or damage the CNRA identified in the applicable policy, except as otherwise provided by the Texas Administrative Procedure Act, Government Code §2001.054.

§29.38 Commissioner Determination on Review of a Proposed Agency Action

(a) On review, the commissioner may affirm or protest an agency's proposed action. A proposed action is consistent with the CMP goals and policies and approved by the commissioner unless the commissioner determines the proposed action to be inconsistent with the CMP and protests the proposed action. If the commissioner protests the proposed action, the commissioner shall issue written findings to the agency or subdivision within 26 days after the date the agency or subdivision proposed the action. The commissioner's findings shall:

(1) specify how the proposed action is inconsistent with the CMP goals and policies; and

(2) include specific recommendations regarding how the proposed action may be modified or amended to make it consistent with the CMP goals and policies.

(b) The commissioner may recommend that an agency undertake only such actions as are within the authority of the agency. A goal or policy may not require an agency to perform an action that would exceed the constitutional or statutory authority of the agency to which the goal or policy applies.

§29.39 Agency Action after Commissioner Protest

(a) After the commissioner has protested a proposed action and issued written findings and recommendations to the agency, the agency shall review the findings and recommendations and determine whether to modify or amend the proposed action to make it consistent with the CMP goals and policies. The agency shall notify the CMP coordinator of its decision no later than 21 days after the date the agency receives the commissioner's written protest.

(b) If the commissioner finds that the agency did not amend or modify the proposed action either to conform substantially with the commissioner's recommendations or to achieve the same results as the commissioner's recommendations, the commissioner shall refer the matter to the attorney general for a legal opinion on consistency of the proposed action with the CMP goals and policies. The agency is stayed from taking the proposed action until the attorney general issues the opinion. The attorney general shall issue an opinion before the 26th day after the date the commissioner requests the opinion. The attorney general shall base the opinion on the record before the agency and the commissioner. In determining whether the proposed action is inconsistent, the attorney general shall consider the commissioner's findings and recommendations and the agency's response.

§29.42 Enforcement after Commissioner Protest of a Proposed Agency Action

- (a) The agency with jurisdiction over a proposed action shall enforce provisions of the CMP.
- (b) If the attorney general issues an opinion under §505.39 of this chapter (relating to Agency Action After Commissioner Protest) that a proposed agency action is inconsistent with the CMP, the attorney general shall file suit in a district court of Travis County unless otherwise directed by the commissioner.
- (c) Notwithstanding the request for an opinion from, or the filing of a suit by the attorney general, the commissioner and the agency may enter into a settlement agreement with regard to the proposed action. If the commissioner and the agency enter into a settlement agreement, the commissioner may rescind the commissioner's request for an opinion from the attorney general. **SUBCHAPTER D COMMISSIONER ADVISORY OPINIONS ON GENERAL PLANS**

§29.50 General Plans

General plans include any comprehensive statement in words, maps, illustrations, or other media issued by a state agency or political subdivision that recommends, proposes, evaluates, or formulates policies or future courses of action involving activities affecting coastal natural resource areas. For purposes of this section, general plans include, but are not limited to, the following:

- (1) State Emergency Management Plan (Texas Government Code, §418.042);
- (2) State Oil and Hazardous Substance Spill Contingency Plan (Texas Water Code, Chapter 26, Subchapter G);
- (3) State-Owned Coastal Wetlands Conservation Plan (Texas Parks and Wildlife Code, §14.002(a));
- (4) State Water Quality Management Plan (Texas Water Code, §26.012);
- (5) Artificial Reef Plan (Texas Parks and Wildlife Code, §89.021);
- (6) State Water Plan (Texas Water Code, §16.051);
- (7) Long-Range Dredging and Disposal Plan (Texas Parks and Wildlife Code, §14.002(b)(8)); and
- (8) Regional Solid Waste Management Plans (Texas Health and Safety Code, §363.062).

§29.51 Request for a Non-Binding Advisory Opinion and Commissioner Action

- (a) An agency or subdivision which has produced a general plan described or listed in §505.50 of this chapter (relating to General Plans) may request a non-binding advisory opinion on the consistency of its general plan.
- (b) The request for an advisory opinion shall be submitted in writing to the CMP coordinator. The CMP coordinator shall forward copies of the request to all committee members. The commissioner shall consider the general plan within 90 days of receiving the request.
- (c) Prior to commissioner issuance of an advisory opinion regarding a general plan, the commissioner may direct the committee to review the general plan and make a recommendation to the commissioner regarding the consistency of the plan.
- (d) The commissioner shall issue the advisory opinion within 90 days of receiving the request from the

agency or subdivision.

