

The Texas Commission on Environmental Quality (commission or agency) proposes amendments to §§328.52, 328.55, 328.60, 328.63, 328.66, 328.69, 328.70 and 328.71; and the repeal of §328.67 and §328.68.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

In 2008, comments received by the scrap tire program requested that the executive director facilitate the ability of local officials and fire marshals to review and have input on applications for scrap tire facilities and Land Reclamation Projects Using Tires (LRPUT). This proposal would require applicants to request input from local authorities, including fire authorities, and resolve any noncompliance issues with local requirements before an application could be approved. Provisions requiring some level of coordination with local government officials are currently in the rule, and they would be amended to require applicants to provide proof of notice and to prohibit the executive director from issuing authorizations if local governments provide timely notice that an application does not comply with local requirements.

The rules currently require that an applicant provide the executive director a copy of written notification which was provided to local government officials for some types of applications and not for others. The proposed revisions would require that applications include proof of notice to local government officials in all applications for LRPUTs and scrap tire facilities. The executive director would be prohibited from authorizing a scrap tire facility or a LRPUT if a local authority provides timely notice that an application does not comply with local requirements. In accordance with 30 TAC §305.127(4)(B), any applicable statutory or regulatory requirements which take effect prior to final administrative disposition of an application or prior to the amendment, modification, or suspension and reissuance of an authorization

shall be included in the authorization. Applications pending when this proposed rule takes effect would be impacted by this amendment.

Proposed amendments would clarify that LRPUTs are subject to annulment, suspension, revocation, denial, and motions to overturn. Amendments would authorize the executive director to withhold approval or request additional information for a LRPUT application for reasons related to protecting public health and the environment. LRPUT applications would be required to include information about groundwater levels in the area, and the executive director could require additional information about groundwater levels at the proposed site.

Other proposed changes in this rule package focus on updating the rules to refer to the Texas Commission on Environmental Quality rather than the Texas Natural Resource Conservation Commission, allowing submittal of electronic documents, and clarifying the exemption from the timeframe requirement to split, quarter, or shred off-the-road tires before disposal.

This proposed rulemaking would repeal the outdated portions of the rules which refer to parts of the Scrap Tire Program, which are no longer supported by the underlying statutory provisions which were repealed or expired in 1997.

SECTION BY SECTION DISCUSSION

§328.52, Applicability

Proposed §328.52(d) would clarify rules implementing an existing statutory requirement that prohibits disposal of scrap tires unless the tires are shredded, split, or quartered. Scrap tires that are off-the-road

tires intended for use on heavy machinery are exempt from the timeframe requirement to be split, quartered, or shredded when stored at a storage site or a permitted landfill, but they must still be split, quartered, or shredded before they may be disposed.

§328.55, Registration Requirements

Proposed §328.55(1) would change the reference from the Texas Natural Resources Conservation Commission to the Texas Commission on Environmental Quality. Proposed §328.55(6) would make LRPUR authorizations subject to annulment, suspension, revocation, and denial.

§328.60, Scrap Tire Storage Site Registration

Proposed §328.60(b)(4) would allow electronic submittals as allowed by the executive director in lieu of hard copy documents. Proposed §328.60(b)(9)(A)(i) would correct outdated address information for the United States Geological Survey and the Texas Department of Transportation. Proposed §328.60(b)(9)(A)(ii) would correct outdated address information regarding where topographic maps can be obtained.

§328.63, Scrap Tire Facility Requirements

Proposed §328.63(c)(3) would allow an application to register a scrap tire facility to be submitted in a manner allowed by the executive director, which would facilitate electronic submittals. Proposed §328.63(d)(1) would require applicants to provide notice to local governments. Proposed §328.63(d)(1) would require the owner or operator of a scrap tire facility to mail a copy of the notification documents to the appropriate local official and fire authority and provide proof of mailing in the form of return receipts for registered mail. The proposal would prohibit the executive director from authorizing a scrap tire

facility if a local government official, including a fire authority, with jurisdiction over the proposed facility provides timely notice that the proposed scrap tire facility does not comply with local requirements. Proposed §328.63(d)(2) and (4) would allow local officials up to 45 days to reply to notice from applicants. Proposed §328.63(d)(4) would change the existing requirement for an applicant for a scrap tire energy recovery facility, one type of scrap tire facility, from having to provide a letter of approval from the fire marshal to having to provide proof of notice. The change of this existing requirement is recommended in order to maintain consistency with the requirements for other types of scrap tire facilities. The executive director would be prohibited from approving an application for any type of scrap tire facility if a local government provides a timely negative response. This change addresses the concern expressed by some tire facility owners that the application process should not be delayed by local governments' failure or refusal to respond to opportunities to provide input.

§328.66, Land Reclamation Projects Using Tires (LRPUT)

Proposed §328.66(a) would allow an application for a LRPUT to be submitted in a manner allowed by the executive director, which would facilitate electronic submittals. Proposed §328.66(a) would authorize the executive director to withhold authorization or request additional information for a LRPUT application for reasons related to protecting public health and the environment. Proposed §328.66(a)(6) would require a demonstration of the seasonal high water level in the area and authorize the executive director to request additional information about groundwater levels at the site. Proposed §328.66(a)(10) would add groundwater districts to the list of entities to be notified of applications. Proposed §328.66(a)(10) and (d) would prohibit the executive director from authorizing a LRPUT if a local official with jurisdiction over the proposed facility provides timely notice that the proposed facility does not comply with local

requirements. Proposed §328.66(a)(10) and (d) would allow local officials up to 45 days to reply to notice provided by applicants.

§328.67, Special Authorization Priority Enforcement List (SAPEL)

This proposed rulemaking would repeal §328.67 which addresses the Special Authorization Priority Enforcement List (SAPEL). This rule is no longer necessary after projects were completed and the underlying statutes expired or were repealed in 1997.

§328.68, Priority Enforcement List (PEL) Program

This proposed rulemaking would repeal §328.68 which addresses the Priority Enforcement List (PEL). This rule is no longer necessary after projects were completed and the underlying statutes expired or were repealed in 1997.

§328.69, Public Notice of Intent to Operate

Proposed §328.69(d) would change the reference from the Texas Natural Resource Conservation Commission to the Texas Commission on Environmental Quality.

§328.70, Motion for Reconsideration

The title of §328.70 would be updated to refer to a Motion to Overturn instead of a Motion for Reconsideration. Proposed §328.70 would authorize persons affected by a LRPUT application to file a Motion to Overturn. Proposed §328.70 would update cross references to the correct Chapter 50 rules.

§328.71, Closure Cost Estimate for Financial Assurance

Proposed §328.71(h)(3) would change the reference from the Texas Natural Resource Conservation Commission to the Texas Commission on Environmental Quality.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency or other units of state or local governments as a result of administration or enforcement of the proposed rules.

The proposed rules amend certain sections of Chapter 328, Subchapter F and propose the repeal of two sections of the rules dealing with scrap tires. Several of the proposed changes are administrative in nature, facilitate the submittal of electronic documents, and clarify that off-the-road scrap tires must be split, quartered, or shredded before disposal. The proposed repeal of the sections concerning the SAPEL and PEL rules would eliminate sections of the rules that are outdated. The proposed rules would also require applications for scrap tire facilities and LRPUTs to include proof of notice to local government officials and prohibit the executive director from approving applications if a local government provides timely notice that a proposed facility does not comply with local requirements. Proposed amendments provide that LRPUTs are subject to annulment, suspension, revocation, denial, and motions to overturn. Amendments would authorize the executive director to withhold an authorization or request additional information for a LRPUT application for reasons related to protecting public health and the environment. LRPUT applications would be required to include a demonstration of the seasonal high water level in the area, and the executive director would be authorized to request additional information about groundwater

levels at the site. The amended application requirements would not apply to currently authorized scrap tire facilities or LRPUs.

