The Texas Commission on Environmental Quality (commission) adopts amendments to §§37.901, 37.911, 37.921, and 37.931. Sections 37.911 and 37.921 are adopted *with changes* to the proposed text as published in the April 23, 2004 issue of the *Texas Register* (29 Tex Reg 3909). Sections 37.901 and 37.931 are adopted *without change*s and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

This rulemaking implements the requirements of House Bill (HB) 1823, 78th Legislature, 2003, which amends Texas Health and Safety Code (THSC), §361.119, to require that owners and operators of recycling facilities, including composting or mulching facilities, have sufficient financial assurance in place. The financial assurance must be conditioned on satisfactorily operating and closing the facility, consistent with the requirements of THSC, §361.085, for a solid waste facility other than a facility for the disposal of hazardous waste. HB 1823 applies to an owner or operator of a recycling facility at which combustible material is stored outdoors or that poses a significant risk to public health and safety as determined by the commission. The legislation also exempts a facility that is owned, operated, or affiliated with a person who has a permit to dispose of municipal solid waste from rules adopted under this section of law.

Corresponding rulemakings published in the Adopted Rules section of this issue of the *Texas Register* include changes to 30 TAC Chapter 328, Waste Minimization and Recycling; Chapter 330, Municipal Solid Waste; Chapter 332, Composting; and Chapter 335, Industrial Solid Waste and Municipal Hazardous Waste.

SECTION BY SECTION DISCUSSION

Administrative and grammatical changes are adopted throughout the sections to be consistent with *Texas Register* requirements and to improve readability. The title of Subchapter J is changed from "Financial Assurance for Permitted Compost Facilities" to "Financial Assurance for Recycling Facilities."

The adopted amendment to §37.901, Applicability, amends incorrect terminology and adds cross-references to establish consistency in the commission's rules.

The adopted amendment to §37.911, Definitions, adds cross-references to establish consistency in the commission's rules.

Adopted §37.921, Financial Assurance Requirements for Closure, amends incorrect terminology and has been restructured since proposal for readability. Subsection (a)(1) - (4) outline financial assurance requirements that will not apply to owners and operators of recycling facilities. A new adopted subsection (b) specifies that at new facilities financial assurance mechanisms must be submitted to the executive director prior to the receipt of materials or as otherwise approved by the executive director while financial assurance mechanisms related to existing facilities must be submitted within 60 days of approval of the closure cost estimate, within 180 days of the effective date of the rule, or as otherwise approved by the executive director, whichever occurs first. A re-lettered subsection (c) requires that insurers providing insurance as a financial assurance mechanism must be either licensed to transact the business of insurance in Texas or eligible to provide insurance as an excess or surplus insurer in Texas.

Adopted §37.931, Financial Assurance Mechanism, amends incorrect terminology and explains the types of financial assurance mechanisms that cannot be used to demonstrate financial assurance.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rules in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the adopted rules are not subject to §2001.0225 because they do not meet the criteria for a "major environmental rule" as defined in that statute.

A "major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way 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.

The specific intent of the adopted rules is to require the owner or operator of an affected recycling facility to have sufficient financial assurance to properly operate and close a facility. These rules will apply to recycling facilities that store combustible material outdoors and recycling facilities that pose a significant risk to public health and safety. Therefore, it is not anticipated that the adopted rules will adversely affect in a material way 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. The commission concludes that these adopted rules do not meet the definition of a major environmental rule.

Furthermore, even if the adopted rules did meet the definition of a major environmental rule, the adopted rules are not subject to Texas Government Code, §2001.0225, because they do not meet any of the four applicable requirements specified in §2001.0225(a). Section 2001.0225(a) applies to a rule adopted by an agency, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

In this case, the adopted rules do not meet any of these requirements. First, there are no applicable federal standards that these rules would address. Second, the adopted rules do not exceed an express requirement of state law, but instead implement the statutory requirement of THSC, §361.119. Third, there is no delegation agreement that would be exceeded by these adopted rules because none relate to this subject matter. Fourth, the commission adopts these rules under the direction of HB 1823, amending THSC, §361.119, and not solely under the commission's general powers.

