

The Texas Natural Resource Conservation Commission (TNRCC or commission) proposes 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 proposes new §17.15, Review Standards; §17.17, Partial Determinations; and §17.25, Appeals Process.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED 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 manual 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 manual, as revised, forms the basis for this proposed rulemaking in the implementation of House Bill (HB) 3121, enacted by the Texas Legislature, during the 77th Legislative Session, 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 proposed amendments to Chapter 17 and the proposed new sections in Chapter 17 will implement the requirements of HB 3121. In addition, the proposed 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 proposed 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 proposed new §17.15 and §17.17; and the definitions are needed to explain the cost analysis procedure.

The proposed 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 proposed 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 proposed 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.

Proposed new §17.15 will describe 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.

Proposed new §17.17 will describe 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.

The proposed 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.

Proposed 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.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeffrey Horvath, Strategic Planning and Appropriations, has determined that for the first five-year

period the proposed rulemaking is in effect, significant fiscal implications are not anticipated for the agency or other units of state government, but there may be significant fiscal implications for certain units of local government as a result of administration or enforcement of the proposed rulemaking.

The proposed rulemaking would implement HB 3121 (relating to exemptions from ad valorem taxation for property used to control pollution), 77th Legislature, 2001. House Bill 3121 established new requirements for the agency when considering applications for use determinations for exemptions from ad valorem taxation for pollution control property. The bill requires the agency to adopt specific standards when reviewing applications for obtaining a use determination for use in obtaining a property tax exemption. In addition, the bill requires that a copy of the ED's use determination for a property tax exemption be provided to the appropriate appraisal district. The bill also establishes an appeals process. Finally, proposed rulemaking would increase the Tier I application fee from \$50 to \$150. The fee increase was not part of HB 3121.

The program consists of three levels or tiers of applications for use determinations for property tax exemptions on newly installed pollution control property. Tier I is for property on the agency's PEL. The PEL consists of property which the agency has previously reviewed and determined to be pollution control property, and therefore is eligible for property tax exemption. Tier II applications are those which request a 100% use determination for property which is not on the PEL and, if it is determined by the agency that the property is completely for pollution control, it is eligible for property tax exemption. Tier III applications are those which request a partial determination for property which is not listed on the PEL. This property is eligible for a partial tax exemption.

In order to meet requirements for specific standards and to ensure that use determinations are equal and uniform, the proposed rulemaking would provide a decision flow chart to determine whether a property item qualifies as pollution control property and whether it qualifies as pollution control property under the Tier I, Tier II, or Tier III structure. No significant fiscal implications are anticipated to the agency to implement the new standards.

The proposed rulemaking would increase the Tier I application fee from \$50 to \$150. The Proposition 2 program is funded from fees, and the fee increase is expected to recover the costs of administering the program. The fee increase is estimated to generate an additional \$55,000 per year, based upon an estimated 550 Tier I applications expected to be received during the year. The fiscal implications for individuals and businesses applying for Tier I determinations is generally expected to be \$100, though some companies may file as many as 50 applications and the impact for them would be up to \$5,000. The fiscal implications of the fee increase are not considered significant and are not expected to impact the number of applications received.

The proposed rulemaking would require the ED to provide a copy of the final use determination for each tax exemption application to the appraisal district where the property is located. No significant fiscal implications are anticipated to the TNRCC to implement this provision.

The proposed rulemaking would provide procedures for appealing a use determination made by the ED. The appeal could be made only by the applicant or the chief appraiser of the appraisal district for the county in which the property is located. The appeal is made to the commission, and the commission

may remand the matter to the ED for a new determination or deny the appeal and affirm the ED's use determination. Because the appeal process is not a contested case hearing, no significant fiscal implications are anticipated to the agency to implement this provision. There will be costs to the applicant or the chief appraiser to appeal use determinations, though these costs are not anticipated to be significant, as they will for the most part consist of travel to appear before the commission.

The proposed rulemaking would conform current practices and legislative mandates with agency rules and provide a standard method of calculation for a Tier III partial determination. The new cost analysis procedure places more emphasis upon the cost of the new pollution control equipment with less emphasis upon the amount of pollution reduced. This procedure was put into practice in January of this year.

Historically, Tier III applications have accounted for approximately 3% of the total number of Proposition 2 applications received. Since the agency began using the new guidelines in January 2001 for determining property eligible for tax exemptions, the number of applications and the dollar amount of positive use determinations has decreased. For fiscal year 2001, seven applications were certified, representing \$172,684,521 worth of new pollution control equipment eligible for property tax exemption compared to fiscal year 2000 when 22 were approved for \$866,398,164.