(e) The advisory opinion shall indicate whether actions taken pursuant to the plan are likely to be consistent or inconsistent with the CMP goals and policies. The advisory opinion shall also:

- (1) identify all goals and policies that apply to the general plan;
- (2) identify any consistency issues of concern to the commissioner;
- (3) identify portions or provisions of the plan that are likely to lead to future inconsistent actions; and
- (4) include recommendations for the resolution of consistency issues identified in paragraphs (2) and (3) of this subsection.

§29.52 Request for Commissioner Participation in the Development of General Plans

(a) An agency or subdivision which is producing a general plan described or listed in §505.50 of this chapter (relating to General Plans) may request commissioner participation in the development of a plan by submitting a written request to the CMP coordinator. The commissioner shall participate in the plan development according to the schedule of the agency developing the plan.

(b) The commissioner may direct the committee to participate in the development of the plan and make regular reports to the commissioner.

(c) At the request of an agency or subdivision which is producing a general plan described or listed in §505.50 of this chapter (relating to General Plans), the commissioner may enter into a memorandum of agreement establishing the manner of commissioner participation in plan development, the criteria to be used in evaluating the plan, criteria to determine the adequacy of alternatives for resolving potential inconsistencies in the plan with the CMP goals and policies, and such other matters as are deemed appropriate by the parties to the agreement.

§29.53 Purpose and Effect of an Advisory Opinion

(a) The purpose of the advisory opinion is to notify the public and the agency or subdivision adopting or approving the plan whether actions taken pursuant to the plan are likely to be consistent with the CMP goals and policies.

(b) The advisory opinion does not ensure that any action taken pursuant to the general plan will or will not be consistent with the CMP goals and policies.

(c) The commissioner's issuance of an advisory opinion does not obviate the requirement that state agencies and political subdivisions prepare consistency determinations in accordance with the requirements of this chapter or preclude commissioner review of those actions. **SUBCHAPTER E CONSISTENCY AND COMMISSIONER REVIEW OF LOCAL GOVERNMENT ACTIONS**

§29.60 Subdivision Actions Subject to the Coastal Management Program

For purposes of this chapter and Chapter 501 of this title (relating to Coastal Management Program), issuance of a dune protection permit or beachfront construction certificate are the only proposed actions by a subdivision that may adversely affect a coastal natural resource area and that therefore must be consistent with the CMP goals and policies provided such actions authorize:

- (1) construction activity that is located 200 feet or less landward of the line of vegetation and that results in the disturbance of more than 7,000 square feet of dunes or dune vegetation;
- (2) construction activity that results in the disturbance of more than 7,500 cubic yards of dunes;
- (3) a coastal shore protection project undertaken on a Gulf beach or 200 feet or less landward of the line of vegetation and that affects more than 500 linear feet of Gulf beach; or
- (4) a closure, relocation, or reduction in existing public beach access or public beach access designated in an approved local government beach access plan, other than for a short term.

§29.62 Subdivision Consistency Determinations

(a) Prior to a proposed action identified in §505.60 of this title (relating to Subdivision Actions Subject to the Coastal Management Program), a subdivision shall comply with the CMP goals and policies.

(1) For dune protection permits, the subdivision determination made pursuant to §15.4 of this title (relating to Dune Protection Standards) that the proposed activity will not materially weaken any dune, or materially damage any dune vegetation, or reduce the effectiveness of any dune as a means of protection against erosion and high wind and water, shall constitute a determination that such permit is consistent with CMP goals and policies.

(2) For beachfront construction certificates, the subdivision determination made pursuant to §15.5 of this title (relating to Beachfront Construction Standards) that the proposed activity is consistent with the beach access portion of its approved dune protection and beach access plan and does not interfere with, or otherwise restrict, the public's right to use and have access to and from the Gulf beach shall constitute a determination that such permit is consistent with CMP goals and policies.