Written comments on the draft regulatory impact analysis determination were solicited during proposal. No comments were received on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these adopted rules and performed an assessment of whether the adopted rules constitute a taking under Texas Government Code, Chapter 2007. The specific purpose of the

adopted rules is to require the owner or operator of an affected recycling facility to have sufficient financial assurance to properly close a facility. These rules will apply to recycling facilities that store combustible material outdoors and recycling facilities that pose a significant risk to public health and safety. The adopted rules would substantially advance this stated purpose by requiring that regulated facilities obtain adequate financial assurance to properly operate and close a facility.

Promulgation and enforcement of these adopted rules would be neither a statutory nor a constitutional taking of private real property because the adopted rules do not affect real property.

In particular, there are no burdens imposed on private real property, and the adopted rules would improve the commission's ability to ensure proper closure of certain recycling facilities. Because the regulation does not affect real property, it does not burden, restrict, or limit an owner's right to property or reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. Therefore, these adopted rules will not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found that the rulemaking is identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), concerning actions and rules subject to the Texas Coastal Management Program (CMP), and therefore, requires that goals and policies of the CMP be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the adopted rulemaking is consistent with CMP goals and policies because the rulemaking is an administrative action that requires financial mechanisms to pay for closure activities; will not have direct or significant adverse effect on any coastal natural resource areas; will not have a substantive effect on commission actions subject to the CMP; and promulgation and enforcement of the adopted rules will not violate (exceed) any standards identified in the applicable CMP goals and policies.

Written comments on the consistency of this rulemaking were solicited during proposal. No comments were received on the consistency determination.

PUBLIC COMMENT

A public hearing was held on May 20, 2004. The comment period closed on May 24, 2004. Comments were received from Abitibi Consolidated (AC); Austin Wood Recycling (AWR); the Compost Advisory Council of the Recycling Alliance of Texas (CACRAT); Harris County Pollution Control (HCPC); Safe Tire Disposal Corp of Texas (STDCT); Silver Creek Materials, Inc. (SCM); and one individual. Oral comments were received from CACRAT, HCPC, and one individual at the hearing. The seven commenters either opposed portions of the rulemaking or supported the rulemaking with suggested changes.

RESPONSE TO COMMENTS

AC commented that it supports the commission's efforts to encourage legitimate recycling operations, but is concerned by the lack of criteria for determining the definition of "a recycling facility that stores combustible materials outdoors." AC commented that it believes that temporary staging or storing outdoors prior to movement inside for processing was not intended to be covered by the financial assurance requirement mandated by the legislation, but that the legislation was concerned with outdoor storage of large volumes of material for extended periods of time. AC recommended that criteria be established for a minimum amount of material and/or minimum closure cost for the financial assurance requirement to apply, as well as an exemption for temporary outdoor staging or storage of materials.

The commission appreciates AC's comment that it supports the commission's efforts to encourage recycling operations.

The commission agrees that the legislation required financial assurance only for materials that are "combustible" and "stored outdoors." The commission amended the rule in §§328.5(c)(2)(A), 330.282(a)(2)(A), and 335.24(j)(2)(A) to include the words "combustible" and "stored outdoors" in response to this comment.

The commission does not agree that establishing criteria for a minimum amount of material and/or a minimum closure cost for the financial assurance requirements would be consistent with implementation of the statutory requirements of THSC, §361.119, because the statute does not provide for any exemptions. No changes were made in response to this comment.

The commission amended the rules in §§328.5(c)(1), 330.282(a)(1), and 335.24(j)(1) to allow the executive director to approve exceptions to the closure cost estimate requirements. Executive director discretion is provided to avoid applying these requirements in circumstances where this will result in unreasonable and unduly burdensome requirements for recyclers.

AWR commented that it was opposed to the financial assurance requirements of the rulemaking, specifically the requirement of an independent third-party cost closure estimate. AWR also commented that the rulemaking would place an undue financial burden on its business, possibly forcing its closure, and urged the commission to modify the rule language as suggested by CACRAT.

The commission finds that the requirement for financial assurance based on third-party closure of a facility is appropriate as a safeguard against the possible abandonment of a facility. No changes were made in response to this comment.

Regarding AWR's comment that the rulemaking would impose an undue financial burden, the commission amended the rules in §§328.5(c)(2)(A) and (C), 330.282(a)(2)(A) and (C), and 335.24(j)(2)(A) and (C) consistent with CACRAT's comments, substituting the term "disposition" for the term "disposal." This will allow financial assurance for facility closure to consider disposition strategies other than disposal of all materials, and reduce the burden of financial assurance for facilities that can demonstrate that certain materials stored on site can be managed by a means other than disposal. The commission would not require closure cost estimates to include disposal costs for materials which are demonstrated to be products. For materials that

are not demonstrated to be either products or manageable by other means, closure cost estimates must be based on disposal costs.

