

The Texas Natural Resource Conservation Commission (commission) adopts new §§328.2 - 328.5.

The commission also adopts an amendment to §328.8. Sections 328.2 - 328.5 are adopted *with changes* to the proposed text as published in the April 26, 2002 issue of the *Texas Register* (27 TexReg 3525).

Section 328.8 is adopted *without change* to the proposed text and will not be republished.

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The purpose of the amendments and new sections is to implement the requirements of House Bill (HB) 2912, Article 9, §9.03, 77th Legislature, 2001. HB 2912 became effective on September 1, 2001. HB 2912 amended Texas Health and Safety Code (THSC) by adding §361.119, which directed the commission to adopt rules, including recordkeeping and reporting requirements and limitations on the storage of recyclable material, to ensure that recyclable material is reused and not abandoned or disposed of, and that recyclable material does not create a nuisance or threaten or impair the environment or public health and safety. Corresponding amendments to 30 TAC Chapter 330, Municipal Solid Waste, and 30 TAC Chapter 332, Composting, are adopted in a concurrent rulemaking (Rule Log Number 2001-081-328-WS).

#### SECTION BY SECTION DISCUSSION

The changes to Chapter 328 add sections and language critical to justifying a recycling facility's exemption from registration and permit requirements under Chapter 330. The amendments add four new sections to Subchapter A and require a change in the title of Subchapter A to reflect that the subchapter contains general information in addition to the subchapter's purpose. Also, the title to Subchapter B has been changed to indicate that the subchapter addresses recycling goals and rates.

Section 328.2, Definitions, was revised to add two new definitions and revise two others with changes critical to the rules on limitations on storage and reporting and recordkeeping requirements. Paragraph (1) defines the term “Affiliated with” that is used, but not defined, in the legislation that created THSC, §361.119, leading to this rule. The commission borrowed from and adapted definitions for “substantial interest” from Texas Government Code, §572.005; “affiliate” from the Texas Business and Commerce Code, §24.002(1); and “affiliated shareholder” from the Texas Business Corporation Act, Article 13.02, while using the criterion of 20% interest for affiliation found in the Texas Business and Commerce Code, §24.002(1); Texas Business Corporation Act, Article 13.02; THSC, §361.089(g); and Texas Water Code (TWC), §7.301(2). The term “Affiliated with” is used in three contexts in the rules: in setting a standard for an exemption to the recordkeeping and reporting requirements for facilities affiliated with a person or facility holding a permit to dispose of municipal solid waste; in setting a standard for an exemption to the storage and to the recordkeeping and reporting requirements for secondary metals recycling facilities affiliated with smelters; and in preventing a facility from using its affiliation with a hauler to circumvent the recordkeeping and reporting requirements and the limitations on material storage and accumulation. Paragraph (1)(A) and (B) would clarify that affiliation by ownership or control can be established in either of two ways. Paragraph 2 was added since proposal to define “Incidental amount(s) of non-recyclable waste or incidental non-recyclable waste” as this term is used throughout the chapter. The definition of “Incidental amount(s) of non-recyclable waste” in proposed §330.2 has been moved here and changed to establish upper limits of 10% on the total amount of non-recyclable waste in any incoming load, and 5% on the average amount of non-recyclable waste in all loads received by a facility in the last six-month period. A reference to §328.4(e) was also added since proposal that outlines the procedures the executive director will use in

evaluating and granting applications for alternative compliance with the requirements for obtaining a permit or registration. The agency intends to create a guidance document for the regulated community and for agency field enforcement personnel detailing the kinds of recordkeeping documents that will be sufficient to demonstrate compliance with the 10% incoming and 5% outgoing limits in the rule.

Facilities that process recyclable material that contains more than incidental amounts of putrescible or non-recyclable waste must obtain a permit or registration. Paragraph (3) was expanded from proposal to include “Processed for recycling or processing for beneficial use” to distinguish material that has been processed at a facility to make it amenable for recycling from unprocessed material when applying the rule’s limitation on material storage and accumulation. Paragraph (4) was added from proposal to define the term “Secondary metals recycling facility” to distinguish a facility that is predominately engaged in the business of obtaining ferrous or nonferrous metals that have served their original economic purpose in order to convert those metals, or sell those metals for conversion, into raw material products. The language for this definition came from Texas Revised Civil Statutes, Article 6687-2a(g). Paragraph (5) defines the term “Source-separated recyclable material” consistent with the definition of “source-separated organic material” in Chapter 332, to distinguish such material from municipal solid waste, which must be taken to a registered or permitted municipal solid waste facility rather than to an exempt recycling facility.

Section 328.3, General Requirements, has been amended from proposal to call attention to the potential applicability of federal laws and regulations and regulations of the commission; and to list all applicable state laws for recycling facilities.

Section 328.4, Limitations on Storage of Recyclable Materials, is adopted with changes to the proposed text. Section 328.4(a) establishes to whom the section is applicable. Composting facilities that require notification under Chapter 332 have been included to ensure that the overall requirements for exempt-tier composting facilities under Chapter 332 not be more stringent than those for notification-tier composting facilities under Chapter 332.

Adopted §328.4(a)(1) - (3) establishes which facilities are exempt from limitations on the storage and accumulation of recyclable material, as specified in the legislation. Section 328.4(a)(1) will exempt a facility owned or operated by a local government or the federal government from the requirements of the section. The federal government and agency of the state has been added to the list of exemptions in §328.4 based on comments received during the comment period. THSC, §361.119(e), reads “A solid waste processing facility that is owned or operated by a local government is not subject to rules adopted under this section.” The commission has interpreted the legislative intent to be that recycling facilities, not solid waste processing facilities, owned and operated by a local government or the federal government be exempt from the requirements of the new rules, inasmuch as all solid waste processing facilities are required to be permitted or registered under Chapter 330.

The language in §328.4(a)(2) reflects the statutory exemption of recycling facilities whose “primary function . . . is to process materials that have a resale value greater than the cost of processing the materials for subsequent beneficial use.” The rule language would create a practical standard for this exemption by limiting it to facilities that receive more than 50% of their recyclable materials directly from any combination of generators not affiliated with the facility, the public, or from haulers not

affiliated with the facility, receive no financial compensation to accept any of the recyclable material they receive, and show that material is potentially recyclable and has an economically feasible means of being recycled. The owner or operator of the facility must demonstrate that the primary function of the facility is to process materials that have a resale value greater than the cost of processing the material for subsequent beneficial use and all the solid waste generated from processing the materials is disposed of in a solid waste facility. Illegitimate recyclers typically charge tipping fees to accept materials, retaining most of these as profits with no further effort. (It should be noted that many legitimate recyclers and composters charge tipping fees to accept recyclable materials. It is not the intent of the legislation nor the rules to restrict these operations; only to require that they further demonstrate their qualification for exemption from municipal solid waste registration and permitting requirements.) Stakeholders pointed out that an unscrupulous facility could circumvent the rule by imposing hauling charges in lieu of tipping fees. The language requiring a facility to show that the material is potentially recyclable and has an economically feasible means of being recycled is meant to provide assurance that a facility actually demonstrates, as the statute requires, that the primary function of the facility is to process materials that have a resale value greater than the costs of processing the materials for subsequent beneficial use. To provide this assurance, a recycler must be able to reasonably demonstrate that there is or will be a market for a recycled/recyclable material.

Section 328.4(a)(3) has been added from proposal in response to oral comments. Originally, the exemption in §328.4(a)(2) was intended to cover to all facilities exempted by THSC, §361.119(c). However, smelters and affiliated secondary metals recycling facilities felt that it was necessary that the

specific exemption for their industry in the statute should be reflected in the adopted rule. The language of adopted §328.4(a)(3) mirrors the language in the statute.

