

Response to Questions Raised by TMHA

Response to Questions are in Italics

- 1. Is there a warranty requirement for manufacturers or builders of modular homes?**
 - If so, how long does the warranty obligation run?**

No, unlike manufactured housing, there is no statutory language or administrative rule that establishes warranty requirements.

- 2. If there is not a warranty requirement, then when does the liability of the manufacturer expire?**

There is no statutory language or administrative rule that establishes liability requirements.

The IHB law and rules require construction of industrialized housing and buildings in accordance with the adopted mandatory building codes. A manufacturer certifies that the modular components or sections of a house or building comply with the mandatory building codes and other applicable sections of the IHB law and rules when they attach the certification decals or insignia.

Section 60.200 of the Procedural Rules of the Commission and TDLR states:

- *That complaints against a person or entity regulated by TDLR are accepted in all circumstances; and*
- *That a complaint must be filed within 2 years of the event giving rise to the complaint unless the complainant can show good cause to the Executive Director for opening the complaint.*

The event giving rise to the complaint may vary between statutes and types of complaints. For example, a modular house is manufactured in 2006, but the house is not sold or installed until 2008. The consumer has identified problems and has taken steps to work through problems with the manufacturer and/or the industrialized builder, but is not satisfied that the problems have been adequately addressed by the manufacturer and/or industrialized builder – this is the event giving rise to the complaint.

Complaints can come from many sources, such as industry, anonymous sources, consumers, department staff, etc.

Department complaints (complaints opened by Department staff) are filed when compliance with a statute, rule, or adopted procedure cannot be achieved through other methods.

Consumer complaints are filed by people outside of TDLR. An Enforcement Division intake legal assistant performs research and analysis as necessary to determine if TDLR has legal jurisdiction and whether there is reason to believe a violation may have occurred. If Enforcement determines that the matter is within TDLR's jurisdiction and that a violation may have occurred, then a case is opened for investigation.

*The Complaint Investigation and Resolution process is posted on the TDLR website:
<http://www.license.state.tx.us/complaintinfo.htm>.*

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3. Does the liability of the manufacturer extend to subsequent homeowners who have no direct contractual privity with the original manufacturer?

There is no statutory language or administrative rule that establishes liability requirements.

- **If so, how many subsequent buyers?**
- **If so, what is the legal basis for this continued obligation?**

Subsequent buyers may file a complaint within 2 years of the event giving rise to the complaint or if the complainant can show good cause to the Executive Director for opening the complaint. Legal basis for this is Section 60.200(b) of the Procedural Rules of the Commission and TDLR.

4. What actions taken by a consumer would negate, nullify, or mitigate the manufacturers' warranty (if not warranty, then liability) obligations?

There is no statutory language or administrative rule that addresses warranty or liability obligations.

- **If yes, is it necessary to disclose to a consumer before purchase these limitations?**

In our experience with inspections/investigations, there may be some confusion for constituents distinguishing between a warranty issue and a non-compliance issue. The Department inspects to determine if there are any code compliance issues or if any of the complainant's issues may, or could, have been caused by code compliance issues. The Department does not inspect to determine if an item is covered by a warranty.

- **If a disclosure is necessary, should it be on a Council/Commission promulgated form?**

No, there is no statutory language or administrative rule that addresses warranty or liability disclosures.

5. Is the manufacturer responsible for a home after a homeowner modifies or attaches additional structures?

The manufacturer is generally held responsible for all construction and building systems that are installed in the factory. The industrialized builder may be responsible for other structures or attachments to the house if the work was completed during the installation of the house and prior to the final inspection. The industrialized builder is required to have the homeowner obtain an installation permit (from TDLR), prior to the final inspection, for any work for which the homeowner will be responsible. Otherwise, the industrialized builder may be held responsible.

The requirement for the installation permit was developed as a tool to allow homeowners to take responsibility for some aspects of the construction completed during the installation. This came about because of past consumer complaints where the industrialized builder claimed the homeowner was responsible for non-code compliant construction and the homeowner claimed the industrialized builder was responsible for this construction – in many cases the industrialized builder did not have any written documentation or contract that specified those aspects of construction for which the homeowner was responsible.

