

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the amendment to §328.7; and new §§328.301 - 328.304.

Amended §328.7 and new §§328.301 - 328.304 are adopted *without changes* to the proposed text as published in the May 24, 2024, issue of the *Texas Register* (49 TexReg 3708) and therefore will not be republished.

Background and Summary of the Factual Basis for the Adopted Rules

The commission adopts this rulemaking to implement House Bill (HB) 3060, 88th Texas Legislature, 2023. HB 3060 amended Texas Health and Safety Code (THSC), §361.0151 (Recycling), §361.421 (Definitions), and §361.427 (Specifications for Recycled Products); and added §361.4215 (Mass Balance Attribution). These statutory enactments require the commission to promulgate rules to: 1) identify third-party certification systems for mass balance attribution that may be used for the purposes of the definitions of "recycled material" and "recycled plastics" in THSC, §361.421(6) and §361.421(6-a), respectively; and 2) establish guidelines by which a product is eligible to be considered a recycled product in accordance with THSC, §361.4215 and §361.427.

As part of this rulemaking, the commission is adopting revisions to 30 Texas Administrative Code (TAC) Chapter 281, Applications Processing; Chapter 330, Municipal Solid Waste; and Chapter 335, Industrial Solid Waste and Municipal Hazardous Waste, concurrently in this issue of the *Texas Register*.

Section by Section Discussion

Subchapter B: Recycling, Reuse, and Materials Recovery Goals and Rates

§328.7, Definitions of Terms and Abbreviations

The commission amends §328.7(4) by replacing existing subparagraphs (A) - (H) with clauses (i) - (viii) in subparagraph (A) and adding clauses (ix) - (xii) to update the definition of "Recycled product" to reference current Environmental Protection Agency Comprehensive Procurement Guidelines and Recovered Materials Advisory Notices. The definition is also revised by reorganizing text in former subparagraph (H) under new subparagraph (B), by updating references to the Federal Trade Commission and the American Society for Testing Materials guidelines, and adding new subparagraph (C) to exclude a product sold as fuel from the definition. The amendments implement HB 3060 which amended the definition of "Recycled product" in THSC, §361.421 by replacing the phrase "which meets the requirements for recycled material content as prescribed by" with the phrase "that is eligible to be considered a recycled product under," and by clarifying that the term does not include a product sold as fuel.

Subchapter L: Third-party Certification Systems for Mass Balance Attribution

§328.301, Purpose and Applicability

The commission adopts new §328.301 to establish the purpose and applicability of the subchapter.

§328.302, Definitions

The commission adopts new §328.302 to implement HB 3060 by adopting definitions of the terms "Recycled material," "Recycled plastics," and "Recycling" to implement the definitions in THSC, §361.421; and adopting definitions of the terms "Mass balance attribution," and "Third-party certification system" to implement §361.4215.

§328.303, Third-Party Certification Systems for Mass Balance Attribution

The commission adopts new §328.303 to implement THSC, §361.4215, as promulgated by HB 3060, which requires the commission to adopt rules to identify third-party mass balance attribution certification systems.

§328.304, Recycled Products

The commission adopts new §328.304 to implement THSC, §361.427, as amended by HB 3060. HB 3060 amended THSC, §361.427 by clarifying that the guidelines the commission establishes in rule for determining whether a product is eligible to be considered to be a recycled product must be based on the percent of the total content of a product that consists of recycled material or the portion determined to consist of recycled material according to a third-party certification system for mass balance attribution, and by clarifying that post-use polymers be included among recycled material in these guidelines.

Final Regulatory Impact Determination

The commission reviewed the rulemaking adoption in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the rulemaking is not subject to Texas Government Code, §2001.0225. Texas Government Code, §2001.0225 applies to a "Major environmental rule" which is defined in Texas Government Code, §2001.0225(g)(3) as a rule with a 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."