The commission amended the rules in §§328.5(c)(1), 330.282(a)(1), and 335.24(j)(1) to allow the executive director to approve exceptions to the closure cost estimate requirements. Executive director discretion is provided to avoid applying these requirements in circumstances where this will result in unreasonable and unduly burdensome requirements for recyclers.

CACRAT commented that it is not opposed to financial assurance as a requirement for recyclers, including mulching and composting businesses; however, CACRAT believes that the benefits of financial assurance can be gained without threatening the economic viability of these operations. Specifically, CACRAT finds the requirement to calculate facility closure costs based on the disposal of all materials on site an unnecessary burden that would fall only on legitimate recyclers, since facilities that store more than incidental amounts of materials with no economically feasible means of being recycled are unauthorized solid waste facilities, subject to enforcement under the THSC and §330.4(f). CACRAT suggested substituting the words "disposition … in compliance with all applicable laws and regulations" for the terms "disposal."

The commission amended the rules in §§328.5(c)(2)(A) and (C), 330.282(a)(2)(A) and (C), and 335.24(j)(2)(A) and (C) consistent with CACRAT's comments, substituting the term "disposition" for the term "disposal." This will allow financial assurance for facility closure to consider disposition strategies other than disposal of all materials, and reduce the burden of financial

assurance for facilities that can demonstrate that certain materials stored on site can be managed by a means other than disposal. The commission would not require closure cost estimates to include disposal costs for materials which are demonstrated to be products. For materials that are not demonstrated to be either products or manageable by other means, closure cost estimates must be based on disposal costs.

The commission responds that one of the means of enforcement of this rule will come in the form of citizen complaints to the commission concerning potential "sham" recycling and composting operations. No changes were made in response to this comment.

HCPC commented that it believes that the rule meets the requirements of HB 1823 and would provide HCPC with another compliance enforcement tool. HCPC agreed with the recommendation to modify language to substitute the word "disposal" with "disposition." HCPC requested that the rule allow the executive director discretion based on: 1) compliance history; 2) property/equipment ownership versus property/equipment renting; and 3) the status of materials-stream and long-term commitment to the recycling industry. HCPC also requested that the rule require that mechanisms of financial assurance related to existing facilities be submitted to the commission within 120 days after adoption of the rules. Finally, HCPC supported CACRAT's comments related to the undue burden of including disposal costs in cost closure estimates, as well as the problems of enforcement against "sham" recyclers.

The commission appreciates HCPC's comment that the rule would provide HCPC with another enforcement tool. No changes were made in response to this comment.

The commission acknowledges the need for timely implementation of these financial assurance requirements and amended the rules in response to this comment. Section 37.921 is amended to require owners or operators to submit an originally signed financial assurance mechanism to the executive director. For new facilities, owners or operators shall submit the originally signed financial assurance mechanism prior to receipt of materials or as otherwise approved by the executive director. For facilities in existence upon the effective date of this rule, owners or operators shall submit the originally signed financial assurance mechanism within 60 days of executive director approval of the closure cost estimate as required in Chapters 328, 330, or 335 or within 180 days of the effective date of the rule, whichever occurs first; or as otherwise approved by the executive director. The commission determined that 180 days are needed to allow sufficient time for facilities to develop and submit closure cost estimates and obtain and submit financial assurance mechanisms; and for the commission to review and approve closure cost estimates.

Section 328.5(c)(1) and §335.24(j)(1) have also been amended to require existing facilities to submit a closure cost estimate within 60 days of the effective date of the rule. Section 328.5(c)(1) has been amended to require new facilities subject to Chapter 328 to submit a closure cost estimate at least 90 days prior to receipt of materials. Section 335.24(j)(1) has been amended to require new facilities subject to Chapter 335 to submit a closure cost estimate with a notification in accordance with §335.6. The commission made these changes to allow sufficient time for the development, submittal, review, and approval of closure cost estimates and to allow sufficient time for recyclers to obtain and submit financial assurance mechanisms.

