

# Texas Commission on Environmental Quality

## Interoffice Memorandum

**To:** Commissioners **Date:** March 9, 2012

**Thru:** Bridget Bohac, Chief Clerk  
Mark R. Vickery, P.G., Executive Director

**From:** Brian Christian, Division Director  
Small Business and Environmental Assistance

**Docket No.:** 2011-0988-RUL

**Subject:** Commission Approval for Rulemaking Adoption  
Chapter 328, Waste Minimization and Recycling  
SB 329: Television Equipment Recycling Program  
Rule Project No. 2011-028-328-AD

### **Background and reason(s) for the rulemaking:**

Rulemaking is necessary to implement Senate Bill (SB) 329, which amends Chapter 361 of the Texas Health and Safety Code by adding Subchapter Z, and amends §7.052 (b-1) and (b-2) of the Texas Water Code. SB 329, 82nd Legislature, Regular Session, 2011, was authored by Senator Kirk Watson and co-authored by Senators John Carona, Wendy Davis, Juan “Chuy” Hinojosa, and Royce West. SB 329 was sponsored by Representative Warren Chisum and joint-sponsored by Representative Elliott Naishtat. The bill took effect September 1, 2011.

SB 329 affects television manufacturers, television retailers, recyclers of television equipment, television consumers, and the TCEQ. While rulemaking is not specifically required, rulemaking authority is provided and adopting rules would give all affected parties clear and enforceable guidelines and requirements. Any rules needed to implement the legislation are required to be adopted by May 1, 2012.

A separate program for recycling consumer computer equipment was created by the 80th Legislature in 2007 and was implemented by adding Subchapter I to 30 TAC Chapter 328.

### **Scope of the rulemaking:**

#### **A.) Summary of what the rulemaking will do:**

The rules will help establish a program for the collection and recycling of television equipment. The rules will specify requirements for the implementation of the program, but do not create significant requirements beyond what is specified by statute. Manufacturers, retailers, recyclers, consumers, and the TCEQ will be affected by the rules.

Manufacturers include those who sell or offer for sale televisions in Texas. The rules require television manufacturers to provide recycling for Texas consumers' covered television equipment, register with the TCEQ, certify that they recycle all accepted covered television equipment in accordance with TCEQ standards, and

Re: Docket No. 2011-0988-RUL

provide reports to the TCEQ regarding their recycling activities. The rules include separate provisions regarding manufacturers who participate in a recycling leadership program (RLP), including exemptions for RLP participants from some registration and reporting requirements.

Retailers include those who sell televisions in Texas, as well as Internet retailers. The rules prohibit retailers from selling products from manufacturers who are not on TCEQ's list of registered manufacturers. The rules also require retailers to provide written information, published by the commission, to consumers on the legal disposition and recycling of television equipment.

Recyclers include those persons engaged in the business of recycling covered television equipment in the state. The rules require recyclers to register with the TCEQ, certify that they are in compliance with TCEQ standards, and certify that they recycle all accepted covered television equipment in accordance with TCEQ standards. Recyclers are also required to maintain a written record of the weight or volume of all covered television equipment received and the disposition of that equipment. Finally, the rules require recyclers to annually report to the TCEQ the total weight or volume of covered television equipment received and recycled within the preceding 12 months.

The rules encourage consumers to learn about recycling and recommended methods for recycling covered television equipment by visiting the TCEQ's or manufacturer's Web site or by calling the TCEQ's or manufacturer's toll free telephone number. The rules make consumers liable for any information, in any form, left on the consumers' covered television equipment that is collected or recycled.

The rules require the TCEQ to post an Internet list of television manufacturers: 1) whose recovery plans have been approved by the TCEQ, 2) who have certified that their public education programs comply with the rules, and 3) who have registered with the TCEQ and paid their annual registration fee. The rules also require the TCEQ to educate consumers and provide information to counties and municipalities regarding the collection and recycling of television equipment. The rules require the TCEQ to host or designate another person to host an Internet Web site and provide a toll-free telephone number to provide consumers with information about recycling covered television equipment. Additionally, the TCEQ is required to determine the annual state recycling rate of covered television equipment, and provide registered television manufacturers with their annual market share allocation for collection, reuse, and recycling. The TCEQ must also review active RLP programs and adopt standards for the recycling or reuse of covered television equipment. Finally, the rules require the TCEQ to provide biennial reports on the program to the agency's legislative oversight committees.

