

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners

Date: July 18, 2014

Thru: Bridget C. Bohac, Chief Clerk
Richard A. Hyde, P.E., Executive Director

From: Steve Hagle, P.E., Deputy Director
Office of Air

Docket No.: 2013-2090-RUL

Subject: Commission Approval for Rulemaking Adoption
Chapter 17, Tax Relief for Property Used for Environmental Protection
Chapter 18, Rollback Relief for Pollution Control Requirements
HB 1897: Exemption from Ad Valorem Taxation of Pollution Control
Property
Rule Project No. 2013-045-017-AI

Background and reason(s) for the rulemaking:

30 Texas Administrative Code (TAC) Chapter 17 implements Texas Tax Code (TTC), §11.31, which requires the commission to determine whether property is used wholly or partly as pollution control property (referred to as *use determinations*). 30 TAC Chapter 18 implements TTC, §26.045, which requires the commission to determine whether property is used to meet pollution control requirements while applying the rollback tax rate for a political subdivision.

In 2007, House Bill (HB) 3732 (80th Legislature, 2007 Regular Session) amended TTC, §11.31 by adding subsections (k), (l), and (m) and §26.045 by adding subsections (f), (g), and (h). TTC, §11.31(k) and §26.045(f) required the commission to adopt a list containing 18 categories of equipment, while TTC, §11.31(m) and §26.045(h) required the executive director to issue a use determination within 30 days of receiving the application for equipment listed in §11.31(k) (referred to as the *Expedited Review List (ERL)*) or §26.045(f) (referred to as the *Equipment and Categories List (ECL)*). TTC, §11.31(l) and §26.045(g) required the commission to update the adopted lists at least once every three years and authorized the commission to remove any item from the list if it found compelling evidence that the item does not provide pollution control benefits. The last rulemaking to review the lists was completed on November 18, 2010, when the ECL located in Chapter 17 was converted into the Tier I Table and the ERL. Chapter 18 was not reviewed during the November 2010 rulemaking and currently contains the ECL. This rulemaking is necessary to review the Tier I Table and the ERL located in Chapter 17 and to place these updated lists in Chapter 18 as replacements to the ECL. Chapter 18 will also be updated to reflect amendments made to Chapter 17 in the November 2010 rulemaking.

In addition, HB 1897 (83rd Legislature, 2013, Regular Session) by Representative Eiland added §11.31(e-1) to the TTC. TTC, §11.31(e-1) requires the executive director to issue a use determination letter and the commission to take final action on an initial use determination appeal, if made, within one year from the date the executive director

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declares the application to be administratively complete. The commission is required to adopt rules implementing TTC, §11.31(e-1) by September 1, 2014. This adoption implements this requirement by amending §17.12.

Scope of the rulemaking:

This rulemaking amends Chapter 17 in order to implement HB 1897 and revises the Tier I Table as part of the triennial review required by §17.14(b). Staff have reviewed the ERL and determined no revisions are necessary at this time. Therefore, revisions to §17.17 were not made. In addition, this rulemaking amends Chapter 18 by adopting the updated Tier I Table and the ERL and by making various amendments to bring the language and style into agreement with Chapter 17.

A.) Summary of what the rulemaking will do:

30 TAC §17.4 was amended by removing a reference to §17.15, which was repealed during the 2010 rulemaking. HB 1897 requires the initial appeals process to be completed within one year of the application being declared administratively complete. The appeals process requires 135 days. This leaves 230 days for the technical review process. HB 1897 will be implemented by amending §17.12 to limit the number of administrative and technical notices of deficiency letters to allow the executive director to end the technical review process if it is determined that the applicant has not provided a technically complete application; limiting the technical review process to a total of 230 days from the day the application is declared to be administratively complete; and requiring the executive director to issue a negative determination if an application is considered to be incomplete after 230 days. The negative use determination will be based on the failure of the applicant to document the eligibility of the property for a positive use determination.

