

EMERGENCY RULES

Emergency Rules include new rules, amendments to existing rules, and the repeals of existing rules. A state agency may adopt an emergency rule without prior notice or hearing if the agency finds that an imminent peril to the public health, safety, or welfare, or a requirement of state or federal law, requires adoption of a rule on fewer than 30 days' notice. An emergency rule may be effective for not longer than 120 days and may be renewed once for not longer than 60 days (Government Code, §2001.034). An emergency rule may be effective for not longer than 120 days and may be renewed once for not longer than 60 days. (Government Code, §2001.034).

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 §15.17, §15.18

The General Land Office adopts, on an emergency basis, new §15.17, concerning Emergency Provisions for Stabilization and Repair of Damaged Residential Structures, and new §15.18, concerning Emergency Measures for Dune Restoration and existing Shoreline Protection Projects. As a result of Hurricane Ike's anticipated landfall near the boundary of Galveston County and Brazoria County late Friday on September 12, 2008, or early Saturday on September 13, 2008, the General Land Office recognizes that all jurisdictions within Nueces, Matagorda, Brazoria, and Galveston Counties with Dune Protection and Beach Access Plans are expected to have areas where residential structures and public infrastructure are in need of emergency stabilization and repair and where emergency hazard mitigation measures are needed to reestablish the protective barrier provided by the beach and natural dunes damaged or destroyed by storm tidal surges in order to prevent imminent peril to the public health, safety, and welfare.

The sections are adopted on an emergency basis due to the imminent peril to public health, safety and welfare represented by the damage to structures and protective barriers caused by high winds, storm surge, high tides and erosion expected from Hurricane Ike. A severe weather advisory issued by the National Weather Service at 7:00 AM on September 12, 2008, indicates that Ike has maximum sustained winds near 105 miles per hour, classified as a category two hurricane on the Saffir-Simpson Scale. Ike is forecast by the National Weather Service to become a major hurricane prior to reaching the Texas coastline. Ike is a very large tropical cyclone with hurricane force winds extending outward to 115 miles from the center and tropical storm force winds extending outward up to 275 miles. The National Weather Service advisory states that coastal storm surge flooding of up to 20 feet above normal tide levels, along with dangerous and battering waves can be expected near and to the east of where the center of Ike makes landfall. Coastal storm surge flooding of 6 to 8 feet above normal tide levels can be expected within the tropical storm warning area along the northern Gulf Coast. Rick Perry, Governor of Texas, issued a proclamation on September 8, 2008, certifying that Hurricane Ike poses a threat of imminent disaster along the Texas Coast for 88 coastal counties, including the counties covered by these emergency rules.

As a result of Hurricane Ike's anticipated landfall near the boundary of Galveston County and Brazoria County late Friday on September 12, 2008, or early Saturday on September 13, 2008, hurricane and tropical storm winds, storm surge, extreme tides and dangerous and battering wave action major property damage, coastal flooding and erosion is expected. It is anticipated that the local jurisdictions will experience loss in elevation of beach sand, and the structural integrity of many houses will be adversely impacted as a result of these natural forces. The protective barrier provided by naturally occurring beaches and dunes in these areas, as well as existing shoreline protection projects will be severely impacted. Coastal residents, public beaches, public and private coastal property, and coastal natural resources are extremely vulnerable to injury, damage, and destruction from subsequent tropical storms and high tide events, as the peak of hurricane season continues.

The General Land Office staff recognized the need for emergency rules as Hurricane Ike approaches the Upper Texas coast. The General Land Office has determined the necessity for emergency rules that allow emergency stabilization and repair of structures and provide for temporary suspension of the permit and certificate application requirements for these emergency stabilization and repair techniques and methods, as well as other hazard mitigation measures.

Emergency rule §15.17 provides procedures and requirements for issuance of authorization to undertake emergency stabilization and repairs of structures impacted by Hurricane Ike. The emergency rules are applicable only to all local jurisdictions with local dune protection and beach access plans within the Counties of Nueces, Matagorda, Brazoria, and Galveston. The section shall be effective for 120 days from the date of filing with the Office of the Secretary of State and may be extended once by the Land Commissioner for not longer than 60 days as necessary to protect public health, safety and welfare. Section 15.17(c) provides definitions applicable to this section. Section 15.17(d) allows the local government to issue authorizations for emergency stabilization and repair of residential structures as necessary to eliminate the danger and threat to public health, safety, and welfare. Section 15.17(e) provides that the normal permit process shall not apply to emergency authorizations, and that emergency authorizations are valid for no more than 180 days from issuance. Section 15.17(f) provides that the local government is required to maintain a written record of the names and addresses of property owners who have been authorized to undertake emergency stabilization and repair actions and the specific activities that have been authorized. Section 15.17(g) provides requirements and limitations with regard to emergency authorizations by the local government of emergency stabilization and repair. Section 15.17(h) provides additional limitations with regard to structures located on the public beach, and requirements related to the placement of beach quality sand. Section 15.17(i), (j), (k) and (l) provide additional limitations and re-