Section 328.4(b) specifies the conditions under which recyclable material may be accumulated or stored at a facility. Based on the comments received during the comment period, the conditions for which recyclable material may be accumulated or stored have been amended. Section 328.4(b) language was derived from 30 TAC §335.17, relating to Special Definitions for Recyclable Materials and Nonhazardous Recyclable Materials, which includes a prohibition against speculative accumulation of materials. In addition to the language borrowed from §335.17, §328.4(b)(2)(B) will establish that if a material has been processed for recycling or undergoes processing for beneficial use (see definition in §328.2) and is managed as a commodity to be sold for recycling, it is not considered to be accumulated material for the purposes of the section. Within 270 days after the effective date of this rule, or 270 days from the commencement of a new facility's operations, the amount of material recycled, or transferred to a different site for recycling, must equal at least 25% by weight or volume of the material accumulated 90 days from the effective date of this rule or 90 days from the commencement of a new facility's operation. During each subsequent six-month period, the amount of material that is recycled, or transferred to a different site for recycling, must equal at least 50% by weight or volume of the material accumulated at the beginning of the period. Materials for mulching and composting facilities that have been ground for use as mulch, or prepared and placed in a windrow, static pile, or vessel for composting or materials for other recycling facilities, that have been processed for recycling, shall not be considered to be accumulated, but shall be considered to be recycled, as long as they have been

contained, covered, or otherwise managed to protect them from degradation, contamination, or loss of value as recyclable material.

Section 328.4(c) has been clarified since proposal to allow the agency to require a non-complier to obtain a municipal solid waste registration or a permit. This is left to the discretion of the executive director to allow flexibility for legitimate recycling facilities that receive massive amounts of materials resulting from natural disasters, or that may not have failed to recycle or process for recycling due to other unavoidable circumstances. The intent of the legislation was to prevent illegitimate recycling operations, not to force legitimate recyclers to comply with registration or permit requirements from which they should be exempt. The reference to subsection (e) was added and the reference to §328.5(g) concerning reporting and recordkeeping requirements was deleted. Section 328.4(d) - (f) has been added since proposal to outline the procedures the executive director will use in evaluating and granting applications for alternative compliance with the requirements under the definition of “Incidental amount(s) of non-recyclable waste” in §328.2. The agency intends to create a guidance document for the regulated community and for agency field enforcement personnel detailing the kinds of recordkeeping documents that will be sufficient to demonstrate compliance with the 10% incoming and 5% outgoing limits in the rule.

Section 328.5, Reporting and Recordkeeping Requirements, fulfills the statutory requirement in THSC, §361.119, that the commission “adopt rules, including recordkeeping and reporting requirements.” Section 328.5(a) applies to facilities and operations claiming to be exempt from registration and permitting under §330.4(f)(1)(B) or registration and permitting under Chapter 332. Paragraphs (1) - (4)

specify the exemptions provided by the legislation. The federal government has been added to the list of exemptions. Paragraphs (1) - (3) provide exemptions identical to those in §328.4. Subsection (a)(4) exempts “A facility that is owned, operated, or affiliated with a person that has a permit to dispose of municipal solid waste,” as directed by THSC, §361.119.

Section 328.5(b) covers information to be included in the facility’s report to the commission.

Additional reports are required only if information submitted on a previous report has changed. The commission anticipates that the report will consist of two parts: the Core Data Form and an explanation of how and what materials will be stored and processed. Section 328.5(c) requires recordkeeping necessary to demonstrate compliance with the limitations on storage of materials in §328.4, and to demonstrate reasonable efforts to maintain source-separation and limit non-recyclable waste to incidental amounts. At the request of stakeholders, language has been included that requires facilities to make these records available to local governments. The statutory authority for this provision is in THSC, §361.032(b), relating to Inspections: Right of Entry. Section 328.5(c)(2)(D) has been changed since proposal to clarify that an owner or operator of a facility shall maintain all records necessary to show documentation that incidental non-recyclable waste constitutes no more than 5% of the average total scale weight or volume of all materials received in the last six-month period. Due to the nature of the operations at recycling facilities, the recordkeeping requirements are not intended to include inspections of every incoming load. It is not expected that one load that is an aberration regarding percentages of incidental waste constitutes a violation. An audit procedure addressing these issues, based on current, similar agency audit procedures, will be developed in guidance. Section 328.5(e) has been added since proposal that will require composting facilities exempt from authorization or requiring

notification and recycling facilities that manage combustible materials not exempt from this section to have a fire prevention and suppression plan that shall be made available to the local fire prevention authority having jurisdiction over the facility for review and coordination. The agency will, in its guidance document, clarify the types of combustible materials covered by this requirement, including, but not limited to, wood, brush, wood chips, and paper.

Section 328.8, Measurement of Recycling Rates, changed only in title, since the title that has been deleted is now the title of §328.5. The new title more accurately describes the contents of §328.8.

#### FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rules are not subject to §2001.0225 because they do not meet the definition of a “major environmental rule” as defined in that statute. Although the intent of the rules is to protect the environment or reduce risks to human health from environmental exposure, the rules will not have an adverse material impact on the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state because the proposed new sections and amendment to Chapter 328 are intended to identify and affect only those facilities improperly disposing of municipal solid waste without an authorization and, therefore, do not meet the definition of a major environmental rule. These rules do not meet any of the four applicability requirements listed in §2001.0225(a). These rules do not exceed any standard set by federal law for distinguishing facilities improperly disposing of municipal solid waste from legitimate recycling facilities, and these rules are specifically required by state law under THSC,

§361.119. These rules do not exceed the requirements of state law under THSC, §361.119, and the rules are not required by federal law. There is no delegation agreement or contract between the state and an agency or representative of the federal government to implement any state and federal program to distinguish facilities improperly disposing of municipal solid waste without authorization from legitimate recycling facilities. These rules are not adopted solely under the general powers of the agency, but rather specifically under THSC, §361.119, as well as the other general powers of the agency.

#### TAKINGS IMPACT ASSESSMENT

The commission evaluated these rules and performed an analysis of whether Texas Government Code, Chapter 2007 is applicable. The commission's analysis indicates that Texas Government Code, Chapter 2007 does not apply to these rules because this is an action taken to prohibit or restrict a condition or use of private real property that constitutes a public or private nuisance, which is exempt under Texas Government Code, §2007.003(b)(6). Specifically, the statutory basis for these rules, THSC, §361.119, directs the commission to develop these rules to ensure that a solid waste processing facility is regulated as a solid waste facility under the Texas Solid Waste Disposal Act and is not allowed to operate unregulated as a recycling facility, and to ensure that recyclable material is reused and not abandoned or disposed of and that recyclable material does not create a nuisance or threaten or impair the environment or public health and safety. Garbage or other organic wastes deposited, stored,

discharged, or exposed in such a way as to be a potential instrument or medium in disease transmission to a person or between persons is a public health nuisance by law under THSC, §341.011(5). A facility that operates without appropriate controls can become a private nuisance. The recordkeeping and reporting requirements in these rules attempt to identify municipal solid waste facilities operating unregulated as recycling facilities and require that they obtain the proper authorization with regulatory controls.

Nevertheless, the commission further evaluated these rules and performed an analysis of whether these rules constitute a takings under Texas Government Code, Chapter 2007. The specific purpose of these rules is to ensure that recyclable material is reused and not abandoned or improperly disposed of, and that recyclable material does not create a nuisance or threaten or impair the environment or public health and safety. The rules would substantially advance the stated purpose by requiring recordkeeping and reporting and imposing limitations on the storage of recyclable material. The records required to be kept and reports required to be filed will assist agency enforcement staff to easily distinguish legitimate recycling facilities from municipal solid waste facilities operating without proper authorization.

Promulgation and enforcement of these rules will be neither a statutory nor a constitutional taking of private real property. Specifically, the rules do not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally), nor restrict or limit the owner's right to property, or reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. In other words, these rules do not prevent property owners from operating

legitimate recycling facilities, which reuse or recycle materials and thus legitimately protect the environment and public health and safety by reducing the volume of the municipal solid waste stream.

There are no burdens imposed on private real property, and the benefits to society are facilities properly and legitimately recycling materials and reducing the volume of the municipal solid waste stream and facilities properly and legitimately processing municipal solid waste with appropriate environmental and health and safety controls. Therefore, the adopted rules will not constitute a takings under Texas Government Code, Chapter 2007.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rules and found that the rules are identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, and will affect an action or authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11 and, therefore, the applicable goals and policies of the Texas Coastal Management Program (CMP) have been considered during the rulemaking process. The CMP goal applicable to these rules is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs) in accordance with 31 TAC §501.12(l). The CMP policy applicable to these rules is 31 TAC §501.14(d)(1) - (2). In accordance with §501.14(d)(1), the construction and operation of solid waste facilities in the coastal zone shall comply with all policies for CNRAs relating to the construction and operation of solid waste treatment, storage, and disposal facilities for both new facilities and areal expansion of existing facilities. In accordance with §501.14(d)(2), the commission shall comply with all policies for CNRAs when issuing permits and adopting rules under THSC, Chapter 361.