The Tier I Table located in §17.14(b) was updated to reflect the appropriate eligibility of equipment contained on the list. The adopted rulemaking modified property names and descriptions to better reflect the equipment eligible for a 100% positive use determination. The proposal suggested the removal of items A-42: Chlorofluorocarbon (CFC) Replacement Projects; A-43: Halon Replacement Projects; A-67: Automotive Dynamometers; W-58: Water Recycling Systems; W-62: Recycled Water Cleaning System; S-27: Concrete Reclaiming Equipment; M-5: Solvent Recovery Systems; M-6: Boxes, Bins, Carts, Barrels, Storage Bunkers; and M-17: Low NOx Combustion System for Drilling Rigs and the modification of items A-186: Blast Cleaning System – Connected to a Control Device and M-4: Compactors, Barrel Crushers, Balers, Shredders. After careful review of and consultation with the Tax Relief for Pollution Control Property Advisory Committee, the executive director recommends that the commission not remove or modify these items from the Tier I Table.

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TTC, §11.31(l) requires the Texas Commission on Environmental Quality (TCEQ) to update the list adopted under §11.31(k) at least once every three years. This list was adopted as the ERL in §17.17(b). The ERL was reviewed and no changes were proposed.

When Chapter 18 was originally adopted, the rules were substantially the same as Chapter 17. However, Chapter 18 was not opened during the 2010 rulemaking. Therefore, this rulemaking also amends Chapter 18 to bring it into agreement with Chapter 17. This rulemaking repealed definitions that are not necessary and amended definitions in response to other adopted changes contained in this rulemaking. Part A of the ECL was repealed and replaced with the Tier I Table located in §17.14(a) with the amendments made in this rulemaking. Part B of the ECL was repealed and replaced with the ERL located in §17.17(b). References to the ECL were replaced with appropriate references to the Tier I Table and the ERL.

TTC, §26.045(g) requires the TCEQ to update the list adopted under §26.045(f) at least once every three years. This list was Part B of the ECL, which is being repealed and replaced with the ERL. The ERL was been reviewed and no changes were proposed.

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

HB 1897 requires the TCEQ to implement the requirements of §11.31(e-1) by September 1, 2014. The review of the ERL is required by TTC, §11.31(l) and §26.045(g).

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

Adopted amendments to Chapter 18 to bring it into agreement with Chapter 17 were not required by federal or state statute but were adopted to improve the administration of Chapter 18.

Statutory authority:

TTC, §11.31 and §26.045
Texas Water Code, §5.102 and §5.103

Effect on the:

A.) Regulated community:

It is anticipated that the impact of this review of the ERL and the Tier I Table on the regulated community will be limited.

The proposed amendment to 30 TAC §17.4(c) is administrative in nature and will have no impact on any group. The proposed amendment of 30 TAC §17.12 will impact the regulated

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community by limiting the number of opportunities applicants have to provide additional information during the technical review process. The current process allows for up to three technical notices of deficiency to be issued with the applicants having 33 days from the day the letter is mailed to respond. Currently, staff has the discretion to grant extensions of up to 14 days on the notice of deficiency response deadline. Staff also have 60 days to conduct the initial technical review and the technical information associated with each notice of deficiency response. To meet the statutory time frame, technical notices of deficiency letters will be limited to two, and no extensions to response deadlines will be granted. The amendment will benefit the regulated community and appraisal districts by expediting the use determination issuance and appeal process.

Impacts related to the replacement of the ECL with the updated Tier I Table and the ERL and the other proposed amendments to Chapter 18 are anticipated to be limited. To qualify for rollback relief, a political subdivision must install equipment or make process changes that are intended to meet a requirement of a permit issued by the TCEQ and be funded out of maintenance and operations funds as defined in TTC, §26.012(16). This process limits the applicability of the exemption to cases where a political subdivision knows that expenditure must be made in a future fiscal year in time to budget for the expenditure out of maintenance and operations funds. These capital items are traditionally funded with bond money. This section of the tax code has been in place for 20 years and only two applications have been approved; i.e., one in 1995 and one in 2001.

B.) Public:

The legislative changes and the adopted amendments to §§17.4, 17.12, and 17.14 and §§18.2, 18.10, 18.15, 18.25, 18.30, and 18.35, and the new §18.26 will have no impact on the public.

C.) Agency programs:

The adopted amendments to §§17.4, 17.12, and 17.14 will have a limited impact on staff. The changes required by HB 1897 will require staff to track application review times in order to ensure that use determinations are issued in a timely manner. The adopted amendment to Chapter 18 will have no impact on staff. Since no change was adopted to the appeals time frame, there is no impact.