First, the rulemaking adoption does not meet the statutory definition of a "Major environmental rule" because its specific intent is not to protect the environment or reduce risks to human

health from environmental exposure. The specific intent of the rulemaking adoption is to promulgate rules to: 1) identify third-party certification systems for mass balance attribution that may be used for the purposes of the definitions of "recycled material" and "recycled plastics" in THSC, §361.421(6) and §361.421(6-a), respectively; and 2) establish guidelines by which a product is eligible to be considered a recycled product in accordance with THSC, §361.4215 and §361.427.

Second, the rulemaking adoption does not meet the statutory definition of a "Major environmental rule" because the adopted rules will not 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. It is not anticipated that the cost of complying with the adopted rules will be significant with respect to the economy as a whole or with respect to a sector of the economy; therefore, the rulemaking adoption will not 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.

Finally, the rulemaking adoption does not meet any of the four applicability requirements for a "Major environmental rule" listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 only applies 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 powers of the agency instead of under a specific state law. This rulemaking adoption does not meet any of the four preceding applicability

requirements.

This rulemaking adoption does not meet the statutory definition of a "Major environmental rule," nor does it meet any of the four applicability requirements for a "Major environmental rule." Therefore, this rulemaking is not subject to Texas Government Code, §2001.0225.

The commission invited public comment regarding the Draft Regulatory Impact Analysis Determination during the public comment period. No public comments were received regarding the regulatory impact analysis determination.

Takings Impact Assessment

The commission has prepared a takings impact assessment for these adopted rules in accordance with Texas Government Code, §2007.043. The commission's preliminary assessment is that implementation of these adopted rules will not constitute a taking of real property. The commission adopts this rulemaking for the purpose of promulgating rules to: 1) identify third-party certification systems for mass balance attribution that may be used for the purposes of the definitions of "recycled material" and "recycled plastics" in THSC, §361.421(6) and §361.421(6-a), respectively; and 2) establish guidelines by which a product is eligible to be considered a recycled product in accordance with THSC, §361.4215 and §361.427.

The commission's analysis indicates that Texas Government Code, Chapter 2007, does not apply to these adopted rules because this is an action that is reasonably taken to fulfill an obligation mandated by state law, which is exempt under Texas Government Code, §2007.003(b)(4). HB 3060 amended THSC, §361.0151 (Recycling), §361.421 (Definitions), and §361.427 (Specifications for Recycled Products); and added §361.4215 (Mass Balance

Attribution). These statutory enactments require the commission promulgate rules to: 1) identify third-party certification systems for mass balance attribution that may be used for the purposes of the definitions of "recycled material" and "recycled plastics" in THSC, §361.421(6) and §361.421(6-a), respectively; and 2) establish guidelines by which a product is eligible to be considered a recycled product in accordance with THSC, §361.4215 and §361.427, which provides a unilateral expectation that does not rise to the level of a recognized interest in private real property. Therefore, Texas Government Code, Chapter 2007 does not apply to these adopted rule changes because the adopted rulemaking falls within the exception under Texas Government Code, §2007.003(b)(4).

Further, the commission determined that promulgation of these adopted rules will be neither a statutory nor a constitutional taking of private real property. Specifically, there are no burdens imposed on private real property under the rulemaking because the adopted rules neither relate to, nor have any impact on, the use or enjoyment of private real property, and there will be no reduction in property value as a result of these rules. Therefore, the adopted rules will not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the rulemaking adoption and found the adoption is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(4) relating to rules subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in

accordance with the regulations of the Coastal Coordination Advisory Committee and determined that the amendments are consistent with CMP goals and policies because the rulemaking will not have direct or significant adverse effect on any coastal natural resource areas; will not have a substantive effect on commission actions subject to the CMP; and promulgation and enforcement of the amendments will not violate (exceed) any standards identified in the applicable CMP goals and policies.

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No public comments were received regarding the CMP.

Public Comment

The commission offered a public hearing on June 20, 2024. The comment period closed on June 25, 2024. No public comments were received.