Local governments may receive more notices of proposed scrap tire facilities or LRPUs within their jurisdictions and may use more resources to review and provide input on those applications. The cost to review and provide input is not expected to be significant. Staff estimates that it may take local officials one to three more hours per application to prepare a written response concerning compliance with local ordinances or codes.

It is not known how many local governments would submit applications for new scrap tire facilities or LRPUs, but staff does not expect to receive more than ten applications per year for these facilities. If a local government applies for a new facility or project, costs to comply with the proposed rules are not expected to be significant. Using an estimated minimum wage of \$7.25 per hour and a timeframe of eight hours to prepare correspondence, staff estimates that it may cost as much as \$58 per instance for a local government to contact the appropriate local officials. There may be additional costs for LRPu applicants to provide information about groundwater levels, but these costs are not expected to be significant.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be increased protection of public health and the environment, and improved planning efforts for scrap tire facilities and LRPUs

due to increased input from local officials. These improvements should allow for a more efficient and protective authorization process.

Staff estimates that it will receive ten or fewer applications each year regarding new scrap tire facilities and LRPUTs. Using an estimated minimum wage of \$7.25 per hour and a timeframe of eight hours to prepare correspondence, staff estimates that it may cost as much as \$58 per instance for applicants to contact and coordinate with the appropriate local officials. There may be additional costs for LRPUT applicants to provide information about groundwater levels, but these costs are not expected to be significant.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. A small or micro-business is not expected to complete the application process unless it is economically advantageous for it to propose a new scrap tire facility or LRPUT. If a small or micro-business does propose a new facility or project, staff estimates that it may cost as much as \$58 per instance for a business to contact and coordinate with the appropriate local officials. There may be additional costs for LRPUT applicants to provide information about groundwater levels, but these costs are not expected to be significant.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect.

LOCAL EMPLOYMENT IMPACT STATEMENT

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

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined the rules do not meet the definition of a "major environmental rule." Under Texas Government Code, §2001.0225, "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 proposed rulemaking is intended to protect the environment and reduce risks to human health, but it is not expected to adversely affect the economy in a material way. The amended application requirements would only apply to new applications, so they would generally not cause any expense to existing facilities. For new applications, the additional requirements and coordination with local governments and fire authorities is not expected to result in a significant expense.

Furthermore, the proposal does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 only applies to a major environmental rule which: 1) exceeds a standard set by federal law, unless the rule is specifically required by state law; 2) exceeds an express requirement of state law, unless the rule is specifically required by

federal law; 3) exceeds 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) adopts a rule solely under the general powers of the agency instead of under a specific state law.

In this case, the proposed rules do not meet any of these applicability requirements. First, there are no standards set for authorizing these types of facilities by federal law and the proposal is not required by state law. Second, the proposed rules do not exceed an express requirement of state law. There are no specific statutory requirements for authorizing these types of facilities. Third, the rules do not exceed an express 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. Fourth, the commission does not propose the rules solely under the general powers of the agency, but rather under the authority of: Texas Health and Safety Code (THSC), §361.011, which establishes the commission's jurisdiction over all aspects of the management of municipal solid waste; THSC, §361.024, which provides the commission with rulemaking authority; THSC, §361.061, which authorizes the commission to require and issue permits governing the construction, operation, and maintenance of solid waste facilities used to store, process, or dispose of solid waste; and, THSC, §361.112, which governs the storage, transportation, and disposal of used or scrap tires. Therefore, the commission does not propose the adoption of the rules solely under the commission's general powers.

The commission invites public comment regarding this draft regulatory impact analysis determination. Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rulemaking and performed an assessment of whether the proposed rulemaking constitutes a taking under Texas Government Code, Chapter 2007. The specific intent of the proposed rulemaking is to facilitate the ability of local officials and fire authorities to review and have input on applications for scrap tire facilities and LRPUs. This proposal would require applicants to provide additional information and request input from local authorities before an application could be approved. The executive director would be prohibited from approving an application if local governments provide timely notice that an application does not comply with local requirements. Input from local governments is expected to make these facilities more protective of public health and the environment.

The amendments, including provisions related to coordination with local governments, do not impose a burden on a recognized real property interest and therefore do not constitute a taking. The promulgation of the proposed rulemaking is neither a statutory nor a constitutional taking of private real property by the commission. Specifically, the proposed rulemaking does not affect a landowner's rights in a recognized private real property interest because this rulemaking neither: burdens (constitutionally) or restricts or limits the owner's right to the property that would otherwise exist in the absence of this rulemaking; nor would it reduce its value by 25% or more beyond that value which would exist in the absence of the proposed rules. Therefore, the proposed rulemaking will not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor would they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rules are not subject to the Texas Coastal Management Program.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on May 11, 2010 at 10:00 AM in Building E, room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in the order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Charlotte Horn, Office of Legal Services at (512) 239-0779. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Michael Parrish, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512)

239-4808. Electronic comments may be submitted at: <http://www5.tceq.state.tx.us/rules/ecomments/>.

File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2008-034-328-CE. The comment period closes May 17, 2010.

Copies of the proposed rulemaking can be obtained from the commission's Web site at

http://www.tceq.state.tx.us/nav/rules/propose_adopt.html. For further information, please contact Brooke Jackson, Field Operations Support Division, (512) 239-0400.

SUBCHAPTER F: MANAGEMENT OF USED OR SCRAP TIRES

§§328.52, 328.55, 328.60, 328.63, 328.66, 328.69, 328.70 and 328.71

STATUTORY AUTHORITY

These amendments are proposed under the authority of: Texas Health and Safety Code (THSC), §361.011, Commission's Jurisdiction: Municipal Solid Waste, which establishes the commission's jurisdiction over all aspects of the management of municipal solid waste; THSC, §361.024, Rules and Standards, which provides the commission with rulemaking authority; THSC, §361.061, Permits; Solid Waste Facility, which authorizes the commission to require and issue permits governing the construction, operation, and maintenance of solid waste facilities used to store, process, or dispose of solid waste; and, THSC, §361.112, Storage, Transportation, and Disposal of Used or Scrap Tires, which governs the storage, transportation, and disposal of used or scrap tires.

The proposed amendments implement THSC, §361.061 and §361.112.

§328.52. Applicability.

(a) This subchapter does not preempt local ordinances regarding the management of used or scrap tires that are as or more stringent than the regulations in this subchapter. All persons or facilities regulated by this subchapter must comply with all applicable local ordinances that are not inconsistent with the regulations in this subchapter. A local ordinance is not inconsistent with this subchapter if a regulated person or facility can simultaneously comply with both the state and local requirements.

(b) This subchapter applies to persons that are involved in the generation, transportation, processing, storage, utilization, and disposal of used or scrap tires or tire pieces that are classified as municipal solid waste, recyclable materials, or inert fill materials. This subchapter does not apply to whole used or scrap tires that are classified as industrial solid waste.

