

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners

Date: October 14, 2011

Thru: Bridget C. 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 Proposed Rulemaking
Chapter 328, Waste Minimization and Recycling
SB 329: Television Equipment Recycling Program
Rule Project No. 2011-028-328-AS

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 would help establish a program for the collection and recycling of television equipment. The rules would specify requirements for the implementation of the program, but would not create significant additional requirements than are specified by statute. Manufacturers, retailers, recyclers, consumers, and the TCEQ would be affected by the rules.

Manufacturers include those who sell or offer for sale televisions in Texas. The rules would 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 provide reports to the TCEQ regarding their recycling activities. The rules would

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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 would prohibit retailers from selling products from manufacturers who are not on TCEQ's list of registered manufacturers. The rules would also require them 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 would 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 would also be required to maintain a written record of the weight of all covered television equipment received and the disposition of that equipment. Finally, the rules would require recyclers to annually report to the TCEQ the total weight of covered television equipment received and recycled within the preceding 12 months.

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

The rules would 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 would also require the TCEQ to educate consumers and provide information to counties and municipalities regarding the collection and recycling of television equipment. The rules would require the TCEQ to host or designate another person to host an Internet website and provide a toll-free telephone number to provide consumers with information about recycling covered television equipment. Additionally, the TCEQ would be 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 would also be required to review active RLP programs, and adopt standards for the recycling or reuse of covered television equipment. Finally, the rules would 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:

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

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

Staff recommends that the TCEQ exercise the rulemaking authority provided by SB 329 and add Subchapter J to Chapter 328 to provide all affected parties with clear and enforceable guidelines and requirements.

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 proposed change would 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 definition of a recycler would clarify that entities that only collect equipment for recycling would not be classified as a recycler and therefore would not be subject to the requirements of a recycler.
- **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 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 website 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.

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- This addition will help the commission better ensure that an RLP's plan will meet the requirements of the subchapter.
- 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.
 - 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, would 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 would be required by statute 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, would be affected. No significant fiscal impact is anticipated.

Recyclers who accept television equipment for recycling would be affected. Some recyclers may be required to change or adopt new recycling standards in order to

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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 would 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 provide review for 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.
- 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 would 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:

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- 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 proposed §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 count as a recycler. Proposed §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 RIOS, 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, ease 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 website and toll-free telephone number.

Potential controversial concerns and legislative interest:

The legislation requires 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 the Institute of Scrap Recycling Industries, Inc. (ISRI), April 25, 2006, or other standards from a comparable nationally recognized organization. During rulemaking for the CERP, whose statute contained the same language, many stakeholders asked the TCEQ to adopt portions of the ISRI standards that the TCEQ did not have the authority to adopt, such as bans on prison labor and export to foreign countries. During rulemaking for the Television Equipment Recycling Program, stakeholders suggested that the TCEQ adopt entirely different standards for recycling or reuse of covered television equipment than is used for the CERP.

Adopting the portions of the ISRI standards that fall under the commission's jurisdiction, rather than other standards from a comparable nationally recognized organization, would

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provide regulatory consistency to recyclers because the same standards are used in the CERP. It would also help the commission more efficiently implement the program in that investigators would have a consistent set of standards to use when reviewing a recycler. Using a different set of standards could have a negative impact on small businesses, in particular, that would be required to comply with two different sets of standards for electronics recycling.

TCEQ staff researched standards from other nationally recognized organizations, including the R2, RIOS, and e-Stewards standards. The RIOS standards were last revised in March of 2006, making them less current than the proposed April 2006 ISRI standards. Staff also determined that much of the R2 and e-Stewards standards fall outside of the commission's jurisdiction. The commission could not require a recycler to attain certification from an entity if the commission does not have jurisdiction over all standards used for the certification.

Further, the proposed portions of the ISRI standards are as protective of the environment as the portions of the R2 and e-Stewards standards where the commission does have jurisdiction. Recycling facilities already face a number of regulations under the commission's jurisdiction that are meant to ensure the safe management of waste and adopting an additional set of standards would not increase that protection. TCEQ staff have found no correlation between certification by a private entity and their compliance with TCEQ rules.

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 are evaluating other standards as part of this rulemaking.

Rulemaking for the CERP received over 15,000 comments.

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

This rulemaking would 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?

One alternative to rulemaking would be to not conduct rulemaking, and implement the program with only the amended statute in place. While this may save time and conserve

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agency resources in the short run, without rules in place, the agency might spend more time and resources implementing the program on an ad hoc basis. Staff recommends proceeding with rulemaking.

Key points in the proposal rulemaking schedule:

Anticipated proposal date: Nov. 2, 2011

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

Public hearing date (if any): Dec. 13, 2011

Public comment period: Nov. 18, 2011 - Dec. 19, 2011

Anticipated adoption date: Mar. 28, 2012

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