quirements related to the repair of hard structures and septic and sewage systems, the placement of materials on the public beach, and the removal of beach debris.

Under emergency rule §15.17(g), a local government may permit the repair of a structure that appears to be partially or wholly seaward of the line of vegetation; however, a local government is prohibited from authorizing the following: repairing or constructing a slab of concrete, fibercrete, or other impervious material; placing material other than beach quality sand on the public beach; repairing or constructing an enclosed space, including a space with breakaway walls, below the base flood elevation, as identified on the pertinent community's flood insurance rate map, and seaward of the line of vegetation; increasing the footprint of the structure; repairing a structure previously built, repaired, or renovated in violation of the Land Office's beach/dune rules or the local government's dune protection and beach access plan or without an approved certificate or permit; or constructing, repairing, or maintaining an erosion response structure. These limitations on a local government's authority to issue a beachfront construction certificate or dune protection permit for repair of a structure that crosses the line of vegetation or on state-owned submerged lands are existing law and are necessary to ensure compliance with the provisions of §15.4, relating to Dune Protection Standards, §15.5, relating to Beachfront Construction Standards, and §15.6, relating to Concurrent Dune Protection and Beachfront Construction Standards. In areas located landward of the public beach, a slab or other paving beneath the footprint of a structure may be replaced by wooden decking, brick pavers, or other pervious materials; however, the emergency rule does not require that an owner remove an existing slab or other impervious surface when no repairs to the slab or other impervious surface is needed. A local government may authorize the repair of a septic system landward of the line of vegetation if the system complies with the rules of the TCEQ and the local government governing on-site sewage facilities.

Emergency rule §15.18 provides procedures and requirements for issuance of authorization to undertake emergency measures for dune restoration or repairs to existing shoreline protection projects for littoral property impacted by Hurricane Ike. The emergency rules are applicable only to local jurisdictions with local dune protection and beach access plans within the Counties of Nueces, Matagorda, Brazoria, and Galveston. The section shall be effective for 120 days from the date of filing with the Office of the Secretary of State and may be extended once by the Land Commissioner for not longer than 60 days as necessary to protect public health, safety and welfare. Section 15.18(c) provides definitions applicable to this section. Section 15.18(d) allows the local government with beach/dune permitting jurisdiction to issue authorizations for emergency measures for dune restoration or for repairs to existing shoreline protection projects as necessary to eliminate the danger and threat to public health, safety, and welfare. Section 15.18(e) provides that the normal permit process shall not apply to authorizations, and that emergency authorizations are only valid for a period no longer than 180 days. Section 15.18(f) provides that the local government is required to maintain a written record of the names and addresses of property owners who have been authorized to undertake emergency dune restoration projects and shoreline protection project repairs. Section 15.18(g) provides requirements and limitations with regard to the location of emergency dune restoration projects. Section 15.18(h) provides guidelines for authorized methods and materials with regard to emergency dune restoration projects. Section 15.18(i) contains limitations

on repairs to shoreline protection projects to ensure that such projects are consistent with policies of the Coastal Coordination Council established for structural shoreline protection projects. Section 15.18(j) contains prohibitions with regard to dune restoration projects and shoreline protection project repairs. Section 15.18(k) prohibits a local government from authorizing construction or repair of a bulkhead or new shoreline protection project seaward of the line of vegetation on the public beach easement.

The General Land Office has determined that a takings impact assessment (TIA), pursuant to §2007.043 of the Texas Government Code, is not required for the adoption of this emergency rule because the rule is adopted in response to a real and substantial threat to public health, safety, and welfare.