(c) All used or scrap tires or tire pieces, except for tires collected incidentally by municipal solid waste collection vehicles, are subject to manifesting by generators according to the requirements in §328.58 of this title (relating to Manifest System).

(d) Scrap tires that are off-the-road tires intended for use on heavy machinery, including, but not limited to, an earth mover/dozer, a grader, or mining equipment are exempt from the timeframe requirements to be split, quartered, or shredded when stored at a registered storage site or a permitted landfill, but must be split, quartered, or shredded prior to disposal.

§328.55. Registration Requirements.

Registration requirements for scrap tire storage sites, scrap tire facilities, transportation facilities, and transporters are as follows:

(1) An application for a registration shall be made on a form obtained from the executive director, upon request. The applicant may deliver the completed application to any commission regional office or mail it to the following address: Texas Commission on Environmental Quality [Natural

Resource Conservation Commission], P.O. Box 13087, Mail Code 174 [125], Austin, Texas 78711-3087.

The following registration information must be provided to the executive director:

(A) the name, mailing address, county, and telephone and facsimile numbers of the applicant;

(B) the name, mailing address, and telephone number of the property owner where the scrap tire storage site, scrap tire facility, or transportation facility is located;

(C) the street location of the scrap tire storage site, scrap tire facility, or transportation facility, including county;

(D) the approximate number of used or scrap tires or tire pieces (in tons) that will be stored at the scrap tire storage site or the scrap tire facility;

(E) the existing land use surrounding the scrap tire storage site, scrap tire facility, or transportation facility; and

(F) the tax identification number.

(2) The application must be signed by the authorized representative and, if applicable, the professional engineer who assisted in its preparation.

(3) Entities that are registered by the executive director shall maintain a copy of their commission registration notice at their designated place of business.

(4) A registered entity shall provide written notice to the executive director, within 15 days, if:

(A) the mailing address or telephone number of the entity changes;

(B) the office or designated place of business is relocated;

(C) the applicant's registered name is changed; or

(D) the authorized representative has changed. If the authorized representative has changed, a registered entity shall provide a written, signed designation of the new authorized representative, including the representative's name, mailing address, and telephone and facsimile numbers.

(5) Within 10 days of a change in ownership, or if a change in operations or management methods occurs such that the existing registration no longer adequately describes current operations or management methods, the registered entity shall submit a new registration application to the executive director. Following a determination, the executive director may issue a new registration, cancel the old registration or transfer the old registration to the new registrant. Timeliness of required submittals may be a factor in the executive director's determination.

(6) Annulment, suspension, revocation, or denial of registration, including Land

Reclamation Projects Using Tires, procedures are as follows:

(A) The executive director may annul, suspend, or revoke a registration or deny an initial or renewal registration for:

(i) failure to maintain complete and accurate records required under this chapter;

(ii) failure to maintain vehicles in safe working order as evidenced by at least two citations per vehicle from the Texas Department of Public Safety or local traffic law enforcement agencies;

(iii) failure to maintain equipment in safe working order;

(iv) altering any record maintained or received by the registrant;

(v) delivery of used or scrap tires or tire pieces to a facility not registered to handle the tires, unless the facility receiving the tires is exempt from registration under §328.54 of this title (relating to General Requirements);

(vi) failure to comply with any rule or order issued by the commission pursuant to the requirements of this chapter;

(vii) failure to submit any applicable annual report;

(viii) failure to maintain financial assurance as required;

(ix) dumping of used or scrap tires or tire pieces illegally;

(x) collection, storage, transportation, or processing of used or scrap tires or tire pieces without registration, as required in this section;

(xi) failure to notify the executive director of any change in registration information as required in paragraph (4) of this section; or

(xii) failure to obtain and maintain necessary approvals or certifications from the Fire Marshal with jurisdiction over the facility location;

(B) A registration shall be suspended for a period of one year; however, depending upon the seriousness of the offense(s), the time of suspension may be increased or decreased. A registration is revoked automatically upon a second suspension. If the registration is suspended or revoked, an entity shall not collect, store, transport, or process used or scrap tires or tire pieces regulated under this subchapter.

(C) The holder of a registration that has been revoked by the executive director may reapply for registration under this subchapter as if applying for the first time, after a period of at least one year from the date of revocation. If a registration is revoked by the executive director a second time, the revocation shall be permanent.

(D) Appeal of annulment, suspension, revocation, or denial of initial or renewal registration procedures are as follows:

(i) An opportunity for a formal hearing on the annulment, suspension, or revocation of registration may be requested in writing by the registrant by certified mail, return receipt requested, provided the request is postmarked within 20 days after a notice of proposed revocation or denial of registration has been sent from the executive director to the last known address of the registrant, as shown in the records of the agency.

(ii) An opportunity for a formal hearing on the denial of registration or renewal of registration may be requested in writing by the applicant by certified mail, return receipt requested, provided the request is postmarked within 20 days after a notice of denial has been sent from the executive director to the last known address. If the registration is denied, a person shall not collect, store, transport, or process used or scrap tires or tire pieces.

(iii) The formal hearing under this paragraph shall be a contested case in accordance with the requirements of the Administrative Procedure Act, Texas Government Code

Annotated, §2001 et seq. and the Texas Solid Waste Disposal Act, Texas Health and Safety Code
Annotated Chapter 361 and the rules of the commission.

§328.60. Scrap Tire Storage Site Registration.

(a) Registration required. Persons who store more than 500 used or scrap tires (or weight equivalent tire pieces or any combination thereof) on the ground or 2,000 used or scrap tires (or weight equivalent tire pieces or any combination thereof) in enclosed and lockable containers at a facility shall be required to obtain a scrap tire storage site registration for that facility from the executive director pursuant to §328.55 of this title (relating to Registration Requirements). Storage activities shall not begin until the executive director approves the registration.

(b) Application requirements.

(1) The application for a scrap tire storage site registration, amended registration, or renewal shall consist of: the application form; site and surrounding area information; engineering information, including a site layout plan and a site operating plan; and evidence of financial assurance as required under this section.

(2) Upon filing a registration application, the applicant shall mail a copy of the application to the appropriate county judge and shall mail notice that an application has been filed to the appropriate regional council of government and the appropriate mayor if the proposed facility is to be

located within the corporate limits or extraterritorial jurisdiction of a city. Proof of mailing shall be provided in the form of return receipts for registered mail.

(3) Upon filing a registration application, the facility owner or operator shall provide notice to the general public by means of a notice by publication and a notice by mail. Each notice shall specify both the name, affiliation, address, and telephone number of the applicant and of the commission employee who may be reached to obtain more information about the application to register the site. The notices shall specify that the registration application has been provided to the county judge and that it is available for review by interested parties. The applicant shall publish notice in the county in which the facility is located, and in adjacent counties. Notice shall be published in a newspaper of general circulation. The published notice shall be published once a week for three weeks. The applicant should attempt to obtain publication in a Sunday edition of a newspaper. The notice by certified mail, return receipt requested, shall be sent to all adjacent landowners and all owners of property within 500 feet of the boundary of the facility; the health authorities of the city and county in which the facility will be located, if applicable; and the appropriate state senator and representative for the area encompassing the facility.

(4) Applications shall be submitted in triplicate either in writing or through an electronic reporting system as allowed by the executive director.