**B.) Scope required by federal regulations or state statutes:**

Re: Docket No. 2011-0988-RUL

Rulemaking is authorized by SB 329, which states that any rules required to implement SB 329 must be adopted by May 1, 2012.

**C.) Additional staff recommendations that are not required by federal rule or state statute:**

Staff recommends several additions to the rules beyond the requirements that are specified by statute:

- **Applicability and Effective Date (§328.163):**
  - Allow retailers to sell television equipment acquired before April 1, 2013 without incurring a penalty. The statutory deadline is September 1, 2012.
    - This change will allow retailers to sell inventory acquired prior to the commission's publication of its Internet list of manufacturers who are in compliance with Subchapter J; thereby avoiding the unintended consequence of prohibiting retailers from ordering or selling covered television equipment after the statutory deadline of September 1, 2012 and before the commission's publication of its Internet list on April 1, 2013.
- **Definitions (§328.165):**
  - Specifically define a recycler as a person who separates collected equipment and refurbishes that equipment for reuse, or processes equipment to be returned to use in the form of raw materials or products.
    - This additional definition clarifies that entities that only collect or sort equipment for recycling will not be classified as recyclers and therefore will not be subject to the requirements of recyclers.
  - Specifically define a collector as a person who receives covered television equipment from consumers and arranges for the delivery of the covered television equipment to a recycler.
    - This additional definition further clarifies which entities will be considered recyclers.
- **Manufacturer's Registration and Reporting (§328.171):**
  - Add specific requirements on how a manufacturer should complete and submit their registration information to the commission.
    - These additions clarify what is required of a manufacturer as part of their registration and help ensure manufacturer compliance with this subchapter.
- **Manufacturer's Recovery Plan and Related Responsibilities (§328.173):**
  - Add to the requirements for a manufacturer's recovery plan: (1) information for consumers on how and where to return the manufacturer's television equipment, and (2) a statement

Re: Docket No. 2011-0988-RUL

indicating by what date the manufacturer had, or will have, a compliant collection program.

- These additions clarify the responsibilities of the manufacturer and will better allow the commission to determine which manufacturers are eligible for inclusion on the commission's Internet Web site list of manufacturers.
- Recycling Leadership Program (§328.175):
  - Add a requirement that an RLP also submit to the commission a list of the 200 sites or programs planned by the program participants for the current year.
    - This addition will help the commission better ensure that an RLP's plan will meet the requirements of the subchapter.
  - Add a requirement that an RLP also submit to the commission documentation that the RLP has established a public education program regarding collection, reuse, and recycling opportunities for covered television equipment in this state.
    - An RLP must have a compliant education program in order to be listed on the commission's Internet Web site list of manufacturers. This addition is necessary for the commission to determine whether a participant in an RLP is eligible for inclusion on the Internet Web site list.
- Recycling Leadership Program Collection Report (§328.177):
  - Add three additional requirements to an RLP's biennial report: (1) separate the reporting by year; (2) document that a financial incentive of equal or greater value to any fee charged at the time of recycling is provided by the television manufacturer, if applicable; and (3) document that a participating manufacturer has, either individually or through the RLP, implemented the required public education program.
    - These requirements will help the commission ensure that an RLP is meeting the requirements of the subchapter and will help ensure consistency in the commission's legislative report.
- Retailer Responsibilities (§328.179):
  - Add language to clarify that the definition of an "order" is the entire amount of covered television equipment requested from a manufacturer at one time for the purpose of sale by the retailer.
    - This addition could help clarify how a potential enforcement action could be calculated against a retailer who orders and sells television equipment from a manufacturer not on the commission's list of manufacturers.
- Recycler Responsibilities (§328.181):
  - Add specific requirements as to how a recycler must certify that they are in compliance with the standards adopted under the subchapter.

Re: Docket No. 2011-0988-RUL

- These additions clarify exactly what is required of a recycler to certify their compliance with the subchapter and would help ensure compliance of a recycler with the rules.