It is estimated that the number of applications will drop by 50% from the 2001 level due to the new Tier III cost analysis procedure, if the current trend continues. It is estimated that approximately four applications will be certified for approximately \$86 million. Further, from the 2001 level, it is assumed

that some businesses may have higher property appraisals of approximately \$86 million due to the new cost analysis procedures. Consequently, some taxing districts may realize an increase in the appraised value of property of approximately \$86 million. The amount of additional tax revenue received will depend upon the tax rate of the taxing jurisdiction affected.

PUBLIC BENEFITS AND COSTS

Mr. Horvath also determined that for each year of the first five years the proposed rulemaking is in effect, the public benefit anticipated from enforcement of and compliance with the proposal will be a more equitable and standard procedure for determining whether business capital investments used to comply with environmental mandates meet legal requirements for property tax exemptions.

In accordance with the Proposition 2 constitutional amendment and HB 3121 as proposed to be implemented, there are fiscal implications which are anticipated to be significant for certain businesses or individuals seeking exemption from property taxes as a result of purchasing and installing certain pollution control equipment.

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tax exemption be provided to the appropriate appraisal district. The bill also establishes an appeals process. Finally, proposed rulemaking would increase the Tier I application fee from \$50 to \$150. The fee increase was not part of HB 3121.

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In order to meet requirements for specific standards and to ensure that use determinations are equal and uniform, the proposed rulemaking would provide a decision flow chart to determine whether a property item qualifies as pollution control property and whether it qualifies as pollution control property under the Tier I, Tier II, or Tier III structure.

The proposed rulemaking would increase the Tier I application fee from \$50 to \$150. The Proposition 2 program is funded from fees, and the fee increase is expected to recover the costs of administering the program. The fee increase is estimated to generate an additional \$55,000 per year, based upon an estimated 550 Tier I applications expected to be received during the year. The fiscal implications for

individuals and businesses applying for Tier I determinations is generally expected to be \$100, though some companies may file as many as 50 applications and the impact would be up to \$5,000. The fiscal implications of the fee increase are not considered significant and are not expected to impact the number of applications received.

The proposed rulemaking would require the ED to provide a copy of the final use determination for each tax exemption application to the appraisal district where the property is located. No significant fiscal implications are anticipated to the TNRCC to implement this provision.

The proposed rulemaking would provide procedures for appealing a use determination made by the ED. The appeal could be made only by the applicant or the chief appraiser of the appraisal district for the county in which the property is located. The appeal is made to the commission, and the commission may remand the matter to the ED for a new determination or deny the appeal and affirm the ED's use determination. Because the appeal process is not a contested case hearing, no significant fiscal implications are anticipated to the agency to implement this provision. There will be costs to the applicant or the chief appraiser to appeal use determinations, though these costs are not anticipated to be significant, as they will for the most part consist of travel to appear before the commission.

The proposed rulemaking would conform current practices and legislative mandates with agency rules and provide a standard method of calculation for a Tier III partial determination. The new cost analysis procedure places more emphasis upon the cost of the new pollution control equipment with less emphasis upon the amount of pollution reduced. This procedure was put into practice in January of this

year.

Historically, Tier III applications have accounted for approximately 3% of the total number of Proposition 2 applications received. Since the agency began using the new guidelines for determining property tax exemptions in January 2001, the number of applications and the dollar amount of positive use determinations has decreased. For fiscal year 2001, seven applications were certified, representing \$172,684,521 worth of new pollution control equipment eligible for property tax exemption compared to fiscal year 2000 when 22 were approved for \$866,398,164.

It is estimated that the number of applications will drop by 50% from the 2001 level due to the new Tier III cost analysis procedure. It is estimated that approximately four applications will be certified for approximately \$86 million, if current trends continue. Further, from the 2001 level, it is assumed that some businesses may have higher property appraisals of approximately \$86 million due to the new procedures. Consequently, these businesses and individuals may receive increases to the appraised value of their property by a total of \$86 million or an average of \$21.5 million per individual or business. The amount of additional tax revenue that will be required to be paid by these entities will depend upon the tax rate of that district.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

There are adverse fiscal implications to small or micro-businesses seeking a property tax exemption from the purchase and installation of certain pollution control equipment which are not anticipated to be significant as a result of implementation of the proposed rulemaking.

The proposed rule amendments would implement HB 3121 (relating to exemptions from ad valorem taxation for property used to control pollution), 77th Legislature, 2001. House Bill 3121 established new requirements for the agency when considering applications for use determinations for exemptions from ad valorem taxation for pollution control property. The bill requires the agency to adopt specific standards when reviewing applications for obtaining a use determination for use in obtaining a property tax exemption. In addition, the bill requires that a copy of the ED's use determination for a property tax exemption be provided to the appropriate appraisal district. The bill also establishes an appeals process. Finally, proposed rule amendments would increase the Tier I application fee from \$50 to \$150. The fee increase was not part of HB 3121.