Stakeholder meetings:

The members of the Tax Relief for Pollution Control Property Advisory Committee established under TTC, §11.31(n) were informed at their September 6, 2013 meeting that the ERL and the Tier I Table were under review. The committee meetings are open to the public. The committee provided comment on the lists at its March 27, 2014 meeting. The committee subsequently filed written comments.

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Public comment:

The commission scheduled a public hearing in Austin on April 3, 2014; however, the commission did not officially open the hearing because no one registered to provide comments. The public comment period closed April 14, 2014. The commission received comments from the Tax Relief for Pollution Control Property Advisory Committee (TRPCPAC), Jackson Walker, Association of Electric Companies of Texas (ACET), Freescale Semiconductor, Inc. (Freescale), Texas Association of Business (TAB), Texas Taxpayers and Research Association (TTRA) and one individual. Jackson Walker, ACET, Freescale, and TAB expressed support for the proposed rules. Significant public comments and responses are summarized as follows.

- TRPCPAC, Jackson Walker, Freescale, TTRA, AECT, and TAB commented that items A-186, W-58, W-62, S-27, M-4, M-5, and M-6 should not be eliminated from the Tier I Table. *After careful consideration of these comments and the discussion by the TRPCPAC at its March 27, 2014 meeting, the commission has decided not to remove property from the Tier I Table as was originally proposed. Although all equipment that was proposed to be deleted will be retained on the Tier I Table, the executive director will evaluate Tier I applications as stated in the introduction to the Tier I Table to determine if a Tier III application would be more appropriate. If the executive director determines that the equipment is not being used in a standard manner (e.g., use in production or recovery of a marketable product), the executive director may require that a Tier III application, using the Cost Analysis Procedure, be filed by the applicant to calculate the appropriate use determination. The proposed rule was revised in response to these comments.*
- Jackson Walker commented that the commission should clarify preamble statements that imply that Tier I can only include 100% pollution control items. Freescale and TAB commented that there is nothing in statute or rule that restricts the Tier I list to only 100% exempt items. *The items listed on the Tier I Table are all listed as eligible for a 100% positive use determination as long as the property is used in the manner described in the table and the use of the property does not generate a marketable product. The Tier I Table does not list any pollution control equipment that is eligible for a pre-determined partial use determination percentage. The executive director does not have sufficient information to establish a partial use determination percentage that can be applied to all applicants for the same piece of equipment. If an item is used in a manner different from that described on the list or if the use of the property generates a marketable product, a Tier III application requesting a partial use determination is required. No change was made to the proposed rule in response to these comments.*
- Jackson Walker, AECT, and Freescale commented that the commission should clarify preamble statements that imply that no recycling system can qualify for a 100% positive use determination. *The commission agrees that some recycling*

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systems may be eligible for a 100% positive use determination. Any statements that implied that recycling systems were not eligible for a 100% positive use determination have been removed.

- AECT, Jackson Walker, Freescale, TAB, and TTRA commented on several portions of the Chapter 17 rules related to the term *marketable product* and the Cost Analysis Procedure (CAP) calculation, which were not proposed for revisions in this rulemaking, citing concerns with how these portions of the rule were written or how the rules were being interpreted. Commenters suggested revisions to these portions of the rule. *The commission did not propose any amendments to §17.2 and the definition of **marketable product** or to §17.17 as part of this rulemaking and cannot amend the section now in response to comments. The commission is required to have rules that allow for use determinations that distinguish the proportion of property that is used to control, monitor, prevent, or reduce pollution from the portion of property that is used to produce goods or services. The inclusion of marketable product in the Cost Analysis Procedure captures the production value of a piece property. The commission agrees that the method used to calculate partial positive use determinations, including all of its variables, could be reexamined. The commission believes that these issues should be discussed first by TRPCAC and that rulemaking could occur after the committee has reached consensus. Because of the complexity of the issue and the differing viewpoints of the various stakeholders, the commission would appreciate specific advice from TRPCAC before deciding to launch a significant rulemaking project. No change was made to the proposed rule in response to these comments.*
- Jackson Walker, Freescale, and TAB commented that the proposed removal of A-42 and A-43 from the Tier I table requires discussion of how the executive director interprets the environmental citation requirement and what it means to *meet or exceed* an environmental rule. AECT commented that TCEQ is interpreting the *meet or exceed* requirement to mean that the regulatory citation provided by the applicant must require the specific pollution control property for which the use determination is sought. *The requirement that the property must be installed to meet or exceed an adopted environmental law, rule, or regulation is located in §17.4 was not proposed for this rulemaking. The purpose of this tax relief program is to provide tax relief for businesses required by law to use or possess pollution control devices or equipment. The commission does not interpret **meet or exceed** to mean that the cited law, rule, or regulation must specify the pollution control property to be used. The commission interprets **meet or exceed** to mean a rule citation that compels the use, construction, acquisition, or installation of pollution control equipment. No change was made to the proposed rule in response to these comments*
- Jackson Walker and Freescale commented that the commission should interpret the phrase *wholly or partly to meet or exceed rules or regulations* to include situations:

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(1) where an environmental rule sets a goal, target, or general standard that the property assists in achieving; and (2) where an environmental rule has been duly adopted but does not apply to the facility because of the timing of the property's installation or the manner in which it is utilized. *The purpose of this tax relief program is to provide tax relief for businesses required by law to use or possess pollution control devices or equipment. The commission does not agree that rules that establish unenforceable goals or targets or which require the development of an unenforceable plan qualify as the type of environmental rule contemplated by the Texas Tax Code and the Constitution. If a cited environmental law has a **grandfathering** provision or an effective date such that the property owner is not subject to the law, then the property is not used, constructed, acquired, or installed to meet or exceed a law, rule, or regulation adopted by any environmental protection agency of the United States, Texas, or a political subdivision of Texas for the prevention, monitoring, control, or reduction of air, water, or land pollution. No change was made to the proposed rule in response to these comments.*

- Jackson Walker and Freescale commented that the commission should affirm that rules promulgated under the TCEQ's pollution prevention, recycling, and water conservation programs qualify as the type of environmental rule contemplated by the Texas Tax Code and the Constitution. *The commission agrees that rules promulgated under the TCEQ's pollution prevention, recycling, and water conservation programs qualify as the type of environmental rule contemplated by the Texas Tax Code and the Constitution as long as the pollution control property is used, constructed, acquired, or installed wholly or partly to meet or exceed the rule. The purpose of this tax relief program is to provide tax relief for businesses required by law to use or possess pollution control devices or equipment. Rules that establish unenforceable goals or targets or require the development of a plan do not qualify as the type of environmental rules contemplated by the Texas Tax Code and the Constitution because the owner of the property is not required to use, construct, acquire, or install it. No change was made to the proposed rule in response to these comments.*

Significant changes from proposal:

The proposal included the removal of items A-42, A-43, A-67, W-58, W-62, S-27, M-5, M-6, and M-17 and the modification of items A-186 and M-4 on the Tier I Table. In response to comments received, the executive director recommends that the commission not remove or amend these items at this time.

Potential controversial concerns and legislative interest:

Some of the commenters urged the commission to immediately initiate another rulemaking to revisit the formula for determining partial positive use determinations

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instead of the CAP in current rule 30 TAC §17.17. Because §17.17 was not opened during the proposal, revisions to the CAP could not be addressed as part of this rulemaking.

No stakeholders expressed concerns about limiting the opportunity to extend the notice of deficiency response deadlines and limiting the opportunities for providing additional information requested by agency staff. Since the review time frame being implemented in 30 TAC §17.12 is in response to HB 1897, there may be legislative interest in order to ensure that TTC, §11.31(e-1) is effectively implemented.

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

The Standard Operating Procedures for the Tax Relief for Pollution Control Property program will need to be updated to reflect the changes made to the application review process.

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

Failure to adopt amendments to §17.12 in order to meet the requirement to implement TTC, §11.31(e-1) and failure to conduct the required review on the equipment lists would result in the TCEQ being out of compliance with the TTC.

Key points in the adoption rulemaking schedule:

Texas Register proposal publication date: March 14, 2014

Anticipated *Texas Register* adoption publication date: August 22, 2014

Anticipated effective date: August 28, 2014

Six-month *Texas Register* filing deadline: September 14, 2014

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Attachments

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