**Statutory authority:**

Texas Health and Safety Code, §§361.971 - 361.992

Texas Water Code, §7.052(b-1) and (b-2)

**Effect on the:**

**A.) Regulated community:**

Television manufacturers whose televisions are offered for sale or sold to a consumer in Texas, including those manufacturers who are located outside of Texas, will be affected. There may be a fiscal impact on manufacturers in order to start up a recycling program. Additionally, manufacturers who do not participate in an RLP will be required to pay a \$2,500 annual fee to the TCEQ. However, any fiscal implications for manufacturers are not expected to be significant.

Retailers who offer for sale or sell televisions to consumers in Texas, including Internet retailers, will be affected. No significant fiscal impact is anticipated.

Recyclers who accept television equipment for recycling will be affected. Some recyclers may be required to change or adopt new recycling standards in order to comply with the rules. These affected recyclers may realize some fiscal impact as they conform to the new standards.

**B.) Public:**

Consumers who have, or will have in their possession, covered television equipment should be positively affected by the rules. There is no significant fiscal impact expected for consumers.

**C.) Agency programs:**

Several agency programs will be affected by the rules. Staff proposes to divide the work as follows:

- The Small Business and Environmental Assistance Division (SBEA) will conduct necessary reviews of manufacturer recovery and education plans; perform consumer education, including the development of necessary materials; make updates to and ensure maintenance of the required Web page and telephone number; conduct compliance assistance for manufacturers; determine and provide to manufacturers the annual state recycling rate and market share allocation; and develop the biennial report to the legislature.
- The Waste Permits Division will facilitate the registration and annual registration renewal for recyclers and will accept manufacturer recovery plans.

Re: Docket No. 2011-0988-RUL

- The Permitting and Registration Support Division will accept manufacturer registrations and fees.
- The Financial Administration Division will work with the Permitting and Registration Support Division to facilitate manufacturers' annual payment of the \$2,500 fee.
- Field Operations and Enforcement staff will conduct compliance and enforcement tasks on an as-needed basis.

The rules do not create a group of affected persons who are not already affected by statute.

**Stakeholder meetings:**

A stakeholder meeting was held on July 7, 2011, prior to drafting of the rules. Stakeholders included television manufacturers, environmental groups, the general public, councils of government, local governments, and electronics recyclers. Because the stakeholder meeting was held prior to drafting of the rules, the rule proposal was drafted using stakeholder input.

During the stakeholder meeting, there was discussion about the following issues:

- Establishing market share amounts and recycling rates for manufacturers. Some stakeholders voiced concern about the lack of incentive for manufacturers to recycle significant amounts in an attempt to keep market share requirements low.
- Possibilities for mail-back programs. Stakeholders discussed how mail-back options could be a benefit to rural communities and also raised potential feasibility issues.
  - Concern was raised about hazardous material leaking from improperly packaged televisions. Language in adopted §328.175(d)(2) addresses this comment.
- Responsibilities for recyclers, including how a recycler is defined for this program.
  - Stakeholders suggested clarification to the definition of a recycler, including whether a city collecting electronics would be considered a recycler. Adopted §328.165 includes a definition of a recycler to clarify that a person who solely collects covered television equipment for recycling would not be considered a recycler.
- Environmental management standards for the program, including which certification criteria would be used and how it would be enforced.
  - Some stakeholders suggested the use of several certification criteria including Recycling Industry Operating Standards (RIOS), Responsible Recycling (R2), e-Stewards, and third-party auditing. TCEQ staff researched the suggested standards and determined that the proposed standards, also used in the Computer Equipment Recycling Program (CERP), would provide regulatory consistency to recyclers, help ensure

Re: Docket No. 2011-0988-RUL

efficient implementation, and provide the same level of environmental protection as adopting other suggested standards.

- Ensuring consumer education. Stakeholders discussed how to inform consumers about the issue of liability and what kind of outreach the TCEQ is required to conduct using the manufacturer fees.
  - TCEQ staff clarified that the statute lists the specific uses for the manufacturer registration fees collected, which are to maintain the public Internet Web site and toll-free telephone number.

