

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts the amendments to §17.2, Definitions; §17.4, Applicability; §17.10, Application for Use Determination; §17.12, Application Review Schedule; and §17.20, Application Fees. The commission also adopts new §17.15, Review Standards; §17.17, Partial Determinations; and §17.25, Appeals Process.

Sections 17.2, 17.12, 17.15, 17.17 and 17.25 are adopted *with changes* to the proposed text as published in the September 28, 2001, issue of the *Texas Register* (26 TexReg 7420) and will be republished. Sections 17.4, 17.10, and 17.20 are adopted *without change* and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The program for providing tax relief for pollution control property was established under a constitutional amendment listed as Proposition 2 on the state ballot on November 2, 1993. This amendment added §1-1 to the Texas Constitution, Article VIII, which provides, in part, that “{t}he legislature by general law may exempt from ad valorem taxation all or part of real and personal property used, constructed, acquired, or installed wholly or partly to meet or exceed rules or regulations adopted by any environmental protection agency...for the prevention, monitoring, control or reduction of air, water, or land pollution.” The 73rd Legislature added §11.31, Pollution Control Property, to Texas Tax Code (TTC), Chapter 11 and §26.045 to TTC, Chapter 26 to implement the new constitutional provision. In accordance with TTC, §11.31, obtaining a tax exemption for pollution control property is a two-step process. First, the person seeking the exemption must obtain a positive determination from the commission that the property is used wholly or partially for pollution control (i.e., to meet or exceed environmental regulatory requirements). Second, once a person obtains a

positive determination, it then applies to the local appraisal district, which completes the second step by granting the tax exemption.

The commission adopted Chapter 277 of its regulations on September 30, 1994, to establish the procedures for obtaining a use determination for pollution control property under Proposition 2. In 1998, Chapter 277 was changed to Chapter 17 to be consistent with the commission's policy to place general or multimedia rules within the Chapter 1 - 100 series of the commission's rules in Title 30 of the Texas Administrative Code (TAC).

In 2000, program staff assembled a workgroup consisting of representatives of industry, appraisal districts, taxing authorities, and consumer and environmental groups to discuss potential changes to the program guidelines manual, which describes procedures for processing use determination applications, including applications for property that is used only partially for pollution control. Potential changes developed in meetings with the workgroup were discussed with the commission at a work session in November 2000. Based on guidance provided at that work session, in January 2001, a number of changes were made to the procedures set out in the program guidelines document for processing use determination applications. These changes include revision of the standards used for determining if property qualifies as pollution control property, the establishment of a cost analysis procedure for calculating partial determinations, and the development of several definitions as discussed in the SECTION BY SECTION DISCUSSION. The program guidelines document, as revised, forms the basis for this rulemaking in the implementation of House Bill (HB) 3121, enacted by the 77th Legislature, 2001.

House Bill 3121 amended TTC, §11.31 in several respects. First, HB 3121 requires that the commission adopt specific standards for considering applications to ensure that use determinations, including partial determinations, are equal and uniform. Second, HB 3121 creates an appeals process for a person seeking a use determination from the executive director (ED), or for the chief appraiser of the appraisal district for the county in which the property is located. Third, HB 3121 requires the commission's ED to provide a copy of the use determination to the chief appraiser of the appraisal district for the county in which the property is located.

The adopted amendments to Chapter 17 and the adopted new sections in Chapter 17 will implement the requirements of HB 3121. In addition, the adopted change to §17.20 will raise the Tier I application fee from \$50 to \$150. This fee increase is necessary for the commission to continue to recover its operating costs to run the use determination program. There is a variable mix of Tier I, Tier II, and Tier III applications from year-to-year and the total revenue generated by the program for the last two years has been insufficient to meet budgetary requirements. Since the program is required to be self-funded in accordance with TTC, §11.31, fees must be increased. The vast majority of applications submitted each year are Tier I. Also, the complexity of Tier I applications has increased over the last several years, requiring increased staff time to review them. It is appropriate, therefore, to increase the Tier I fee in order to recoup a higher percentage of the operating costs attributable to processing those applications.

SECTION BY SECTION DISCUSSION

The adopted changes to §17.2 include the addition of language to clarify that terms used in this chapter

are also used in the field of property taxation, not just pollution control; and the addition of the following term definitions: byproduct, capital cost new, capital cost old, cost analysis procedure, decision flow chart, partial determination, production capacity factor, Tier I, Tier II, and Tier III. These terms are used in new §17.15 and §17.17 and the definitions are needed to explain the cost analysis procedure. In response to comments, §17.2(10) and §17.2(14) have been changed from the proposed language and §17.2(15) has been added. Section 17.2(10) has been changed to reflect that new property receives the same treatment as replacement property and §17.2(14) has been changed to explain that a use determination includes the percentage of the property that is considered to be pollution control property. New §17.2(15) has been added to define “use determination letter.”

The adopted changes to §17.4 will correct a grammatical error and add a requirement for the ED to follow the standards established within this chapter in making a final use determination on pollution control property.