5) Preparation of the application shall be in accordance with the requirements of the Texas Engineering Practice Act, Texas Occupations Code, Chapter 1001. Each sheet of engineering plans, drawings, maps, calculations, computer models, cost estimates, and the title or contents page of the

application shall be signed and sealed by a professional engineer in accordance with the Rules of the Texas Board of Professional Engineers.

(6) Drawings shall be legible and include a dated title block, scale, and responsible engineer's seal, if required. If color coding is used, it should be legible and the code distinct when reproduced on black and white photocopy machines. Drawings shall be submitted using a standard engineering scale.

(7) Each map or plan drawing shall have a north arrow, a legend and a reference to the base map source and date if the map is based upon another map. The latest revision of all maps shall be used. Maps shall show the following:

(A) all structures and inhabitable buildings within 500 feet of proposed site;

(B) location of all roads within one mile of the site that will normally be used to access the site;

(C) latitudes and longitudes;

(D) area streams;

(E) the property boundary of the site; and

(F) drainage, pipeline, and utility easements within or adjacent to the site.

(8) The applicant or an authorized representative shall provide a signed statement representing that he or she: is familiar with the application and all supporting data; is aware of all commitments represented in the application; is familiar with all pertinent requirements in these regulations; and agrees to develop and operate the scrap tire storage site in compliance with the application, applicable local and state regulations, and any special provisions that may be imposed by the executive director.

(9) Site and surrounding area information includes the following:

(A) Maps.

(i) Location maps. These maps shall be all or a portion of county maps prepared by Texas Department of Transportation. At least one general location map shall be at a scale of one-half inch equals one mile. These maps may be obtained at a nominal cost from the nearest District Highway Engineer Office or by writing to: Texas Department of Transportation, Attention: Transportation Planning Division [(D-10)], P.O. Box 5020 [5051, West Austin Station], Austin, Texas, 78726-5020 [78763-5051];

(ii) Topographic maps. These maps shall be United States Geological Survey 7-1/2-minute quadrangle sheets or equivalent, marked to show the storage site boundaries and

roadway access. These maps may be obtained at a nominal cost from [: Branch of Distribution,] any
United States Geological Survey, Federal Center [, Denver, Colorado 80225];

(iii) Land ownership map and list. This map shall locate the property owned by potentially affected landowners. The map shall show all property ownership within 500 feet of the site. A list shall be provided that gives each property owner's and easement holder's name and mailing address. The list shall be keyed to the Land Ownership Map.

(iv) Floodplain maps. These maps shall be the appropriate Federal Emergency Management Agency maps or other demonstration acceptable to the executive director indicating the location of any 100-year flood plain which may exist within the property boundary or surrounding area.

(B) Legal description. A legal description of the storage facility and the volume and page number of the deed record, or if platted property, the book and page number of the plat record of only that acreage encompassed in the application.

(C) Property owner affidavit. A statement from the property owner shall be submitted on a form provided by the executive director; and shall be witnessed and notarized. The form shall include:

(i) the legal description of the site;

(ii) acknowledgment that the State of Texas may hold the property owner of record either jointly or severally responsible for the operation, maintenance, and closure and post-closure care of the site;

(iii) acknowledgment that the owner has a responsibility to file in the county deed records an affidavit to the public advising that the land has been used for a tire storage facility, at the time as the site actually begins operating; and

(iv) acknowledgment that the site owner or operator and the State of Texas shall have access to the property during the active life and for a period of not less than five years after closure for the purpose of inspection and maintenance.

(D) Fire marshal approval. The fire marshal with jurisdiction over the facility location shall approve the fire protection system. A letter from the fire marshal shall be included in the application stating that the fire marshal has reviewed and approved the fire protection aspects of the application as well as the design of the all-weather roads to accommodate fire fighting vehicles. The fire marshal shall sign and date the Site Layout Plan.

(10) Engineering information includes the following:

(A) Site layout plan. The site layout plan shall include:

(i) location of storage areas;

(ii) location of fire lanes and fire control facilities;

(iii) security fencing, gates and gatehouse, site entrance, and access roads and fire lanes in accordance with §328.61 of this title (relating to Design Requirements for Scrap Tire Storage Site);

(iv) location of buildings; and

(v) location and description of processing equipment.

(B) Drainage plan. A drainage plan showing drainage flow throughout the scrap tire storage site area, locations of streams, and any other important drainage feature of the facility. Calculations shall be presented to show that normal drainage patterns will not be significantly altered. If the executive director determines that significant alteration will occur, the owner/operator shall design and provide additional surface drainage controls which shall be designed and provided to mitigate the effects of the altered watershed, as required by the executive director.

(C) Fire plan. The fire plan and all revisions shall be maintained at the site, with copies provided to all local fire departments and other emergency response teams, and shall include guidance or instruction on the following:

(i) roles to be assumed by on-site personnel (example: fire-fighting coordinator, equipment custodian, hose operator, etc.) in the event of a fire, duty stations, and procedures to be followed by these persons;

(ii) arrangements agreed to by local fire departments, police departments, hospitals, contractors, nearby businesses and industries that can be called for assistance, and state and local emergency response teams. In this regard, a letter from each of these entities shall be included in the fire plan, which letters shall acknowledge receipt of a copy of the fire plan, and agreement to participate as stated in the fire plan.

(iii) names, addresses, and telephone numbers of these emergency response teams (fire, police, medical, etc.) that are to be included in the plan. The fire plan must include a map of the general area of the site that shows the site location, the location of the emergency response teams included in the plan (fire stations, police stations, hospitals, etc.). The plan shall also include the best route for these emergency response teams to take from their location to the site location.

(iv) names, addresses, and telephone numbers of all site employees that are qualified to act as emergency coordinator(s) (this list must be kept up to date, and where more than one person is listed one must be designated as primary coordinator and the others as alternates);

(v) a list of all emergency equipment at the facility (fire extinguishers, protective clothing items, hoses, pumps, axes, shovels, detention ponds, water storage tanks, fire hydrants, signal and alarm system equipment, decontamination equipment, etc.), a copy of the Site Layout Plan (to

be posted at several prominent locations on the site as well as included in the fire plan) drawing that clearly marks the location of these items as well as personnel assembly points and evacuation routes from the site and from buildings on the site, and a narrative description of where these items are kept or located on site as well as a description of how the items are used (if applicable) and their capabilities;

(vi) an evacuation procedure for facility personnel where there is a possibility that evacuation could be necessary, evacuation routes, alternate routes, and signals to be used by the emergency coordinator(s) for the various necessary procedures; and

(vii) information about any insurance held by the company that would cover fire damage, loss, and cleanup.

(D) Cost estimate for closure. The applicant shall submit a cost estimate for closure costs in accordance with §328.71 of this title (relating to Closure Cost Estimate for Financial Assurance).

