

The Texas Natural Resource Conservation Commission (commission) proposes new §§328.2 - 328.5; and the commission also proposes an amendment to §328.8.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The purpose of the proposed rules is to implement the requirements of House Bill (HB) 2912, Article 9, §9.03, 77th Legislature, 2001. House Bill 2912 became effective on September 1, 2001. House Bill 2912 amends Texas Health and Safety Code (THSC) by adding §361.119, which directs 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 changes to 30 TAC Chapter 330, Municipal Solid Waste, and 30 TAC Chapter 332, Composting, are published in the Proposed Rules section of this issue of the *Texas Register*.

SECTION BY SECTION DISCUSSION

The proposed changes to Chapter 328 would add sections and language critical to justifying a recycling facility's exemption from registration and permit requirements under Chapter 330. The proposed amendments would 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 is proposed to be changed to indicate that the subchapter addresses recycling goals and rates.

Proposed new §328.2, Definitions, would add three new definitions critical to the proposed rules on limitations on storage and reporting and recordkeeping requirements. Paragraph (1) would define the term “Affiliated with” that is used, but not defined, in the legislation that created THSC, §361.119, leading to this proposed rule. Staff 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 two contexts in the proposed 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; 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) would define the term “Processed for recycling” 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 (3) would define 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.

Proposed new §328.3, General Requirements, would consolidate general requirements for recycling facilities exempt from registering and permitting under proposed §330.4(f)(1)(B), relating to Permit Required. The general requirements have been duplicated, with minor grammatical editing, from §332.4, to stress that all recycling facilities exempt from permit and registration requirements under Chapter 330, are subject to basic regulations that protect the environment and human health and safety. The proposed introductory paragraph clarifies that §328.3 specifically applies to recycling operations exempt from registration and permitting under proposed §330.4(f)(1)(B). Paragraph (1) would require all recycling facilities to comply with the TWC prohibition on the discharge of material to or the pollution of surface water or groundwater. Paragraph (2) would prohibit all recycling facilities from creating a nuisance as defined in Chapter 330 and as prohibited under the authority of the Solid Waste Disposal Act; Texas Clean Air Act; TWC, Chapter 26; and the general air quality rules of the commission. Paragraph (3) would emphasize the prohibition on discharging pollutants to surface water or groundwater as the result of recycling activities. Paragraph (4) would require that all recycling facilities comply with all applicable federal laws and regulations. Paragraph (5) would require that all recycling facilities comply with all applicable state laws and regulations. Paragraph (6) would require facility operations to be conducted in a manner that does not endanger human health and welfare, or the environment. Paragraph (7) would prohibit recycling activities from being conducted within the permitted boundaries of a municipal solid waste landfill without prior approval by the executive director as required by 30 TAC §305.70, relating to Municipal Solid Waste Permit and Registration Modifications. Paragraph (8) would require that recycling operations be conducted in a manner to ensure that no unauthorized or prohibited materials are processed at the facility and that any unauthorized or prohibited materials be disposed of at an authorized facility in a timely manner.

Paragraph (9) would require that all hazardous wastes and nonhazardous industrial solid wastes be managed in accordance with the industrial solid waste and municipal hazardous waste rules of the commission. Paragraph (10) would require the operator of a recycling facility to address the release of a chemical of concern according to the requirements of the Texas Risk Reduction Program and to perform the appropriate corrective action for that release.

Proposed new §328.4(a) establishes to whom the section is applicable. Composting facilities that require notification under Chapter 332 have been included to establish 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.

Proposed new §328.4(a)(1) and (2) would establish which facilities are exempt from limitations on the storage and accumulation of recyclable material, as specified in the legislation. Proposed §328.4(a)(1) would exempt a facility owned or operated by a local government from the requirements of the section. Texas Health and Safety Code, §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 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 proposed §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 proposed 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 the public and/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. 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 proposed 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 proposed 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.

Proposed new §328.4(b) specifies the conditions under which recyclable material may be accumulated or stored at a facility. Its language derives 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, proposed

new §328.4(b)(2)(B) would establish that if a material has been “processed for recycling” (see definition in proposed §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.

Proposed new §328.4(c) would 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 have recycled or processed for recycling less than 75% of their materials in a particular calendar year due to other unavoidable circumstances. Again, the intent of the legislation is understood to be to prevent illegitimate recycling operations, not to force legitimate recyclers to comply with registration or permit requirements from which they should be exempt.