The adopted change to §17.10 will add a requirement that for property which is not used wholly for pollution control purposes, the cost analysis procedure listed in §17.17 must be followed and the calculation must be shown in the application and that the Decision Flow Chart, §17.15, must be included in the application.

The adopted change to §17.12 will add a requirement that the ED provide a copy of the final use determination to the appraisal district where the property is located. The final use determination contains a description of the pollution control property for which a use determination was requested. In

response to a comment, §17.12(3)(C) has been changed to clarify that a copy of the use determination will be enclosed with the letter to be mailed to the appropriate appraisal district.

Adopted new §17.15 describes the review standards to be used in determining the pollution control property status of each property item for which a use determination is requested. A decision flow chart is provided to determine whether a particular property item qualifies as pollution control property and whether it qualifies as pollution control equipment under the Tier I, Tier II, or Tier III fee structure. Tier I property is property which is included on the predetermined equipment list (PEL). The PEL is a list of property that the ED has determined is either wholly or partially for pollution control purposes. Tier II property is that property which is 100% pollution control property but is not contained on the PEL. Tier III property is partially for pollution control and partially for process or product improvement and is therefore only eligible for a partial pollution control property use determination. In response to a comment, the phrase “process change” has been changed to “process.” This was done to reflect that a new process will receive the same consideration as a replacement process.

Adopted new §17.17 describes the required calculation procedure for a Tier III partial pollution control property use determination. This procedure is followed for applications that are partially for pollution control and partially for process or product improvement and thereby do not qualify as 100% pollution control property. In response to a comment, footnotes 1 and 3.2 (Figure: 30 TAC §17.17(b)) were changed to allow for the adjustment of capital cost old in cases where the production capacity of the replacement property is lower than the capacity of the replaced property.

The adopted change to §17.20 will raise the Tier I application fee from \$50 to \$150. This fee increase is necessary for the commission to continue to recover its operating costs to run the use determination program.

Adopted new §17.25 will describe the procedures for appealing a use determination made by the ED. This section allows an appeal by only the use determination applicant or the chief appraiser of the appraisal district for the county in which the property is located. Section 17.25 also describes the procedures followed by the TNRCC chief clerk to process the appeal, possible actions by the commission after hearing the appeal, and required action by the ED if the determination is remanded to the ED by the commission. Section 17.25(b) has been clarified to state that the ED's use determination shall be final if a proper appeal is not timely filed. Further, §17.25(d)(3) has been added to clarify that the commission's decision to deny an appeal and uphold the ED's use determination shall constitute the agency action which is final and appealable.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has determined that this rulemaking is not subject to Texas Government Code, §2001.0225, because it does not meet the definition of a "major environmental rule" as defined in that statute. Furthermore, it does not meet any of the four applicability requirements listed in §2001.0225(a).

"Major environmental rule" means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material

way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The adopted rulemaking does not meet the definition of “major environmental rule” because the specific intent of the rulemaking is procedural in nature. The rulemaking revises procedures for providing notice to the chief appraiser of the county in which the property is located, adds procedures and definitions contained in the program guidelines manual as revised, for determining whether property is used for the control of air pollution, adds procedures describing how certain persons may appeal a decision by the ED, and increases the fee for a Tier 1 application.

In addition, even if the adopted rule is a major environmental rule, a draft regulatory impact assessment is not required because the rules do not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or propose to adopt a rule solely under the general powers of the agency. The rules do not exceed a standard set by federal law. The adopted rules do not exceed an express requirement of state law because they are authorized by the following state statutes: Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal state agency procedures; and TTC, §11.31, which authorizes the ED to determine if property is used for the control of air pollution, as well as the other statutory authorities cited in the STATUTORY AUTHORITY analysis of this preamble. In addition, this rulemaking is in direct response to HB 3121, and does not exceed any of the requirements of this bill, nor does it exceed the requirements of the Texas Constitution, Article VIII, §1-1. This rulemaking does not adopt a rule solely under the general powers of the agency, but rather under a specific state laws (i.e., TTC, Chapter 11, Subchapter B

(Exemptions); and Texas Government Code, §2001.004). Finally, this rulemaking is not being adopted on an emergency basis to protect the environment or to reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The commission determined that the adopted rules are not subject to Texas Government Code, Chapter 2007. The specific primary purpose of the rulemaking is to revise commission rules relating to procedures for processing use determinations applications requesting a determination of whether certain property qualifies as pollution control property as required by HB 3121. As amended by HB 3121, TTC, §11.31(d) requires the ED to provide a copy of a use determination to the appraisal district, §11.31(e) allows appeal by the applicant or the appraisal district to the commission of a use determination by the ED, and §11.31(g) requires the commission to establish specific standards to be followed for considering use determination applications. These new requirements and other revisions to §11.31 are described in the BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES and SECTION BY SECTION DISCUSSION portions of this rulemaking. The adopted rule revisions and new sections do not substantively change the program requirements that are already in place. The adopted rules will substantially advance the stated purpose by providing specific procedural requirements for processing use determination applications. Promulgation and enforcement of these rules will not burden private real property. The adopted rule revisions and new sections do not affect private property in a manner which restricts or limits an owner's right to the property that would otherwise exist in the absence of governmental action. Consequently, these adopted rule revisions and new sections do not meet the definition of a taking under Texas Government

Code, §2007.002(5).

