

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts the repeal of §104.1, concerning Control Facility; §104.2, concerning Fuel Treatment; and §104.3, concerning Certification. The repeals are adopted to remove unnecessary rules because the reasons for the rules no longer exist as determined by a rules review as required under Texas Government Code, §2001.039, and the General Appropriations Act, Article IX, §9-10.13, 76th Legislature, 1999. The repeals are adopted without changes as published in the March 17, 2000 issue of the *Texas Register* (25 TexReg 2292) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED REPEALS

The Chapter 104 rules were first adopted by the Texas Air Control Board, now the TNRCC, in early 1973. They allowed companies and bond issuing agencies to apply for certification from the TNRCC that certain property or equipment qualifies as a “control facility.” The statutory authority for the rules is the Texas Clean Air Financing Act (TCAFA), which defines a control facility as a facility which was designed to reduce or eliminate air pollution. The purpose of the TCAFA is to allow, if not promote, affordable financing for the purchase of such equipment through the sale of tax-exempt industrial development bonds, a procedure that was authorized under the United States Internal Revenue Code. In order to qualify for this financing, a facility is required to be certified as a “control facility” by the TNRCC. In 1986, however, the United States Congress deleted the bond program for air pollution control equipment from the Internal Revenue Code, §103(c), effectively eliminating the financial incentive for obtaining these certifications. The last bond certification was issued in June 1986.

Statutory authority for this chapter remains in effect under Texas Health and Safety Code, Chapter 383, and continues to allow the TNRCC to issue control facility bond certifications with or without the procedural rules in this chapter. While the statute allows the commission to “prescribe necessary criteria and procedures for certifying a control facility,” it does not require the commission to adopt or maintain implementing regulations or procedures. The commission has reviewed the rules in Chapter 104 and determined that the agency no longer needs rules which specify bond certification criteria for air pollution control facilities. The last application was received in 1986 and the commission does not expect to receive any more requests for bond certifications due to changes in the federal Internal Revenue Code that eliminated the tax incentive for these bonds. As an alternative to clean air financing bonds, companies today may apply for *ad valorem* tax relief for new air pollution control equipment under 30 TAC Chapter 17, concerning Tax Relief for Property Used for Environmental Protection. Accordingly, the repeal of Chapter 104 is adopted.

SECTION BY SECTION DISCUSSION

Section 104.1, concerning Control Facility, which establishes the criteria to be demonstrated by an applicant for equipment for which certification is requested, is repealed. Section 104.2, concerning Fuel Treatment, which specifies that if the equipment to be certified is used to treat fuel to prevent emissions of air contaminants due to the use of the fuel, then the treated fuel must be consumed entirely on-site at the plant property, is repealed. Section 104.3, concerning Certification, which states that the process of certification under Chapter 104 will not include any consideration of the material recovered or produced as a result of operation of the certified equipment, is repealed.

REGULATORY IMPACT ASSESSMENT

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 does not meet the definition of a “major environmental rule” as defined in that statute.

“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, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Because the specific intent of the rulemaking is to repeal outdated and unnecessary rules, and does not add regulatory requirements to existing rules, the rulemaking is not anticipated to have an adverse material effect on the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Therefore, this rulemaking does not meet the definition of a “major environmental rule.” In addition, §2001.0225 only applies to a major environmental rule, the result of which is to: (1) exceed a standard set by federal law, unless the rule is specifically required by state law; (2) exceed an express requirement of state law, unless the rule is specifically required by federal law; (3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or (4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

This rulemaking does not meet any of these four applicability requirements of a “major environmental rule.” Specifically, the adopted repeals do not exceed a standard set by federal law, or exceed an

express requirement of state law, or exceed a requirement of a delegation agreement. In addition, the adoption is specifically to repeal outdated and unnecessary rules.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for this adoption under the Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of the rulemaking is to repeal Chapter 104 because it is no longer needed. Prior to June 1986, the United States Internal Revenue Code, provided a public bond program to help companies finance new air pollution control equipment at attractive interest rates. Since Congress deleted the bond program for new air pollution control equipment in 1986, no new applications for bond certification have been received. Further, while the TCAFA still allows the commission to issue bond certifications, it does not require rules to do so. Adoption of the repeals will not affect private real property which is the subject of the rules because this rulemaking action does not restrict or limit the owner's right to the property that otherwise would exist in the absence of the rulemaking. Further, this rulemaking is not the producing cause of the reduction in the market value of private real property and, therefore, does not create a burden on private real property.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission has reviewed the rulemaking and found that the rules are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the Texas Coastal Management Program (CMP), nor will they affect any action/authorization identified in

Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the rulemaking is not subject to the CMP.

HEARING AND COMMENTERS

A public hearing on the repeals was held on April 11, 2000. No comments were received at the public hearing or during the public comment period which closed on April 17, 2000.

STATUTORY AUTHORITY

The repeals are adopted under Texas Health and Safety Code, the Texas Clean Air Act (TCAA), §382.017, which provides the commission with the authority to adopt rules consistent with the policies and purposes of the TCAA and under Texas Government Code, §2001.039, and the General Appropriations Act, Article IX, §9-10.13, 76th Legislature, 1999, which requires state agencies to review and consider for readoption each of their rules every four years.

§104.1. Control Facility.

§104.2. Fuel Treatment.

§104.3. Certification.

