

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts new §§17.1, 17.2, 17.4, 17.6, 17.10, 17.12, and 17.20, concerning Tax Relief for Property Used for Environmental Protection. Section 17.20 is adopted with changes to the proposed text as published in the February 12, 1999 issue of the *Texas Register* (24 TexReg 920). The remaining sections are adopted without changes and will not be republished. The new chapter replaces existing 30 TAC Chapter 277, concerning Use Determinations for Tax Exemptions for Pollution Control Property, which is repealed in concurrent action in this edition of the *Texas Register*. The primary revisions are procedural clarifications to existing §277.12 and §277.20 (new §17.12 and §17.20), concerning Application Review Schedule and Application Fees. The changes to §17.12 and §17.20 clarify the procedures for reviewing applications for use determinations when the applicant does not adequately respond to a deficiency notice. As part of the commission's regulatory reform initiative, the former provisions of Chapter 277 (now §§17.1, 17.2, 17.4, 17.6, 17.10, 17.12, and 17.20) are rewritten for clarity, readability, and improved organization.

REVIEW OF AGENCY RULES

The new chapter has been renamed Tax Relief for Property Used for Environmental Protection as a part of the regulatory reform effort in order to clarify the intent of the rules. The commission has conducted its review of the rules contained in Chapter 277, as required by the General Appropriations Act, Article IX, §167. The results of that review are concurrently published in the Rules Review of this edition of the *Texas Register*.

EXPLANATION OF 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 Article VIII of the Texas Constitution. The 73rd Legislature (Act of May 25, 1993, Chapter 285, 1993 Texas General Laws, 1322), added §11.31, concerning Pollution Control Property, to Chapter 11 of the Tax Code and §26.045, concerning Rollback Relief for Pollution Control Requirements, to Chapter 26 of the Tax Code to implement the new constitutional provision. Chapter 277 was adopted by the commission on September 30, 1994 to establish the procedures for obtaining a tax exemption under Proposition 2. The enacted legislation was to encourage business, industry, and political subdivisions to take voluntary steps to reduce pollution through prevention, control, monitoring, or reduction of pollution.

The commission is moving the regulations currently located in Chapter 277 to new Chapter 17 to be consistent with the commission's policy to place general or multi-media rules within the Chapters 1-99 series of the commission's rules in Title 30 of the Texas Administrative Code. The 200 number range is intended for water related rules. Since the tax exemption program is multi-media, covering air, water, and waste, it should be located with the rules of general applicability, which is in the 1-99 range. Chapter 277 is being repealed in concurrent action with the adoption of the new Chapter 17. In addition, as part of the commission's regulatory reform initiative and rules review, the former provisions in Chapter 277 are rewritten for clarity, readability, and improved organization. These changes are for purposes of simplification and clarification only and do not involve substantive changes in the requirements of this chapter. In general, these changes involve using shorter sentences, limiting

each citation to one main concept, reordering requirements into a more logical sequence, and using more commonplace terminology.

The definition of “Predetermination” in §17.2 (former §277.2) is renamed to “Predetermined equipment list” and revised to better reflect the concept of using a list of property that is predetermined to be pollution control property. A new §17.4(c) states that the executive director will maintain a list of property that is predetermined, either wholly or partially, to be pollution control property. The current practice of periodically updating that list will not be changed by the revisions to this rule.

The change to §17.12 (former §277.12) will clarify the consequences of an applicant failing to respond adequately to a notice of deficiency. The current rule language merely states that the application will be returned, during either the administrative completeness review or the technical review, if the applicant fails to provide an adequate response to a notice of deficiency within the 30-day time period. Some applicants have interpreted “returned” to mean that the deficiencies can be addressed after the end of the 30-day response period and that the application can continue to be reviewed by the executive director. The intent of this section has always been to completely terminate the review of the application. This intent was demonstrated by the existing language allowing applicants to refile their applications if one was returned. Further, §17.20(b) (former §277.20(b)) states that fees are forfeited for applications that are returned. To clarify the intent of the rule, the term “returned” is replaced in §17.12(2)(A) and (B) (former §277.12(2)) with “sent back to the applicant without further action by the executive director and the application fees will be forfeited under §17.20(b) of this title.”

