The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes new §§328.200 - 328.204.

**Background and Summary of the Factual Basis for the Proposed Rules**

This rulemaking is proposed to add new rules that would apply to certain governmental entities to establish recycling programs and purchasing preferences for products made of recycled materials.

Senate Bill (SB) 1376, 86th Texas Legislature, 2019, amended Texas Health and Safety Code (THSC), §361.425 and §361.426 to exempt certain governmental entities from compliance with recycling requirements, if the commission finds that compliance would create a hardship on the governmental entity. SB 1376 also requires the commission to exempt certain governmental entities from compliance with purchasing preferences for recycled materials, if the commission finds that compliance would create a hardship on the governmental entity.

The rulemaking proposes new Chapter 328, Subchapter K, Governmental Entity Recycling and Purchasing of Recycled Materials, to establish requirements for a governmental entity to create a recycling program, to give preference in purchasing to products made of recycled materials, and to create an exemption that would apply to certain governmental entities, if compliance with these rules would create a hardship.
Section by Section Discussion

§328.200, Purpose

The commission proposes new §328.200 which would pertain to governmental entities and establish a standard to implement a recycling program.

§328.201, Definitions

The commission proposes new §328.201 to define governmental entity, hardship, and recyclable materials within the context of the requirements.

§328.202, General Requirements

The commission proposes new §328.202 to describe the responsibilities for governmental entities to establish a recycling program. Overall, the entity must consider how to collect and store recyclable materials, maintain containers for recyclable materials, create procedures with buyers of recyclable materials, evaluate and modify the recycling program, and create measures to encourage employee participation.

§328.203, Exemptions

The commission proposes new §328.203 to provide specific exemptions that are allowed under the rule as well as opportunities for an exemption request due to a hardship.
§328.204, Purchasing Preference for Recycled Materials

The commission proposes new §328.204 to require certain governmental entities to give preference to purchase products made of recycled materials.

Fiscal Note: Costs to State and Local Government

Jené Bearse, Analyst in the Budget and Planning Division, determined that for the first five-year period the proposed rulemaking is in effect, no fiscal implications are anticipated for the agency or for other units of state government. Fiscal implications are not anticipated for units of local government because the proposed rulemaking includes a process to apply for an exemption in the cases of a hardship.

This rulemaking addresses recent changes to THSC, §361.425, Governmental Entity Recycling. The proposed rulemaking is required by law and needed to create a process for units of government to apply for an exemption from the requirements.

Public Benefits and Costs

Ms. Bearse determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated will be compliance with state law. The proposed rulemaking is not anticipated to result in fiscal implications for businesses or individuals.
Local Employment Impact Statement

The commission reviewed this proposed rulemaking and determined that a Local Employment Impact Statement is not required because the proposed rulemaking does not adversely affect a local economy in a material way for the first five years that the proposed rulemaking is in effect.

Rural Communities Impact Assessment

The commission reviewed this proposed rulemaking and determined that the proposed rulemaking does not adversely affect rural communities in a material way for the first five years that the proposed rulemaking is in effect. The proposed rulemaking includes a process for an exemption if compliance with the proposed rules and the associated state law is shown to create a hardship.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses due to the implementation or administration of the proposed rules for the first five-year period the proposed rulemaking is in effect.

Small Business Regulatory Flexibility Analysis

The commission reviewed this proposed rulemaking and determined that a Small Business Regulatory Flexibility Analysis is not required because the proposed rulemaking does not adversely affect a small or micro-business in a material way for
the first five years the proposed rulemaking is in effect.

**Government Growth Impact Statement**

The commission prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program; the requirement for the government recycling program existed in state law. This proposed rulemaking does create a process for a unit of government to gain an exemption from the requirement if a hardship is found. The proposed rulemaking will not require an increase or decrease in future legislative appropriations to the agency. The proposed rulemaking does not require the creation of new employee positions, eliminate current employee positions, nor require an increase or decrease in fees paid to the agency. The proposed rulemaking does not create or expand the regulation of units of government or individuals; the requirement for the recycling program existed in state law. During the first five years, the proposed rules should not impact positively or negatively the state's economy.

**Draft Regulatory Impact Analysis Determination**

The commission reviewed the rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to Texas Government Code, §2001.0225, because it does not meet the definition of a "Major environmental rule" as defined in that statute. A "Major environmental rule" is a rule with the specific intent 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. New §§328.200 - 328.204 are proposed in accordance with SB 1376, which amended THSC, Chapter 361, Subchapter N. The proposed rules establish requirements for a governmental entity to create a recycling program and to give preference in purchasing to products made of recycled materials. The proposed rules would not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or public health and safety of the state or sector of the state. In addition, the proposed rules provide an exemption for the regulated community if compliance with the proposed rules would create a hardship on the regulated entity.