Proposed new §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) states that the section applies to recycling facilities and operations that are exempt from registration and permitting under §330.4(f)(1)(B) and (C), and notification-tier compost facilities. Paragraphs (1) - (3) would specify the exemptions provided by the legislation. Paragraphs (1) and (2) provide exemptions identical to those in proposed new §328.4, for the same reasons discussed previously in this preamble. Proposed new subsection (a)(3) would exempt “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) would cover 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 was added that requires facilities to make these records available to local governments. The statutory authority for this proposed provision is in THSC, §361.032(b), relating to Inspections: Right of Entry.

The proposed amendment to §328.8 would change only the title, since the title proposed to be deleted is the title of proposed new §328.5. The proposed new title more accurately describes the contents of §328.8.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, has determined that for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency or other units of state and local government due to implementation of the proposed rules. Units of local government would be exempt from the recordkeeping, reporting, and storage limitation requirements; however, units of state government would have to comply with these requirements.

These proposed rules are intended to implement certain provisions of HB 2912 (an act relating to the continuation and functions of the Texas Natural Resource Conservation Commission; providing penalties), 77th Texas Legislature, 2001. This bill requires the commission to ensure that solid waste processing facilities are regulated as solid waste facilities and are not allowed to operate unregulated as recycling facilities. In order to comply with this requirement, the commission proposes to restate existing recycling facility requirements (that currently appear in different statutes and rules) in one place, and add new definitions relating to permit exemptions, recycling processes, and source-separated recyclable material. The commission also proposes to implement recordkeeping, reporting, and storage limitation requirements. These proposed rules are intended to more clearly define the type of materials and processes associated with recycling, and to implement procedures to ensure that facilities authorized as recycling facilities are not storing materials on-site for periods of time unsafe to public health or the environment.

The proposed rules would affect all recycling facilities statewide that are not registered or permitted under Chapter 332 or part of a registered or permitted municipal solid waste site, except those excluded under the legislation. 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. The legislation also excludes facilities owned, operated, or affiliated with municipal solid waste permit holders from the recordkeeping and reporting requirements of the new rules. Affected facilities include processors, handlers, and collectors of recyclable material as well as owners and operators of certain composting facilities. The commission estimates that approximately a minimum of 1,000 recycling and 134 composting facilities could potentially be affected, but expects

that many of these facilities would qualify for the exclusions provided in the legislation. The commission estimates that the number of recycling facilities owned or operated by units of state government will be very low. Currently, the commission has no records of any units of state government operating recycling facilities that would be affected by the proposed rules.

Recycling facilities that serve as collection and processing points for nonputrescible recyclable materials are currently exempt from permitting and registration under Chapters 330 and 332, and are not required to maintain records, provide reports to the commission, or process a certain amount of received materials within a year. The proposed rules would require new or existing recycling facilities claiming exemption from municipal solid waste registration and permitting to submit an initial report to the executive director, prior to commencing or continuing operations, that lists the type of materials to be accepted for recycling, any storage of materials prior to recycling, and how the materials will be recycled. Subsequent reports would have to be filed only if the facilities' operations change. Owners and operators of affected facilities would be required to maintain compliance records, and make the records available to the executive director and local government officials upon request. The commission does not anticipate the recordkeeping and reporting requirements would cost affected owners and operators more than \$500 a year.

The new storage limitation provision would prohibit the accumulation of unprocessed materials at a recycling facility exempt from municipal solid waste registration and permitting and not excluded under this legislation. At a minimum, 75% of the material stored on January 1 of a calendar year would have to be processed during that year. This requirement is intended to prevent the unsafe storage of

materials at recycling facilities exempt from municipal solid waste registration and permitting. Affected facilities that currently do not meet the processing requirements would either have to change their operations or obtain a permit. The commission is not aware of any existing facilities owned and operated by units of state government that would be affected by the storage limitation requirement. The commission anticipates that any new facilities that commence operations following the adoption of the proposed rules would integrate the new storage limitation requirements into the overall operations of their sites. Therefore, the commission does not anticipate significant fiscal implications for units of state government due to implementation of the storage limitation requirement.

PUBLIC BENEFITS AND COSTS

Mr. Davis also has determined that for each year of the first five years that the proposed rules are in effect, the public would benefit from increased compliance with commission regulations and potentially increased environmental protection due to the new standards for exempt recycling facilities.

These proposed rules are intended to implement certain provisions of HB 2912, which require the commission to ensure that solid waste processing facilities are regulated as solid waste facilities and are not allowed to operate unregulated as recycling facilities.

The proposed rules would affect all recycling facilities statewide that are not registered or permitted under Chapter 332 or part of a registered or permitted municipal solid waste site, except those excluded under the legislation. 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. The legislation also excludes facilities owned, operated, or affiliated with municipal solid waste permit holders from the recordkeeping and reporting requirements of the new rules. Affected facilities include processors, handlers, and collectors of recyclable material as well as owners and operators of certain composting facilities. The commission estimates that approximately 1,000 recycling and 134 composting facilities would be affected.

