

The Texas Commission on Environmental Quality (commission) adopts an amendment to §335.24.

Section 335.24 is adopted *with change* to the proposed text as published in the April 23, 2004 issue of the *Texas Register* (29 TexReg 3935).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

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. House Bill 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 this issue of the *Texas Register* include changes to 30 TAC Chapter 37, Financial Assurance; Chapter 328, Waste Minimization and Recycling; Chapter 330, Municipal Solid Waste; and Chapter 332, Composting.

SECTION DISCUSSION

Administrative and grammatical changes are adopted throughout the section to be consistent with *Texas Register* requirements and to improve readability. As appropriate, subsections have been relettered to accommodate new language.

The adopted amendment to §335.24, Requirements For Recyclable Materials and Nonhazardous Recyclable Materials, modifies subsection (a) to indicate that nonhazardous recyclable materials are subject to regulation under subsections (h) - (l) rather than the previous provisions under subsection (h) only. This modification is necessary to reflect the addition of new subsections (j) - (l).

Adopted new subsection (j) requires 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 yards 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 §335.24(j)(1) to allow facilities to use a simple cost-estimate formula. In addition, the closure cost estimate must be submitted with any new notification 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 §335.24(j)(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 §335.24(j)(2)(A) to include the words “combustible” and “stored outdoors” to be consistent with the legislative language. Section 335.24(j)(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.

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

Adopted new subsection (l) describes 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.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rule in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the adopted rule is not subject to §2001.0225 because it does 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 rule is to require the owner or operator of an affected recycling facility to have sufficient financial assurance to properly close a facility. This rule 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 rule 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 the adopted rule does not meet the definition of a major environmental rule.

Furthermore, even if the adopted rule did meet the definition of a major environmental rule, the adopted rule is not subject to Texas Government Code, §2001.0225, because it does 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 rule does not meet any of these requirements. First, there are no applicable federal standards that the rule would address. Second, the adopted rule does not exceed an express requirement of state law, but instead implements the statutory requirement of THSC, §361.119. Third, there is no delegation agreement that would be exceeded by the adopted rule because it does not relate to this subject matter. Fourth, the commission adopts the rule under the direction of House Bill 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 the adopted rule and performed an assessment of whether the adopted rule constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of the adopted rule is to require the owner or operator of an affected recycling facility to have sufficient financial assurance to properly close a facility. This rule 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 rule would substantially advance this stated purpose by requiring that regulated facilities obtain adequate financial assurance to properly close a facility.

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

In particular, there are no burdens imposed on private real property, and the adopted rule 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, the adopted rule 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 rule 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: INDUSTRIAL SOLID WASTE AND MUNICIPAL HAZARDOUS WASTE

IN GENERAL

§335.24

STATUTORY AUTHORITY

The amendment is 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.

§335.24. Requirements For Recyclable Materials and Nonhazardous Recyclable Materials.

(a) Hazardous wastes that are recycled are subject to the requirements for generators, transporters, and storage facilities of subsections (d) - (f) of this section, except for the materials listed in subsections (b) and (c) of this section. Hazardous wastes that are recycled will be known as recyclable materials. Nonhazardous industrial wastes that are recycled will be known as nonhazardous recyclable materials. Nonhazardous recyclable materials are subject to the requirements of subsections (h) - (l) of this section.

(b) The following recyclable materials are not subject to the requirements of this section, except as provided in subsections (g) and (h) of this section, but are regulated under the applicable provisions of Subchapter H of this chapter (relating to Standards for the Management of Specific Wastes and Specific Types of Facilities) and all applicable provisions in Chapter 305 of this title

(relating to Consolidated Permits); Chapter 1 of this title (relating to Purpose of Rules, General Provisions); Chapter 3 of this title (relating to Definitions); Chapter 10 of this title (relating to Commission Meetings); Chapter 17 of this title (relating to Tax Relief for Property Used for Environmental Protection); Chapter 20 of this title (relating to Rulemaking); Chapter 37 of this title (relating to Financial Assurance); Chapter 39 of this title (relating to Public Notice); Chapter 40 of this title (relating to Alternative Dispute Resolution Procedure); Chapter 50 of this title (relating to Action on Applications and Other Authorizations); Chapter 55 of this title (relating to Requests for Reconsideration and Contested Case Hearings; Public Comment); Chapter 70 of this title (relating to Enforcement); Chapter 80 of this title (relating to Contested Case Hearings); Chapter 86 of this title (relating to Special Provisions for Contested Case Hearings); and Chapter 261 of this title (relating to Impact Statements).