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- **If so, to what extent?**
 - ✓ **Damage to the house?**
 - ✓ **Damage to the additional attached structure?**

If the industrialized builder did NOT have the homeowner obtain an installation permit for the work for which the homeowner was responsible then the industrialized builder may be responsible for any code violations the modification has caused, provided that it was completed prior to the final inspection. The industrialized builder is not responsible for construction performed by the installation permit holder as specified on the installation permit application.

If the final inspection shows evidence that the structure was not there at the time of final inspection, the respondent can use this as mitigating evidence in resolution of the complaint. The prosecutor, State Office of Administrative Hearings (SOAH), and/or the commission determines the appropriate resolution of the case.

- **If so, can a manufacturer eliminate this responsibility with a consumer disclosure?**

*The industrialized builder can eliminate this responsibility by ensuring the homeowner obtains an installation permit for work to be completed by the homeowner and by ensuring that the homeowner is not allowed to occupy the house prior to the final inspection. **The industrialized builder is not responsible for construction performed by the installation permit holder as specified on the installation permit application.***

- ✓ **If so, should this disclosure be on a Council/Commission promulgated form or defined in statute?**

No, the responsibilities of the industrialized builder are outlined in the rules.

- 6. Is it department practice to notify the industrialized builder or the manufacturer when a state inspection is requested or a consumer complaint is filed?**

Yes, Enforcement notifies affected parties when a complaint is opened. A letter is sent to the person who filed the complaint (known as the complainant) and a letter is sent to the person or company (known as the respondent) against whom the complaint was filed.

“Complaint Investigation and Resolution” information can be found on the TDLR website at: <http://www.license.state.tx.us/complaintinfo.htm>.

If not, should such a procedure be adopted?

See response above.

- 7. Is it department practice to notify and allow the industrialized builder or manufacturer to attend the department inspection of homes?**

The IHB inspector schedules the inspection with the homeowner. If the homeowner wants a representative of the industrialized builder and/or the manufacturer to be present, then the IHB program specialist will notify the respondent of the inspection date.

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On occasion, conflicts have occurred between the complainant and the respondent, which results in the IHB inspector acting as referee instead of inspecting the house and gathering information. In some cases the conflict has risen to a level that prevented a thorough inspection from occurring.

- **If not, should such a procedure be adopted?**

See response above.

8. **What is the department's procedure when a complaint is filed on a home, but the department has been notified the home in question is the subject of pending litigation? In these instances the manufacturer or industrialized builder is forced to suspend their installation efforts leaving the home incomplete, and without a final third-party inspection.**

The Department's procedures for handling a contested case are governed by the Administrative Procedures Act (APA), Chapter 2001, Texas Government Code; the Department's enabling statute, Chapter 51, Texas Occupations Code; and procedural rules found in 16 Texas Administrative Code, Chapter 60, as well as individual program statutes and rules, which can be found on the Department's web site at www.license.state.tx.us.

Enforcement opens a complaint if TDLR has legal jurisdiction and if there is reason to believe a violation may have occurred. The IHB section, as part of the investigation, performs an inspection if requested to do so by Enforcement.

As a standard practice, the enforcement investigator will interview the complainant, the respondent, and any pertinent witnesses, either by telephone or in person. The enforcement investigator will also gather copies of any documents relevant to the case. If necessary, the enforcement investigator may request an on-site investigation/inspection. After the investigation is complete, the enforcement investigator submits a detailed report to a prosecuting attorney.

It is ultimately the prosecuting attorney who decides what will be considered an enforcement action. If the respondent does not agree with the alleged violations, then they can request a formal hearing before a judge with SOAH. Procedures may be found on the Agency's website at <http://www.license.state.tx.us/complaintinfo.htm>.

- **Should the department similarly suspend any department inspection and/or enforcement action until the home installation is completed following the outcome of the litigation?**

No, the Department cannot suspend an investigation because of private litigation. TDLR is obligated to investigate a complaint if it is determined that the Department has legal jurisdiction and if there is reason to believe that a violation may have occurred. The results of the investigation are open records that can be requested by anyone.

- **If not, what is the rationale in inspecting a home that is admittedly incomplete, but similarly legally prohibited due to pending litigation from being completed?**

TDLR is obligated to investigate a complaint if it is determined that the Department has legal jurisdiction and if there is reason to believe that a violation may have occurred. Section

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60.200(b) of the Procedural Rules of the Commission does not stipulate that an investigation or inspection cannot be performed if "litigation is pending".