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission has determined that the adopted rulemaking does not relate to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Management Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq.*) and the commission's rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. The rules do not govern air pollutant emissions, on-site sewage disposal systems, or underground storage tanks. The rulemaking revises procedures for providing notice to the chief appraiser of the county in which the property is located, adds procedures and definitions contained in the program guidelines manual as revised, for determining whether property is used for the control of air pollution, adds procedures describing how certain persons may appeal a decision by the ED, and increases the fee for a Tier 1 application. These actions concern only the procedural rules of the commission, are not substantive in nature, do not govern or authorize any actions subject to the CMP, and are not themselves capable of adversely affecting a coastal natural resource area (Title 31 Natural Resources and Conservation Code, Chapter 505; 30 TAC §§281.40, *et seq.*).

HEARING AND COMMENTERS

The commission held a public hearing in Austin on October 23, 2001. The public comment period closed on October 29, 2001. One commenter provided oral comments at the public hearing and also submitted written comments. In addition, three commenters provided written comments only.

The commenters were: Texas Center for Policy Studies (TCPS), which presented oral and written comments endorsed by Clean Water Action, Environmental Defense's Texas Office, Public Citizen's Texas Office, Lone Star Chapter of the Sierra Club, the Sustainable Energy and Economic Development Coalition, Consumer's Union, Texas Campaign for the Environment, League of Conservation Voters, and the Center for Public Policy Priorities. Commenters submitting written comments only were Association of Texas Intrastate Natural Gas Pipelines (ATINGP); Texas Taxpayers And Research Association (TTARA); and Ryan Valuation Services (RVS).

Analysis of Comments

TCPS stated that it only had two brief additions to the proposed rules. First, TCPS suggested that the phrase "use determination letter" should be defined or, alternatively, that additional explanation be provided in §17.12(3)(C) regarding the contents of use determination letter. Specifically, TCPS suggested that the use determination letter contain a description of the property or device, its calculated value, the pollution control percentage, and for Tier III applications a copy of the Cost Analysis Procedure (CAP) worksheet. Second, TCPS urged that the Predetermined Equipment List (PEL) should be reviewed and updated at least once a year with public input.

In response to TCPS's first comment, the ED's decision on a use determination application is reflected in the use determination itself rather than the letter that is used to transmit it to the chief appraiser of the appraisal district for the county in which the property is located. In order to better clarify the definition of a "use determination," §17.2(14) has been amended to state that a use determination includes the percent of the property which is determined to qualify as pollution

control property. The term “use determination letter” has been defined to include the use determination and the name of the company, the name and location of the facility, and the property description. In addition, for Tier III applications a copy of the Cost Analysis Procedure worksheet will be enclosed. For Tier II and Tier I applications a copy of the program staff’s technical review document will be enclosed. The calculated value of the property or device is not contained in the use determination or the use determination letter because calculating the value of the property or device is the responsibility of the appraisal district. TNRCC’s responsibility is to determine if the property qualifies as pollution control property and if the property is used only partly as pollution control property to determine the percentage of the property used for pollution control.

Second, TCPS commented that language either should be added to the definition of PEL in §17.2(7) or in §17.4 to require that the PEL be reviewed and updated, with public input, on an annual basis.

The commission agrees that the items on the PEL should be periodically reviewed. Program staff is currently in the process of conducting a comprehensive review of the PEL with input from the workgroup. Staff expects to complete this review of the entire list by December 2002. Upon completion of this review, staff will draft a policy for reviewing the PEL for presentation to the commission that will address whether the PEL should be reviewed on an annual basis and how to solicit and incorporate public input into the process. No changes have been made in response to this comment.

ATINGP commented that while the association generally supports the proposed rules, it has some concern about the appeals process. The proposed rules do not identify the point in time at which the ED's determination is considered to be a final administrative action of the agency. ATINGP recommended that §17.25(b) be amended to provide that in the event an appeal is not timely filed, the ED's determination letter is deemed to be the final action of the agency upon expiration of the 20-day period of appeal; and that §17.25(d)(2) be amended to provide that in the event that the commission denies the appeal and affirms the ED's use determination that the ED's determination letter becomes the final administrative action of the agency on the date the commission issues its order denying the appeal.

The commission agrees that §17.25 does not specifically identify the point in time at which the ED's determination is deemed a final administrative action of the agency. Section 17.25(b) has been clarified to state that the ED's use determination shall be final if a proper appeal is not timely filed. Further, §17.25(d)(3) has been added to clarify that the commission's decision to deny an appeal and uphold the ED's use determination shall constitute the agency action which is final and appealable.

