

The Texas Natural Resource Conservation Commission (TNRCC or commission) proposes 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. The proposed new chapter will replace existing 30 TAC Chapter 277, concerning Use Determination for Tax Exemptions for Pollution Control Equipment, which will be repealed in concurrent action in this edition of the *Texas Register*.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 proposed 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. 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 also conducted its review of the rules in 30 TAC Chapter 277, as required by the General Appropriations Act, Article IX, §167. The results of that review are concurrently published in the Rules Review section of this edition of the *Texas Register*.

EXPLANATION OF 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 Article VIII of the Texas Constitution. The 73rd Legislature 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 on September 30, 1994, to establish the procedures for obtaining a tax exemption under Proposition 2. The enacting 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 proposes to move the regulations currently located in Chapter 277 to new Chapter 17 to be consistent with the commission's policy to place general or multimedia rules within the Chapter 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 multimedia, covering air, water, and waste, it should be located with the rules of general applicability, which is in the 1 - 99 range. This chapter redesignation will require the repeal of Chapter 277 in concurrent action with the adoption of the new Chapter 17. In addition, as part of the commission's regulatory reform initiative, 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. Changes made for regulatory reform purposes will not be specifically noted in this preamble.

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 proposed revisions to this rule.

The proposed 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” will be 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 proposed change to §17.20(c) (former §277.20(c)) deletes the words “Proposition 2” and the reference to the TNRCC Proposition 2 Section. The proposed 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.

FISCAL NOTE

Jeff Grymkoski, Strategic Planning and Appropriations Section, has determined that for the first five-year period the sections are in effect, there will be no significant fiscal implications for state or local government as a result of enforcing or administering the sections. There are no fiscal implications caused by repealing the provisions of Chapter 277 and readopting them in the new Chapter 17. The clarification for the treatment of applications with deficiencies is not a new requirement, so there will be no new fiscal implications. The regulatory reform changes have no fiscal impacts.

PUBLIC BENEFIT

Mr. Grymkoski also has determined that for each year of the first five years the sections are in effect, the anticipated public benefit will be a better understanding of the rules, resulting in more efficient operation of the program. The proposed concurrent repeal of Chapter 277 and adoption of new Chapter 17 will clarify for the public and the regulated community the specific intent of the rules, which were established to provide the procedure and mechanism for an owner, including political subdivisions, of pollution control property, to apply to the commission for a finding, either negative or positive, that the property is used wholly or partly for the prevention, monitoring, control, or reduction of air, water, or land pollution. A person is entitled to a property tax exemption for all or part of real and personal property that the person owns that is used wholly or partly as a facility, device, or method for the control of air, water, and land pollution. Removing the program name from the rules will allow future

changes to the program name without requiring a rule change and will relate better to the actual purpose and function of the program. Current rule language regarding actions taken by the executive director on deficient applications is often confusing to applicants. The proposed revisions are intended to eliminate this confusion. Recodification of the rules from Chapter 277 to Chapter 17 will comply better with the commission's policy regarding general or multimedia rules. There are no changes to the fundamental procedures of this voluntary program.

SMALL BUSINESS ANALYSIS

The proposed concurrent repeal of Chapter 277 and adoption of new Chapter 17 clarifies the specific intent of the rules, which were established to provide the procedure and mechanism for an owner, including political subdivisions, of pollution control property, to apply to the commission for a finding, either negative or positive, that the property is used wholly or partly for the prevention, monitoring, control, or reduction of air, water, or land pollution. A person is entitled to a property tax exemption for all or part of real and personal property that the person owns that is used wholly or partly as a facility, device, or method for the control of air, water, and land pollution. The rules provide ad valorem property tax relief through tax exemptions for capital expenditures for pollution control. Small businesses are not required to participate in the program. There are no changes to the fundamental procedures of this voluntary program nor are there adverse economic impacts to small businesses.

DRAFT REGULATORY IMPACT ANALYSIS

The commission has reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code (the 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 proposal does not meet any of the four applicability requirements listed in §2001.0225(a).

This proposal does not exceed a standard set by federal law and is specifically required by state law. The proposed rule changes do not exceed a standard set by federal law. Federal law does not require states to allow tax abatements for the installation of pollution control property.

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

This proposal 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 proposed solely under the general powers of the commission aside from a specific state law. Rather, the rules are proposed under Texas Water Code, §5.102 and §5.103, and Tax Code, §11.31 and §26.045.

TAKINGS IMPACT ANALYSIS

The staff 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 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 proposed rule revisions do not substantively change the program requirements that are already in place. The proposed 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 the proposed rulemaking 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. The rules are not agency rules governing air pollutant emissions, on-site sewage disposal systems or underground storage tanks. The purpose of the rules 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.

SUBMITTAL OF COMMENTS

Comments may be submitted to Lisa Martin, Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 98050-277-AD. Comments must be received by 5:00 p.m., March 15, 1999. For further information, please contact Gary McArthur, Office of the Chief Engineer, (512) 239-1917, or Forrest Brooks, Office of Policy and Regulatory Development, (512) 239-0578.

STATUTORY AUTHORITY

The new sections are proposed 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.

The proposed new sections implement Texas Water Code, §5.102 and §5.103, and Tax Code, §11.31 and §26.045.

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 designated as eligible for predetermination.

(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.