(b) A subdivision proposing an action listed in §505.60 of this title (relating to Subdivision Actions Subject to the Coastal Management Program) shall affirm that it has taken into account the CMP goals and policies by issuing a written determination that the proposed action is consistent with program goals and policies.

§29.63 Preliminary Consistency Review of a Proposed Subdivision Action

(a) Prior to taking final action, a subdivision may request preliminary consistency review for any proposed action listed in §505.60 of this chapter (relating to Subdivision Actions Subject to the Coastal Management Program).

(b) A subdivision's request for preliminary consistency review shall be submitted and handled in accordance with the provisions of Chapter 504 of this title (relating to Permitting Assistance and Preliminary Consistency Review).

§29.64 Requirements for Referral of a Proposed Subdivision Action

A proposed subdivision action listed in §505.60 of this chapter (relating to Subdivision Actions Subject to the Coastal Management Program) may be referred to the commissioner for review to determine consistency with the CMP goals and policies only if:

- (1) the subdivision proposed the action for which referral is sought;
- (2) the consistency determination for the proposed action was contested by a member of the committee or other person by the filing of written comments with the subdivision;

(3) a person described in paragraph (2) of this section files a request for referral within ten days of the date the action was proposed alleging a significant unresolved dispute regarding the proposed action's consistency with the CMP goals and policies; and

(4) any three committee members other than the representative of the Texas Sea Grant College Program agree within 13 days of the date the action was proposed that there is a significant unresolved dispute regarding the proposed action's consistency with the CMP goals and policies and the matter is referred to the commissioner for review.

§29.65 Filing of Request for Referral

(a) To seek commissioner review of an action identified in §505.60 of this chapter (relating to Subdivision Actions Subject to the Coastal Management Program), a member of the committee or other person must file a written Request for Referral with the CMP coordinator. The request must be filed no later than ten days after the subdivision has proposed the action for which consistency review is sought.

(b) The Request for Referral shall include:

(1) the names, addresses, and signatures of all persons joining in the request;

(2) a certificate of service indicating that requestor has provided copies of the request by personal delivery or certified service to:

(A) the subdivision proposing the action for which review is sought; and

(B) the applicant, if other than the subdivision;

(3) a description of the proposed action for which review is sought, indicating the date of the proposed subdivision action, including a copy of the order, permit, or other official subdivision proposal;

(4) a statement demonstrating, by reference to the requirements of §505.64 of this chapter (relating to Requirements for Referral of a Proposed Subdivision Actions), that the proposed action is one subject to referral; and

(5) a clear and concise statement of the proposed action's inconsistencies with the CMP goals and policies, including specific reference to the applicable goals and policies and to the applicable facts in the subdivision's proposal.

§29.66 Referral of a Proposed Subdivision Action to the Commissioner for Review

(a) Upon receipt of a timely Request for Referral which satisfies the requirements of §505.65 of this chapter (relating to Filing of Request for Referral), the CMP coordinator shall provide a copy to each member of the committee.

(b) The members of the committee shall consider the Request for Referral.

(c) For the commissioner to accept a Request for Referral, any three committee members other than the representative of the Texas Sea Grant College Program must agree that there is a significant unresolved dispute regarding the action's consistency by submitting the matter to the CMP coordinator in writing no later than 13 days after the date of action is proposed.

(d) The adequacy or inadequacy of a Request for Referral shall not be a reviewable issue before the

commissioner. The commissioner may exercise the discretion to accept a deficient Request for Referral.

(e) No right to commissioner review is created by these rules. The decision to review a proposed action is within the commissioner's discretion.

§29.67 Procedures for Commissioner Review of a Proposed Subdivision Action

(a) The CMP coordinator shall, by certified mail or hand delivery, provide notice of any hearing at which the commissioner will review a proposed action to:

- (1) the subdivision proposing the action;
- (2) the applicant, if other than the subdivision; and
- (3) the person(s) filing the Request for Referral.

(b) In conducting reviews, the commissioner shall consider only:

- (1) the record before the subdivision involved in the matter under review;
- (2) the subdivision's findings;
- (3) applicable laws and rules;
- (4) any additional information provided by the subdivision; and
- (5) the oral or written testimony of any person regarding the CMP as the testimony relates to the subdivision proposed action or activity. Notice of the period during which testimony will be received shall be published in the *Texas Register* and in a newspaper of general circulation in each county directly affected by the matter under review before the review period begins. The commissioner may reasonably limit the length and format of the testimony and the time at which it will be received.