The new sections are adopted on an emergency basis under the Texas Natural Resources Code §§63.121, 61.011, and 61.015(b), which provide the General Land Office with the authority to: identify and protect critical dune areas; preserve and enhance the public's right to use and have access to and from Texas's public beaches; protect the public easement from erosion or reduction caused by development or other activities on adjacent land; and other measures needed to mitigate for adverse effects on access to public beaches and the beach/dune system. The new sections are also adopted pursuant to the Texas Natural Resources Code §33.601, which provides the General Land Office with the authority to adopt rules on erosion, and the Texas Water Code §16.321, which provides the General Land Office with the authority to adopt rules on coastal flood protection. Finally, the new sections are adopted on an emergency basis pursuant to Texas Government Code §2001.034, which authorizes the adoption of a rule on an emergency basis without prior notice and comment based upon a determination of imminent peril to the public health, safety or welfare.

§15.17. Emergency Provisions for Stabilization and Repair of Damaged Residential Structures.

(a) Purpose. The purpose of this section is to allow a local government to grant to a property owner the ability to undertake emergency stabilization and repair of a residential structure damaged as the result of Hurricane Ike.

(b) Applicability. This section applies only to structures located in all local jurisdictions with local dune protection and beach access plans within the Counties of Nueces, Matagorda, Brazoria, and Galveston. This section shall be in effect for 120 days from the date of filing with the Office of the Secretary of State and may be extended once by the Land Commissioner for not longer than 60 days as necessary to protect public health, safety and welfare.

(c) Definitions. The following words and terms, as used in this section, shall have the following meanings:

(1) The Code--The Texas Natural Resources Code.

(2) Habitable--The condition of the premises which permits the inhabitants to live free of serious threats to health and safety.

(3) House--A single or multi-family structure that serves as living quarters for one or more persons or families.

(4) Emergency repair--Those immediate response actions that must be undertaken to render a structure habitable or to prevent further damage.

(5) Emergency stabilization--Those immediate response actions that must be undertaken to stabilize a residential structure that is subject to imminent collapse or substantial damage as a result

of erosion or undermining caused by waves or currents of water exceeding normally anticipated cyclical levels.

(d) Local government authorization. The local governments with jurisdiction to issue dune protection permits and beachfront construction certificates may, in accordance with this section, authorize emergency stabilization and repair of a residential structure damaged by Hurricane Ike. All authorizations issued under this section must otherwise be in accordance with applicable state and local law. The local government is responsible for assessing damage to such structures, determining whether the structures are eligible for approval of emergency stabilization and repair, and determining appropriate emergency stabilization and repair procedures. Under this section, the local government may only authorize emergency stabilization and repair as necessary to eliminate the danger and threat to public health, safety, and welfare. Any proposed stabilization and repair method or technique must comply with the standards provided in this section and §15.6(e) and (f) of this title (relating to Concurrent Dune Protection and Beachfront Construction Standards) or §15.11 of this title (relating to Repairs to Certain Houses Located Seaward of the Boundary of the Public Beach). If a house appears to be seaward of the line of vegetation solely because of Hurricane Ike and the local government provides a written statement to that effect with the written record described in subsection (f) of this section, the local government may authorize stabilization and repair methods and techniques in accordance with §15.11 of this title for such house.

(e) Procedure. The permit and certificate application requirements of §15.3(s)(4) of this title (relating to Administration) are not applicable to the emergency stabilization and repair of residential structures under this rule. However, all property owners eligible to undertake emergency stabilization efforts and repair must receive prior approval for such actions from the local government officials responsible for approving such actions. Any action that is not necessary for the emergency stabilization and repair of residential structures will require a permit and/or certificate before such action is undertaken. An authorization issued by a local government under this section shall be valid for no more than 180 days from the date of issuance. A local government shall not renew an authorization issued under this section.

(f) Written Record. The local government authorizing emergency stabilization and repair of residential structures shall compile and maintain a written record of the names and addresses of the property owners that receive such authorization and the specific activities authorized. The local governments must make such records available for inspection by the General Land Office upon request. Within one week of the expiration of this rule, the local government shall submit to the General Land Office copies of the complete written record of actions authorized under this section.

(g) Authorized Repairs. The local government may authorize emergency stabilization and repair of a residential structure only if the local government determines that the proposed action:

- (1) is solely to make the house habitable or prevent further damage, including reconnecting the house to utilities;
- (2) does not increase the footprint of the house;
- (3) does not include the use of impervious or pervious materials, with the exception of beach quality sand seaward of the natural line of vegetation;
- (4) does not include the construction of an enclosed space below the base flood elevation seaward of the natural line of vegetation;
- (5) does not include the repair, construction, or maintenance of an erosion response structure;

(6) does not occur on state-owned submerged lands;

(7) does not include construction underneath, outside or around the house other than for reasonable access to the house; and

(8) does not include activities inconsistent with the Beach/Dune Rules or local dune protection and beach access plan.

