The Texas Commission on Environmental Quality (commission) adopts the amendments to §328.4 and §328.5. Section 328.5 is adopted *with change* to the proposed text as published in the April 23, 2004 issue of the *Texas Register* (29 TexReg 3923) and will be republished. Section 328.4 is adopted *without change* 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 37, Financial Assurance; 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. As appropriate, subsections have been re-lettered to accommodate new language.

The adopted amendment to §328.4, Limitations on Storage of Recyclable Materials, adds, in new subsection (a)(4), an exemption from material storage limitations for the owner or operator of a facility who owns or operates a recycling facility permitted to dispose of municipal solid waste, or is affiliated with a person holding a permit to dispose of municipal solid waste.

The adopted amendment to §328.5, Reporting and Recordkeeping Requirements, requires, in new subsection (c), the owner or operator of an affected facility to submit a written cost estimate for closure of the facility. In order to ensure that financial assurance will cover closure costs for a facility, this estimate must be based on the collection and disposition of processed and unprocessed materials in cubic yard and/or short ton measure by a third party not owned or affiliated with the recycling facility.

The word “detailed” has been deleted since proposal from §328.5(c)(1) to allow facilities to use a simple cost-estimate formula. In addition, the closure cost estimate must be submitted with any new registration application or at least 90 days prior to receipt of materials for new facilities; existing facilities must submit the cost estimate within 60 days of the effective date of this rule; or as otherwise requested by the executive director. Language requiring the closure cost estimate to show the cost of disposal of processed and unprocessed materials has been replaced with language requiring the estimate

to show the cost of "disposition" of all processed and unprocessed materials in accordance with all applicable regulations. This section has also been amended since proposal to allow the executive director to approve exceptions to these requirements. Executive director discretion is provided in amended §328.5(c)(1) to avoid applying these requirements in circumstances where this will result in unreasonable and unduly burdensome requirements for recyclers. Exceptions approved by the executive director may be revoked if the executive director determines that circumstances do not warrant an exception to the requirements of these rules.

The commission also revised the rule in §328.5(c)(2)(A) to include the words "combustible" and "stored outdoors" to be consistent with the legislative language. Section 328.5(c)(2)(A) and (C) has been revised to reflect that the cost estimate must be based on the disposition costs instead of the disposal costs.

The adopted amendment to §328.5, establishes, in new subsection (d), the actual financial assurance requirement for owners or operators of recycling facilities who store combustible materials outdoors or that pose a significant risk to public health and safety. The subsection also refers affected entities to Chapter 37, Subchapter J, for specific financial assurance requirements for recycling facilities.

The adopted amendment to §328.5 describes, in new subsection (e), requirements for closure of affected recycling facilities. This subsection defines closure to include the collection, transportation, and disposition of processed and unprocessed materials. The deadline for closure is set at 180 days

following the most recent acceptance of material unless otherwise approved or directed by the executive director.

The adopted amendment to §328.5, adds, in new subsection (f)(3), a requirement for the owner or operator of a facility subject to the requirements of this subchapter to maintain records necessary to show proof of financial assurance sufficient to cover all closure costs.

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 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 rulemaking 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 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), relating to 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 A: PURPOSE AND GENERAL INFORMATION

§328.4, §328.5

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.

§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 (concerning 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;

(4) the facility is owned or operated by, or affiliated with, a person who holds a permit to dispose of municipal solid waste.

(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 (concerning 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) any updates or changes to information contained in the facility report within 90 days of the effective date of the change.

(c) Closure cost estimates.

(1) Except as otherwise approved by the executive director, an owner or operator of a recycling facility that stores combustible material outdoors, or that poses a significant risk to public health and safety as determined by the executive director, shall provide a written cost estimate, in current dollars, showing the cost of hiring a third party to close the facility by disposition of all processed and unprocessed materials in accordance with all applicable regulations. The cost estimate for financial assurance must be submitted with any new registration application or at least 90 days prior to receipt of materials for new facilities; within 60 days of the effective date of this rule for existing facilities; or as otherwise requested by the executive director.

(2) The estimate must:

(A) equal the costs of closure of the facility, including disposition of the maximum inventories of all processed and unprocessed combustible materials stored outdoors on site during the life of the facility, in accordance with all applicable regulations;

(B) be based on the costs of hiring a third party that is not affiliated (as defined in §328.2 of this title (relating to Definitions)) with the owner or operator; and

(C) be based on a per cubic yard and/or short ton measure for collection and disposition costs.

(d) Financial assurance. An owner or operator of a recycling facility that stores combustible material outdoors, or that poses a significant risk to public health and safety as determined by the executive director shall establish and maintain financial assurance for closure of the facility in accordance with Chapter 37, Subchapter J of this title (relating to Financial Assurance for Recycling Facilities).

(e) Closure requirements.

(1) Closure must include collecting processed and unprocessed materials, and transporting the materials to an authorized facility for disposition unless otherwise approved or directed in writing by the executive director.

(2) Closure of the facility must be completed within 180 days following the most recent acceptance of processed or unprocessed materials unless otherwise approved or directed in writing by the executive director.

(f) 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;

(3) proof of financial assurance sufficient to cover all closure costs.

(g) 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.

(h) 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.