(c) If the subdivision did not hold a hearing, make a record, or make findings, the commissioner may hold a hearing and make findings necessary for a complete and thorough review.

(d) The commissioner shall determine whether an action is consistent with the CMP goals and policies before the 26th day after the subdivision has proposed the action.

§29.68 Standard of Commissioner Review of a Proposed Subdivision Action

(a) The only basis on which the commissioner may protest a proposed subdivision action is that the proposed action is inconsistent with the CMP goals and policies.

(b) Following the GLO's certification of a subdivision's dune protection and beach access plan under §15.3(o) of this title (relating to Administration) as consistent with the CMP goals and policies:

- (1) the subdivision's consistency determination is final and is not subject to referral and review, except as provided in §505.64 of this chapter (relating to Requirements for Referral of Subdivision Actions); and
- (2) the commissioner shall presume that the subdivision's consistency determination is valid, if such determination is documented by the underlying record, and the burden shall be on the person filing the Request for Referral to demonstrate that the subdivision's proposed action is inconsistent with the CMP goals

and policies.

§29.69 Activities Pending Commissioner Review of a Proposed Subdivision Action

Pending commissioner review of a proposed subdivision action which is referred to the commissioner, no person may conduct activities proposed by the subdivision that would irreparably alter or damage critical dunes or dune vegetation or interfere with or restrict the public's right to use and have access to and from the Gulf beach.

§29.70 Commissioner Action on Review of a Proposed Subdivision Action

(a) On review, the commissioner may affirm or protest the subdivision's proposed action. A proposed action is consistent with the CMP goals and policies and approved by the commissioner unless the commissioner determines the proposed action to be inconsistent with the CMP and protests the proposed action. If the commissioner protests the proposed action, the commissioner shall issue written findings in writing to the subdivision. The commissioner's findings shall:

- (1) specify how the proposed action is inconsistent with the CMP goals and policies; and
- (2) include specific recommendations regarding how the proposed action may be modified or amended to make it consistent with the CMP goals and policies.

(b) The commissioner may recommend that a subdivision undertake only such actions as are within the authority of the subdivision. A goal or policy may not require a subdivision to perform an action that would exceed the constitutional or statutory authority of the subdivision to which the goal or policy applies.

§29.71 Subdivision Action after Commissioner Protest

(a) After the commissioner has protested a proposed subdivision action and reported its findings to the subdivision, the subdivision shall review the findings and recommendations and determine whether to modify or amend the proposed action to make it consistent with the CMP goals and policies. The subdivision shall notify the commissioner of its decision no later than 21 days after the date the subdivision receives the commissioner's written protest.

(b) If the commissioner finds that the subdivision did not amend or modify the proposed action either to conform substantially with the commissioner's recommendations or to achieve the same results as the commissioner's recommendations, the commissioner shall refer the matter to the attorney general for a legal opinion on consistency of the proposed action with the CMP goals and policies.

(c) The subdivision is stayed from taking the proposed action until the attorney general issues the opinion. The attorney general shall issue an opinion before the 26th day after the date the commissioner requests the opinion. The attorney general shall base the opinion on the record before the subdivision and the commissioner. In determining whether the proposed action is inconsistent, the attorney general shall consider the commissioner's findings and recommendations and the subdivision's response to the recommendations.

§29.74 Enforcement after Commissioner Protest of a Proposed Subdivision Action

(a) The agency or subdivision with jurisdiction over a proposed action shall enforce the CMP provisions.

(b) If the attorney general issues an opinion pursuant to §505.71 of this chapter (relating to Subdivision Action After Commissioner Protest) finding that a proposed subdivision action is inconsistent with the CMP and the agency or subdivision fails to implement the commissioner's recommendation, the attorney general

shall file suit in a district court of Travis County unless otherwise directed by the commissioner.

(c) Notwithstanding the request for an opinion from, or the filing of a suit by the attorney general, the commissioner and the subdivision may enter into a settlement agreement with regard to the proposed action. If the commissioner and the subdivision enter into a settlement agreement, the commissioner may rescind the commissioner's request for an opinion from the attorney general.