- 9. When enforcement action is taken against a manufacturer or industrialized builder and the enforcement is based on a department home inspection and violation report that asserts the home violates specifically cited building codes, does the compliance and/or enforcement division(s) verify the code citations being asserted?**

The IHB program specialist, who is an ICC certified inspector, prepares a report for the enforcement investigator that details the code violations and the code references of the violations. The IHB Team Leader, who is an ICC certified plans examiner, reviews the report before the report is submitted to Enforcement.

- **If not, should such a procedure be implemented to ensure violations are proper, clearly verifiable and appropriate code references are accurate?**

See response above.

- 10. What is the result when the department is notified or learns on its own accord specific code citations made in the department inspection and/or violation reports are mistaken or found to include unverifiable or subjective items or comments?**

The IHB staff, who are ICC certified, do not reference violations that cannot be cited in the applicable adopted building codes. It is possible that a building code may be interpreted differently and the respondent may provide this information to the enforcement investigator and/or prosecutor.

- **Are those specific violations automatically dismissed?**

No, allegations are not automatically dismissed. If the prosecutor determines that the allegations are without merit or that they cannot be confirmed based on the evidence/information available, then the allegations would not be included in the NOAV.

- **If not, is there a requirement to review the report and provide corrected and accurate citation to applicable code?**

The respondent can provide the enforcement [~~investigator or~~] prosecutor with any documentation they have that supports the premise that the violations observed by the IHB inspector are "mistaken," "unverifiable," or "subjective items or comments". The prosecuting attorney will decide what will be considered or excluded from the NOAV. If the respondent does not agree, then they can request a formal hearing before a judge with SOAH.

- ✓ **If it is subsequently discovered a correct and accurate citation cannot be attributed to a violation, is the violation automatically dismissed?**

See response above.

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- ✓ **If not, what is the rationale for sustaining a violation that cannot be clearly and specifically cited by correctly interpreted building codes?**

See response above.

- 11. Should there be a definition in rule or statute as to what constitutes “normal wear and tear”?**

No, we do not believe that a definition is warranted.

- 12. Should there be a definition in rule or statute as to what constitutes “cosmetic”?**

No, we do not believe that a definition is warranted.

- 13. Should there be a definition in rule or statute as to what constitutes “home owner inflicted damage”?**

No, we do not believe that a definition is warranted.

- 14. Should a manufacturer or industrialized builder bear any responsibility for items associated as “normal wear and tear”, “cosmetic” or “home owner inflicted damage”?**

The IHB staff does not reference violations that cannot be cited in the adopted building codes.

- **If so, to what extent does this responsibility extend?**

The prosecuting attorney will decide what will be considered or excluded from the Notice of Alleged Violation or NOAV. If the respondent does not agree, then they can request a formal hearing before a judge with the State Office of Administrative Hearings (SOAH). Procedures may be found on the Agency’s website at <http://www.license.state.tx.us/complaintinfo.htm>.

- 15. Following a home’s proper initial installation, what is the manufacturers’, industrialized builder’s and homeowner’s responsibility regarding future maintenance required due to soil erosion, foundation movement or settlement?**

The IHB staff is aware that, just as with site built houses, the homeowner has responsibilities for maintenance. The industrialized builder and the engineer who designs the foundation have a responsibility to ensure that the foundation is designed for the existing soil conditions, and the industrialized builder has a responsibility to ensure that the foundation is constructed as designed. The Council approved inspector inspects the foundation as constructed for adherence to the design and compliance to the mandatory building codes.

- **Should these responsibilities be clearly defined in pre-contract consumer disclosures?**

No, what is defined in a Pre-contract consumer disclosure would best be addressed internally by the industrialized builder. There is no statutory language or administrative rule that establishes contract obligations between an industrialized builder and the homeowner.

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- **If so, should these disclosures be on Council/Commission promulgated forms or defined in statute?**

No, there is no statutory language or administrative rule that establishes contract obligations between an industrialized builder and the homeowner.