TTARA commented on two issues. First, TTARA commented that the proposed rule fails to reflect the Attorney General's (AG) April 27, 2001 Opinion No. JC-0372, concerning the application of the pollution control equipment as it relates to new versus existing sites. TTARA commented that the definition of "Production Capacity Factor" in §17.2(10) refers to the original property or process, implying that a new facility may not qualify since there is no original property or process and that §17.15 refers to a process change when a new facility has a new process, not a changed one. TTARA

recommended the following three actions: first, amend §17.2(10) to read: “Production Capacity Factor – A calculated value used to adjust the value of a partial use determination to reflect capacity considerations”; second, change all references to “process change” to “process”; and third, add a statement to the rules that stating that all pollution control equipment, whether used in a new or existing facility is eligible for a pollution control exemption.

The commission agrees with the first two suggestions. The proposed definition of Production Capacity Factor and the use of the phrase “process change” do appear to be in conflict with the Attorney General’s opinion and §17.2(10) and §17.15 have been revised in response to these suggestions. Section 17.2(10) has been changed to read: “Production Capacity Factor - A calculated value used to adjust the value of a partial use determination to reflect capacity considerations.” Section 17.15, as proposed, contained the only usage of the phrase “process change.” The word “change” has been deleted. With these specific modifications, the adopted rules contain no language that implies that property installed at a new site will be treated differently than property installed at an existing site. No changes have been made in response to the third recommendation.

As to TTARA’s second issue, it commented that limiting the use of the Production Capacity Factor (PCF) in the CAP to cases where there is an increase in production understates the partial percentage for installation of an equipment/process that has a smaller production capacity than the previous equipment/process. TTARA recommends that footnote 1 in §17.17(b) be eliminated.

The commission agrees that not adjusting for a decrease in capacity may result in a reduced use determination. However, the commission disagrees that the adjustment should be made to Capital Cost New (CCN) by using the PCF. The more appropriate method for handling a decrease in production capacity is to adjust Capital Cost Old (CCO) to reflect the lower production capacity. Footnotes 3.1, 3.2, and 3.3, in §17.17(b) provide three methods for calculating CCO. The methods described in 3.1 and 3.3 calculate CCO based on CCO being comparable to CCN. These two methods account for a decrease in production capacity. The method in footnote 3.2 as proposed did not account for a decrease in production capacity. Accordingly, footnote 3.2 has been modified to read: “If the conditions in variable 3.1 of §17.17(b) do not apply and the company is replacing an existing unit, then the company shall convert the original cost of the unit to today’s dollars by using a published industry specific standard. If the production capacity of the new equipment or process is lower than the production capacity of the old equipment or process, then CCO is divided by the PCF in order to reduce CCO to reflect the same production capacity as CCN.” Adjusting the production capacity of CCO to reflect the lower production capacity of CCN provides the same benefit as adjusting CCN to reflect the lower production capacity of CCO.

RVS commented that the CAP assumes that capital cost/capacity relationships are linear and that the use of this assumption will likely understate the amount of the exemption to the disadvantage of the taxpayer. RVS commented that while a PCF is necessary to adjust for size differences between the existing and replacement equipment, a scale factor or size exponent should be added as a component since the capital cost of equipment of different capacities often varies exponentially rather than linearly

due to economies of scale. The proposed scale factor is the “six-tenths factor.”

The commission agrees that the relationship between capital cost for equipment of varying production capacities in some cases is not linear. However, the commission does not agree that the “six-tenths factor” should be added to the CAP. Before the CAP was approved by the commission, staff reviewed several Tier III applications where the “six-tenths factor” was included in the calculation. In all cases the applicants were unable to justify the use of the scale factor and it was not included in the final calculation. The CAP was developed by staff and revised by the workgroup. Several factors, including the “six-tenths factor” were reviewed for inclusion in the equation. The workgroup decided not to include a scale factor. The information provided by RVS does not provide justification for changing the rule. No changes have been made in response to this comment.

RVS also commented that it disagrees with the method used for determining the Net Present Value of the Byproduct (BP). RVS provided an alternative method for calculating byproduct. RVS proposed allowing income tax to be subtracted from the value of the byproduct to arrive at a truer cash flow number and that a weighted average cost of capital (WACC) be used as the discount rate rather than the Prime-Lending Rate (PLR).

The commission does not agree with either of RSV’s proposed revisions to the method used for determining Net Present Value of Byproduct. The byproduct calculation was developed by staff and revised by the workgroup. Several factors, including income tax were reviewed for inclusion

in the equation. The workgroup decided that because the CAP was developed to look at capital values operating expenses and net income were not appropriate items for inclusion.

Further, the commission disagrees that the use of the WACC will provide a more accurate byproduct value. The PLR was chosen because of its wide availability. The WACC is not widely available. RVS provided examples to illustrate the increase in the byproduct value which would occur if its two proposals are implemented. After removing income taxes from the equation the example using WACC provides only a 2% increase in byproduct value over the example using the PLR. No changes have been made in response to this comment.

STATUTORY AUTHORITY

The amendments and new sections are adopted under Texas Water Code (TWC), §5.102, which authorizes the commission to perform any acts authorized by TWC or other law which are necessary and convenient to the exercise of its jurisdiction and powers and §5.103, which authorizes the commission to adopt rules necessary to carry out its powers and duties under TWC. The amendments and new sections are also adopted under TTC, §11.31, which authorizes an exemption from taxation of all or part of real and personal property that is used wholly or partly as a facility, device, or method for the control of air, water, or land pollution.