The change to §17.20(c) (former §277.20(c)) deletes the words "Proposition 2" and the reference to the TNRCC Proposition 2 Section. The revision allows the fees to be sent to the address indicated on the application for a use determination and will allow the program to be renamed without a rule change. Upon adoption, a change was made to substitute "predetermined equipment list" for "predetermination" in §17.20(2) for consistency with the changes being adopted in §17.20(1).

FINAL REGULATORY IMPACT ANALYSIS

The commission has reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety. The adoption does not meet any of the four applicability requirements listed in §2001.0225(a).

It does not exceed a standard set by federal law and is specifically required by state law. Federal law does not require states to allow tax abatements for the installation of pollution control property.

It does not exceed an express requirement of state law and is not specifically required by federal law. The rules are required to implement Tax Code, §11.31 and §26.045. It does not exceed any of the requirements of the Texas Constitution, Article VIII, §1-1 or of the Tax Code, §11.31 or §26.045.

It does not exceed the requirements of a delegation agreement or contract between the state and federal government as there is no agreement or contract between the commission and the federal government concerning tax abatements for pollution control property.

The rules are not adopted solely under the general powers of the commission aside from a specific state law. Rather, the rules are adopted under the Texas Water Code, §5.102 and §5.103, and the Tax Code, §11.31 and §26.045.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for these rules under Texas Government Code, §2007.043. The following is a summary of that assessment. Chapter 277 implements the provisions of the Texas Constitution, Article VIII, §1-1, and the Tax Code, §11.31 and §26.045, which provide ad valorem property tax relief through tax exemptions for capital expenditures for pollution control property. There is an economic benefit to businesses and industries that participate in the program in the form of a tax exemption for capital expenditures for pollution control property. Many changes throughout the rules are intended to implement the commission's guidelines on regulatory reform, as well as provide clarifications to existing rule language. The adopted rule revisions do not substantively change the program requirements that are already in place. The adopted rules will not make existing rules less stringent. Adoption and enforcement of the rule amendments and repeals will not create a burden on private real property.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has determined that this rulemaking action does not meet the criteria for an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination 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. As required by 31 TAC §505.11(b)(2) and §505.22(a) and 30 TAC §281.45(a)(3), relating to actions and rules subject to the CMP, agency rules governing air pollutant emissions, on-site sewage disposal systems, or underground storage tanks must be consistent with applicable CMP goals and policies. This rule is not an agency rule governing air pollutant emissions, on-site sewage disposal systems, or underground storage tanks. The purpose of the rule is to encourage the installation of pollution control property by ensuring that the capital investment used to comply with environmental mandates does not result in an increase in a facility's property taxes. Therefore, this rulemaking is not subject to the CMP.

HEARINGS AND COMMENTERS

There was no request for a public hearing and no written comments were received during the public comment period. Therefore, the rules will be adopted as proposed without changes.

STATUTORY AUTHORITY

The new sections are adopted under Texas Water Code, §5.102 and §5.103, which provide the commission with the authority to adopt rules necessary to carry out its powers, duties, and policies, and Tax Code, §11.31 and §26.045, which designate the commission as the reviewing authority to make the pollution control property use determinations.

CHAPTER 17

TAX RELIEF FOR PROPERTY USED FOR ENVIRONMENTAL PROTECTION

§§17.1, 17.2, 17.4, 17.6, 17.10, 17.12, 17.20

§17.1. Scope and Purpose.

The purpose of this chapter is to establish the procedure and mechanism for an owner, including political subdivisions, of pollution control property, to apply to the commission for a determination of pollution control use.

§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 field of pollution control. 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) **Installation** - The act of establishing, in a designated place, something that is put into place for use or service.

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

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

(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) 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 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) 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.

§17.6. Property Ineligible for Exemption from Taxation.

The following are not exempt from taxation and are not entitled to a positive use determination under this chapter:

(1) property is not entitled to an exemption from taxation solely on the basis that the property is used to manufacture or produce a product or provide a service that prevents, monitors, controls, or reduces air, water, or land pollution;

(2) property that is used for residential purposes, or for recreational, park, or scenic uses as defined by Tax Code, §23.81;

(3) motor vehicles; and

(4) property that was subject to a tax abatement agreement executed before January 1, 1994. However, property acquired, constructed, or installed after expiration of a tax abatement agreement could be eligible for a positive use determination.

§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, 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;

(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; and

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

§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 subparagraph (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.

§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 \$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) 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.