(h) Repair of structures on the public beach.

(1) A local government may grant authorization in accordance with this section for emergency stabilization of a structure that encroaches or may encroach on the public beach, but only to the limited extent necessary to prevent an immediate threat to public health, safety, and welfare.

(2) A local government may grant authorization in accordance with this section for emergency repair of a residential structure that encroaches or may encroach on the public beach, but only if the structure is:

(A) a house;

(B) not in imminent danger of collapse or other imminent threat to public health and safety;

(C) is not subject to a pending enforcement action under this subchapter, the Open Beaches Act (Texas Natural Resources Code, Chapter 61), or the Dune Protection Act (Texas Natural Resources Code, Chapter 63). An enforcement action includes the filing of a suit in district court or the referral of a matter for enforcement to the attorney general or other public prosecutor;

(D) is less than 50% damaged.

(3) Beach-quality sand may be placed on the lot in the area five feet seaward of a structure where necessary to prevent further erosion due to wind or water. The beach-quality sand must remain loose and cannot be placed in bags. Such actions are authorized in situations where protection of the land immediately seaward of a structure is required to prevent foreseeable undermining of habitable structures in the event of such erosion. Beach quality sand must not be placed seaward of mean high tide.

(i) The local government is not authorized under this rule to allow the use of concrete or the construction or repair of bulkheads or hard protective structures. However, repairs to existing shoreline protection projects are permitted only as provided in §15.18 of this title (relating to Emergency Measures for Dune Restoration and Existing Shoreline Protection Projects).

(j) Repair of sewage or septic systems. If the Texas Commission on Environmental Quality or its designated local authority, the Texas Department of Health, or a local health department has made a determination that a sewage or septic system located on or adjacent to the public beach poses a threat to the health of the occupants of the property or public health, safety or welfare, and requires removal of the sewage or septic system, the sewage or septic system shall be located in accordance with §15.5(b)(1) of this title (relating to Beachfront Construction Standards) and §15.6(b) and §15.6(e)(1) of this title (relating to Concurrent Dune Protection and Beachfront Construction Standards).

(k) Prohibitions. This emergency rule does not authorize the placement of materials on the public beach except in conjunction with authorized emergency stabilization and repair of residential structures.

(l) Removal of beach debris. Beach debris moved by wind or water can threaten Gulf-fronting properties. The local government, therefore, shall coordinate with property owners to remove debris

including but not limited to pilings, concrete, fibercrete, pavers, and garbage from the public beach as soon as possible.

§15.18. Emergency Measures for Dune Restoration and Existing Shoreline Protection Projects.

(a) Purpose. The purpose of this section is to allow a local government to grant property owners the ability to immediately undertake emergency repairs to dunes and existing shoreline protection projects that have been damaged by the effects of Hurricane Ike and to construct dune restoration projects to minimize further threat or damage to coastal residents and littoral property.

(b) Applicability. This section applies only to the emergency dune restoration projects and existing shoreline protection projects located in all local jurisdictions with local dune protection and beach access plans within the Counties of Nueces, Matagorda, Brazoria, and Galveston. This section shall be in effect for 120 days from the date of filing with the Office of the Secretary of State and may be extended once by the Land Commissioner for not longer than 60 days as necessary to protect public health, safety, and welfare.

(c) Definitions. The following words, terms, and phrases when used in this section, shall have the following meanings:

(1) Emergency dune restoration--Those immediate response measures that must be undertaken to construct a dune, repair a damaged dune, or stabilize an existing dune in order to minimize further threat or damage to coastal residents and littoral property.

(2) Shoreline protection project repairs--Those immediate response measures that must be undertaken to restore an existing shoreline protection project to condition that affords protection from subsequent storms or tidal events.

(d) Local government authorization. The local government with jurisdiction to issue dune protection permits and/or beachfront construction certificates may, in accordance with this section, authorize emergency dune restoration projects and shoreline protection project repairs in areas where dunes or existing shoreline protection projects have been damaged by the effects of Hurricane Ike. All authorizations issued under this section must otherwise be in accordance with applicable state and local laws. Under this section, the local government may only authorize emergency dune restoration projects and shoreline protection project repairs as necessary to minimize the danger and threat to coastal residents and littoral property. Any proposed emergency dune restoration project or shoreline protection project repairs must comply with the standards provided in this section.