- 16. Does the Council believe the department's inspection and oversight authority is prescriptive in nature as outlined in code or performance based (like the old TRCC program)?**

IHB staff is not familiar with the requirements for the defunct TRCC program and cannot speak for Council; however, the codes adopted under the Texas IHB program have both a performance and a prescriptive method of compliance. This means it will allow builders to meet the requirements of the code through a performance design approach, a prescriptive approach, or a combination of performance and prescriptive. It is the intent of the adopted codes to safeguard occupants while allowing the flexibility to utilize different materials and methods of construction.

- *Performance based standards require the builder to prove that each new design component meets the required health and safety standards.*
- *Prescriptive based standards limit the builder to use only specified materials in specific methods.*

- **If performance based, by what criteria and authority is this standard set?**

The IRC allows for the use of a variety of materials or methods of construction and can be somewhat objective to allow for greater flexibility. A builder can utilize the prescriptive method of construction to demonstrate compliance to eliminate potential violations. An example would be if a builder chooses to build a wood framed floor utilizing conventional wood framing members -- the IRC addresses this floor system prescriptively. If the same builder chooses to build the same floor utilizing a combination of wood, steel, and engineered framing materials, then the builder would have to prove how the system is going to perform.

Inspections are performed to verify compliance with the adopted codes and to the approved plans. The adopted codes set the minimum standards for construction and allow for the use alternative materials or methods of construction. When a builder chooses to use an alternative product, the product has to be evaluated for the performance with applicable standards, as well as verification of how the product is installed with other building products. This is achieved most often by field verification.

- **If prescriptive in nature, will the department no longer cite violations that are not clearly and explicitly stated in the adopted code?**

The IHB staff does not reference violations that cannot be cited in the adopted building codes. It is possible that a building code may be interpreted differently and the respondent may provide this information to the enforcement investigator and/or the prosecutor.

The prosecuting attorney will decide what will be considered or excluded from the NOAV. If the respondent does not agree with the alleged violations, then they can request a formal hearing before a judge with SOAH. Procedures may be found on the Agency's website at <http://www.license.state.tx.us/complaintinfo.htm>.

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- 17. Does the department allow, before moving forward with any enforcement action, an industrialized builder or manufacturer an opportunity to cure deficient items following a final third-party inspection?**

Yes, curing deficiencies is encouraged; however, curing the deficiency does not guarantee that no penalty will be assessed. When the prosecutors examine the entirety of a case to decide whether a penalty is appropriate and if so, how much, they consider the following factors: (1) the seriousness of the violations; (2) the history of past violations; (3) the amount necessary to deter future violations; (4) efforts made to correct the violations; and (5) any other matter that justice may require.

- 18. Does the department allow subjective opinions to be the basis for violations?**

No, the IHB staff does not reference violations that cannot be cited in the adopted building codes. It is possible that a building code may be interpreted differently and the respondent may provide this information to the enforcement investigator and/or the prosecutor.

The prosecuting attorney will decide what will be considered or excluded from the NOAV. If the respondent does not agree with the alleged violations, then they can request a formal hearing before a judge with SOAH. Procedures may be found on the Agency's website at <http://www.license.state.tx.us/complaintinfo.htm>.

- **If so, what is the rationale for allowing subjective opinions to be the basis for violations?**

See response above.

- **If so, how would the Council propose a manufacturer and/or industrialized builder educate themselves such that they avoid violations that are based on subjective opinions?**

See response above.

- 19. Does the Council have a procedure to address when a third-party professional engineer disagrees with a violation assigned by a department employee who is not a professional engineer?**

No. Resolution of complaints falls under the authority of the Department, not the Council.

- 20. Does the Council believe a department inspector (non-professional engineer) has the authority to overrule or disregard the opinions or assertions made by a licensed professional engineer?**

- **If so, what is the rationale for this position?**

The Department does not know what the Council believes.

Section 2: Suggested improvements related to current practices:

The suggestions below are offered to the Council for consideration in an effort to improve efficiency, streamline administrative rules, and reduce unnecessary costs allowing the savings to be passed on to consumers.