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In order to meet requirements for specific standards and to ensure that use determinations are equal and uniform, the proposed rulemaking provides a decision flow chart to determine whether a property item qualifies as pollution control property and whether it qualifies as pollution control property under the

Tier I, Tier II, or Tier III structure. No significant fiscal implications are anticipated to the agency to implement the new standards.

The proposed rulemaking would increase the Tier I application fee from \$50 to \$150. The fee increase is estimated to generate an additional \$55,000 per year, based upon an estimated 550 Tier I applications expected to be received during the year. The fiscal implication for individuals and businesses applying for Tier I determinations is generally expected to be \$100, though some companies may file as many as 50 applications and the impact would be up to \$5,000. The fiscal implications of the fee increase are not considered significant and are not expected to impact the number of applications received.

The proposed rulemaking would provide procedures for appealing a use determination made by the ED. The appeal could be made only by the applicant or the chief appraiser of the appraisal district for the county in which the property is located. The appeal is made to the commission, and the commission may remand the matter to the ED for a new determination or deny the appeal and affirm the ED's use determination. Because the appeals process is not a contested case hearing, no significant fiscal implications are anticipated to the agency to implement this provision. There will be costs to the applicant or the chief appraiser to appeal use determinations, though these costs are not anticipated to be significant as they will for the most part, consist of travel to appear before the commission.

The proposed rulemaking would conform current practices and legislative mandates with agency rules and provide a standard method of calculation for a Tier III partial determination. The new cost analysis procedure places more emphasis upon the cost of the new pollution control equipment with less

emphasis upon the amount of pollution reduced. This procedure was put into practice in January of this year.

No small or micro-businesses has applied for a Tier III determination in the last two years, even though they are eligible. Small businesses such as spray paint companies, dry cleaners, and others have accounted for approximately 10% of all facilities receiving Proposition 2 certifications, mostly for air pollution controls. Paint spray booths, hoods, collection systems used to route air contaminants to a collection device, closed loop dry cleaning machines, and vapor recovery systems are some equipment items eligible on the PEL preauthorized for Proposition 2 certification.

The following is an analysis of the potential costs per employee for small or micro-businesses affected by the proposed rulemaking. Small and micro-businesses are defined as having fewer than 100 or 20 employees respectively. A small business that decides to apply for a Tier I application would incur additional costs of \$100 per application or \$1.00 per employee. A micro-business that decides to apply for a Tier I application would incur additional costs of \$100 or \$5.00 per employee. The overall costs to small or micro-businesses will vary depending on how many Tier I applications are filed.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has review this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rules are in affect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the proposed rulemaking is not subject to §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 proposed rulemaking does not meet the definition of “major environmental rule” because the specific intent of the proposed rulemaking is procedural in nature. The proposed 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 proposed rule is a major environmental rule, a draft regulatory impact assessment is not required because the rule does 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. This proposal does not exceed a standard set by

federal law. This proposal does not exceed an express requirement of state law because it is 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 section of this preamble. In addition, this proposal 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-l. This proposal 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 proposed or adopted on an emergency basis to protect the environment or to reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The commission evaluated this proposed rulemaking action and performed an analysis of whether these proposed rules are subject to Texas Government Code, Chapter 2007. The following is a summary of that analysis. The specific primary purpose of the proposed 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 PROPOSED RULES and SECTION BY SECTION DISCUSSION portions of this proposal. The proposed rule revisions and new sections do not substantively change the program requirements that are already in place. The proposed 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 proposed 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 proposed 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 proposed 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 proposed 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. The proposed 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.*).

Interested persons may submit comments on the consistency of the proposed rules with the CMP during the public comment period.

ANNOUNCEMENT OF HEARING

A public hearing on this proposal will be held in Austin on October 23, 2001 at 10:00 a.m., in Building F, Room 2210, at the commission's central office located at 12100 Park 35 Circle. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Patricia Durón, MC 205, Office of Environmental Policy, Analysis, and Assessment, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. All comments should reference Rule Log Number 2001-045-017-AD. Comments must be received by 5:00 p.m., October 29, 2001. For further information, please contact Auburn Mitchell at (512) 239-1873.

STATUTORY AUTHORITY

The amendments and new sections are proposed 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 proposed 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.

The amendments and new sections implement TWC, §5.102 and §5.103, and TTC, §11.31.

**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 [field] 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) [(1)] Installation - The act of establishing, in a designated place, property [something] 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) [(2)] Pollution control property - A facility, device, or method for control of air, water, or land pollution as defined by [the] Texas Tax Code, §11.31(b).