The specific purpose of these rules is to make existing commission rules consistent with the new legislative changes made to THSC by HB 2912. The rules require the commission to ensure solid waste processing facilities are regulated as solid waste facilities and are not allowed to operate unregulated as recycling facilities. The commission anticipates that promulgation and enforcement of these rules will not have a direct or significant adverse effect on any CNRAs, nor will these rules have a substantial effect on commission actions subject to CMP. Therefore, the commission has made a finding of consistency with the applicable goals and policy. The commission solicited public comment, but no comments were received.

#### PUBLIC COMMENT

The public comment period closed on June 7, 2002. A total of 18 commenters provided both general and specific written comments on the proposed rules. The commenters were: Abitibi-Consolidated, Inc. (ACI); Balcones Recycling (BR); City of Fort Worth; City of Houston; Community Waste Disposal, Inc.; Department of the Air Force; El Paso Disposal, LP (EPD); Goodwill Industries; Harris County Commissioners Court (HCCC); Harris County Public Health & Environmental Services (HCPH&ES); Representative Charlie F. Howard; I-27 Recycling & Public Scales (I-27); Novus Wood Group (NWG); Silver Creek Materials Recycling & Compost (SCMR&C); Texas Chapter National Solid Wastes Management Association (NSWMA); Trinity Waste Services (TWS); Waste Management; and one individual.

#### RESPONSE TO COMMENTS

Department of the Air Force commented that the rule cannot be applied to federal facilities because the rule does not apply equally to all “persons.” The waiver of sovereign immunity in the Resource Conservation and Recovery Act (RCRA) mandates that federal facilities comply with requirements “in the same manner, and to the same extent, as any person is subject to such requirements.” 42 United States Code (USC), §6961(a). The definition of “person” includes political subdivisions of a state (42 USC, §6903(15)). Sections 328.4(a)(1) and 328.5(a)(1) of the rule exclude facilities owned or operated by local governments from the requirements of the rule. Because the rule discriminates against federal facilities by exempting certain “persons” from its requirements, the rule exceeds the limited waiver of sovereign immunity promulgated by Congress. Waivers of the federal government’s sovereign immunity must be unequivocally expressed in statutory text; they may not be implied or inferred. Federal facilities should be included in the exemptions contained in §328.4(a)(1) and §328.5(a)(1) of the rule.

**The commission agrees with this comment. The waiver of immunity from suit in RCRA clearly and unambiguously requires that federal facilities be subject to state requirements in the same manner, and to the same extent, as any person. RCRA defines “person” to include not only a state or political subdivision of a state, but also a municipality. THSC, §361.119, exempts facilities owned or operated by a local government from the storage and recordkeeping requirements of the rules, as well as smelters and affiliated secondary metals recycling facilities, and exempts facilities owned, operated, or affiliated with a person holding a permit to dispose of municipal solid waste from the recordkeeping requirements of the rules. Therefore, the state law treats federal facilities differently, and to a different extent, from some other persons. Sections**

**328.4(a)(1) and 328.5(a)(1) have been changed to exempt federal facilities from the storage and recordkeeping requirements of these rules. Federal facilities remain subject to Chapter 330 and may be required to obtain a permit or registration. Also, if a federal facility contracts out its recycling activities, the contractor will be required to comply with these recycling rules.**

NSWMA commented that under the proposed definition of “Affiliated with” under §328.2(1), only parent/subsidiary companies can be affiliated. Discussions with legislators before and after the legislative session about THSC, §361.119(d), indicate it was their intent to include sister companies as well. Proposed §328.2(1) should add a subparagraph (C) as follows: “(C) ‘A’ and ‘B’ are owned or controlled by the same entities with either ‘A’ or ‘B’ possessing a municipal solid waste facility permit within 50 miles of the affiliated recycling facility.” EPD commented that the definition of “Affiliated with” should be clarified to include sister business entities that share a common parent. EPD suggested the following rule language for §328.2(1)(C): “(C) ‘A’ and ‘B’ are subsidiaries of the same parent entity.” Representative Charlie Howard commented that currently the rule does not allow two businesses that are owned by the same entity to claim affiliated status. This is especially troubling for municipal solid waste companies because many of these companies split their landfill and hauling operations for business reasons. Because of specifics of how the municipal solid waste and recycling business operates, this rule needs to be tailored to their specific needs and, in this case, to fail to do so is unfair. Representative Howard suggested that the definition of “Affiliated with” be expanded to include businesses owned by the same individual or entity. Anything less would be unjustly detrimental and discriminatory to many good operators that are exemplary in their compliance efforts.

**The commission agrees with the assertion that the principle of fairness is of primary importance in the establishment of effective regulations. However, in this instance, the commission considers consistency with established law and regulation to be a critical aspect of fairness, and sees no compelling reason to create a different standard under this rule for affiliates of a person holding a permit to dispose of municipal solid waste than is applied to other business entities in legal and regulatory precedents that do not consider sister companies to be affiliated. The commission borrowed from and adapted definitions for “substantial interest” from Texas Government Code, §572.005; “affiliate” from the Texas Business and Commerce Code, §24.002(1); and “affiliated shareholder” from the Texas Business Corporation Act, Article 13.02, while using the criterion of 20% interest for affiliation found in the Texas Business and Commerce Code, §24.002(1); Texas Business Corporation Act, Article 13.02; THSC, §361.089(g); and TWC, §7.301(2). The commission has made no changes in response to this comment.**

NWG commented that regarding “Affiliated with” the definition can be abused by unscrupulous operators that wish to be exempt from the proposed rules. It is a simple task to assign 20% of the voting stock of a company, which owns a permitted disposal facility, to a related entity for purposes of becoming exempt from the rules. This is a loophole that will be exploited and needs to be closed. The affiliated person must own or operate a permitted disposal facility within 100 miles of the recycling facility seeking the exemption. The cost associated with transporting the recyclable material can be economical within 100 miles, thereby providing the party owning or operating the permitted disposal facility with the ability to dispose of the material if it is not recycled or properly processed.

**The commission acknowledges the possibility that a company may seek to avoid regulation through the structuring of its business operations. However, the commission finds that the concept of distance, especially in a state as large and diverse as Texas, cannot be appropriately incorporated in a definition of affiliation. Rather, the commission understands the intent of the legislative exemption to be an acknowledgment of a permitted entity's vested interest in the responsible management of solid waste, in accordance with the requirements of its permit. The commission has made no changes in response to this comment.**

BR commented that excluding municipally-owned facilities (that operate in direct competition with private industry), non-profit entities, and business entities that own and operate both recycling and landfill operations from the recycling rules amounts to uneven and unfair oversight of recycling facilities. Any rules that are adopted for and directed at the private sector should apply equally to public sector recycling operations and all business entities that operate stand-alone recycling operations. An individual commented that §328.4(a)(1) should be deleted from the proposed rules. Exempting facilities owned or operated by local governments from storage and accumulation limitations creates a dual standard and places non-governmental organizations at a competitive disadvantage. An individual commented that §328.5(a)(1) should be deleted from the proposed rules. The exemption of facilities owned or operated by local governments from reporting and recordkeeping requirements creates a dual standard that places a non-governmental organization at a competitive disadvantage. This individual also commented that §328.5(a)(3) should be deleted from the proposed rules. All recycling facilities located outside of the boundaries of permitted landfills should be required to comply with same reporting and recordkeeping requirements. This paragraph creates a dual standard based on facility

ownership. NSWMA commented that the legislature enacted an exception to THSC, §361.119(c), for facilities that reuse or smelt metals. This exemption should be listed as passed by the legislature in proposed §328.4(a).