**CHAPTER 17: TAX RELIEF FOR PROPERTY USED FOR ENVIRONMENTAL
PROTECTION**

§§17.2, 17.4, 17.10, 17.12, 17.15, 17.17, 17.20, 17.25

§17.2. Definitions.

Unless specifically defined in the TCAA, the TSWDA, the Texas Water Code (TWC), or the Texas Health and Safety Code (THSC), or in the rules of the commission, the terms used by the commission have the meanings commonly ascribed to them in the fields of pollution control or property taxation. In addition to the terms which are defined by the TCAA, the TSWDA, TWC, and THSC, the following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) **Byproduct** -- A chemical or material that would normally be considered a waste material requiring disposal or destruction, but due to pollution control property is now used as a raw material in a manufacturing process or as an end product. The pollution control property extracts, recovers, or processes the waste material so that it can be used in another manufacturing process or an end product.

(2) **Capital cost new** -- The estimated total capital cost of the equipment or process.

(3) **Capital cost old** -- This is the cost of comparable equipment or process without

the pollution control feature.

(4) **Cost analysis procedure** -- A procedure which uses cost accounting principles to calculate the percentage of a project or process that qualifies for a positive use determination as pollution control property.

(5) **Decision flow chart** -- A flow chart which is used to determine if a property or process is eligible for a determination as pollution control property.

(6) **Installation** -- The act of establishing, in a designated place, property that is put into place for use or service.

(7) **Partial Determination** - A determination that an item of property or a process is not used wholly as pollution control. This is property that is not on the predetermined equipment list (PEL) and that is not used wholly for pollution control.

(8) **Pollution control property** -- A facility, device, or method for control of air, water, or land pollution as defined by Texas Tax Code, §11.31(b).

(9) **Predetermined equipment list** -- A list of property that the executive director has determined is either wholly or partially for pollution control purposes.

(10) **Production capacity factor** -- A calculated value used to adjust the value of a partial use determination to reflect capacity considerations.

(11) **Tier I** -- An application which contains property that is on the PEL or that is necessary for the installation or operation of property located on the PEL.

(12) **Tier II** -- An application for property that is used wholly for the control of air, water, and/or land pollution, but not on the PEL.

(13) **Tier III** -- An application for property used partially for the control of air, water, and/or land pollution.

(14) **Use determination** -- A finding, either positive or negative, by the executive director that the property is used wholly or partially for pollution control purposes and listing the percentage of the property that is determined to be used for pollution control.

(15) **Use determination letter** -- The letter sent to the applicant and the chief appraiser which includes the executive director's use determination. In addition to the use determination, the letter will also include at least the following information:

(A) the name of the applicant;

(B) the name and location of the facility;

(C) the property description;

(D) in the case of a Tier III application, a copy of the Cost Analysis Procedure worksheet; and

(E) any other information the executive director deems relevant to the use determination.

§17.4. Applicability.

(a) To obtain a positive use determination, the pollution control property must be used, constructed, acquired, or installed wholly or partly to meet or exceed laws, rules, or regulations 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. In addition, pollution control property must meet the following conditions.

(1) Property must have been constructed, acquired, or installed after January 1, 1994.

(2) Land must include only the portion of the land acquired after January 1, 1994, that actually contains pollution control property.

(3) Equipment, structures, buildings, or devices must not have been taxable by any taxing unit in Texas on or before January 1, 1994, except that if construction of pollution control property was in progress on January 1, 1994, that portion of the property constructed, acquired, or installed after January 1, 1994, is eligible for a positive use determination.

(4) Property purchased from another owner is eligible for a positive use determination if it is acquired, constructed, or installed by the new owner after January 1, 1994, will be used as pollution control property, and was not taxable by any taxing unit in which the property is located on or before that date.

(b) The executive director shall determine the portion of the pollution control property eligible for a positive use determination.

(c) The executive director shall maintain a predetermined equipment list of property that is predetermined to qualify, either wholly or partially, as pollution control property.

(d) The executive director may not make a determination that property is pollution control property unless all requirements of this section and the requirements of §17.15 and §17.17 of this title (relating to Review Standards and Partial Determination) have been met.

§17.10. Application for Use Determination.

(a) In order to be granted a use determination a person or political subdivision shall submit to the executive director:

(1) a Texas Natural Resource Conservation Commission application form or a similar reproduction; and

(2) the appropriate fee, under §17.20 of this title (relating to Application Fees).

(b) An application must be submitted for each unit of pollution control property or for each facility consisting of a group of integrated units which have been, or will be, installed for a common purpose.

(c) If the applicant, other than a political subdivision, desires to apply for a use determination for a specific tax year, the application must be postmarked no later than January 31 of the following year. Applications postmarked after this date will not be processed until after review of all applications postmarked by the due date is completed and without regard for any appraisal district deadlines.