(E) Site operating plan. The Site Operating Plan shall include information to provide specific guidance and instructions for the management and operation of a scrap tire storage site and should include:

(i) information on security, facility access control, the hours and days during which tire-hauling vehicles will be admitted, traffic control and safety;

(ii) sequence of the development of the scrap tire storage site such as utilization of storage areas, drainage features, firewater storage ponds, trenches, and buildings;

(iii) information on control of loading and unloading of used or scrap tires or tire pieces within designated areas, so as to minimize operational problems at the storage facility;

(iv) fire prevention and control plans, and special training requirements for fire-fighting personnel that may be called for assistance;

(v) vector control procedures for any type of vector that may be found at the scrap tire storage site;

(vi) a procedure for removal of any waste material that is not a used or scrap tire or tire piece to a disposal facility permitted by the commission. This procedure must include the means to remove this illegally deposited waste material. In all cases, such waste shall be removed from the storage area immediately and placed in suitable collection bins, or shall be returned to the transporter's vehicle and removed from the scrap tire storage site. Collection bins must be emptied at least weekly, depending on the amount and type of unauthorized waste. The equipment necessary to meet this objective shall be specified in the design requirements and shall be on site and operable during operating hours;

(vii) the name of the facility employee who is designated by the owner or operator to inspect each load of used or scrap tires or tire pieces that is delivered to the scrap tire storage

site. The employee shall have the authority and responsibility to reject unauthorized or improperly manifested loads. The employee shall also be authorized to have unauthorized materials removed by the transporter, assess appropriate disposal fees, and have any unauthorized material removed by on-site personnel;

(viii) a procedure whereby the required transporter manifest, the daily log and other required documents shall be maintained at the scrap tire storage site for a period of three years and be made available for inspection by the executive director or authorized agents or employees of local governments having jurisdiction to inspect the storage facility;

(ix) dust and mud control measures for access roads, fire lanes, and storage areas within the scrap tire storage site;

(x) posting of signs and enforcement of scrap tire storage site rules;

(xi) procedures for wet-weather operations;

(xii) preventive maintenance procedures for all storage areas, tire processing equipment, fire lanes, fire control devices, drainage facilities, access roads, buildings, and other structures on the scrap tire storage site in use during the active operating period of the scrap tire storage site. A schedule shall be established for periodic inspection of all equipment and facilities to determine if unsatisfactory conditions exist; and

(xiii) incorporation of other instructions as necessary to ensure that the scrap tire storage site personnel comply with all of the operational standards for the facility.

(11) The applicant seeking registration or amended registration for a scrap tire storage site shall submit evidence of financial responsibility in conformance with §328.71 of this title (relating to Closure Cost Estimation for Financial Assurance).

(c) Application processing. If an application for registration or amended registration of a scrap tire storage site is received that is not administratively or technically complete, the executive director shall notify the applicant of the deficiencies within 30 working days. If the additional information is not received within 60 days of the date of receipt of the deficiency notice, the executive director may return the incomplete application to the applicant. The executive director may extend the response time to a maximum of 270 days upon sufficient proof from the applicant within 60 days of the receipt of the deficiency note that an adequate response cannot be submitted within 60 days. If, however, the applicant does not submit an administratively and technically complete application or sufficient proof of inability within the time frames indicated, the application may be considered withdrawn without prejudice.

(d) Registration expiration. A scrap tire storage site registration shall expire 60 months from the date of issuance. A scrap tire storage site registration is transferable contingent upon executive director approval. A change in the federal tax identification number will constitute a change of ownership. Registrations shall be renewed prior to the expiration date. Applications for renewal shall be submitted at least 60 days prior to the expiration date of the scrap tire storage site registration. Failure to timely file an application for renewal shall result in automatic expiration of the registration.

§328.63. Scrap Tire Facility Requirements.

(a) Applicability. This section applies to owners or operators of facilities that process, conduct energy recovery or recycle used or scrap tires or tire pieces.

(b) Storage site registration requirement. The applicant shall obtain a scrap tire storage site registration in accordance with §328.60 of this title (relating to Scrap Tire Storage Site Registration) if the applicant seeking registration for a scrap tire facility:

(1) intends to have more than a 30 calendar day supply of tires at the facility site; or

(2) is solely a scrap tire processing facility with no recycling or energy recovery conducted on-site and intends to store in excess of 500 used or scrap tires (or weight equivalent tire pieces or any combination thereof) on the ground or 2,000 used or scrap tires (or weight equivalent tire pieces or any combination thereof) in trailers.

(c) Scrap tire facility registration requirements. Scrap tire facilities shall register their operation with the executive director in accordance with §328.55 of this title (relating to Registration Requirements) before starting operations. An application for registration shall be made on a form provided by the executive director upon request. In addition to the General Registration requirements, the following registration information must be provided to the executive director.

(1) Persons that process, conduct energy recovery or recycle used or scrap tires or tire pieces shall submit an application for a registration number from the executive director for the operation of the scrap tire facility.

(2) The application for registration shall be prepared and signed by the applicant. The application shall identify the use of the tires (e.g., the product to be made and the end use market), and shall include information necessary for the executive director to make an evaluation of the proposed operation.

(3) The application for registration of a scrap tire facility shall be submitted in triplicate either in writing or through an electronic reporting system as allowed by the executive director.

(4) Data presented in support of an initial or renewal application for a scrap tire facility shall consist of the following information:

(A) an application form provided by the executive director and location map(s) pursuant to §328.60 of this title (relating to Scrap Tire Storage Site Registration);

(B) the maximum amount of tires (in pounds) that will be on the scrap tire facility at any given time;

(C) the amount of tires necessary to provide a 30 calendar day raw material supply for the proposed recycling process;

(D) the storage method (piles on the ground, piles inside a building or enclosure, or totally enclosed and lockable containers that are locked during non-operational hours);

(E) the product to be manufactured and the end use market;

(F) a property owner affidavit on a form provided by the executive director pursuant to §328.60 of this title (relating to Scrap Tire Storage Site Registration); and

(G) a list of all other applicable federal, state, and local permits and/or registrations with the associated numbers;

(5) Persons that conduct energy recovery shall obtain all other applicable authorizations (i.e., permits and/or registrations) necessary for conducting tire related activities before submitting an application for registration as a scrap tire facility.

(d) General requirements.

(1) The owner or operator shall mail a copy of the notification documents and attachments to the appropriate mayor and county judge if the proposed project is to be located within the corporate limits or extraterritorial jurisdiction of a city; or the appropriate county judge if the proposed project is to be located within an unincorporated area of a county; to the appropriate regional council of

government; and, to the appropriate local fire authority. Proof of mailing shall be provided in the form of return receipts for registered mail.

(2) [(1)] Where local ordinances require controls and records more stringent than the requirements of this subchapter, scrap tire facility operators shall use those criteria to satisfy commission requirements under this section. The executive director shall not authorize a scrap tire facility if a local government with jurisdiction over a proposed facility provides timely written notice to the executive director that the proposed facility does not comply with local requirements. Local governments shall be allowed up to 45 days after an applicant mails notice to mail its reply to the executive director.

(3) [(2)] Stockpiles of used or scrap tires or tire pieces at the processing location that are awaiting splitting, quartering, shredding, processing, or recycling shall be monitored for vector control and appropriate vector control measures shall be applied when needed, but in no event less than once every two weeks.

(4) [(3)] If a scrap tire facility does not intend to provide its own fire fighting personnel or system, the facility shall make arrangements with public or private emergency response personnel that are capable of complying with applicable fire and building codes. The executive director shall not authorize a scrap tire facility if a local fire authority with jurisdiction over a proposed facility provides timely written notice to the executive director that the proposed facility does not comply with local requirements relating to fire protection. Local fire authority officials shall be allowed up to 45 days after an applicant mails notice to mail its reply to the executive director. [In addition, the scrap tire energy recovery facility shall provide a letter from the fire marshal within whose jurisdiction the scrap tire energy

recovery facility is located stating that the fire marshal has reviewed and approved the fire protection system.]