Facilities that serve as collection and processing points for nonputrescible recyclable materials are currently exempt from municipal solid waste registration and permitting, and are not required to maintain records, provide reports to the commission, or process a certain amount of received materials within a year. The proposed rules would require recycling facilities claiming exemption from registration and permitting to submit an initial report to the executive director that lists the type(s) of materials to be accepted for recycling, any storage of materials prior to recycling, and how the materials will be recycled. Subsequent reports would have to be filed only if the facilities' operations change. Owners and operators of affected facilities would be required to maintain compliance records, and make the records available to the executive director and local government officials upon request. The commission does not anticipate that the recordkeeping and reporting requirements would cost affected owners and operators more than \$500 a year.

The proposed rules would implement a new storage limitation provision that would prohibit the accumulation of unprocessed materials at a recycling facility exempt from municipal solid waste registration and permitting and not excluded under this legislation. At a minimum, 75% of the material stored on January 1 of a calendar year would have to be processed during that year. This requirement

is intended to prevent the unsafe storage of materials at recycling facilities exempt from municipal solid waste registration and permitting. Affected facilities that currently do not meet the processing requirements would either have to change their operations or obtain a permit or registration. Although the total number of affected facilities is unknown, the commission recognizes that existing facilities would be impacted by these requirements and would be required to make changes to existing operating procedures or obtain a permit. However, it is estimated that the number of affected facilities requiring major changes to operations would not be large because the majority of recycling facilities currently meet or exceed the 75% processing requirement in order to maintain profits. The commission expects that the proposed processing provision would affect a relatively low number of facilities that claim to be recycling materials but are actually receiving and storing materials on-site for long periods of time.

The commission anticipates that the costs to comply with the proposed rules could be significant, depending on the facility and what compliance option it chooses to pursue. For those sites that have significant backlogs of materials that would have to be processed in order to meet the 75% processing requirement, the commission estimates that it would cost from \$20 to \$200 per additional ton processed, depending on the type of site and material being processed. If a facility decides to obtain a municipal solid waste registration (the type of authorization that would apply to the great majority of facilities requiring an authorization) to operate as a transfer facility and store waste on-site, the costs of hiring a consultant, preparing the application, legal, and public notice costs would range from \$35,000 to \$250,000, depending on the type and location of the site, and the types of materials to be stored on-site. There could also be technical costs related to preparing the site to meet existing environmental standards. The site preparation costs would vary considerably, depending on the current condition of

the site, its location, and what type of modifications would be required to meet the registration requirements. Costs associated with obtaining a permit for the disposal of municipal solid waste typically run upwards of \$1 million, in addition to site development expenses and cleanup of accumulated wastes.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

There may be adverse fiscal implications, which could be significant, for small and micro-businesses due to implementation of the proposed rules. These proposed rules are intended to implement certain provisions of HB 2912, which require the commission to ensure that solid waste processing facilities are regulated as solid waste facilities and are not allowed to operate unregulated as recycling facilities.

The proposed rules would affect all recycling facilities statewide that are not already part of a permitted municipal solid waste site, except those excluded under the legislation. 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. The legislation also excludes facilities owned, operated, or affiliated with municipal solid waste permit holders from the recordkeeping and reporting requirements of the new rules. Affected facilities include processors, handlers, and collectors of recyclable material as well as owners and operators of certain composting facilities. The commission estimates that approximately 1,000 recycling and 134 composting facilities would be affected, many of which are small or micro-businesses.

Recycling facilities that serve as collection and processing points for nonputrescible recyclable materials are currently exempt from municipal solid waste registration and permitting, and are currently not required to maintain records, provide reports to the commission, or process a certain amount of received materials within a year. The proposed rules would require recycling facilities claiming exemption from municipal solid waste registration and permitting to submit an initial report to the executive director, prior to commencing or continuing operations, that lists the type(s) of materials to be accepted for recycling, any storage of materials prior to recycling, and how the materials will be recycled. Subsequent reports would have to be filed only if the facilities' operations change. Owners and operators of affected facilities would be required to maintain compliance records, and make the records available to the executive director and local government officials upon request. The commission does not anticipate that the recordkeeping and reporting requirements would cost affected owners and operators more than \$500 a year.