(d) The application shall contain at least the following:

(1) the anticipated environmental benefits from the installation of the pollution control property for the control of air, water, or land pollution;

(2) the estimated cost of the pollution control property;

(3) the purpose of the installation of such facility, device, or method, and the proportion of the installation that is pollution control property;

(4) the specific law, rules, or regulations that are being met or exceeded by the use, installation, construction, or acquisition of the pollution control property;

(5) if the installation includes property that is not used wholly for the control of air, water, or land pollution, and is not on the predetermined equipment list, a worksheet showing the calculation of the Cost Analysis Procedure, §17.17 of this title (relating to Partial Determination), and explaining each of the variables;

(6) any information that the executive director deems reasonably necessary to determine the eligibility of the application;

(7) if the property for which a use determination is sought has been purchased from another owner who previously used the property as pollution control property, a copy of the bill of sale or other information submitted by the person or political subdivision that demonstrates, to the

satisfaction of the executive director, that the transaction involves a bona fide change in ownership of the property and is not a sham transaction for the purpose of avoiding tax liability;

(8) the name of the appraisal district for the county in which the property is located;

and

(9) the Decision Flow Chart, §17.15 of this title (relating to Review Standards),

showing how each piece of pollution control property flows through the diagram.

§17.12. Application Review Schedule.

Following submission of the information required by §17.10 of this title (relating to Application for Use Determination), the executive director shall determine whether the pollution control property is used wholly or partly for the control of air, water, or land pollution. If the determination is that the property is used partly for pollution control, the executive director shall determine the proportion of the property used for pollution control.

(1) As soon as practicable, the executive director shall send notice by regular mail to the chief appraiser of the appraisal district for the county in which the property is located that the person has applied for a use determination under this chapter.

(2) Within 30 days of receipt of an application for use determination, the executive director shall mail written notification informing the applicant that the application is administratively complete or that it is deficient.

(A) If the application is deficient, the notification shall specify the deficiencies, and allow the applicant 30 days to provide the requested information. If the applicant does not submit an adequate response, the application will be sent back to the applicant without further action by the executive director and the application fee will be forfeited under §17.20(b) of this title (relating to Application Fees).

(B) Additional technical information may be requested within 60 days of issuance of an administrative completeness letter. If the applicant does not provide the requested technical information within 30 days, the application will be sent back to the applicant without further action by the executive director and the application fee will be forfeited under §17.20(b) of this title.

(C) If an application is sent back to the applicant under subparagraphs (A) or (B) of this paragraph, the applicant may refile the application and pay the appropriate fee as required by §17.20 of this title.

(3) The executive director shall determine whether the property is used wholly or partly to control pollution. The executive director is authorized to grant positive use determinations for some or all of the property included in the application that is deemed pollution control property.

(A) If a positive use determination is made, the executive director shall issue a use determination letter to the applicant which describes the proportion of the property that is pollution control property.

(B) If a negative use determination is made, the executive director shall issue a denial letter explaining the reason for the denial.

(C) A letter enclosing a copy of the use determination shall be sent by regular mail to the chief appraiser of the appraisal district for the county in which the property is located.

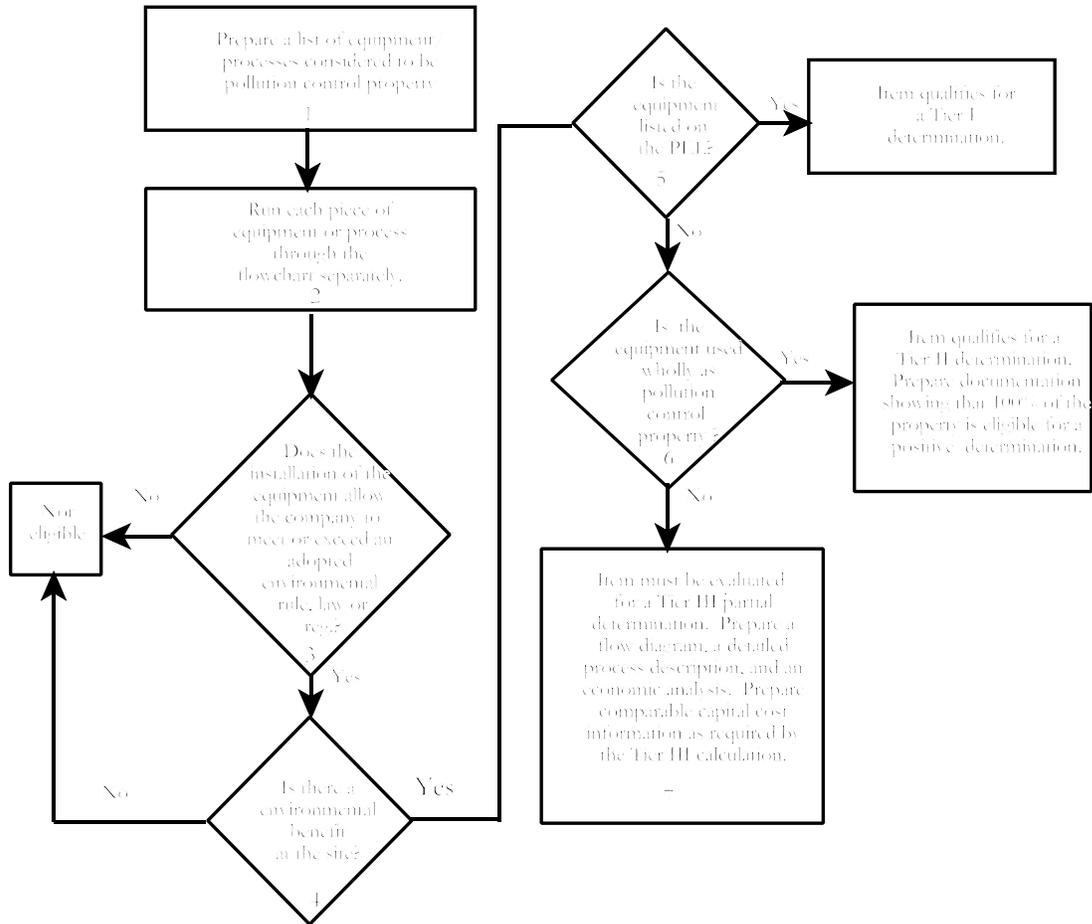
§17.15. Review Standards.