1. **TMHA recommends the Council review the legality of some of the “Technical Bulletins” the department has issued. “Technical Bulletins” or “standards of procedure” that carry the force and effect of formal administrative rules, but have not been adopted in the necessary formal administrative rule process have been deemed illegal and unenforceable in other agencies. The concern are those IHB “Technical Bulletins” which impose specific compliance requirements that are not found in statute or administrative rule, but violations of the “Technical Bulletins” carry the same enforcement weight and effect as if they were formal rules. (See DM 98-092 <https://www.oag.state.tx.us/opinions/opinions/48morales/lo/1998/pdf/lo1998092.pdf>)**

For Council’s reference, two “Technical Bulletins” specifically questioned are:

- **IHB TB 10-03 – Concrete Acceptance for Foundations: Requires specific requirements on concrete “trip tickets,” mandatory processes, timing, violations and additional responsibilities/duties on the IHB builder not contained in administrative rule or law.**
- **IHB TB 10-01 – Foundations on Expansive Soils – Residential: Requires specific action, parameters, measurements and responsibilities not found in administrative rule or law.**

Technical bulletins are not adopted as rule because they are only provided as information to explain specific code requirements that are part of the building codes adopted under the IHB program. In some cases technical bulletins are also used to call the industry’s attention to other Texas laws that might require action by, or impact, the manufacturer or industrialized builder (such as TDI windstorm requirements).

- ***IHB TB 10-03 – Concrete Acceptance for Foundations.*** *As with all building construction, evidence that materials comply with building code requirements and approved and/or engineered plans is required. The building codes reference ACI 318 for requirements for concrete, which is the subject of this technical bulletin. One way to verify compliance of the concrete materials in accordance with ACI 318 is to have the concrete tested. However, this is not typical for small projects. In these cases, a copy of the trip ticket from the concrete truck is maintained so that any quality or compliance questions about the concrete can be traced back to the concrete supplier and/or the concrete order. Note that this is no different than what manufacturers do to demonstrate code compliance of purchased materials – evidence of code compliance is obtained from the supplier and maintained in the building file.*
- ***IHB TB 10-01 – Foundations on Expansive Soils.*** *All the parameters, measurements, and responsibilities found in this technical bulletin can be found in the adopted building codes. In addition, the building official representatives on the Council at the time this bulletin was developed reviewed the bulletin to ensure that it accurately reflected the code requirements. The code sections are referenced in the bulletin.*

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2. **TMHA recommends a formal coordination with the Texas Department of Insurance on coastal home construction requirements, along with a singular inspection process that will serve both IHB and TDI inspection requirements.**
 - **Currently, the conflict between TDI and the IHB results in double or triple inspections of the homes at the factory for windstorm certification. TDI will not accept the IHB process of design and certification. This means a second inspector working for an engineer is in the plant doing the same inspection that should be done by the defined third-party inspection company. On windstorm homes, this adds \$300 to \$600 to the cost of a home, as well as potential costly corrections due to the different standards and requirements of IHB and TDI.**

The Department has attempted to work with TDI in the past and will continue to work with them in the future.

However, the TDI inspector is not performing the "same inspection" as the IHB inspector. IHB requires inspections in the plant to monitor the performance of the manufacturer's ability to construct code compliant buildings. TDI inspections are only required if the house is going to a coastal area where the owner of the building will want to obtain windstorm insurance through the insurance pool, and then the inspector is only inspecting the structural portions for compliance with TDI adopted codes.

It should also be noted that the inspections by city and/or county inspectors are also not accepted by TDI unless performed under the auspices of a TDI appointed windstorm inspector.

There are avenues by which manufacturers and industrialized builders can meet both the windstorm and IHB inspection requirements.

- *The manufacturer can request that the engineering manager of their contracted Texas approved third party inspection agency become a TDI approved windstorm inspector. This would allow the manufacturer to use their current TPIA to perform the windstorm inspections. Third party inspectors from the same third party inspection agency could then also perform the site inspections for the industrialized builder.*
- *Contract with a TDI approved windstorm inspector for performance of the windstorm inspections both in the plant and on-site for those buildings that need these inspections*

3. **TMHA recommends the Council institute a specific timeline requirement for all inspection reports delivered to the builder. Currently, several months, and in one case as long as three years, pass between the TDLR inspection and the builder receiving the report. The passage of time exposes additional variables such as weather and/or further actions taken by others relative to the home in question. TMHA recommends the Council institute a 30 day requirement from the time an inspection report is completed to when the builder and/or manufacturer receives the report.**

The Department agrees with the 30 day requirement for completed inspection reports to be submitted to the industrialized builder and/or manufacturer.

Please note, however, it has never taken IHB staff 3 years to complete an inspection and inspection report for a consumer complaint case.

