

The Texas Natural Resource Conservation Commission (commission) proposes the repeal of §104.1, concerning Control Facility, §104.2, concerning Fuel Treatment, and §104.3, concerning Certification. The purpose of the repeal is to remove unnecessary rules because the reasons for the rules no longer exist.

The commission also is proposing, in concurrent action, the review of the rules in Chapter 104 as required by Texas Government Code, §2001.039, and the General Appropriations Act, Article IX, §9-10.13, 76th Legislature, 1999. The proposed notice of review can be found in the Review of Agency Rules section of this issue of the *Texas Register*.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The rules currently codified as Chapter 104 were first adopted by the Texas Air Control Board, now the Texas Natural Resource Conservation Commission (TNRCC), in early 1973. They allow 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 these rules was the Texas Clean Air Financing Act (TCAFA), which defined a control facility as a facility which was designed to reduce or eliminate air pollution. The purpose of the TCAFA was 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 U.S. Internal Revenue Code. In order to qualify for this financing, property had to be officially certified as a “control facility”. In 1986, however, the United States Congress deleted the bond program from Internal Revenue Code, §103(c), effectively eliminating

the financial incentive for obtaining these certifications. The last bond certification was issued by 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 rules to do so. A preliminary review of the rules in Chapter 104 indicates 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 certification in the absence of the tax incentives associated with a federally-approved bond program. Today, companies 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 proposed.

SECTION BY SECTION DISCUSSION

Section 104.1, concerning Control Facility, establishes the criteria to be demonstrated by an applicant for equipment for which certification is requested. Section 104.2, concerning Fuel Treatment, 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. Section 104.3, concerning Certification, 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.

FISCAL NOTE

Bob Orozco, Technical Specialist with Strategic Planning and Appropriations, has determined that for the first five-year period after the proposed repeal of this chapter, there will be no significant adverse fiscal implications for the TNRCC and other units of state and local government as a result of the repeal. This chapter currently allows companies and bond issuing agencies to apply for certification from the TNRCC that certain property or equipment qualifies as a “control facility.” A “control facility” is defined as a facility which was designed to reduce or eliminate air pollution. The purpose of the rule was to prescribe necessary criteria and procedures to certify certain equipment as a “control facility” for the purpose of qualifying that equipment to be financed through the sale of tax-exempt bonds as authorized under the U.S. Internal Revenue Code.

This chapter is being repealed because the U.S. Congress deleted the bond program from the Internal Revenue Code in 1986, effectively eliminating the financial incentive and any further need for these certifications. The last certification was issued in June, 1986.

PUBLIC BENEFIT

Mr. Orozco has also determined that for each year of the first five years after the proposed repeal of this chapter, the public benefit anticipated from the repeal will be removal of old, outdated rules promulgated under this chapter. No significant adverse fiscal implications are anticipated to any person or business as a result of repealing the provisions of this chapter.

SMALL BUSINESS AND MICRO-BUSINESS ANALYSES

No significant adverse fiscal implications are anticipated to any person, small business, or micro-business as a result of repealing the provisions of this chapter. The repeal will eliminate outdated and unnecessary rules promulgated under this chapter.

DRAFT REGULATORY IMPACT ANALYSIS

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 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 proposed 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 proposed repeal does 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 proposed amendments are made specifically to repeal outdated and unnecessary rules. The commission invites public comment on the draft regulatory impact analysis.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for this proposal 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 U.S. 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 repeal 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.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

The commission has determined that this rulemaking action is 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.), the rules of the Coastal Coordination Council (31 TAC Chapters 501-506), and the commission's rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas CMP. As required by 31 TAC §505.11(b)(2) and 30 TAC §281.45(a)(3), relating to actions and rules subject to the CMP, agency rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission has reviewed this action for consistency and has determined that Chapter 104 does not impact any CMP goals or policies because it prescribes necessary criteria and procedures for bond certification, but, does not govern air pollution emissions. Chapter 104 is administrative and does not regulate the environment. Interested parties may submit comments on this determination during the public comment period.

PUBLIC HEARING

A public hearing on this proposal will be held April 11, 2000, at 10:00 a.m. in Room 3202A of TNRCC Building F, located at 12100 Park 35 Circle, Austin. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not occur 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.

SUBMITTAL OF COMMENTS

Comments may be submitted to Bettie Bell, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 1999-079-104-AI. Comments must be received by 5:00 p.m., April 10, 2000. For further information or questions concerning this proposal, please contact Barry Irwin, Policy and Regulations Division, (512) 239-1461.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearings should contact the agency at (512) 239-4900. Requests should be made as far in advance as possible.

STATUTORY AUTHORITY

The repeals are proposed 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.

The proposed repeals implement Texas Health and Safety Code, §382.017, concerning Rules.

§104.1. Control Facility.

§104.2. Fuel Treatment.

§104.3. Certification.