(e) Procedures. The permit and certificate application requirements and procedures of §15.3(s)(4) of this title (relating to Administration) are not applicable to emergency dune restoration projects and shoreline protection project repairs. However, any person eligible to undertake an emergency dune restoration project or shoreline protection project repairs must receive prior approval for such actions from the local government officials responsible for approving such actions. Any action that is not necessary for the emergency dune restoration project or shoreline protection project repairs under this section will require a permit and/or certificate before such action is undertaken. An authorization issued by a local government under this section shall be valid only for six months, after which it will expire. A local government shall not renew an authorization issued under this section.

(f) Written Record. The local government authorizing an emergency dune restoration project or shoreline protection project repairs shall compile and maintain a written record of the names and addresses of the property owners that receive such authorization and the specific activities authorized. For each authorization, the persons requesting emergency authorizations must provide the local

governments with pictures of the emergency dune restoration project or shoreline protection project conditions before and after completion of the authorized activities. The local governments must make such records available for inspection by the General Land Office upon request. Within one week of the expiration of this rule, the local government shall submit to the General Land Office copies of the complete written record of actions authorized under this section.

(g) Authorized emergency dune restoration. The local government shall require persons to locate restored dunes in the area extending no more than 20 feet seaward of the post-storm landward boundary of the public beach easement, referred to herein as the restoration area. The local government shall ensure that the restoration area follows the natural meander or migration of the post-storm vegetation line. The local government may issue permits and certificates to allow the restoration of dunes on the public beach only under the following conditions:

(1) Restored dunes may be located farther seaward than the restoration area only to the limited extent necessary to minimize further damage to coastal residents and littoral property, provided such dunes shall not substantially restrict or interfere with the public use of the beach at normal high tide;

(2) The local government shall not allow any person to restore dunes, even within the restoration area, if such dunes would effectively prohibit access to or use of the public beach at normal high tide; and

(3) Under no circumstances may sand or other materials be placed below mean high water.

(h) Authorized methods and materials for emergency dune restoration. The local government may allow persons to use the following methods or materials for emergency dune restoration:

(1) piles of sand having similar grain size and mineralogy as the surrounding beach;

(2) clay cored dunes landward of the line of vegetation;

(3) organic brushy material such as used Christmas trees; and

(4) sand obtained by scraping accreting beaches only if the scraping is approved by the local government and the project is monitored to determine any effect on the public beach, including, but not limited to, increase erosion of the public beach.

(i) Shoreline protection project repairs. Notwithstanding the general prohibition on maintaining or repairing erosion response structures in §15.6(d) of this title (relating to Concurrent Dune Protection and Beachfront Construction Standards), a local government may authorize repairs to an existing shoreline protection project, subject to the following limitations:

(1) Repairs to existing shoreline protection projects may be permitted to minimize further damage to coastal residences and littoral property, provided the existing shoreline protection project does not substantially restrict or interfere with the public use and access of the beach at normal high tide;

(2) The local government shall not authorize any person to repair a shoreline protection project that is located below mean high water; and

(3) The existing shoreline protection project must conform with the policies of the Coastal Coordination Council promulgated in §501.26(b) of this title (relating to Policies for Construction in the Beach/Dune System).

(j) Prohibitions. The local government shall not allow any person to undertake dune restoration projects or temporary shoreline protection projects using any of the following methods or materials:

(1) materials such as bulkheads, riprap, concrete, or asphalt rubble, building construction materials, and any non-biodegradable items;

(2) fine, clayey, or silty sediments; except as provided for clay cored dunes landward of the line of vegetation;

(3) sediments containing the hazardous substances listed in Appendix A to §302.4 in Volume 40 of the Code of Federal Regulations, Part 302 in concentrations which are harmful to people, flora, and fauna as determined by applicable, relevant, and appropriate requirements for toxicity standards established by the local, state, and federal governments; or

(4) sand obtained by scraping or grading dunes, or from beaches in eroding areas.

(k) The local government is not authorized under this rule to allow the use of concrete or the construction or repair of bulkheads or construct new shoreline protection projects. This rule does not prohibit

a local government from authorizing the removal of portions of damaged bulkheads or shore protection projects that threaten public health safety and welfare.

This agency hereby certifies that the emergency adoption has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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