(5) [(4)] The owner or operator of the scrap tire facility shall operate the vehicles and equipment to prevent nuisances or disturbances to adjacent landowners.

(6) [(5)] A scrap tire facility operator shall submit to the executive director an annual summary of facility activities from January 1 through December 31 of each calendar year, showing the number and type of scrap tires received, amount by weight of tires shredded, processed, burned for energy recovery or recycled, and the amount by weight of tire pieces removed from the facility. If the tire pieces were delivered to an end user, the annual report shall include the name of the end user, type of end user and the date of delivery to the end user. The annual report shall be submitted no later than March 1 of the year following the end of the reporting period. The report shall be prepared on a form provided by the executive director.

§328.66. Land Reclamation Projects Using Tires (LRPUT).

(a) Any person or entity intending to initiate a Land Reclamation Projects Using Tires (LRPUT) shall notify the executive director in writing of the intent to fill land by means of a LRPUT. The application shall be submitted in triplicate either in writing or through an electronic reporting system as allowed by the executive director. Owners/operators of LRPUTs are required to provide information to the executive director as part of the notification document as described in [paragraph (1) of] this subsection. Approval in writing by the executive director (authorization to proceed) is required before the

reclamation project may be initiated. The executive director may withhold authorization to proceed for good cause related to protecting public health and the environment or if the information submitted is not deemed to be complete. The executive director shall have 60 days to review the notification documents for completeness. The executive director may request additional information if the executive director determines that the notification submittal does not address all applicable requirements of this subchapter or any potential risks to public health or the environment. The following information shall be submitted in the notification document or attachments thereto.

(1) The owner/operator of the LRPOT shall disclose in the notification the location of the project on a state highway map, United States Geological Survey map or similar, and provide a legal description of the property. The general location on the site where fill activities will take place shall be shown on one or more of these maps;

(2) A property owner's affidavit shall be submitted at the time of notification of intent to initiate a LRPOT and shall include the following:

(A) legal description of the property on which the LRPOT will occur; and

(B) acknowledgment that the owner has a responsibility to file with the county deed records an affidavit to the public advising that a reclamation project utilizing tire pieces exists on the site, and providing details about the location of the filled area within the property boundaries, areal extent of the fill project, coordinates or survey data, and the approximate volume or weight of tires which were used as fill, at such time as the fill project has been completed;

(3) The approximate volume of tire pieces proposed to be placed below ground, or the equivalent number of whole tires, and the approximate size and depth of the depression or borrow area to be filled shall be disclosed in the notification document;

(4) The approximate period of time during which the project will be conducted shall be disclosed, with estimated start and finish dates;

(5) The method of placement and commingling of the tire shreds to achieve a mix of tire pieces with the inert fill material in a proportion no greater than 50% of tire material by volume.

(6) A demonstration of the seasonal high groundwater level in the area. The executive director may require that an additional demonstration be provided for the seasonal high groundwater level at the proposed site based on the demonstration provided for the area. If the executive director requires an additional demonstration of the seasonal high groundwater level at the proposed site, the applicant shall provide the requested information within the timeframe specified by the executive director.

(7) [(6)] A statement signed and sealed by a professional engineer licensed to practice in Texas shall be submitted in the notification to the executive director to certify that the LRPUT is designed in a manner that will comply with the following standards.

(A) The LRPUT shall not cause a discharge of solid waste or pollutants adjacent to or into the waters of the state, including ground water, that is in violation of the requirements of the Texas Water Code, §26.121;

(B) The LRPUT shall not adversely affect human health, public safety or the environment, either during fill operations or after the reclamation project is complete; and

(C) Tire or tire pieces shall not be placed below ground in a manner that constitutes disposal as defined in Texas Health and Safety Code §361.003(7);

(8) [(7)] An affidavit signed by the property owner shall be submitted certifying that:

(A) the borrow area, hole or disturbed land area existed before the project; was excavated for another purpose; and was not excavated for the burial of tire pieces;

(B) the LRPUT will be completed in a manner that will comply with all regulations set forth in this subchapter and any other rules of the commission or any other local, state or federal agency which apply; and

(C) the local fire marshal has been notified of the tire placement or fill activity.

(9) [(8)] An affidavit signed by the operator shall be submitted certifying that he or she is familiar with the application and all supporting data; is aware of all commitments represented in the

notification; is familiar with all pertinent requirements in these regulations; and agrees to develop and operate the project in accordance with the application, applicable local and state regulations, and any special provisions that may be imposed by the executive director.

(10) [(9)] The owner or operator shall mail a copy of the notification documents and attachments to the appropriate mayor and county judge if the proposed project is to be located within the corporate limits or extraterritorial jurisdiction of a city; or the appropriate county judge if the proposed project is to be located within an unincorporated area of a county; to the appropriate groundwater district; and to the appropriate regional council of government. Proof of mailing shall be provided in the form of return receipts for registered mail. The executive director shall not authorize a LRPUT if a local government with jurisdiction over a proposed facility provides timely written notice that the proposed facility does not comply with local requirements. Local governments shall be allowed up to 45 days after an applicant mails notice to mail its reply to the executive director.

(11) [(10)] Upon the filing of the notification documents, the facility owner or operator shall provide notice to the general public by means of a notice by publication and a notice by mail. Each notice shall specify both the name, affiliation, address, and telephone number of the applicant and of the commission employee who may be reached to obtain more information about the LRPUT project. The notices shall specify that the notification documents have been provided to the county judge and that they are available for review by interested parties. The applicant shall publish notice in the county in which the facility is located, and in adjacent counties. The notice shall be published once a week for three weeks. The applicant should attempt to obtain publication in a Sunday edition of a newspaper. The notice by certified mail, return receipt requested, shall be sent to all adjacent landowners and all owners

of property within 500 feet of the boundary of the project; the health authorities of the city and county in which the project will be located, if applicable; and the appropriate state senator and representative for the area encompassing the project.

(b) Undisturbed land shall not be excavated for the purpose of filling the same land with a mixture of tires and debris or soil. Any borrow area, hole or other disturbed land area to be used for a LRPUR must have existed before the project, and it must have been excavated or soil removed for a purpose other than for the burial of tire pieces.

(c) The LRPUR shall not result in a public nuisance.

(d) An applicant for a LRPUR shall notify the local fire authority [marshal or fire department] serving the area of the proposed tire placement or fill activity. If an owner or operator of a LRPUR does not intend to provide its own fire fighting personnel or system, the owner or operator shall make arrangements with public or private emergency response personnel that are capable of complying with applicable fire and building codes. The executive director shall not authorize a LRPUR if a local fire authority with jurisdiction over a proposed facility provides timely written notice to the executive director that the proposed facility does not comply with local requirements relating to fire protection. Local fire authority officials shall be allowed up to 45 days after an applicant mails notice to mail its reply to the executive director. Applicants must provide proof that the mailed notice was received by the fire authority.

(e) All tires used to fill land shall be split, quartered, or shredded. Whole tires shall not be placed below ground.

(f) The owner and operator of the LRPOT shall comply with all applicable local ordinances, including any public safety, or zoning and land use laws.

(g) Shredded, split or quartered tires placed below ground shall be mixed in a proportion no greater than approximately 50% by volume with inert material acceptable for filling land. If greater than 50% of tire pieces by volume are placed below ground, the site is considered a tire monofill and is subject to §328.65 of this title (relating to Tire Monofill Permit Required).