(1) recyclable materials used in a manner constituting disposal;

(2) hazardous wastes burned for energy recovery in boilers and industrial furnaces that are not regulated under Subchapter E of this chapter (relating to Interim Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities) or Subchapter F of this chapter (relating to Permitting Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities);

(3) recyclable materials from which precious metals are reclaimed;

(4) spent lead-acid batteries that are being reclaimed.

(c) The following recyclable materials are not subject to regulation under Subchapters B - I or O of this chapter (relating to Hazardous Waste Management General Provisions; Standards Applicable to Generators of Hazardous Waste; Standards Applicable to Transporters of Hazardous Waste; Interim Standards for Owners and Operators of Harzardous Waste Storage, Processing, or Disposal Facilities; Permitting Standards for Owners and Operators of Hazardous Waste Storage, Processing, or Disposal Facilities; Location Standards for Hazardous Waste Storage, Processing, or Disposal; Standards for the Management of Specific Wastes and Specific Types of Facilities; Prohibition on Open Dumps; and Land Disposal Restrictions); Chapter 1 of this title; Chapter 3 of this title; Chapter 10 of this title; Chapter 17 of this title; Chapter 20 of this title; Chapter 37 of this title; Chapter 39 of this title ; Chapter 40 of this title; Chapter 50 of this title; Chapter 55 of this title; Chapter 70 of this title; Chapter 80 of this title; Chapter 86 of this title; Chapter 261 of this title; or Chapter 305 of this title, except as provided in subsections (g) and (h) of this section:

(1) industrial ethyl alcohol that is reclaimed except that, unless provided otherwise in an international agreement as specified in the regulations contained in 40 Code of Federal Regulations (CFR) §262.58, which are in effect as of November 8, 1986:

(A) a person initiating a shipment for reclamation in a foreign country, and any intermediary arranging for the shipment, must comply with the requirements applicable to a primary exporter in the regulations contained in 40 CFR §§262.53, 262.56(a)(1) - (4) and (6) and (b), and

262.57, which are in effect as of November 8, 1986, export such materials only upon such consent of the receiving country and in conformance with the EPA acknowledgment of consent as defined in the regulations contained in 40 CFR Part 262, Subpart E, which are in effect as of November 8, 1986, and provide a copy of the EPA acknowledgment of consent to the shipment to the transporter transporting the shipment for export;

(B) transporters transporting a shipment for export may not accept a shipment if he knows the shipment does not conform to the EPA acknowledgment of consent, must ensure that a copy of the EPA acknowledgment of consent accompanies the shipment and must ensure that it is delivered to the facility designated by the person initiating the shipment;

(2) scrap metal that is not already excluded under 40 CFR §261.4(a)(13);

(3) fuels produced from the refining of oil-bearing hazardous waste along with normal process streams at a petroleum refining facility if such wastes result from normal petroleum refining, production, and transportation practices (this exemption does not apply to fuels produced from oil recovered from oil-bearing hazardous waste, where such recovered oil is already excluded under 40 CFR §261.4(a)(12)); and

(4) the following hazardous waste fuels:

(A) Hazardous waste fuel produced from oil-bearing hazardous wastes from petroleum refining, production or transportation practices, or produced from oil reclaimed from such hazardous wastes where such hazardous wastes are reintroduced into a process that does not use distillation or does not produce products from crude oil so long as the resulting fuel meets the used oil specification under 40 CFR §279.11 and so long as no other hazardous wastes are used to produce the hazardous waste fuel;

(B) Hazardous waste fuel produced from oil-bearing hazardous waste from petroleum refining production, and transportation practices, where such hazardous wastes are reintroduced into a refining process after a point at which contaminants are removed, so long as the fuel meets the used oil fuel specification under 40 CFR §279.11;

(C) Oil reclaimed from oil-bearing hazardous wastes from petroleum refining, production, and transportation practices, which reclaimed oil is burned as fuel without reintroduction to a refining process, so long as the reclaimed oil meets the used oil fuel specification under 40 CFR §279.11.