In addition, a regulatory impact analysis is not required because the proposed rulemaking does not meet any of the applicability criteria for requiring a regulatory analysis of a "Major environmental rule" as defined in the Texas Government Code. Texas Government Code, §2001.0225, applies only to a major environmental rule, 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 authority of the commission. Proposed new §§328.200 - 328.204 do not exceed an express requirement of state law, federal law, or a requirement of a delegation agreement and were not developed solely under the general powers of the agency but are authorized by specific sections of the THSC that are cited in the Statutory Authority section of this preamble. Therefore, this rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

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 analysis of whether the proposed rulemaking constitutes a taking under Texas Government Code, Chapter 2007. The commission's preliminary assessment indicates Texas Government Code, Chapter 2007, does not apply.

Under Texas Government Code, §2007.002(5), taking means: (A) a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Section 17 or 19, Article I, Texas Constitution; or (B) a
governmental action that: (i) affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and (ii) is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

Promulgation and enforcement of the proposed rulemaking would be neither a statutory nor a constitutional taking of private real property. The primary purpose of the rulemaking is to amend Chapter 328 in accordance with the amendments to THSC, Chapter 361 as a result of SB 1376. The proposed rules would establish requirements for a governmental entity to create a recycling program and require certain governmental entities to give preference to purchase products made of recycled materials. The proposed rulemaking does not affect a landowner's rights in private real property because this rulemaking does not burden, restrict, or limit the owner's right to property, nor does it reduce the value of any private real property by 25% or more beyond that which would otherwise exist in the absence of the regulations. Therefore, these proposed rules would not constitute a taking under Texas Government Code, Chapter 2007.
Consistency with the Coastal Management Program

This rulemaking is not applicable to the 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.

Effect on Sites Subject to the Federal Operating Permits Program

This rulemaking is not subject to requirements of the Federal Operating Permit program.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on February 27, 2020, at 10:00 a.m. 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 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 Sandy Wong, Office of Legal Services at
(512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

**Submittal of Comments**

Written comments may be submitted to Andreea Vasile, 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: https://www6.tceq.texas.gov/rules/ecomments/. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2019-125-328-AD. The comment period closes on March 3, 2020. Copies of the proposed rulemaking can be obtained from the commission’s website at https://www.tceq.texas.gov/rules/propose_adopt.html. For further information, please contact Calen Roome, Public Education Unit, (512) 239-4621.
SUBCHAPTER K: GOVERNMENTAL ENTITY RECYCLING AND PURCHASING OF RECYCLED MATERIALS

§§328.200 - 328.204

Statutory Authority
The new rules are proposed under Texas Water Code (TWC), §5.102, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC and other laws of this state; and TWC, §5.105, which authorizes the commission by rule to establish and approve all general policy of the commission. The new rules are also proposed under Texas Health and Safety Code (THSC), §361.024, which authorizes the commission to adopt rules regarding the management and control of solid waste; THSC, §361.425, which provides that the commission shall adopt rules for administering governmental entity recycling programs; and THSC, §361.426 which provides that the commission shall adopt rules for administering governmental entity preferences for recycled products.

The new rules are proposed as part of the implementation of THSC, Chapter 361, Subchapter N, as amended by Senate Bill 1376, 86th Texas Legislature, 2019.

§328.200. Purpose.
The purpose of this subchapter is to establish requirements for a governmental entity to create a recycling program and provide preference for purchasing recycled materials.

§328.201. Definitions.

The following terms, when used in this subchapter, shall have the following meanings.

(1) Governmental entity--A state agency, state court or judicial agency, a university system or institution of higher education, a county, municipality, school district, or special district.

(2) Hardship--A circumstance that causes unreasonable burden on the governmental entity.

(3) Recyclable material--A material generated by the entity's operations, including aluminum, steel containers, aseptic packaging and polycoated paperboard cartons, high-grade office paper, and corrugated cardboard.

A governmental entity shall:

(1) establish a program for the separation and collection of all recyclable materials generated by the entity's operations;

(2) provide procedures for collecting and storing recyclable materials, containers for recyclable materials, and procedures for making contractual or other arrangements with buyers of recyclable materials;

(3) evaluate the amount of recyclable material recycled and modify the recycling program as necessary to ensure that all recyclable materials are effectively and practicably recycled; and

(4) establish educational and incentive programs to encourage maximum employee participation.

§328.203. Exemptions.

(a) This subchapter does not apply to:

(1) a school district with a student enrollment of less than 10,000 students; and
(2) a municipality with a population of less than 5,000, if compliance with this subchapter would create a hardship.

(b) A governmental entity may exclude one or more recyclable materials from their program if the commission finds that:

(1) a recycling program for a recyclable material is not available through their solid waste provider; or

(2) the inclusion of a recyclable material would create a hardship.

(c) A governmental entity may request additional consideration from the commission if compliance with this subchapter would create a hardship.

§328.204. Purchasing Preference for Recycled Materials.

A state agency, state court, or judicial agency not subject to Texas Government Code, Title 10, Subtitle D, and a county, municipality, school district, junior or community college, or special district shall give preference in purchasing to products made of recycled materials if the products meet applicable specifications as to quantity and quality. Preferences will be applied in accordance with state procurement
statutes and rules.