**The commission is charged with implementing the legislation, which contains exclusions for various types of recycling facilities, and cannot respond to comments that address the equity of the statutory law. The exemptions specified in the legislation (THSC, §361.119), including facilities that reuse or smelt metals, have been provided for in proposed §328.4 and §328.5. However, the commission has added no exclusions or exceptions in drafting the Chapter 330 rules that create basic standards for the registration and permitting requirements of municipal solid waste facilities, taking its statutory authority for those rules from other legislation, including THSC, §361.011, which provides the commission all powers necessary and convenient to carry out its responsibilities concerning the regulation and management of municipal solid waste. The commission has made no changes in response to these comments.**

EPD commented that there is no provision for financial assurance to cover clean-up costs for a sham recycler who simply goes out of business leaving solid waste in place. Consideration should be given to developing such a mechanism. NWG commented that a financial assurance requirement is necessary to provide monies to address large quantities of stockpiled recyclable material that are not processed properly in a timely manner. Combining the reporting and processing requirements with some form of financial assurance will not be unreasonable for compliant operators and will present barriers to entry for unscrupulous operators. A financial assurance requirement was consistent with the solid waste rules

and should be required of those existing and future recycling facility operators. SCMR&C commented that §328.4(c) should be rewritten as follows: “(c) A recycling facility that fails to comply with the requirements of this section shall be required, if the executive director so requests in writing, to post financial assurance equal in amount to what is deemed to be necessary for clean-up and closure of site operations should the entity fail or be ordered to cease operations by the Commission.” HCCC commented that prior to the operation of mulching and composting facilities, financial assurance as per 30 TAC Chapter 37, Subchapter J, should be required for site closure and corrective actions (including fire suppression). HCCC recommended that each site provide \$1 million value of financial assurance, which would require expansion of the applicability of Chapter 37 to include exempted composting facilities.

**The commission disagrees with the suggestion that financial assurance be required of recycling facilities that meet the standards and operational requirements of the new rules, which are intended to prevent the mismanagement of recyclable materials and, therefore, the need for cleanup and remediation of mismanaged facilities. Further, financial assurance is currently required only for registered and permitted solid waste facilities and permitted composting facilities and would, therefore, not be appropriate for recycling facilities exempt from registration and permitting under §330.4(f). While a facility that does not comply with these rules may be subject to regulation as a solid waste facility under Chapter 330, it is not the intent of the legislation to regulate a compliant recycler as a solid waste facility.**

**However, the requirements of the Chapter 328 do not constitute the only restrictions and penalties to which a recycler, legitimate or otherwise, is subject. Once the commission makes a determination that an illegitimate recycler is a solid waste facility requiring a municipal solid waste registration or permit, other statutory remedies can be applied. For example, a person that disposes or allows or permits the disposal of more than five pounds of solid waste, for a commercial purpose, at a place that is not an approved solid waste site, is subject to both civil suit and criminal prosecution under the Texas Litter Abatement Act, which may result in an injunction against the illegal activity, fines, recovery of damages and costs, and imprisonment of the guilty person. The commission has made no changes in response to these comments.**

Representative Charlie Howard commented that he has concerns with the inspection time period and compliance requirements. Representative Howard stated that a new rogue operator would have two years before any enforcement action can be taken. This is not effective and would not address any of the issues faced in Fort Bend County. Many rogue operators are not even in business for a year before they have made a mess and disappeared. Representative Howard suggested that it is essential that the time period be shortened to three months if possible, but absolutely no more than six months, from the first opening of the business or at the start of the rule for previously existing operators. The percentage of material required to be recycled during each period could also be adjusted to reflect shorter periods, but only if necessary in order to make the rule fair. For new operators, in order to assure that a new operator was truly a recycler and was recycling in a timely fashion, immediate progress towards recycling should be demonstrated at shorter periods during the first time frame. This is so that a rogue operator cannot start a business with the knowledge that no one can require any recycling for the first

two periods, which could be as long as a year. There needs to be immediate demonstrated progress so that a new problem facility can be dealt with within weeks or months, not a year. NWG commented that the proposed reporting requirement and time frames required to comply are too long and can be abused by unscrupulous recycling operators. Essentially, a new operator can open January 2 of any year and have two years in which to begin to comply with the processing requirements described in the proposed rules. NWG suggested that the reporting period be increased to quarterly from annually to be consistent with the solid waste rules and that the percentage of material that is “recycled or transferred to a different site for recycling, equals 50% by weight or volume of the material accumulated during the period plus any unprocessed material balances carried over from a prior period.” This will identify the bad actors more quickly, which will reduce the potential impact and risk associated with all future illegal dumping sites. SCMR&C commented that §328.4(b)(2), and (3) should be rewritten as follows: “(b)(2) For existing facilities that have been conducting recycling for at least six-months, by the end of each six-month period (the first commencing on January 1 and ending on June 30; and the second commencing on July 1 and ending on December 31) the amount of material that is recycled, or transferred to a different site for recycling, equals at least 75% by weight or volume of the material accumulated at the beginning of that six-month period. (3) for an existing facility that is beginning a new form of recycling or a new facility that is beginning to recycle, by the end of the first six-month period (commencing on the first day of recycling operations) the amount of material that is recycled, or transferred to a different site for recycling, equals at least 25% by weight or volume of the material accumulated during that six-month period and the amount of material that is recycled, or transferred to a different site for recycling, equals at least 75% by weight or volume of the material accumulated at the beginning of each subsequent 6-month period.” I-27 commented that accumulation of recyclable

materials is not necessarily based on day-to-day activities. Most are generated after an act of God. Hail, wind, and tornadoes cause a drastic increase in the amount of material. Individual situations, including previous years' weather calamities, should be taken into account for the new storage limitation provision. HCPH&ES commented that §328.4(c) should be amended to read as follows: "A recycling facility that fails to comply with the requirements of this section shall be required to obtain a permit or registration as a municipal solid waste facility under the provisions of §330.4 of this title, except when additional storage time is necessary, due to natural disaster, as determined by the executive director based on local conditions." Such language will clarify the situation where exemption from the time limits can be allowed instead of leaving enforcement of this provision to lack of action, as in the current proposed language. This would allow a facility operator to specifically and proactively apply for an exemption in a case of natural disaster instead of waiting for the inactivity of the executive director. NSWMA commented that in proposed §328.4, limitations are placed on the amount of time recyclable material may be stored at a facility. A provision should be included to allow a facility to apply to the commission for a waiver of the storage limitations for one year if an unforeseen event beyond its control prevents the facility from meeting the storage requirements. EPD commented that proposed §328.4(c) should be revised to read as follows: "A recycling facility that fails to comply with the requirements of this section shall be required to obtain a permit or registration as a municipal solid waste facility under the provisions of §330.4 of this title unless overruled by the executive director and/or a majority vote of the commissioners as a discretionary act." NSWMA commented that proposed §328.4(c) says a recycling facility that fails to comply with the storage limitations shall be required, if the executive director so requests in writing, to obtain a permit or registration as a municipal solid waste facility. The burden of compliance with the storage limitations and applying for a

permit or registration should be on the facility operator. The burden should not be on the executive director to request in writing that operators comply with the rules. This will allow a facility to operate illegally without a penalty until caught.

**The commission agrees with the need to prevent the accumulation of recyclable materials for extended periods of time, and has amended proposed §328.4 and §328.5 to require monitoring and processing of accumulated materials every six months. Language has also been added to proposed §328.4(c) referring to circumstances beyond a facility's control, including those noted by commenters, that may be considered exceptions to the storage requirements of the section. A vote of the commission is not necessary to authorize such exceptions. Enforcement of this section is expected to follow the commission's standard enforcement process, whereby a non-compliant facility is issued a notice of violation and a timetable to come into compliance prior to a determination that a facility is required to obtain a solid waste permit or registration.**

TWS commented that §328.4 should require quarterly turn-over of a small percentage of the stored materials and annual turn-over of a larger percentage of the stored recyclable material. Recycling facilities should be required to either recycle a portion of their on-site material every quarter or post a security bond that would cover the cost of the processing of all on-site materials. TWS encouraged the commission to also retain the requirement that a facility annually recycle 75% of the material accumulated. TWS believed it was appropriate to require a facility to show that it regularly recycles at least a small portion (25%) of its intake and that it annually recycles a majority (75%) of the material stored on-site. If a facility were unable to make this determination, the facility should be excused from

the requirement if it posts a bond in the amount required to process the material. Posting such a bond would show that the operation has the actual intention to recycle when the conditions or the market is right.