The proposed rules would implement a new storage limitation provision that would prohibit the accumulation of unprocessed materials at a recycling facility exempt from municipal solid waste registration and permitting and not excluded under the legislation. At a minimum, 75% of the material stored on January 1 of a calendar year would have to be processed during that year. This requirement is intended to prevent the unsafe storage of materials at recycling facilities exempt from municipal solid waste registration and permitting. Affected facilities that do not meet the processing requirements would either have to change their operations or obtain a permit or registration. Although the total number of affected facilities is unknown, the commission recognizes that small and micro-businesses would be impacted by these requirements and would be required to make changes to existing operating

procedures or obtain a permit or registration. However, it is anticipated that the number of affected facilities requiring major changes to operations would not be large because the majority of recycling facilities currently meet or exceed the 75% processing requirement in order to maintain profits. The commission expects that the proposed processing provision would affect a relatively low number of facilities that claim to be recycling materials but are actually receiving and storing materials on-site for long periods of time.

The commission anticipates that the costs to comply with the proposed rules could be significant, depending on the facility and what compliance option it chooses to pursue. For those sites that have significant backlogs of materials that would have to be processed in order to meet the 75% processing requirement, the commission estimates that it would cost between \$20 to \$200 per additional ton processed, depending on the type of site and material being processed. If a facility decides to obtain a municipal solid waste registration (the type of authorization that would apply to the great majority of facilities requiring an authorization) to operate as a transfer facility and store waste on-site, the costs of hiring a consultant, preparing the application, legal, and public notice costs would range from \$35,000 to \$250,000, depending on the type and location of the site, and the types of waste to be stored on-site. There could also be technical costs related to preparing the site to meet existing environmental standards. The site preparation costs would vary considerably, depending on the current condition of the site, its location, and what type of modifications would be required to meet the registration requirements. Costs associated with obtaining a permit for the disposal of municipal solid waste typically run upwards of \$1 million, in addition to site development expenses and cleanup of accumulated wastes.

The following is an analysis of the costs per employee for small and micro-businesses that are required to obtain a municipal solid waste permit to comply with the proposed rules. Small and micro-businesses are defined as having fewer than 100 or 20 employees respectively. A small business may pay an additional \$2,500 per employee to comply with the proposed rules. A micro-business may pay an additional \$12,500 per employee to comply with the proposed rules. The overall costs to small or micro-businesses could be higher if affected facilities are required to conduct site changes to comply with permit requirements.

LOCAL EMPLOYMENT IMPACT

The commission has reviewed these proposed rules and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed 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 proposed rules is to protect the environment or reduce risks to human health from environmental exposure, the proposed 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 amendments 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 proposed rules do not meet any of the four applicability requirements listed in §2001.0225(a). These proposed 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 proposed rules do not exceed the requirements of state law under THSC, §361.119, and the proposed 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 proposed 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. The commission invites public comment on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these proposed rules and performed a preliminary analysis of whether Texas Government Code, Chapter 2007 is applicable. The commission's preliminary analysis indicates that Texas Government Code, Chapter 2007 does not apply to these proposed 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 proposed rules, THSC, §361.119, directs the commission to develop these proposed 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 proposed 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 proposed rules and performed a preliminary analysis of whether these proposed rules constitute a takings under Texas Government Code, Chapter 2007. The specific purpose of these proposed 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 proposed 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 proposed rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the proposed 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 proposed 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.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission has prepared a consistency determination for the proposed rules in accordance with 31 TAC §505.22, and has found that the proposed rules are consistent with the applicable Texas Coastal Management Program (CMP) goals and policies. The proposed rules are subject to the CMP and must be consistent with applicable goals and policies that are found in 31 TAC §501.12 and §501.14. The CMP goal applicable to the rules is the goal to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values in Coastal Natural Resource Areas (CNRAs). The proposed rules do not govern any of the activities that are within the designated coastal zone management area or otherwise specifically identified under the Texas Coastal Management Act or related rules of the Coastal Coordination Council. Interested persons may submit comments on the consistency of the proposed rules with the CMP during the public comment period.

SUBMITTAL OF COMMENTS

Comments may be submitted to Angela Slupe, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808.

Comments must be received by 5:00 p.m., May 28, 2002, and should reference Rule Log Number 2001-081-328-WS. For further information, please contact Michael Bame, Policy and Regulations Division, at (512) 239-5658.

SUBCHAPTER A: PURPOSE AND GENERAL INFORMATION

§§328.2 - 328.5

STATUTORY AUTHORITY

The new sections are proposed 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 power 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 proposed 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.

The proposed new sections implement THSC, §361.119; §361.032, which provides the commission and local governments with right of entry to inspect facilities and investigate conditions concerning solid waste management and control; §361.061, which provides the commission with the authority to require and issue permits for solid waste facilities; and TWC, §5.103.