SUBCHAPTER B: RECYCLING, REUSE, AND MATERIALS RECOVERY GOALS AND RATES

§328.7

Statutory Authority

The amendments are adopted under the authority of Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102, which provides the commission with the authority to carry out its duties and general powers under its jurisdictional authority as provided by TWC; TWC, §5.103, which requires the commission to adopt any rule necessary to carry out its powers and duties under TWC and other laws of the state; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; the Administrative Procedures Act under Texas Government Code, Chapter 2001, which authorizes the commission as a state agency to adopt rules pursuant to the rulemaking process; Texas Health and Safety Code (THSC), §361.011, which grants the commission authority over municipal solid waste; THSC, §361.017, which grants the commission jurisdiction over industrial solid waste and hazardous municipal waste; THSC, §361.024, which authorizes the commission to adopt rules consistent with the general purposes of the Solid Waste Disposal Act; THSC, §361.0151, which requires the commission to base its goals or requirements for recycling or the use of recycled materials on the definitions and principles established by Subchapter N, THSC, §§361.421 - 361.431; THSC, §361.022 and §361.023, which set public policy in the management of municipal solid waste and hazardous waste to include reuse or recycling of waste; THSC, §361.041, which conditionally excludes post-use polymers and recoverable feedstock from classification as solid waste when are converted using pyrolysis, gasification, solvolysis, or depolymerization into valuable raw materials, valuable intermediate products or valuable final products, that include plastic monomers, chemicals, waxes, lubricants, and chemical feedstocks; THSC, §361.078 which

identifies that THSC Chapter 361 Subchapter B does not abridge, modify or restrict the commission's authority to adopt rules issue permits and enforce the terms of permits as necessary to maintain state authorization of Texas' hazardous waste program; THSC, §361.119, which requires the commission to adopt rules and to adopt rules consistent with THSC Chapter 361 to ensure that solid waste processing facilities are regulated as solid waste facilities and not allowed to operate unregulated as recycling facilities; THSC, §361.4215 which authorizes the commission to identify third-party certification systems for mass balance attribution that may be used for the purposes of THSC, §361.421(6) and (6-a); THSC, §361.425 which provides that the commission shall adopt rules for administering governmental entity recycling programs; THSC, §361.426, which provides that the commission shall adopt rules for administering governmental entity preferences for recycled products; and THSC, §361.427 which authorizes the commission to promulgate rules to establish guidelines by which a product is eligible to be considered a recycled product.

The adopted amendments to §328.302 will implement House Bill (HB) 3060, 88th Texas Legislature, 2023, by adding the definitions of "Recycled material," "Recycled plastics," and "Recycling" so that they are consistent with the definitions under THSC, §361.421. The adopted amendments to §328.302 will also implement HB 3060 by adding the definitions of "Recycled product" and "Third-party certification system" so that they are consistent with the definitions under THSC, §361.427 and §361.4215, respectively.

§328.7. Definitions of Terms and Abbreviations

The following words and terms, when used in this subchapter shall have the following meanings, unless the context clearly indicates otherwise.

(1) Base year--The year 1990 used as a reference for recycling credit limits and for determining the amount of waste reduced at the source.

(2) Municipal sludge--Any solid, semisolid, or liquid waste generated from a municipal wastewater treatment plant, water supply treatment plant, or any other such waste having similar characteristics and effect, exclusive of the treated effluent from a wastewater treatment plant.

(3) Net tons of waste exported--The difference between that portion of the municipal waste stream generated within specific geographic boundaries and exported for disposal and that portion which is generated outside the boundaries and imported for disposal during a specified time period.

(4) Recycled product--

(A) A product which conforms to the minimum content of recycled material as specified in the Comprehensive Procurement Guidelines (CPG) and the Recovered Materials Advisory Notice (RMAN) published by the Environmental Protection Agency (EPA). The following is a list of the EPA guidelines:

(i) CPG I, as amended through May 1, 1995, at 60 Federal Register (FR) 21370;

(ii) RMAN I, as amended through May 1, 1995, at 60 FR 21386;

(iii) RMAN (update), as amended through May 29, 1996, at 61 FR
26985;

(iv) CPG II, as amended through November 13, 1997, at 62 FR
60962;

(v) RMAN II, as amended through November 13, 1997, at 62 FR
60975;

(vi) RMAN (update), as amended through June 8, 1998, at 63 FR
31214;

(vii) CPG III, as amended through January 19, 2000, at 65 FR 3069;

(viii) RMAN III, as amended through January 19, 2000, 65 FR 3082;

(ix) CPG IV, as amended through April 30, 2004, at 69 FR 24028;

(x) RMAN IV, as amended through April 30, 2004, at 69 FR 24039;

(xi) CPG V, as amended through September 14, 2007, at 72 FR
52475; and

(xii) RMAN V, as amended through September 14, 2007, at 72 FR 52561.