**As noted in response to the previous comment, the commission agrees with the need to prevent the accumulation of recyclable materials for extended periods of time, and has amended proposed §328.4 and §328.5 to require monitoring and processing of accumulated materials every six months. However, the commission disagrees with the suggestion that a bond be required of recycling facilities, as such a requirement is beyond the scope of the enabling legislation and is currently required only for registered and permitted solid waste facilities and permitted composting facilities.**

EPD commented that a real concern was the sham recycler who begins operating a facility; abandons it and moves to a new location, leaving behind an accumulation of solid waste; and then re-opens in a new location. The proposed storage rules seemed to leave a loophole. For this reason, §328.4(b)(2) should be revised to read as follows: “(2) during each calendar year (commencing on January 1), the amount of material that is recycled, or transferred to a different site for recycling, equals at least 75% by weight or volume of the material accumulated at the beginning of the period and at least 75% by weight or volume of the additional material brought to the site during the calendar year.”

**The commission disagrees with the proposed change, as it could seriously jeopardize the viability of legitimate recyclers that face seasonal and annual fluctuations both in the incoming stream of**

**feedstock materials and in the markets for their processed materials or products. Supply and market variability are historical characteristics of the recycling industry, and are largely beyond the control of a facility owner or operator. The suggested requirement would also be significantly more stringent than the regulation currently applied to generators of industrial solid waste and municipal hazardous waste in §335.17(a)(8). In addition, the shortening of monitoring and storage intervals to six months in length reduces the likelihood of an illegitimate operator relocating his business to avoid compliance requirements and enforcement, particularly when other regulatory performance measures are in effect and enforceable from the first day of a facility's operation. The commission has made no changes in response to this comment.**

An individual commenter commented that the definitions of "Processed for recycling" in §328.2(2) and "Source-separated recyclable material" in §328.2(3) are good definitions and should be retained in the proposed rules. This individual also commented that §328.4(b)(2)(B) should be retained in the proposed rules. NWG commented that the definition of "Processed for recycling" should be amended to prevent unscrupulous operators from avoiding its intent. In the wood processing business, for example, an operator may receive large quantities of land clearing debris (trees, stumps, and brush) and claim that it has processed the material by simply shaking the dirt from it and then stacking it up in large piles. The last portion of the proposed definition was unclear and subject to interpretation or misinterpretation and may provide unscrupulous operators with the ability to claim that they have processed the material thereby complying with the volume reduction requirements in §328.4(2). NWG suggested the following rule language for §328.4(2) "cleaning, grinding, size reduction, or other mechanical preparation at a recycling facility to make it amenable for subsequent use." Including the

words “size reduction,” “mechanical preparation,” and “use” in the definition may preclude abuse of the rules by unscrupulous operators.

**The commission agrees that unscrupulous operators should not be able to circumvent the storage requirements of §328.4(b) through token processing of accumulated materials. Rather than amending the definition of “Processed for recycling,” the commission has amended proposed §328.4(b)(2)(B), specifying certain mulching and composting practices to qualify materials as “processed” as a more appropriate means of preventing this practice.**

ACI commented that §328.4(a)(2) and §328.5(a)(2) should be clarified regarding the receipt of recyclables directly from the public. Exempting these facilities will allow the commission to focus on the sham recyclers the legislation intends to eliminate. ACI recognized that these approaches go beyond this rulemaking but should be considered as an alternative to the current proposal. ACI recommended clarification of proposed §328.4(a)(2) and §328.5(b), and recommended that the phrase “the facility receives no financial compensation to accept any of the recyclable materials it receives” be deleted from §328.4(a)(2). ACI questioned the reasonableness of the limitation of these exemptions to exclude recycling facilities that may receive financial compensation to accept any of the recyclable materials. Whether the material was bought by the recycling facility subject to a recycling processing fee is not determinative of the legitimacy or quality of the recycling operation. ACI recommended that the phrase, “the facility receives no financial compensation to accept any of the recyclable material it receives” be deleted. I-27 commented that instead of penalizing businesses by withholding exemptions for accepting tipping fees, encourage the use of the fee so businesses have more funds for individual

research and experimentation of uses for recyclable resources. Evaluate each individual business by its acquisition of equipment to be used in recycling and its labor force. NSWMA commented that proposed §328.4(a)(2) creates an exemption from the storage limitations for facilities that accept more than 50% of its material from the public at no charge. That exemption is not authorized by the statute and should have been deleted.

**The commission disagrees with the suggested changes. The draft rule language exempting facilities that charge no fees to accept any of the recyclable materials they receive applies a practical standard to implement the terms of the statute: “(c) A facility that reuses or smelts recyclable materials or metals and the operations conducted and materials handled at the facility are not subject to regulation under rules adopted under this section if the owner or operator of the facility demonstrates that: (1) the primary function of the facility is to process materials that have a resale value greater than the cost of processing the materials for subsequent beneficial use.”**

**The fee standard also avoids requiring reports from backyard composters and community gardens, as well as drop-off centers operated by schools, churches, and non-profit or volunteer community groups. It also exempts the vast majority of legitimate recycling businesses that pay for their feedstocks from furnishing detailed records of their processing costs and resale value of processed materials, which they would be reluctant to provide and difficult for an inspector to verify. The commission has made no changes in response to these comments.**

EPD commented that in proposed §328.4(a)(2) and (b)(1) and §328.5(a)(2), anything could be characterized as being “potentially recyclable.” EPD suggested the following changes: the words “the material is potentially recyclable and has an economically feasible means of being recycled” should be deleted and the following words substituted therefor: “the material meets the criteria of §328.4(c).” EPD commented that a new §328.4(c) should be added, and the current §328.4(c) should be relettered to §328.4(d). The new §328.4(c) should read as follows.

“(c) A recycling facility in possession of recyclable material must demonstrate that: (1) there are commercially-feasible manufacturing means for processing or preparing the recyclable material for use in the production of new saleable products; (2) there are commercially-feasible means for recyclable material when processed or prepared; (3) the recyclable material meets, or when processed or prepared will meet, a commercial specification grade; (4) a market has existed, exists, or is likely to exist for the recyclable material when processed or prepared; (5) substantial quantities of the recyclable material when processed or prepared or material of a like-kind have been made available for use as feedstock for the production of new saleable products; and (6) the recyclable material when processed or prepared can be a replacement or substitute for a virgin raw material in the production of new saleable products.”

**The commission disagrees with the proposed amendments, as they are essentially no more specific than the current proposed rule language. Simply stated, a recycler must be able to demonstrate that the materials stored at his facility are recyclable in practice rather than in theory; that is, identify someone that will buy the materials or take possession of them for beneficial reuse, or**

**show that they can be beneficially used by the facility owner or operator. Examples of specific types of acceptable evidence to substantiate the recyclability of a particular material would include published market indexes for a particular material and region, sales receipts or price quotations from buyers, and evidence of the recycler's ability to process the material to market specifications. The commission has been successful in enforcing this same language in its industrial and hazardous waste rules (§335.17(8)). The commission has made no changes in response to these comments.**

EPD commented that it was not clear in the proposed rules that both existing facilities and new facilities were required to file reports. The reporting requirements should be structured as a demonstration that the facility is, in fact, exempt from registration and permitting requirements. The current reporting requirements do not appear to be adequate. Section 328.5(b) should be revised to read as follows.

“(b) Prior to the commencement of operations of new facilities, and within 60 days after the effective date of these rules for existing facilities, the owner or operator of a facility that serves as a collection and processing point for only non-putrescible source-separated recyclable materials, or for mulching or composting of only source-separated yard trimmings, clean wood material, vegetative material, paper, and manure shall demonstrate that the facility is exempt from the registration and permit requirements under §330.4(f)(B) or (C) of this title by filing a report on a form or forms to be provided by the executive director, which includes a description of : (1) the type(s) of material(s) accepted for recycling; (2) any storage of materials prior to recycling; and (3) how the material(s) will be recycled.

Subsequent reports shall be submitted annually thereafter and within 90 days of the effective date of any change to update or change any information contained in the facility report.”