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

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

(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) [(4)] **Use determination** - A finding, either positive or negative, by the executive director that the property is used wholly or partially for pollution control purposes.

§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) - (2) (No change.)

(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 [is] 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) (No change.)

(b) - (c) (No change.)

(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) - (c) (No change.)

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

(1) - (4) (No change.)

(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, [sufficient cost or other information, presented by the person or political subdivision seeking the use determination, that demonstrates to the satisfaction of the executive director the proportion of the installation that is pollution control property] a worksheet showing the calculation of the Cost Analysis Procedure, §17.17 of this chapter (relating to Partial Determination), and explaining each of the variables;

(6) (No change.)

(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; [and]

(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) - (2) (No change.)

(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) - (B) (No change.)

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

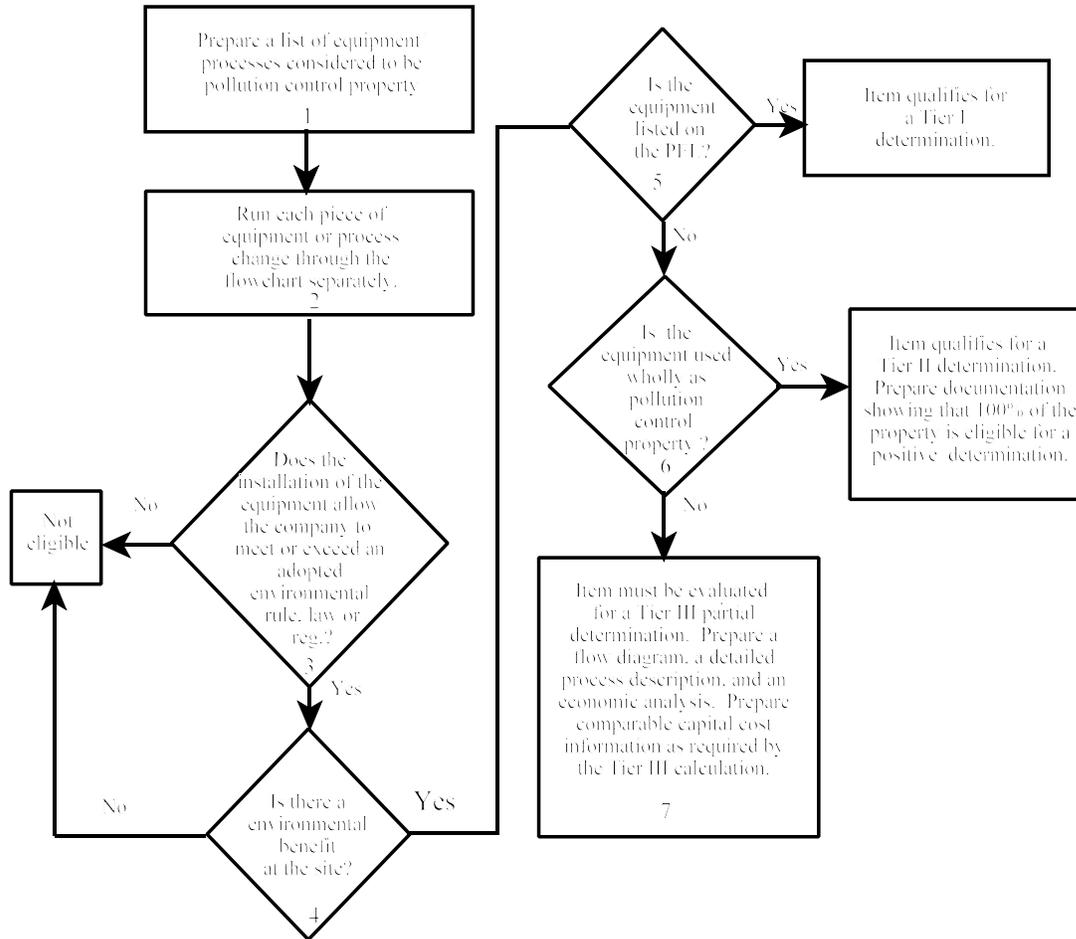
§17.15. Review Standards.

The Prop 2 Decision Flow Chart shall be used for each item of pollution control property or process change 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 is calculated by dividing the capacity of the existing equipment or process by the capacity of the new equipment or process. The Production Capacity Factor is only used when there is an increase in production capacity.

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) does 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.

^{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 [\$50] 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) - (3) (No change.)

(b) - (c) (No change.)

§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 Texas Natural Resource Conservation 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. 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.

(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 Texas Natural Resource Conservation Commission.