(B) For products for which no EPA guidelines exist, states may use guidelines from the Federal Trade Commission (FTC), or the American Society for Testing Materials (ASTM) for those products for which FTC or ASTM guidelines exist. The FTC guideline is found in 16 Code of Federal Regulations Part 260 and 16 CFR §260.13. The ASTM guidelines are available online at ASTM's website, www.astm.org.

(C) The term does not include a product sold as fuel.

(5) Recycling rate--That percentage of the municipal solid waste stream which is recovered or diverted for recycling.

(6) Source-reduced waste--A material or product, previously or typically entering the municipal solid waste stream, which has been prevented from entering that stream through source reduction.

(7) Source reduction--Any action that averts the discarding of products or materials by reducing material use or waste at the source, including redesigning products or packaging so that less material is used, voluntary or imposed behavioral changes in the use and reuse on site of materials or products, or increasing durability or reusability of materials or products.

(8) Total municipal solid waste stream--The sum of the state's total municipal solid waste that is disposed of as solid waste, measured in tons, and the total number of tons of recyclable material that has been diverted or recovered from the total municipal solid waste and recycled.

(9) Waste stream reduction rate--That percentage of the municipal solid waste stream which is source-reduced or recovered or diverted for recycling.

SUBCHAPTER L: THIRD-PARTY CERTIFICATION SYSTEMS FOR MASS BALANCE

ATTRIBUTION

§§328.301, 328.302, 328.303, 328.304

Statutory Authority

The new sections are adopted under the authority of Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102, which provides the commission with the authority to carry out its duties and general powers under its jurisdictional authority as provided by TWC; TWC, §5.103, which requires the commission to adopt any rule necessary to carry out its powers and duties under TWC and other laws of the state; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; the Administrative Procedures Act under Texas Government Code, Chapter 2001, which authorizes the commission as a state agency to adopt rules pursuant to the rulemaking process; Texas Health and Safety Code (THSC), §361.011, which grants the commission authority over municipal solid waste; THSC, §361.017, which grants the commission jurisdiction over industrial solid waste and hazardous municipal waste; THSC, §361.024, which authorizes the commission to adopt rules consistent with the general purposes of the Solid Waste Disposal Act; THSC, §361.0151, which requires the commission to base its goals or requirements for recycling or the use of recycled materials on the definitions and principles established by Subchapter N, THSC, §§361.421 - 361.431; THSC, §361.022 and §361.023, which set public policy in the management of municipal solid waste and hazardous waste to include reuse or recycling of waste; THSC, §361.041, which conditionally excludes post-use polymers and recoverable feedstock from classification as solid waste when are converted using pyrolysis, gasification, solvolysis, or depolymerization into valuable raw materials, valuable intermediate products or valuable final products, that include plastic

monomers, chemicals, waxes, lubricants, and chemical feedstocks; THSC, §361.078 which identifies that THSC Chapter 361 Subchapter B does not abridge, modify or restrict the commission's authority to adopt rules issue permits and enforce the terms of permits as necessary to maintain state authorization of Texas' hazardous waste program; THSC, §361.119, which requires the commission to adopt rules and to adopt rules consistent with THSC Chapter 361 to ensure that solid waste processing facilities are regulated as solid waste facilities and not allowed to operate unregulated as recycling facilities; THSC, §361.4215 which authorizes the commission to identify third-party certification systems for mass balance attribution that may be used for the purposes of THSC, §361.421(6) and (6)(a); THSC, §361.425 which provides that the commission shall adopt rules for administering governmental entity recycling programs; THSC, §361.426, which provides that the commission shall adopt rules for administering governmental entity preferences for recycled products; and THSC, §361.427 which authorizes the commission to promulgate rules to establish guidelines by which a product is eligible to be considered a recycled product.