**The commission disagrees with the proposed change. The addition of the words “shall demonstrate that the facility is exempt from the registration and permit requirements under §330.4(f)(B) or (C) of this title by filing a report” to this section of the rules would not enhance the value of the information contained in the report, which is unchanged from the current proposal. The commission considers the reporting requirement for recycling facilities to be primarily a notification process. Actual demonstration of a facility’s exemption from solid waste authorization requirements is to be based on the facility’s performance, and the records maintained on-site to substantiate that performance. On-site inspection of a facility’s operations and access to its records by state and local officials constitute the fairest, most effective means of evaluating a facility’s compliance and regulatory status. The commission has made no changes in response to this comment.**

EPD commented that as an assurance of compliance there should be some record or justification subject to examination for facilities that are exempted from the storage and recordkeeping requirements of the new section because they meet the requirements for exemption. EPD suggested adding the following language to proposed §328.4(a)(2) and §328.5(a)(2): “Prior to the commencement of operations of new facilities, and within 60 days after the effective date of these rules for existing facilities, the owner or operator of a facility described in this subsection shall certify on a form or forms to be provided by the

executive director that the facility meets the criteria of this subsection, and will give notice when the facility ceases to operate.”

**The commission disagrees with the proposed change, as it cannot enforce a regulatory requirement (in this case, reporting) on an entity that is exempted by law from that requirement.**

**The commission has made no changes in response to this comment.**

NWG commented that all operators should be required to comply with the terms and conditions imposed by the Texas Pollutant Discharge Elimination System storm water multi-sector general permit. This requirement should be referenced in the rules where it is appropriate to do so.

**The commission agrees with the comment, and has included a general reference to compliance with TWC, Chapter 26 (relating to Water Quality Control) in adopted §328.3.**

HCPH&ES commented that in addition to requiring a site-specific fire prevention and suppression plan to be approved by the local fire marshal for recycling facilities, a technical guide should be drafted to assist these facilities in preparing a fire protection and suppression plan. HCPH&ES provided a draft document of Fire Protection and Suppression Plan Guidelines for Mulch and Tire Recycling Facilities as prepared by Harris County Fire and Pollution Hazard Review Committee to assist the commission in drafting such a technical guide. HCCC commented that for each recycling facility storing combustible materials, a site-specific fire prevention and suppression plan should be approved by the local fire marshal prior to operation. HCCC provided technical standards for said fire prevention and

suppression plan. HCCC stated that this plan could be added to §328.4 with reference from Chapter 332 and, alternatively, it could be applied to only composting/mulching facilities by placement in Chapter 332.

**The commission agrees that fire protection is an important aspect of recycling operations that handle combustible materials. Therefore, §328.5(e) has been added to require composting facilities exempt from authorization or requiring notification and recycling facilities that manage combustible materials to have a fire prevention and suppression plan and be made available to the local fire prevention authority having jurisdiction over the facility for review and coordination.**

ACI commented regarding §328.5(b) that the reporting requirements should be clarified to assure that business confidential or other competitive information not be included in the reports. ACI was concerned about the reporting and subsequent release to competitors of information regarding the volume of specific materials recycled as well as specific business contractual relations (e.g., end users). ACI recommended that the report only require the identification of the materials and end use markets on a generic basis.

HCCC commented that per §328.5(b), the draft language proposed that certain facilities “report on a form to be provided by the executive director.” HCCC suggested that this form include identification of key personnel by full name and driver’s license number in addition to the information required in the current commission forms 10400 (Core Data Form) and 0651 (Compost Form No. 1). Such information would assist in enforcement actions, if needed. Additionally, HCCC commented that the

commission should create a process for local governments to have a timely access to the information provided in these forms. I-27 commented that records were already available for United States Internal Revenue Service officials and state sales tax representatives. I-27 stated, "Why should records showing total incoming and outgoing material be available for local government officials? What business is it of any local government what I do? If these records keeping rules are passed, the only agency the rules apply to should have access to the information and then, only if there is sufficient evidence to show non-compliance. What is this information going to be used for? What is considered "local official" government officials? Does this include any city or county official from the mayor to the dogcatcher and every councilman from city hall? My taxing district is New Deal. Does this give the sheriff of New Deal the right to walk in and go through my personal business records?"

**The commission will require the reporting of only that information necessary to identify a regulated entity as required by commission Form 10400 (Core Data Form) and establish the nature of its activities, similar to commission Form 0651 (Compost Form No. 1, Notice of Intent to Operate A Compost Facility). These forms are public records, and contain no information that could be considered proprietary to a business interest. Recordkeeping requirements in the rules include only that information necessary to verify a facility's regulatory status and compliance, consistent with the state's authority to regulate in the interests of environmental protection and public health and safety. These records, as proposed, may be accessed by agents or employees of the executive director or of local governments with territorial or extra-territorial jurisdiction over the property on which the facility is located (including local health, safety, environmental, and law**

**enforcement officials with the authority to enforce THSC). The commission has made no change in regard to these comments.**

I-27 commented that “excluded facilities are those owned or operated by local governments and those whose primary function is to process materials that have a resale value greater than the cost of processing the materials.” Primary function should be changed to “those whose intent is to process.” By the use of “intent,” the processor of the material would have to show ability by acquiring equipment and a firm lease of the property or a purchase agreement.

**The commission disagrees with the suggested change, as the intent of a facility owner or operator is not subject to objective evaluation, nor does it guarantee the protection of environmental quality and public health and safety, which are the state’s primary interests in this regulatory area. The commission maintains that the performance standards contained in the rules provide fair criteria by which to evaluate the day-to-day and overall operations of recycling and solid waste facilities in the protection of these interests. The commission has made no changes in response to this comment.**

I-27 commented that the best product produced is out of ground asphalt shingles which need to age in order to become brittle before being ground. This produces a more uniform material and results in less machine maintenance. The more extreme the temperature changes are, the better the final product is. Also, the rule should exclude inert recycled materials and concrete.

**The commission recognizes that recycling processes imitate natural systems and can be aided by them. However, a recycling facility is expected to recycle materials, both organic and inert, more rapidly than they are recycled in nature, and this expectation may be legitimately expressed and enforced through the rules. The commission has made no changes in response to this comment.**

## **SUBCHAPTER A: PURPOSE AND GENERAL INFORMATION**

### **§§328.2 - 328.5**

#### **STATUTORY AUTHORITY**

The new sections are adopted under THSC, Texas Solid Waste Disposal Act, §361.119, which provides the commission with the authority to adopt rules to ensure that a solid waste processing facility is regulated as a solid waste facility under Texas Solid Waste Disposal Act and is not allowed to operate unregulated as a recycling facility; §§361.011, 361.017 and 361.024, which provide the commission with the authority to adopt rules necessary to carry out its powers and duties under Texas Solid Waste Disposal Act; §361.022, which establishes state public policy concerning municipal solid waste to include recycling of waste as a preferred method and requires the commission to consider that policy when adopting rules; and §361.428, which provides the commission with the authority to adopt rules establishing standards and guidelines for composting facilities. The new sections are also authorized by TWC, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under TWC.

#### **§328.2. Definitions.**

The following terms, when used in this subchapter, shall have the following meanings. Other definitions may be found in Chapters 3, 330, and 332 of this title (relating to Definitions; Municipal Solid Waste; and Composting).

(1) **Affiliated with** - A person, "A," is affiliated with another person, "B," if either of the following two conditions applies:

(A) "A" owns or controls more than 20% of the voting interest, fair market value, profits, proceeds, or capital gains of "B"; or

(B) "B" owns or controls more than 20% of the voting interest, fair market value, profits, proceeds, or capital gains of "A."

(2) **Incidental amount(s) of non-recyclable waste or incidental non-recyclable waste**

- Non-recyclable waste that accompanies recyclable material despite reasonable efforts to maintain source-separation and that is no more than 10% by volume or scale weight of each incoming load, and averages no more than 5% of the total scale weight or volume of all materials received in the last six-month period, as substantiated by the facility's records. The practices and standards of recycling facilities of a particular type will be considered by the executive director to allow alternative compliance with these standards on a case-by-case basis, as provided for in §328.4(e) of this title (relating to Limitations on Storage of Recyclable Materials). Reasonable efforts to maintain source-separation must include: having dual collection and transportation systems in place for recyclable material and non-recyclable waste at the point of generation; having informed generators and haulers of the source-separation requirements; and the recycling facility having instituted quality control measures including, at a minimum, inspection of incoming loads and rejection by the recycling facility of those loads that would cause the facility to exceed these percentages as described in this paragraph.