(h) Tire pieces shall be placed no closer than 18 inches to the final grade or ground surface. A soil cover unadulterated with tire pieces shall make up at least the upper 18 inches of the reclamation project.

(i) The owner or operator of the LRPOT shall register as a scrap tire facility if a shredding operation is conducted on site for processing tires.

(j) The owner or operator of the LRPOT shall register as a scrap tire storage site under §328.60 of this title (relating to Scrap Tire Storage Site Registration) if:

(1) operations requiring storage of more than 500 used or scrap tires (or weight equivalent tire pieces or any combination thereof) on the ground or more than 2,000 used or scrap tires (or

weight equivalent tire pieces or any combination thereof) in enclosed and lockable containers would qualify the site as a registered tire storage site under §328.60 of this title [(relating to Scrap Tire Storage Site Registration)]; and

(2) the construction of the LRPUT extends beyond 90 days from the date of delivery of tires or tire pieces to the site.

(k) The executive director shall issue an identifying number at the time the approval letter for the LRPUT is issued. This identifying number shall be referenced in any correspondence relating to a particular LRPUT for which such a number is issued.

(l) A person may provide the commission with written comments on any notification of a LRPUT project. The executive director shall review any written comments when they are received within 30 days of mailing the notice. The written information received will be utilized by the executive director in determining what action to take on the application for a LRPUT.

(m) Following completion of all fill activities for the LRPUT, the owner or operator shall submit to the executive director, for review and approval, a documented certification signed by a licensed professional engineer verifying that the project has been completed in accordance with this subchapter, the notification documents, and all attachments. Once approved, this certification shall be placed in the file.

§328.69. Public Notice of Intent to Operate.

(a) Scrap tire storage sites that are registered with the executive director shall publish notice in the county where they intend to store used or scrap tires or tire pieces before beginning operation. Notice shall be published in a newspaper of general circulation. Subject to executive director approval, a variance to the public notice requirement may be requested provided that similar notice has been published within the previous 12-month period and that the notice was associated with activities under the jurisdiction of this subchapter.

(b) Scrap tire facilities that are registered with the executive director and have submitted an application amendment to request a variance from the 8,000 square feet pile size shall publish notice of intent to increase the pile size in accordance with this section.

(c) The notice of intent published by the scrap tire storage site owner shall contain at a minimum the following information:

(1) the facility registration number;

(2) the name under which the facility registration number was issued;

(3) the permanent street address and telephone number of the facility;

(4) a brief statement explaining the utilization activities the facility intends to perform at the location;

(5) where the tires intended for utilization or already utilized will be stored, if different from the actual facility site; and

(6) the number of tire piles planned for the storage facility and the square footage of the largest pile planned.

(d) The public notice of intent to operate shall identify the Texas Commission on Environmental Quality [Natural Resource Conservation Commission] as the state agency regulating this activity.

(e) The public notice of intent shall be published at least 30 days before beginning activities. The public notice of intent shall be published for a period of 10 days continuously. In counties where no daily newspaper is published, the notice shall be published at least once each week for three consecutive weeks.

§328.70. Motion to Overtturn [for Reconsideration].

A person affected by a registration or Land Reclamation Projects Using Tires under this chapter may file a Motion to Overtturn [for Reconsideration] pursuant to §50.139 [§50.39] of this title (relating to Motion to Overtturn Executive Director's Decision [for Reconsideration]), notwithstanding §50.131 [§50.31] of this title (relating to Purpose and Applicability).

§328.71. Closure Cost Estimate for Financial Assurance.

(a) As part of a facility's registration application, an owner or operator of a scrap tire storage site must prepare a written estimate, certified by a professional engineer, in current dollars, of the cost of hiring a third party to close the facility(ies). The closure cost for scrap tire storage sites is determined by the sum of paragraphs (1) and (2) of this subsection:

(1) The estimated cost for a third party to transport and dispose of the maximum site capacity of used or scrap tires and tire pieces as depicted by the site layout plan. The estimate shall include equipment and operator time for loading tires and disposal costs.

(2) The estimated cost for a third party to complete cleanup of the site of any and all debris, as well as dismantling any equipment used in the processing of whole tires into shreds or used to recycle whole tires or shredded tires into manufactured products, securing the site, and preventing access to the equipment or removing it from the site to a location acceptable to the executive director; or the amount of \$3,000, whichever is greater.

(b) The closure cost estimate must equal the cost of closing the facility based on the maximum number of whole tires stored at the facility, the maximum volume of tire pieces, and disabling any equipment as disclosed in the facility's registration application. The executive director shall evaluate and determine the amount for which evidence of financial assurance is required. The closure cost estimate provided by the owner or operator may be amended by the executive director. In some cases, the closure cost estimate may not be sufficient which means that the owner or operator remains responsible for the entire costs to close the site.

(c) Any amendment application shall include a recalculation of the closure cost estimate based on any requested volume increases. Facilities shall not increase the volume of whole tires or tire pieces generated from out of state and stored at the facility until the registration amendment has been approved by the executive director. Only upon approval of the executive director will the amended registration closure cost estimate be the basis for determining the amount of financial assurance required.

(d) The quantities of scrap tires reported on the registration application form and used in the calculation of financial assurance shall be obtained from the site layout plan volumes by using the following conversion factors:

(1) a typical whole tire shall be considered to occupy four cubic feet unless an exact count of all whole tires is to be maintained by an operator and shall be considered to weigh 20 pounds; and

(2) a cubic yard of tire shreds or pieces shall be considered to weigh no more than 950 pounds; however, other verifiable data may be used if accepted and approved by the executive director.

(e) The calculated capacity of a site as calculated for closure may not be exceeded without the submission and approval of an amended registration application specifically including, but not limited to, new site layout plans to substantiate the revised capacity and new closure calculations based upon the depicted volumetric capacity converted to weights, posting of the revised financial assurance and written approval for the amended registration. The owner or operator is also responsible for submitting a registration amendment to revise the closure cost estimate whenever requested to do so by the executive

director. Registration amendments with revised closure cost estimates shall be submitted to the executive director within 15 days of the executive director's written request to revise the closure cost estimate.

(f) The owner or operator must keep at the facility during the operating life of the facility a copy of the latest approved closure cost estimate and a copy of the current financial assurance mechanism.

(g) Financial assurance required under this section shall be provided in accordance with Chapter 37, Subchapter M of this title (relating to Financial Assurance Requirements for Scrap Tire Sites).

(h) Closure will begin when:

(1) the executive director deems the facility abandoned; or

(2) the registration expires, is terminated, or revoked or a new or renewal registration is denied; or

(3) closure is ordered by the Texas Commission on Environmental Quality [Natural Resource Conservation Commission] or a United States District Court or other court of competent jurisdiction.

(i) Following a determination that the owner or operator has failed to perform closure in accordance with the registration requirements when required to do so or when closure begins under the

circumstances outlined in subsection (h) of this section, the executive director may terminate or revoke the registration and draw on the financial assurance funds.