In order to minimize the regulatory burden imposed on recycling facilities and to streamline the commission's review of cost estimates, the commission intends to develop a simple cost-estimate formula that can be used to calculate a closure cost estimate. The word "detailed" has been deleted from §§328.5(c)(1), 330.282(a)(1), and 335.24(j)(1) to allow facilities to use a simple cost-estimate formula. The commission anticipates that the facilities subject to the requirements of these rules will have the option of using the cost-estimate formula or developing a detailed site-specific closure cost estimate.

In addition, the commission amended §328.5(c)(1) and §335.24(j)(1) to make the language in these rule sections more consistent with the corresponding requirements for closure cost estimates already included in §330.282(a)(1).

Regarding HCPC's comment that the rulemaking would place an undue financial burden on recycling facilities, the commission amended the rules in §§328.5(c)(2)(A) and (C), 330.282(a)(2)(A) and (C), and 335.24(j)(2)(A) and (C) consistent with CACRAT's comments, substituting the term "disposition" for the term "disposal." This will allow financial assurance for facility closure to consider disposition strategies other than disposal of all materials, and reduce the burden of financial assurance for facilities that can demonstrate that certain materials stored on site can be managed by a means other than disposal. The commission would not require closure cost estimates to include disposal costs for materials which are demonstrated to be products. For materials that are not demonstrated to be either products or manageable by other means, closure cost estimates must be based on disposal costs.

Regarding the issue of enforcement, the commission responds that one of the means of enforcement of this rule will come in the form of citizen complaints to the commission concerning potential "sham" recycling and composting operations. No changes were made in response to this comment.

STDCT commented that the rule is incomplete and biased because it grants exemptions to those facilities that are owned and operated by or affiliated with a person who has a permit to dispose of municipal solid waste. STDCT commented that the rules encompass vague and subjective terminology. Specifically, STDCT objected to the use of the term "satisfactorily operating and closing the facility…". STDCT commented that HB 1823 directed the commission to adopt rules which will assure the proper cleanup and closure of facilities "in the event of abandonment or bankruptcy." STDCT further commented that the rules negate the necessity for proof of abandonment or bankruptcy.

The commission is charged with implementing the requirements of HB 1823 to require financial assurance for the owners or operators of recycling facilities. The exemption for facilities owned, operated, or affiliated with a person who has a permit to dispose of municipal solid waste is a statutory exemption and the commission does not have the authority to change that exemption. No changes were made in response to this comment.

The commission responds that although the phrase "satisfactorily operating and closing the facility" is used in HB 1823, this phrase is not used in the rules. The rules establish specific

requirements for the financial assurance needed to meet the statutory requirement of satisfactorily operating and closing a facility. No changes were made in response to this comment.

The commission responds that the enrolled version of HB 1823 does not use the phrase "in the event of abandonment or bankruptcy." No changes were made in response to this comment.

SCM commented that it operates in compliance with the regulations in Chapters 328 and 332, keeping incoming materials clean and grinding them within a week of arrival. SCM stated that ground material is a true commodity and should be used as such, even in the event of facility closure. Specifically, SCM suggested that the commission require financial assurance only for unground material, allowing a facility to obtain financial assurance to cover either: 1) transportation and disposition of the material; or 2) on-site processing and on-site or off-site reuse. SCM further commented that the rules could increase the gap of profitability between public and private facilities, and suggested grandfathering facilities with five or more years of good compliance histories.

The commission appreciates the efforts of recyclers and composters to comply with its regulations. The commission amended the rules in §§328.5(c)(2)(A) and (C), 330.282(a)(2)(A) and (C), and 335.24(j)(2)(A) and (C), substituting the term "disposition" for the term "disposal." This will allow financial assurance for facility closure to consider disposition strategies other than disposal of all materials, and reduce the burden of financial assurance for facilities that can demonstrate that certain materials stored on site can be managed by a means other than disposal. The commission would not require closure cost estimates to include disposal costs for materials which

are demonstrated to be products. For materials that are not demonstrated to be either products or manageable by other means, closure cost estimates must be based on disposal costs.

The commission does not agree that grandfathering facilities with five or more years of good compliance histories would be consistent with implementation of the statutory requirements of THSC, §361.119, because the statute does not provide for any exemptions. No changes were made in response to this comment.