After incoming loads are processed for recycling, all resulting non-recyclable waste must be managed according to the requirements of this chapter or taken to an authorized solid waste facility within one week. Incidental amount(s) of non-recyclable waste does not include non-recyclable components that are integral to recyclable material, including:

(A) the non-recyclable components of white goods, whole computers, whole automobiles, or other manufactured items for which dismantling and separation of recyclable from non-recyclable components by the generator are impractical, such as insulation or electronic components in white goods;

(B) source-separated recyclable material rendered unmarketable by damage during collection, unloading, and sorting, such as broken recyclable glass; and

(C) tramp materials, such as:

(i) glass from recyclable metal windows;

(ii) nails and roofing felt attached to recyclable shingles;

(iii) nails and sheetrock attached to recyclable lumber generated through the demolition of buildings; and

(iv) pallets and packaging materials.

(3) **Processed for recycling or processing for beneficial use** - Material has been or is processed for recycling, or undergoes processing for beneficial reuse, if it has been subjected to activities including extraction or separation of component materials (such as the separation of commingled recyclable materials), cleaning, grinding, or other preparation at a recycling facility to make it amenable for subsequent recycling or beneficial reuse.

(4) **Secondary metals recycling facility** - A facility that:

(A) is predominately engaged in the business of obtaining ferrous or nonferrous metals that have served their original economic purpose in order to convert those metals, or to sell those metals for conversion, into raw material products consisting of prepared grades and having an existing or potential economic value;

(B) has the capability for performing the process by which ferrous or nonferrous metals are converted into raw material products consisting of prepared grades and having an existing or potential economic value, other than by the exclusive use of hand tools, by methods including, without limitation, the processing, sorting, cutting, classifying, cleaning, baling, wrapping, shredding, shearing, or changing the physical form or chemical content thereof; and

(C) sells or purchases those ferrous or nonferrous metals solely for purposes of use in the form of raw materials in the production of new products.

(5) **Source-separated recyclable material** - Recyclable material from residential, commercial, municipal, institutional, recreational, industrial, and other community activities, that at the point of generation has been separated, collected, and transported separately from municipal solid waste, or transported in the same vehicle as municipal solid waste, but in separate containers or compartments. Source-separation does not require the recovery or separation of non-recyclable components that are integral to a recyclable product, including:

(A) the non-recyclable components of white goods, whole computers, whole automobiles, or other manufactured items for which dismantling and separation of recyclable from non-recyclable components by the generator are impractical, such as insulation or electronic components in white goods;

(B) source-separated recyclable material rendered unmarketable by damage during collection, unloading, and sorting, such as broken recyclable glass; and

(C) tramp materials, such as:

(i) glass from recyclable metal windows;

(ii) nails and roofing felt attached to recyclable shingles;

(iii) nails and sheetrock attached to recyclable lumber generated through the demolition of buildings; and

(iv) pallets and packaging materials.

**§328.3. General Requirements.**

(a) All recycling facilities shall comply with all applicable regulations of the commission, all applicable federal laws and regulations, as well as, without limitation, the following state laws, as applicable:

(1) Texas Solid Waste Disposal Act, Texas Health and Safety Code (THSC), Chapter 361;

(2) Texas Litter Abatement Act, THSC, Chapter 365;

(3) Texas Toxic Chemical Release Reporting Act, THSC, Chapter 370;

(4) Texas Clean Air Act, THSC, Chapter 382;

(5) Texas Radiation Control Act, THSC, Chapter 401; and

(6) Texas Water Code (TWC), Chapter 26 (relating to Water Quality Control).

(b) Violations of state laws or regulations are subject to enforcement by the commission and may result in the assessment of civil or administrative penalties under TWC, Chapter 7 (relating to Enforcement).

**§328.4. Limitations on Storage of Recyclable Materials.**

(a) The provisions of subsections (e) and (f) of this section are available to all recycling facilities. In order to be exempt from the registration and permit requirements under §330.4(f)(1)(B) of this title (relating to Permit Required) or under Chapter 332 of this title (relating to Composting), a facility must comply with the requirements of this section unless:

(1) the owner or operator of the facility is a local government or an agency of the state or the federal government;

(2) the facility receives more than 50% of its recyclable material directly from any combination of generators not affiliated with the facility, from the public, or from haulers not affiliated with the facility; the facility receives no financial compensation to accept any of the recyclable material

it receives; and the facility accumulating the recyclable material can show that the material is potentially recyclable and has an economically feasible means of being recycled; or

(3) the facility smelts recyclable metals or the facility is a secondary metals recycling facility affiliated with a smelter of recyclable metals, including the operations conducted and materials handled at the facility, provided that the owner or operator of the facility demonstrates that:

(A) the primary function of the facility is to process materials that have a resale value greater than the cost of processing the materials for subsequent beneficial use; and

(B) all the solid waste generated from processing the materials is disposed of in a solid waste facility authorized under Texas Health and Safety Code, Chapter 361 (relating to the Solid Waste Disposal Act), with the exception of small amounts of solid waste that may be inadvertently and unintentionally disposed of in another manner.

(b) Recyclable material may be accumulated or stored at a recycling facility only under the following conditions:

(1) the facility accumulating it can show that the material is potentially recyclable and has an economically feasible means of being recycled;

(2) within 270 days after the effective date of this rule, or 270 days from the commencement of a new facility's operations, the amount of material recycled, or transferred to a different site for recycling, equals at least 25% by weight or volume of the material accumulated 90 days from the effective date of this rule or 90 days from the commencement of a new facility's operation; and

(3) during each subsequent six-month period, the amount of material that is recycled, or transferred to a different site for recycling, equals at least 50% by weight or volume of the material accumulated at the beginning of the period.

(A) In calculating the percentage of turnover, the percentage requirements are to be applied to each material of the same type.

(B) For the purposes of this section, the following materials shall not be considered to be accumulated, but shall be considered to be recycled, as long as they have been contained, covered, or otherwise managed to protect them from degradation, contamination, or loss of value as recyclable material:

(i) materials for mulching and composting facilities that have been ground for use as mulch, or compost, or prepared and placed in a windrow, static pile, or vessel for composting; or

(ii) materials for other recycling facilities that have been processed for recycling.

(c) A recycling facility that fails to comply with the requirements of this section shall be required, if the executive director so requests in writing, to obtain a permit or registration as a municipal solid waste facility under the provisions of §330.4 of this title. A facility that receives large quantities of materials as a result of a disaster or other circumstance beyond its control, and a mulching or composting facility that must accumulate a certain volume of materials in order to obtain grinding services from a contractor may not be subject to one or more of the requirements of subsection (b) of this section as determined by the executive director on a case-specific basis for a specified period of time as provided for in subsection (e) of this section.

(d) A facility that processes recyclable material that contains more than incidental amounts of non-recyclable waste must obtain a permit or registration as applicable under §330.4 of this title unless the executive director approves its request for alternative compliance.

(e) The executive director will use the following procedures in evaluating applications for alternative compliance with the standards in the definition of “Incidental amount(s) of non-recyclable waste” in §328.2 of this title (relating to Definitions) or with the requirements of subsection (b) of this section.

(1) The applicant must apply in writing to the executive director for the alternative compliance. The application must address the relevant criteria contained in subsection (f) of this section.

(2) The executive director will evaluate the application and issue a letter granting or denying the application. Any person affected by the decision of the executive director may file with the chief clerk a motion to overturn according to the procedures set out in §50.139(b) - (g) of this title (relating to Motion to Overturn Executive Director's Decision). The executive director may revoke an alternative compliance for good cause.

(f) The executive director may grant requests for alternative compliance if the applicant submits sufficient documentation demonstrating that the applicant cannot meet the requirements in the definition of "Incidental amount(s) of non-recyclable waste" in §328.2 of this title without affecting the ability to support related recycling activities. Failure to qualify for alternative compliance will subject the applicant to the permitting or registration requirements of §330.4 of this title. The executive director's decision will be based on the following factors:

(1) whether the application is for a single facility or for facilities of a similar type recycling the same kind of material;

(2) the locations of all facilities to be covered by the alternative compliance;

- (3) the type(s) of material(s) accepted for recycling;
- (4) any storage of materials prior to recycling;
- (5) how the material(s) are recycled;
- (6) the amount of and reasons for unavoidable damage to incoming material during collection, unloading, and sorting that renders the material unmarketable;
- (7) reasons that data on tramp or damaged materials cannot be separated from data on other non-recyclable waste;
- (8) reasonable efforts used at the facility or facilities to maintain and enforce source-separation, or reasons why source-separation cannot be practicably maintained and enforced at the facility or facilities;
- (9) the amount and type of non-recyclable waste disposed of by the facility or facilities, the method of disposal, and the amount of time between receiving the waste and disposal;
- (10) the prevalence of the practice on an industry-wide basis, or on the basis of other similar facilities recycling the same kind of material;

(11) reasons why alternative compliance would be protective of the environment and human health and safety; and

(12) other relevant factors.