§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) **Processed for recycling** - Material has been or is processed for recycling 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.

(3) **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) damage to source-separated recyclable material during collection, unloading, and sorting of that material, such as breakage of recyclable glass, that renders the material unmarketable; and

(C) tramp materials, such as:

(i) glass from recyclable metal windows;

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

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

§328.3. General Requirements.

Recycling facilities exempt from the permit and registration requirements under §330.4(f)(1)(B) of this title (relating to Permit Required) shall comply with all of the following general requirements. Violations of these requirements are subject to enforcement by the commission and may result in the assessment of civil or administrative penalties under Texas Water Code (TWC), Chapter 7 (relating to Enforcement).

(1) Compliance with TWC. The activities that are subject to this chapter shall be conducted in a manner that prevents the discharge of material to or the pollution of surface water or groundwater in accordance with the provisions of TWC, Chapter 26 (relating to Water Quality Control).

(2) Nuisance conditions. The handling and processing of recyclable material shall be conducted in a sanitary manner that shall prevent the creation of nuisance conditions as defined in §330.2 of this title (relating to Definitions) and as prohibited by Texas Health and Safety Code, Chapters 341 and 382 (relating to Minimum Standards of Sanitation and Health Protection Measures; and Clean Air Act); TWC, Chapter 26; §101.4 of this title (relating to Nuisance); and any other applicable regulations or statutes.

(3) Discharge to surface water or groundwater. The discharge of material to or the pollution of surface water or groundwater as a result of the beneficial use or reuse and recycling of material is prohibited.

(4) Compliance with federal laws. Facility operations shall be conducted in accordance with all applicable federal laws and regulations.

(5) Compliance with state laws. Facility operations shall be conducted in accordance with all applicable laws and regulations of the State of Texas.

(6) Facility operations. Facility operations shall not be conducted in a manner that causes endangerment of human health and welfare, or the environment.

(7) Operations at a municipal solid waste landfill. No recycling activities shall be conducted within the permitted boundaries of a municipal solid waste landfill without prior approval by the executive director as required by §305.70 of this title (relating to Municipal Solid Waste Permit and Registration Modifications).

(8) Operational requirement. Operations shall be conducted in a manner to ensure that no unauthorized or prohibited materials are processed at the facility. All unauthorized or prohibited materials received by the facility shall be disposed of at an authorized facility in a timely manner.

(9) Industrial and hazardous waste. All hazardous wastes and all nonhazardous industrial solid wastes shall be managed in accordance with Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste).

(10) Chemicals of concern. The operator of a recycling facility shall address the release of a chemical of concern from a recycling facility to any environmental media under the requirements of Chapter 350 of this title (relating to Texas Risk Reduction Program) to perform the corrective action.

§328.4. Limitations on Storage of Recyclable Materials.

(a) A recycling facility that is exempt from the registration and permit requirements under §330.4(f)(1)(B) or (C) of this title (relating to Permit Required) or that is required to submit a notification under Chapter 332 of this title (relating to Composting) shall comply with the requirements of this section unless:

(1) the owner or operator of the facility is a local government; or

(2) the facility receives more than 50% of its recyclable material directly from the public and/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.

(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; and

(2) during the 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.

(A) In calculating the percentage of turnover, the 75% requirement is to be applied to each material of the same type.

(B) For purposes of this section, materials that have been managed in a controlled mulching or composting process, or otherwise processed for recycling, and are contained, covered, or otherwise managed to protect them from degradation, contamination, or loss of value as recyclable materials shall not be considered to be accumulated, but shall be considered recycled when making this calculation.

(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.

§328.5. Reporting and Recordkeeping Requirements.

(a) A recycling facility that is exempt from the registration and permit requirements under §330.4(f)(1)(B) or (C) of this title (relating to Permit Required) or that is required to submit a notification under Chapter 332 of this title (relating to Composting) shall comply with the requirements of this section unless:

(1) the owner or operator of the facility is a local government;

(2) the facility receives more than 50% of its recyclable material directly from the public and/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 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 yard trimmings, clean wood material, vegetative material, paper, and manure 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; and

(3) how the material(s) will be recycled. 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 5 percent incidental non-recyclable waste, and

(C) documentation of loads that have been rejected for exceeding 5 percent incidental non-recyclable waste.

(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.

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

RATES

§328.8

STATUTORY AUTHORITY

The amendment is proposed 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 power 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 proposed 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.

The proposed amendment implements THSC, §361.119; §361.061, which provides the commission with the authority to require and issue permits for solid waste facilities; and TWC, §5.103.

§328.8. Measurement of Recycling Rates [Recordkeeping and Reporting Requirements].

(a) - (g) (No change.)