One individual commented regarding concerns about how the commission would enforce the rule against operators that did not notify the commission of their operations or operators that just abandoned their operations. The individual also stated that the rules would only hurt the legitimate composters and believed that there was a lack of enforcement against "sham" recyclers. The individual suggested that the rule could allow discretion by the executive director to assist legitimate composters that would be unduly burdened by the rulemaking which is intended to prevent "sham" recyclers.

The commission responds that one of the means of enforcement of this rule will come in the form of citizen complaints to the commission concerning potential "sham" recycling and composting operations. No changes were made in response to this comment.

The commission amended the rules in §§328.5(c)(1), 330.282(a)(1), and 335.24(j)(1) to allow the executive director to approve exceptions to the closure cost estimate requirements. Executive

director discretion is provided to avoid applying these requirements in circumstances where this will result in unreasonable and unduly burdensome requirements for recyclers.

SUBCHAPTER J: FINANCIAL ASSURANCE FOR RECYCLING FACILITIES

§§37.901, 37.911, 37.921, 37.931

STATUTORY AUTHORITY

The amendments are adopted under THSC, §361.119, as amended by HB 1823; and §361.017 and §361.024, which provide the commission with the authority to adopt rules necessary to carry out its power and duties under the Texas Solid Waste Disposal Act.

§37.901. Applicability.

This subchapter applies to owners and operators of recycling facilities required to provide evidence of financial assurance under Chapters 328, 330, 332, or 335 of this title (relating to Waste Minimization and Recycling; Municipal Solid Waste; Composting; and Industrial Solid Waste and Municipal Hazardous Waste). This subchapter establishes requirements and mechanisms for demonstrating financial assurance for closure.

§37.911. Definitions.

Definitions for terms that appear throughout this subchapter may be found in Subchapter A of this chapter (relating to General Financial Assurance Requirements), as well as Chapters 328, 330, 332, and 335 of this title (relating to Waste Minimization and Recycling; Municipal Solid Waste; Composting; and Industrial Solid Waste and Municipal Hazardous Waste).

§37.921. Financial Assurance Requirements for Closure.

(a) In addition to the requirements of this subchapter, owners and operators of recycling facilities required to demonstrate financial assurance for closure must comply with Subchapters A - D of this chapter (relating to General Financial Assurance Requirements; Financial Assurance Requirements for Closure, Post Closure, and Corrective Action; Financial Assurance Mechanisms for Closure, Post Closure, and Corrective Action; and Wording of the Mechanisms for Closure, Post Closure, and Corrective Action) except:

(1) §37.31 of this title (relating to Submission of Documents) is not applicable;

(2) §37.131 of this title (relating to Annual Inflation Adjustments to Closure Cost Estimates) is not applicable;

(3) §37.161 of this title (relating to Establishment of a Standby Trust) is not applicable; and

(4) §37.241(b) of this title (relating to Insurance) is not applicable.

(b) Owners or operators shall submit an originally signed financial assurance mechanism to the executive director.

(1) For new facilities, owners or operators shall submit the originally signed financial assurance mechanism:

(A) prior to receipt of materials; or

(B) as otherwise approved by the executive director.

(2) For facilities in existence upon the effective date of this section, owners or operators shall submit the originally signed financial assurance mechanism:

(A) within 60 days of executive director approval of the closure cost estimate as required in §328.5(c) of this title (relating to Reporting and Recordkeeping Requirements), §330.282(a) of this title (relating to Closure for Process Facilities), or §335.24(j) of this title (relating to Requirements for Recyclable Materials and Nonhazardous Recyclable Materials); or

(B) within 180 days of the effective date of this section, whichever occurs first; or

(C) as otherwise approved by the executive director.

(c) Insurers providing insurance in accordance with §37.241 of this title must be licensed to transact the business of insurance in Texas or eligible to provide insurance as an excess or surplus lines insurer in Texas.

§37.931. Financial Assurance Mechanisms.

Owners and operators subject to this subchapter may use any of the financial assurance mechanisms as specified in Subchapter C of this chapter (relating to Financial Assurance Mechanisms for Closure, Post Closure, and Corrective Action) to demonstrate financial assurance for closure except:

(1) a pay-in trust fund may not be used; and

(2) a surety bond guaranteeing performance may not be used unless the owner or operator is required to provide financial assurance under §332.47 of this title (relating to Permit Application Preparation).