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4. **TMHA recommends the Council consider developing an Alternative Dispute Resolution process. The process would serve as an initial informal dispute resolution process on potential violations and consumer complaints to determine if a proper remedy can be achieved to the satisfaction of all parties, prior to initiating the formal enforcement process.**

The Department encourages informal resolution of its pending cases. Every NOAV that is mailed gives a phone number and email address asking Respondent's to contact the Enforcement division so that the parties can discuss resolution of the case. Currently 67% of the Department's final orders for fiscal year 2011 were resolved by agreement of the parties.

5. **TMHA recommends the formation of a specific task force to examine all current fees and compliance costs to validate the systems and costs are necessary and cost appropriate.**

By law the TDLR Executive office performs an annual fee review of all TDLR programs.

6. **The industry expresses concerns over current requirements which add costs that can accumulate in excess of \$1,000 - \$1,500 (rural and very rural areas) and more than \$3,000 per home in coastal areas. Examples of, but not limited to, costs to review would be: trip ticket cost, site specific stair design, extent of responsibility and liability attributed to third-party inspectors, and timeliness of state audits.**

- **Rural and very rural areas** – *Inspections in rural and very rural areas are required by IHB statute. This would require a change in the IHB law.*
- **Are the current requirements that add to \$3,000 to the cost of housing installed in coastal areas related to the windstorm requirements?** *If so, then this issue needs to be raised with TDI, not TDLR. In addition, the code requirements that add to this cost must also be met by site built housing that is constructed in coastal areas if the housing is to receive windstorm insurance through the insurance pool.*
- **Trip ticket costs** - *The concrete supplier should be able to provide a copy of the trip ticket at the time of delivery of the concrete with no additional charge. If there is a charge it may be for the one of following reasons: requesting the ticket AFTER THE FACT – trip ticket was not requested at the time of delivery and now the industrialized builder is requesting a copy; or the industrialized builder is receiving concrete left over from concrete that was ordered for another project and the trip ticket went to the person who originally ordered the concrete.*
- **Site specific stair design** – *TDLR does not require site specific stair design. However, the manufacturer is required to provide details, approved by their design review agency, for completing these buildings at the installation site. If the manufacturer has not provided these details, then the rules require “unique on-site construction details” prepared by a licensed engineer for completion of the construction at the installation site. This is not a new rule and has been part of the IHB program since its inception. The rationale for the details to be prepared by a licensed engineer was that, hopefully, the engineer would ensure that the design was code compliant and no plan review would then be required by a Council approved design review agency. These types of details would probably not be required to be prepared by an engineer for a house installed within the jurisdiction of a municipality; however, the city would, most likely, perform a plan review to ensure that code requirements were met.*

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- **Extent of responsibility and liability attributed to third-party inspectors** – *Third party inspectors inspect for code compliance and their responsibility and liability is no different than for any other inspector. It is possible that an inspector might be held partly liable for a code compliance issue that resulted in injury or death to another person if it could be shown that the violation existed at the time of the inspection and that the inspector took no action to inform the builder of the existing violation and that corrective action was required.*
- **“Timeliness” of state audits** – *It was suggested at the August meeting of the Council that audits be done every other year and that IHB staff should look into “streamlining” the process. No details were provided on why the process needed to be streamlined or what the problems were with the current process. Note that this is another agenda item that will be discussed further during the December meeting.*

7. TMHA recommends examining existing processes to determine if greater use of technology, in particular electronic communication, could provide greater efficiency and cost savings.

TDLR is continually reviewing processes to find more efficient ways to operate and has incorporated many of these processes into the Agency’s culture. Examples of just some of the processes that have been improved through technology include the following:

- *TDLR Email notification lists that allow constituents to subscribe to receive updates about the regulated programs, job opportunities, and other news about TDLR that may matter to constituents*
- *TDLR is on Facebook and Twitter*
- *Online registration and licensing is available for some of the regulated programs*
- *Online AB project registrations*
- *Constituents may file complaints online*

In addition, the IHB staff is already making use of electronic technology to the extent possible with the resources available. Most audits, audit responses, certification deviation reports, etc. are now issued electronically through email to IHB constituents and from IHB constituents and manufacturers are encouraged to submit their monthly reports electronically. We have many ideas for using existing technologies and are pursuing those as time and resources allow.