**Public comment:**

The commission received over 600 comments from individuals, organizations, and businesses. Four attendees provided oral comments at the public hearing on December 13, 2011.

The major concerns identified during the public comment period include the following:

- **Public Interest and Education.** The commission received many comments that encouraged the commission to put public interest first in its adoption and implementation of the rules. Numerous comments also expressed concern over ensuring that the public is educated about the television equipment recycling program.
- **Convenient Recycling Options.** Many individuals commented that television manufacturers need to offer collection methods that are readily available to consumers. In particular, the commission received numerous comments expressing concern over television manufacturers using mail-back programs or post offices as collection sites.
- **Definitions.** Concern was raised that the proposed definition of a recycler would not adequately clarify which entities should be subject to the requirements of a recycler. The commission received suggested definitions for both a “recycler” and a “collector.”
- **Recycling Leadership Program.** Concern was raised that a community who collects televisions at the curbside would be prohibited from having their collected televisions count toward an RLP’s program.
- **Commission Responsibilities.** Several commenters expressed concern over the timeline delineated by the rules. Specific comments included: (1) suggestions that the commission should require RLPs to submit their first reports in 2014 in order to include RLP’s reporting information in the commission’s report to the legislature; (2) suggestions that the commission should provide the recycling rate and manufacturer market share allocation before the respective November 1 and December 1 deadlines; and (3) suggestions that, since the manufacturers must begin their program by April 1, 2013, the commission should extrapolate the nine months of data to 12 months in order to set the market share allocations for 2014.
- **Management of Collected Television Equipment.** The commission received numerous comments in opposition to the adoption of the portions of the 2006

Re: Docket No. 2011-0988-RUL

Institute of Scrap Recycling Industries, Incorporated (ISRI) standards. Specific comments regarding the opposition to the adopted standards include: (1) concerns that the adopted standards are outdated or superseded by other standards; (2) suggestions that the commission should require recyclers to obtain third-party certification from R2 or e-Stewards, or to follow the R2 or e-Stewards standards; and (3) assertions that the e-Stewards and R2 standards are more protective of the environment than the adopted standards.

- Amount of Penalties. The commission received a comment suggesting that manufacturers who miss their market share allocations will have failed to implement a compliant recovery plan and should be subject to the maximum amount of penalties provided for by the statute.

**Significant changes from proposal:**

In response to comments, the commission further clarified the proposed definition of a “recycler” and added a definition of a “collector.” These additions will help clarify which entities are subject to the requirements facing recyclers.

**Potential controversial concerns and legislative interest:**

- Management of Collected Television Equipment:
  - SB 329 instructs the commission to adopt “as standards for recycling or reuse of covered television equipment in this state the standards provided by 'Electronics Recycling Operating Practices' as approved by the board of directors of ISRI, April 25, 2006, or other standards from a comparable nationally recognized organization.” The commission received numerous comments in opposition to adopting portions of the 2006 ISRI standards.

Many commenters suggested that the commission should require recyclers of covered television equipment or television manufacturers to obtain third-party R2 or e-Stewards certifications. SB 329 does not mandate that recyclers of covered television equipment receive R2 or e-Stewards certification.

Many commenters suggested that the commission follow the R2 or e-Stewards standards. Both R2 and e-Stewards are meant to be used in their entirety, and meeting only portions of the standards is not considered compliance by those organizations. An e-Stewards representative explained that in order to comply with the standards an accredited certification body must verify conformity to all of the standards. No one can simply claim that they meet e-Stewards standards, as they are trademarked and protected. According to e-Stewards, this prevents a company from touting their conformity to the e-Stewards standards when there has been no independent accredited certification to verify their compliance. It also ensures that the e-Steward standards are applied in a uniform manner.

If the commission were to require certification by e-Stewards, the commission would be unable to provide recyclers with copies of the

Re: Docket No. 2011-0988-RUL

standards. Recyclers would be required to purchase the e-Stewards standards and obtain certification from that organization. This raises issues of transparency.

Requiring certification by either R2 or e-Stewards would also place an additional financial burden on recyclers, many of which are small businesses, by requiring them to invest in attaining certification.