The Prop 2 Decision Flow Chart shall be used for each item of pollution control property or process to determine whether the particular equipment item will qualify as pollution control property. The executive director shall apply the standards in the Prop 2 Decision Flow Chart when acting on a use determination application.

Figure: 30 TAC §17.15

Prop 2 Decision Flow Chart

Applicants must use this flowchart for each piece of equipment or process change. In order for a piece of equipment or process change to be eligible for a positive use determination the item must generate 'yes' answers to the questions asked in boxes 3 and 4.



Where:

- ¹ Prepare a list of all property that is considered to be pollution control property.
- ² Process each item on the list through the flow chart separately.

³ Determine the specific state, local, or federal environmental regulation, rule or law that is being met or exceeded by the use of this property. If an adopted state, local, or federal environmental regulation, rule or law can not be identified the property is not eligible for a positive use determination.

⁴ Determine the environmental benefit that this property provides at the site where it is installed. If an environmental benefit at the site can not be identified, the property is not eligible for a positive use determination.

⁵ If the equipment is listed on the Predetermined Equipment List (PEL), determine the reference number for that item. Include all PEL equipment for the project in a single list that is included with the application.

⁶ If the equipment is not on the PEL, determine whether the equipment is used wholly for pollution control. If the equipment is used wholly for pollution control, the equipment shall qualify as 100% pollution control property.

⁷ If the equipment is not used wholly for pollution control the equipment must be evaluated as a partial determination.

§17.17. Partial Determinations.

(a) A partial determination must be requested for all property that is not on the predetermined equipment list and that is not wholly used for pollution control. In order to calculate a partial determination percentage, the cost analysis procedure described in subsection (b) of this section must be used.

(b) The following calculation (cost analysis procedure) must be used to determine the creditable partial percentage for a property or project which is not used wholly for pollution control:

Figure: 30 TAC §17.17(b)

$$\frac{[(\text{Production Capacity Factor} \times \text{Capital Cost New}) - \text{Capital Cost Old} - \text{Byproduct}]}{\text{Capital Cost New}} \times 100$$

Where:

¹ The Production Capacity Factor (PCF) is calculated by dividing the capacity of the existing equipment or process by the capacity of the new equipment or process. When there is an increase in production capacity PCF is used to adjust the capacity of the new equipment or process to the capacity of the existing equipment or process. When there is a decrease in production capacity PCF is used to adjust the capacity of the existing equipment or process to the production capacity of the new

equipment or process. In this case, the method of calculation shown in §17.17(b) is modified so that PCF is applied to Capital Cost Old rather than Capital Cost New.

² Capital Cost New is the estimated total capital cost of the new equipment or process.

³ Capital Cost Old is the cost of comparable equipment or process without the pollution control. The standards used for calculating Capital Cost Old are as follows:

^{3.1} If comparable equipment without the pollution control feature is on the market in the United States, then an average market price of the most recent generation of technology must be used.

^{3.2} If the conditions in variable 3.1 of §17.17(b) do not apply and the company is replacing an existing unit, then the company shall convert the original cost of the unit to today's dollars by using a published industry specific standard. If the production capacity of the new equipment or process is lower than the production capacity of the old equipment or process CCO is divided by the PCF in order to reduce CCO to reflect the same capacity as CCN.

^{3.3} If the conditions in variables 3.1 and 3.2 of §17.17(b) do not apply, and the company can obtain an estimate of the cost to manufacture the alternative equipment without the pollution control feature, then an average estimated cost to manufacture the unit must be used. The comparable unit must be the most recent generation of technology.