**§328.5. Reporting and Recordkeeping Requirements.**

(a) In order to be exempt from the registration and permit requirements under §330.4(f)(1)(B) of this title (relating to Permit Required) or under Chapter 332 of this title (relating to Composting), a facility must comply with the requirements of this section unless:

(1) the owner or operator of the facility is a local government or an agency of the state or the federal government;

(2) the facility receives more than 50% of its recyclable material directly from any combination of generators not affiliated with the facility, the public, or haulers not affiliated with the facility; the facility receives no financial compensation to accept any of the recyclable material it receives; and the facility accumulating the recyclable material can show that the material is potentially recyclable and has an economically feasible means of being recycled;

(3) the facility smelts recyclable metals or the facility is a secondary metals recycling facility affiliated with a smelter of recyclable metals, including the operations conducted and materials handled at the facility, provided that the owner or operator of the facility demonstrates that:

(A) the primary function of the facility is to process materials that have a resale value greater than the cost of processing the materials for subsequent beneficial use; and

(B) all the solid waste generated from processing the materials is disposed of in a solid waste facility authorized under Texas Health and Safety Code, Chapter 361 (relating to the Solid Waste Disposal Act), with the exception of small amounts of solid waste that may be inadvertently and unintentionally disposed of in another manner; or

(4) the owner or operator of the facility owns or operates a facility permitted to dispose of municipal solid waste, or is affiliated with a person holding a permit to dispose of municipal solid waste.

(b) Within 90 days of the effective date of this section or prior to the commencement of new operations, the owner or operator of a facility that serves as a collection and processing point for only non-putrescible source-separated recyclable materials, or for mulching or composting of only source-separated recyclable material shall report on a form or forms to be provided by the executive director, describing:

(1) the type(s) of material(s) accepted for recycling;

(2) any storage of materials prior to recycling;

(3) how the material(s) will be recycled; and

(4) Subsequent reports shall be submitted to update or change any information contained in the facility report within 90 days of the effective date of the change.

(c) The owner or operator of a facility subject to the requirements of this subchapter shall maintain all records necessary to show:

(1) compliance with the requirements of §328.4 of this title (relating to Limitations on Storage of Recyclable Materials); and

(2) reasonable efforts to maintain source-separation of materials received by the facility, including:

(A) notice to customers of source-separation requirements,

(B) training of staff in the inspection of incoming loads to ensure that they contain no more than 10% incidental non-recyclable waste,

(C) documentation of loads that have been rejected for exceeding 10% incidental non-recyclable waste, and

(D) documentation that incidental non-recyclable waste constitutes no more than 5% of the average total scale weight or volume of all materials received in the last six-month period.

(d) The owner or operator of a facility subject to the requirements of this section shall make these records available upon request to agents or employees of the executive director or of local governments with territorial or extra-territorial jurisdiction over the property on which the facility is located.

(e) The owner or operator of a facility subject to the requirements of this section that manages combustible materials shall have a fire prevention and suppression plan that shall be made available to the local fire prevention authority having jurisdiction over the facility for review and coordination.

**SUBCHAPTER B: RECYCLING, REUSE, AND MATERIALS RECOVERY GOALS AND  
RATES**

**§328.8**

**STATUTORY AUTHORITY**

The amendment is adopted under THSC, Texas Solid Waste Disposal Act, §361.119, which provides the commission with the authority to adopt rules to ensure that a solid waste processing facility is regulated as a solid waste facility under Texas Solid Waste Disposal Act and is not allowed to operate unregulated as a recycling facility; §§361.011, 361.017, and 361.024, which provide the commission with the authority to adopt the rules necessary to carry out its powers and duties under Texas Solid Waste Disposal Act; §361.022, which establishes state public policy concerning municipal solid waste to include recycling of waste as a preferred method and requires the commission to consider that policy when adopting rules; and §361.428, which provides the commission with the authority to adopt rules establishing standards and guidelines for composting facilities. The adopted amendment is also authorized by TWC, §5.103, which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under TWC.

**§328.8. Measurement of Recycling Rates.**

(a) Annual rates. Annually, the executive director shall determine the statewide recycling rate and, when possible, the waste stream reduction and per capita waste generation rates.

Also, when possible, the executive director shall determine the rates for specific materials and for particular geographic areas of the state.

(b) Recordkeeping. Processors, handlers, and collectors of recyclable materials are encouraged to report and keep appropriate records to facilitate measuring recycling rates. The executive director shall protect confidential information received from these businesses to the extent authorized by law.

(c) Multiple counting. Diligence shall be practiced in collecting and reporting information to prevent multiple counting of any materials. Usually, materials will be counted as they are transferred to a recyclable material end-user or consumer in the state or as they are transferred out of state. The quantities of materials rejected and disposed of by the end-user shall be deducted from the quantities counted for recycling.

(d) Required minimum information for reporting. The following information at a minimum shall accompany the reporting of recycling rates for clarification:

- (1) report area or geographic area covered by the report;
- (2) reporting period - the year or portion of a year covered by the report;

(3) tons of each material, categorized per subsection (e) of this section, recovered or diverted for recycling from the total municipal solid waste stream generated within the report area during the report period;

(4) tons of municipal solid waste generated within the report area during the report period;

(5) tons of municipal solid waste generated during the report period within the report area but disposed of outside the report area;

(6) tons of municipal solid waste generated outside the report area but disposed of inside the report area during the report period;

(7) average populations within the report area during the report period and the base year, 1990; and

(8) the calculated recycling, waste stream reduction, and per capita waste generation rates using the formulas contained in §328.9 of this title (relating to Recycling, Waste Stream Reduction, and Per Capita Waste Generation Rates).

(e) Materials recovered or diverted for recycling. To the extent possible, materials recovered or diverted for recycling shall be reported according to the following categories, using the major categories when finer detail is not possible:

(1) food waste;

(2) glass:

(A) glass containers;

(B) plate glass; and

(C) other glass;

(3) leather and hides;

(4) metal:

(A) aluminum:

(i) cans and containers; and

(ii) other aluminum;

(B) ferrous metal:

(i) steel cans and containers; and

(ii) other ferrous metal;

(C) other nonferrous metal;

(5) paper and paperboard:

(A) computer printout;

(B) white ledger;

(C) colored ledger;

(D) old corrugated cartons/kraft;

(E) old newspaper;

(F) printers' waste;

(G) old magazines;

(H) mixed paper; and

(I) other paper and paperboard;

(6) plastic:

(A) plastic containers:

(i) polyethylene terephthalate (PET, or Code 1 plastic);

(ii) high density polyethylene (HDPE, or Code 2 plastic);

(iii) polyvinyl chloride (PVC, or Code 3 plastic);

(iv) low density polyethylene (LDPE, or Code 4 plastic);

(v) polypropylene (PP, or Code 5 plastic);

(vi) polystyrene (PS, or Code 6 plastic); and

(vii) other plastic containers (Code 7 plastic);

(B) mixed plastic; and

(C) other plastic;

(7) rubber;

(8) textiles and apparel;

(9) wood;

(10) yard debris; and

(11) other materials, not included elsewhere:

(A) asphalt pavement;

(B) appliances;

- (C) batteries:
  - (i) household; and
  - (ii) lead-acid;
- (D) construction-demolition debris;
- (E) hazardous household materials;
- (F) municipal sludge;
- (G) tires;
- (H) used oil and oil filters;
- (I) other inorganic materials;
- (J) other organic materials; and
- (K) other municipal solid waste materials.

(f) Units. All materials shall be reported in dry tons. For those materials normally measured by volume, the report shall indicate the volumetric quantity and the multiplier used to convert to weight in dry tons.

(g) Recycling credit limits. Except for lead-acid batteries, only the amount recycled in addition to 1990 quantities can be credited toward the state recycling goal for materials with an individual recycling rate greater than 80% in the base year, 1990.