Furthermore, much of the R2 and e-Stewards standards deal with activities and practices that fall outside of the commission's jurisdiction. The commission cannot regulate activities and practices that are beyond its jurisdiction. During the adoption of the CERP rules in 2008, the commission specifically adopted only portions of the ISRI standards that fell within the commission's jurisdiction. Requiring recyclers to certify compliance with either R2 or e-Stewards standards would leave the television recycling rules subject to challenge on the basis that the commission exceeded its rulemaking authority.

The Executive Director has determined that the adopted portions of the standards approved by ISRI's board of directors on April 25, 2006 will provide regulatory consistency between the television recycling program and the CERP, and are just as protective as other electronic recycling standards from comparable nationally recognized organizations that are within the commission's jurisdiction. Having a consistent set of standards between the television recycling program and the CERP will assist the commission in administering the television recycling program. For example, an investigator inspecting an electronics recycler would be able to reference one set of recycling standards to determine compliance with both the television recycling program and the CERP. A consistent set of standards between the two programs also minimizes the regulatory burden placed on electronics recyclers who recycle both computer equipment and covered television equipment.

After researching electronics recycling standards from comparable nationally recognized organizations, including the R2, RIOS, and e-Stewards standards, the Executive Director has determined that the adopted portions of the ISRI standards are equally protective. Recycling facilities already face a number of regulations under the commission's jurisdiction that are meant to protect the environment and discourage sham recycling. TCEQ staff have found no correlation between certification by a private entity and compliance with TCEQ rules.

- Use of mail-back programs or post offices as collection sites:
  - The commission received numerous comments expressing concern over manufacturers using only mail-back programs or using only post offices as

Re: Docket No. 2011-0988-RUL

collection sites. A few commenters suggested that the commission should not allow a mail-back option at all and that the commission could automatically reject a plan that relies exclusively on a mail-back program.

The Executive Director respectfully disagrees with the assertion that the commission could automatically reject a manufacturer's plan that relies exclusively on a mail-back program. SB 329 lists three options for an RLP to meet the requirement of 200 sites or programs, including use of a mail-back program. As written, the legislation allows an RLP to use any combination of the three options, or even just one option. Furthermore, SB 329 does not require manufacturers to utilize a specific collection method. The statute and the rules allow manufacturers the flexibility to develop programs that will work best for their customers. If a television manufacturer can provide an effective mail-back program, both the statute and rules allow it. An RLP may consider a post office location to be counted as either a single collection site or a single collection method for the purposes of complying with §328.175(b).

- Legislative Interest:
  - An exchange between Representative Chisum and Representative Aliseda expressed an interest in monitoring the implementation of the program to ensure that it does not have just a few television manufacturers recycling and reporting large numbers for the benefit of all manufacturers participating in an RLP.
  - While not reduced to the written record, Senator Watson stated on the floor of the Senate that the bill language leaves the commission discretion and flexibility to update the recycling standards. Stakeholders may take that flexibility to encourage the commission to adopt standards more stringent than ISRI. As noted, staff evaluated other standards as part of this rulemaking.

**Does this rulemaking affect any current policies or require development of new policies?**

This rulemaking will not affect current policy or require the development of new policy.

**What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking?**

Although rulemaking is not specifically required, without rules in place, the agency might spend more time and resources implementing the program on an ad hoc basis.

**Key points in the adoption rulemaking schedule:**

**Texas Register proposal publication date:** Nov. 18, 2011

**Anticipated Texas Register publication date:** April 13, 2012

**Anticipated effective date:** May 1, 2012

**Six-month Texas Register filing deadline:** May 18, 2012

Commissioners

Page 11

March 9, 2012

Re: Docket No. 2011-0988-RUL

**Agency contacts:**

**Cynthia Carter**, Rule Project Manager, 239-0989, Small Business and Environmental Assistance

**Tim Reidy**, Staff Attorney, 239-0969

**Michael Parrish**, Texas Register Coordinator, 239-2548

cc: Chief Clerk, 2 copies  
Executive Director's Office  
Susana M. Hildebrand, P.E.  
Anne Idsal  
Curtis Seaton  
Ashley Morgan  
Office of General Counsel  
Cynthia Carter  
Michael Parrish