(d) Generators and transporters of recyclable materials are subject to the applicable requirements of Subchapter C of this chapter (relating to Standards Applicable to Generators of Hazardous Waste) and Subchapter D of this chapter (relating to Standards Applicable to Transporters of Hazardous Waste), and the notification requirements of §335.6 of this title (relating to Notification Requirements), except as provided in subsections (a) - (c) of this section.

(e) Owners or operators of facilities that store recyclable materials before they are recycled are regulated under all applicable provisions of this chapter, and Chapter 305 of this title; Chapter 1 of this title; Chapter 3 of this title; Chapter 10 of this title; Chapter 17 of this title; Chapter 20 of this title; Chapter 37 of this title; Chapter 39 of this title; Chapter 40 of this title; Chapter 50 of this title ; Chapter 55 of this title; Chapter 70 of this title; Chapter 80 of this title; and the notification requirements under §335.6 of this title, except as provided in subsections (a) - (c) of this section. The recycling process itself is exempt from regulation.

(f) Owners or operators of facilities that recycle recyclable materials without storing them before they are recycled are subject to the following requirements, except as provided in subsections (a) - (c) of this section:

(1) notification requirements under §335.6 of this title;

(2) §335.12 of this title (relating to Shipping Requirements Applicable to Owners or Operators of Storage, Processing, or Disposal Facilities).

(g) Recyclable materials (excluding those listed in subsections (b)(4), (c)(1) and (2) - (5) of this section) remain subject to the requirements of §§335.4, 335.6, and 335.9 - 335.15 of this title (relating to General Prohibitions; Notification Requirements; Recordkeeping and Annual Reporting Procedures Applicable to Generators; Shipping and Reporting Procedures Applicable to Generators of Hazardous Waste or Class 1 Waste and Primary Exporters of Hazardous Waste; Shipping Requirements for

Transporters of Hazardous Waste or Class 1 Waste; Shipping Requirements Applicable to Owners or Operators of Storage, Processing, or Disposal Facilities; Recordkeeping and Reporting Procedures Applicable to Generators Shipping Hazardous Waste or Class 1 Waste; Recordkeeping Requirements Applicable to Transporters of Hazardous Waste or Class 1 Waste; and Recordkeeping and Reporting Requirements Applicable to Owners or Operators of Storage, Processing, or Disposal Facilities), as applicable. Recyclable materials listed in subsections (b)(4) and (c)(2) of this section remain subject to the requirements of subsection (h) of this section.

(h) Industrial solid wastes that are nonhazardous recyclable materials and recyclable materials listed in subsections (b)(4) and (c)(2) of this section remain subject to the requirements of §335.4 of this title. In addition, industrial solid wastes that are nonhazardous recyclable materials and recyclable materials listed in subsection (c)(2) of this section remain subject to the requirements of §335.6 of this title. Industrial solid wastes that are nonhazardous recyclable materials and recyclable materials listed in subsections (b)(4) and (c)(2) of this section may also be subject to the requirements of §§335.10 - 335.15 of this title, as applicable, if the executive director determines that such requirements are necessary to protect human health and the environment. In making the determination, the executive director shall consider the following criteria:

(1) the waste's toxicity, corrosivity, flammability, ability to sensitize or irritate, or propensity for decomposition and creation of sudden pressure;

(2) the potential for the objectionable constituent to migrate from the waste into the environment if improperly managed;

(3) the persistence of any objectionable constituent or any objectionable degradation product in the waste;

(4) the potential for the objectionable constituent to degrade into nonharmful constituents;

(5) the degree to which the objectionable constituent bioaccumulates in ecosystems;

(6) the plausible types of improper management to which the waste could be subjected;

(7) the nature and severity of potential damage to the public health and environment;

(8) whether subjecting the waste to additional regulation will provide additional protection for human health and the environment; and

(9) other relevant factors.