SUBCHAPTER F: MANAGEMENT OF USED OR SCRAP TIRES

[\§328.67 and §328.68]

STATUTORY AUTHORITY

These repeals are proposed under the authority of: Texas Health and Safety Code (THSC), §361.011, Commission's Jurisdiction: Municipal Solid Waste, which establishes the commission's jurisdiction over all aspects of the management of municipal solid waste; THSC, §361.024, Rules and Standards, which provides the commission with rulemaking authority; THSC, §361.061, Permits: Solid Waste Facility, which authorizes the commission to require and issue permits governing the construction, operation, and maintenance of solid waste facilities used to store, process, or dispose of solid waste; and, THSC, §361.112, Storage, Transportation, and Disposal of Used or Scrap Tires, which governs the storage, transportation, and disposal of used or scrap tires.

The proposed repeals implement THSC, §361.061 and §361.112.

[\§328.67. Special Authorization Priority Enforcement List (SAPEL).]

[(a) SAPEL.]

[(1) General. The SAPEL consists of scrap tires generated in specially designated counties or regions that are identified by the executive director as areas which are not receiving adequate collection service and that pose a threat to public health and safety or the environment.]

[(A) The executive director may designate collection entities as necessary to ensure continuous and adequate collection of SAPEL tires.]

[(B) The executive director may impose certain conditions on the SAPEL tire collection activities of designated collection entities as necessary to minimize disruption of activities at the generator locations and any other actions consistent with this subsection that are necessary to carry out the purposes of this section.]

[(C) Implementation of this section is not intended to impair or reduce existing generator collection in areas of the state containing SAPEL tires if adequate collection service is currently provided.]

[(2) Relationship to priority enforcement list (PEL). Unless otherwise provided by the executive director, the requirements in §328.68 of this title (relating to Priority Enforcement List (PEL) Program) do not apply to the SAPEL or SAPEL process.]

[(3) Generator responsibility. A generator desiring to have tires located at his site listed on the SAPEL shall cooperate fully with executive director instructions. A generator shall make his site available for access by designated collection entities for SAPEL tire collection. Failure to comply may result in tires at that site being ineligible for listing on the SAPEL.]

[(b) SAPEL contract.]

[(1) The executive director may contract with designated collection entities as necessary to ensure adequate collection of SAPEL tires.]

[(2) As part of the SAPEL contract, a designated collection entity may be required to comply with the following:]

[(A) for entities currently providing scrap tire collection, proof that their participation in the SAPEL contract process shall not impair or reduce their existing generator collection routes;]

[(B) attempt to the maximum extent possible to deliver SAPEL tires to an end user;]

[(C) special manifesting and reporting requirements;]

[(D) provide proof of ability to ensure adequate collection service for sites containing SAPEL tires; and]

[(E) any other requirements as necessary which are consistent with this section, and which will facilitate cleanup of SAPEL tires and protect human health, safety, and the environment.]

[\$328.68. Priority Enforcement List (PEL) Program.]

[(a) PEL program.]

[(1) Applicability. This section applies to the creation and maintenance of the PEL and the identification of illegal scrap tire sites, and the determination of a Potentially Responsible Party (PRP).]

[(2) PEL procurement. The executive director may issue contracts to procure cleanups for the removal of tires from such sites through a competitive bid process conducted in accordance with the provisions of the State Purchasing and General Services Act (Chapter 2151, Texas Government Code) applicable to contract for services. The executive director may elect not to enter into contracts under this section. If no reasonable bids are submitted under the procurement process for the cleanup of PEL sites, or at the executive director's discretion, the executive director may rebid the PEL sites.]

[(b) PEL.]

[(1) The PEL shall be a list, maintained by the executive director, of piles of scrap tires or tire pieces in excess of 500 and defined as illegal scrap tire sites identified before December 31, 1997 and classified by the executive director. This list shall be used by the executive director for awarding site cleanups to successful contract bidders. The scrap tires or tire pieces obtained from the PEL sites are eligible for payment according to contract guidelines.]

[(2) The executive director may, on an as needed basis, and with notice, recontract or execute additional contracts for any PEL site identified and contracted in the state.]

[(3) Members of the commission, employees or agents of the commission, and authorized scrap tire facilities or their subcontractors are entitled to enter any public or private property at any reasonable time to inspect, investigate or remediate any condition related to illegal dumping of scrap tires.]

[(4) An authorized contractor or subcontractor is entitled to enter property only at the executive director's direction. The executive director shall give notice of intent to enter private property for those purposes by certified mail to the last known address indicated in the current county property records at least 10 days before a commission member, commission employee or agent, or authorized contractor or subcontractor enters the property. A commission member, commission employee or agent, or authorized contractor or subcontractor who, acting under this subsection, enters private property shall:]

[(A) observe the establishment's rules concerning safety, internal security, and fire protection; and]

[(B) if the property has management in residence, make a reasonable attempt to notify the management or person in charge of the entry and exhibit credentials.]

[(5) Authorized contractors and their subcontractors shall not be considered agents of the state and are solely responsible for their own actions and actions of their agents.]

[(6) Once a PEL site has been cleaned up, property owners shall not be eligible for future cleanup assistance as a result of further tire deposition on the owners' property.]

[(c) PEL scrap tire site cleanup contract.]

[(1) Authorized scrap tire facilities that intend to receive payment shall enter into a PEL scrap tire site cleanup contract as a guarantee of job performance.]

[(2) Should the authorized facility's registration to utilize scrap tires or tire pieces be suspended or revoked by the executive director pursuant to §328.55 of this title (relating to Registration Requirements), then the PEL sites remaining in the PEL Scrap Tire Site Cleanup Contract shall be rebid.]

[(d) Authority of agency personnel.]

[(1) The contractor shall report on the status of the cleanup activities at the PEL site to the executive director in the time frame and manner requested.]

[(2) The executive director shall have the authority to suspend cleanup activities at a PEL site following a determination of whether the conditions and/or activities at the PEL site or other circumstances warrant the temporary suspension of cleanup activities to ensure the protection of public health and safety or the environment.]

[(3) The executive director may undertake immediate remediation of a site if, after investigation, the executive director finds:]

[(A) that there exists a situation caused by the illegal dumping of scrap tires that is causing or may cause imminent and substantial endangerment to the public health and safety or the environment; and]

[(B) the immediacy of the situation makes it prejudicial to the public interest to delay action until an administrative order can be issued to PRPs or until a judgment can be entered in an appeal of an administrative order.]

[(4) If a person ordered to eliminate an imminent and substantial danger to the public health and safety or the environment has failed to do so within the time limits specified in the order or any extension of time approved by the executive director, the executive director may implement a remedial program for the site.]

[(5) The commission or executive director may seek to bring suit against a PRP to recover reasonable expenses incurred in undertaking immediate removal of tires or in implementing a remedial action order. For purposes of this subchapter, the following three criteria shall be used to determine whether a person is a PRP.]

[(A) The person must be the property owner of record, the site operator or the depositor of the scrap tires on the site;]

[(B) The person must have benefitted financially from the disposition of the scrap tires on the site; and]

[(C) The person must be financially capable of paying all or part of the costs of the cleanup as determined by the commission.]

[(6) The commission or executive director shall seek to file the suit to recover costs not later than one year after the date removal or remedial measures are completed.]

[(7) The commission or executive director, in lieu of bringing suit to recover costs incurred under this subchapter, may seek to file a lien against the property on which the site is located. The lien shall state the name of the owner of the property, the amount owed, and the legal description of the property. The lien arises and attaches on the date the lien is filed in the real property records of the county in which the property is located. The lien is subordinate to the rights of prior bona fide purchasers or lienholders of the property.]