(c) For property that generates a marketable byproduct (BP), the net present value of the BP is used to reduce the partial determination. The value of the BP is calculated by subtracting the transportation and storage of the BP from the market value of the BP. This value is then used to calculate the net present value (NPV) of the BP over the lifetime of the equipment. The equation for calculating BP is as follows:

Figure: 30 TAC §17.17(c)

$$BP = \sum_{t=1}^n \frac{[(Byproduct\ Value) - (Storage\ \&\ Transport)]_t}{(1 + Interest\ Rate)^t}$$

ⁱ **Byproduct Value** -- The retail value of the recovered byproduct for a one year period. Typically, the most recent three-year average price of the material as sold on the open market should be used in the calculation. If the price varies from state-to-state, the applicant shall calculate an average, and explain how the figures were determined.

ⁱⁱ **Storage and Transport** -- These costs are the costs to store and transport the byproduct. These costs will reduce the market value of the byproduct. The applicant shall provide verification of how these costs were determined and itemized.

ⁱⁱⁱ **n** -- This is the estimated useful life in years of the equipment that is being evaluated for a use determination.

^{iv} **Interest rate** - This is the current Prime Lending Rate that is in effect at the time the application is submitted. The Prime Lending Rate is defined by the Wall Street Journal as the base rate on corporate loans posted by at least 75% of the nation's 30 largest banks. The Prime Lending Rate is posted daily in the Wall Street Journal and on most financial or investment web sites.

(d) If the cost analysis procedure produces a negative number or a zero, the property is not eligible for a positive use determination.

§17.20. Application Fees.

(a) Fees shall be remitted with each application for a use determination as required in paragraphs (1) - (3) of this subsection.

(1) Tier I Application -- A \$150 fee shall be charged for applications for property that is on the predetermined equipment list, as long as the application seeks no variance from that use determination.

(2) Tier II Application -- A \$1,000 fee shall be charged for applications for property that is used wholly for the control of air, water, and/or land pollution, but not on the predetermined equipment list.

(3) Tier III Application -- A \$2,500 fee shall be charged for applications for property used partially for the control of air, water, and/or land pollution.

(b) Fees shall be forfeited for applications for use determination which are sent back under §17.12(2) of this title (relating to Application Review Schedule). An applicant who submits an insufficient fee will receive a deficiency notice in accordance with the procedures in §17.12(2) of this title. The fee must be remitted with the response to the deficiency notice before the application will be deemed complete.

(c) All fees shall be remitted in the form of a check or money order made payable to the Texas Natural Resource Conservation Commission (TNRCC) and delivered with the application to the TNRCC, at the address listed on the application form.

§17.25. Appeals Process.

(a) Applicability.

(1) This subchapter applies to appeals of use determinations issued by the executive director for use determination applications that are declared administratively complete on or after September 1, 2001. A proceeding based upon an appeal filed under this subchapter is not a contested case for purposes of Texas Government Code, Chapter 2001.

(2) Persons who may appeal a determination by the executive director. The following persons may appeal a use determination issued by the executive director:

(A) the applicant seeking a use determination; and

(B) the chief appraiser of the appraisal district for the county in which the property for which a use determination is sought is located.

(b) Form and timing of appeal. An appeal must be in writing and be filed by United States mail, facsimile, or hand delivery with the chief clerk of the commission within 20 days after the receipt of the executive director's determination letter. A person is presumed to have been notified on the third regular business day after the date the notice of the executive directors action is mailed by first class mail. If an appeal meeting the requirements of this subsection is not filed within the time period specified, the executive director's use determination is final. An appeal filed under this subchapter must:

(1) provide the name, address, and daytime telephone number of the person who files the appeal;

(2) give the name and address of the entity to which the use determination was issued;

(3) provide the use determination application number for the application for which the use determination was issued;

(4) request commission consideration of the use determination; and

(5) explain the basis for the appeal.

(c) Appeal processing. The chief clerk shall:

(1) deliver or mail to the executive director a copy of the appeal;

(2) deliver or mail a copy of the appeal to the applicant if the appeal was filed by the chief appraiser or to the chief appraiser if the appeal was filed by the applicant; and

(3) schedule the appeal for consideration at the next regularly scheduled commission meeting for which adequate notice can be given.

(d) Action by the commission.

(1) The person seeking the determination and the chief appraiser may testify at the commission meeting at which the appeal is considered.

(2) The commission may remand the matter to the executive director for a new determination or deny the appeal and affirm the executive director's use determination.

(3) If the commission denies the appeal and affirms the executive director's use determination, the commission's decision shall be final and appealable.

(e) Action by the executive director.

(1) If the commission remands a use determination to the executive director, the executive director shall:

(A) conduct a new technical review of the application which includes an evaluation of any information presented during the commission meeting; and

(B) upon completion of the technical review, issue a new determination. A copy of the new determination shall be mailed to both the applicant and the chief appraiser of the county in which the property is located.

(2) A new determination by the executive director may be appealed to the commission in the manner provided by this subchapter.

(f) Withdrawn appeals. An appeal may be withdrawn by the entity who requested the appeal. The withdrawal must be in writing, and give the name, address, and daytime telephone number of the person who files the withdrawal, and the withdrawal shall indicate the identification number of the use determination. The withdrawal must be filed by United States mail, facsimile, or hand delivery with the chief clerk of the commission.