(i) Except as provided in Texas Health and Safety Code, §361.090, facilities managing recyclable materials that are required to obtain a permit under this section may also be permitted to

manage nonhazardous recyclable materials at the same facility if the executive director determines that such regulation is necessary to protect human health and the environment. In making this determination, the executive director shall consider the following criteria:

(1) whether managing nonhazardous recyclable materials will create an additional risk of release of the hazardous recyclable materials into the environment;

(2) whether hazardous and nonhazardous wastes that are incompatible are stored and/or processed in the same or connected units;

(3) whether the management of recyclable materials and nonhazardous recyclable materials is segregated within the facility;

(4) the waste's toxicity, corrosivity, flammability, ability to sensitize or irritate, or propensity for decomposition and creation of sudden pressure;

(5) the potential for the objectionable constituent to migrate from the waste into the environment if improperly managed;

(6) the persistence of any objectionable constituent or any objectionable degradation product in the waste;

- (7) the potential for the objectionable constituent to degrade into harmful constituents;
 - (8) the degree to which the objectionable constituent bioaccumulates in ecosystems;
 - (9) the plausible types of improper management to which the waste could be subjected;
 - (10) the nature and severity of potential damage to the public health and environment;
 - (11) whether subjecting the waste to additional regulation will provide additional protection for human health and the environment; and
 - (12) other relevant factors.
- (j) Closure cost estimates.

(1) Except as otherwise approved by the executive director, an owner or operator of a recycling facility that stores combustible nonhazardous materials 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 closure cost estimate for financial assurance must be submitted with any new notification in accordance with

§335.6 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.

(k) Financial assurance. An owner or operator of a recycling facility that stores nonhazardous combustible recyclable materials 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).

(l) 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.

(m) Used oil that is recycled and is also a hazardous waste solely because it exhibits a hazardous characteristic is not subject to the requirements of Subchapters A - I or O of this chapter, but is regulated under Chapter 324 of this title (relating to Used Oil Standards). Used oil that is recycled includes any used oil which is reused, following its original use, for any purpose (including the purpose for which the oil was originally used). Such term includes, but is not limited to, oil which is re-refined, reclaimed, burned for energy recovery, or reprocessed.

(n) Owners or operators of facilities subject to hazardous waste permitting requirements with hazardous waste management units that recycle hazardous wastes are subject to the requirements of 40 CFR Part 264 or Part 265, Subparts AA and BB, as adopted by reference under §335.152(a)(17) and (18) and §335.112(a)(19) and (20) of this title (relating to Standards).

(o) Hazardous waste that is exported to or imported from designated member countries of the Organization for Economic Cooperation and Development (OECD), as defined in 40 CFR

§262.58(a)(1), for purpose of recovery, and any person who exports or imports such hazardous waste, is subject to the requirements of 40 CFR Part 262, Subpart H (both federal regulation references as amended and adopted through April 12, 1996 at 61 FedReg 16290), if the hazardous waste is subject to the federal manifesting requirements of 40 CFR Part 262, or subject to the universal waste management standards of 40 CFR Part 273, or subject to Subchapter H, Division 5 of this chapter (relating to Universal Waste Rule).

(p) Other portions of this chapter that relate to solid wastes that are recycled include §335.1 of this title (relating to Definitions), under the definition of “Solid waste,” §335.6 of this title, §335.17 of this title (relating to Special Definitions for Recyclable Materials and Nonhazardous Recyclable Materials), §335.18 of this title (relating to Variances from Classification as a Solid Waste), §335.19 of this title (relating to Standards and Criteria for Variances from Classification as a Solid Waste), and Subchapter H of this chapter.