The adopted new §328.302 will implement House Bill (HB) 3060, 88th Texas Legislature, 2023, by adding the definitions of "Recycled material." "Recycled plastics." And "Recycling." so that they are consistent with the definitions under THSC, §361.421. The adopted new §328.302 will also implement HB 3060 by adding the definitions of "Recycled product" and "Third-party certification system" so that they are consistent with the definitions under THSC, §361.427 and §361.4215, respectively.

§328.301. Purpose and Applicability.

(a) Purpose. The purpose of this subchapter is to:

(1) establish guidelines by which a product is eligible to be considered a recycled product;

(2) identify what is not eligible to be considered a recycled product; and

(3) identify third-party certification systems for mass balance attribution to certify:

(A) "Recycled material";

(B) "Recycled plastics"; and

(C) the portion of the total content of a product that consists of recycled material.

(b) Applicability. This subchapter is applicable to determining that a product is eligible to be considered a recycled product and third-party certification systems for mass balance attribution.

§328.302. Definitions.

The following words and terms, when used in this subchapter shall have the following meanings, unless the context clearly indicates otherwise.

(1) Mass balance attribution--A chain of custody accounting methodology with rules defined by a "Third-party certification system" that enables the attribution of "Recycled material" and "Recycled plastics," as those terms are defined in this section, to a "Recycled product," as described in §328.304 of this title (relating to Recycled Products).

(2) Recycled material--Materials, goods, or products that consist of recovered "Recyclable material," as defined in §330.3 of this title (relating to Definitions), materials derived from "Recoverable feedstocks" or "Post-use polymers" as those terms are defined in §330.3 of this title, or postconsumer waste, industrial waste, or hazardous waste which may be used in place of a raw or virgin material in manufacturing a new product or that are certified under a "Third-party certification system" for "Mass balance attribution," as those terms are defined in this section. The term includes "Recycled plastics" as defined in this section.

(3) Recycled plastics--Products that are produced from:

(A) mechanical recycling of post-use polymers; or

(B) nonmechanical recycling of "Recoverable feedstocks" or "Post-use polymers" as those terms are defined in §330.3 of this title, that are certified under a "Third-party certification system" for "Mass balance attribution," as those terms are defined in this section.

(4) Recycling--A process by which materials that have served their intended use or are scrapped, discarded, used, surplus, or obsolete are collected, separated, or processed and returned to use in the form of raw materials or feedstocks used in the manufacture of new

products. The term includes the conversion of post-use polymers and recoverable feedstocks through pyrolysis, gasification, solvolysis, or depolymerization, but does not include waste-to-energy processes or incineration of plastics in an incinerator as defined in §335.1 of this title (relating to Definitions).

(5) Third-party certification system--An international or multinational third-party certification system that consists of a set of rules to implement "Mass balance attribution" approaches for attribution of "Recycled material" to a "Recycled product" as these terms are defined in this section.

§328.303. Third-Party Certification Systems for Mass Balance Attribution.

(a) The commission shall:

(1) maintain a list that identifies third-party certification systems for mass balance attribution; and

(2) provide a copy of that list to any person on request.

(b) Recyclable materials, as defined in §330.3 of this title (relating to Definitions), converted to fuels may not be considered for mass balance attribution for the purpose of this subchapter.

§328.304. Recycled Products.

(a) A product is eligible to be considered a recycled product when it conforms with the minimum content of recycled material as specified in the Comprehensive Procurement Guidelines (CPG) and the Recovered Materials Advisory Notice (RMAN) published by the Environmental Protection Agency (EPA) as described in §328.7(4) of this title (relating to Definitions of Terms and Abbreviations).

(b) Manufacturers may use a third-party certification system for mass balance attribution as identified under §328.303 of this title (relating to Third-party Certification Systems for Mass Balance Attribution) to identify the portion of the total content of a product which consists of recycled material and recycled plastics.