

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** February 7, 2014

Thru: Bridget C. Bohac, Chief Clerk
Richard A. Hyde, P.E., Executive Director

From: Steve Hagle, P.E., Deputy Director
Office of Air

Docket No.: 2013-2090-RUL

Subject: Commission Approval for Proposed Rulemaking
Chapter 17, Tax Relief for Property Used for Environmental Protection
Chapter 18, Rollback Relief for Pollution Control Requirements
HB 1897: Exemption from Ad Valorem Taxation of Pollution Control
Property
Rule Project No. 2013-045-017-AI

Background and reason(s) for the rulemaking:

30 Texas Administrative Code (TAC) Chapter 17 implements Texas Tax Code (TTC), §11.31, which requires the commission to determine whether property is used wholly or partly as pollution control property (referred to as “use determinations”). 30 TAC Chapter 18 implements TTC, §26.045, which requires the commission to determine whether property is used to meet pollution control requirements while applying the rollback tax rate for a political subdivision.

In 2007, House Bill (HB) 3732 (80th Legislature, 2007 Regular Session) amended TTC, §11.31 by adding subsections (k), (l), and (m) and §26.045 by adding subsections (f), (g), and (h). TTC, §11.31(k) and §26.045(f) required the commission to adopt a list containing 18 categories of equipment, while TTC, §11.31(m) and §26.045(h) required the executive director to issue a use determination within 30 days of receiving the application for equipment listed in §11.31(k) (referred to as the “Expedited Review List” (ERL)) or §26.045(f) (referred to as the “Equipment and Categories List” (ECL)). TTC, §11.31(l) and §26.045(g) required the commission to update the adopted lists at least once every three years and authorized the commission to remove any item from the list if it found compelling evidence that the item does not provide pollution control benefits. The last rulemaking to review the lists was completed on November 18, 2010, when the ECL located in Chapter 17 was converted into the Tier I Table and the ERL. Chapter 18 was not reviewed during the November 2010 rulemaking and currently contains the ECL. This rulemaking is necessary to review the Tier I Table and the ERL located in Chapter 17 and to place these updated lists in Chapter 18 as replacements to the ECL. Chapter 18 will also be updated to reflect amendments made to Chapter 17 in the November 2010 rulemaking.

In addition, HB 1897 (83rd Legislature, 2013, Regular Session) by Representative Eiland added §11.31(e-1) to the TTC. TTC, §11.31(e-1) requires the executive director to issue a use determination letter and the commission to take final action on an initial use determination appeal, if made, within one year from the date the executive director

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declares the application to be administratively complete. The commission is required to adopt rules implementing TTC, §11.31(e-1) by September 1, 2014. This proposal would implement this requirement by amending §17.12.

Scope of the rulemaking:

This rulemaking would amend Chapter 17 in order to implement HB 1897 and to propose revisions to the Tier I Table as part of the triennial review required by §17.14(b). Staff have reviewed the ERL and determined no revisions are necessary at this time. Therefore, revisions to §17.17 are not proposed with this rulemaking. In addition, this rulemaking would amend Chapter 18 by adopting the updated Tier I Table and the ERL and by making various amendments to bring the language and style into agreement with Chapter 17.

A.) Summary of what the rulemaking will do:

30 TAC §17.4 would be amended by removing a reference to §17.15, which was repealed during the 2010 rulemaking. HB 1897 requires the initial appeals process to be completed within one year of the application being declared administratively complete. The appeals process requires 135 days. This leaves 230 days for the technical review process. HB 1897 will be implemented by amending §17.12 to limit the number of administrative and technical notices of deficiency letters to allow the executive director to end the technical review process if it is determined that the applicant has not provided a technically complete application; limiting the technical review process to a total of 230 days from the day the application is declared to be administratively complete; and requiring the executive director to issue a negative determination if an application is considered to be incomplete after 230 days. The negative use determination will be based on the failure of the applicant to document the eligibility of the property for a positive use determination.

The Tier I Table located in §17.14(a) would be updated to reflect the appropriate eligibility of equipment contained on the list. The proposed rulemaking would modify property names and descriptions to better reflect the equipment eligible for a 100% positive use determination and delete equipment that is not eligible for a 100% positive use determination. The revisions to the Tier I Table would also reformat the table for accessibility; make non-substantive changes including punctuation and spelling corrections, and renumber items as necessary.

TTC, §11.31(l) requires the TCEQ to update the list adopted under TTC, §11.31(k) at least once every three years. This list was adopted as the ERL in §17.17(b). The ERL has been reviewed and no changes are being proposed.

When Chapter 18 was originally adopted, the rules were substantially the same as Chapter 17. However, Chapter 18 was not opened during the 2010 rulemaking. Therefore, this rulemaking would also amend Chapter 18 to bring it into agreement with Chapter 17. This

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rulemaking will require the repeal of definitions that are not necessary and the amendment of definitions in response to other proposed changes contained in this rulemaking. Part A of the ECL is proposed to be repealed and replaced with the Tier I Table located in §17.14(a) with the amendments proposed in this rulemaking. Part B of the ECL would be repealed and replaced with the ERL located in §17.17(b). References to the ECL would be replaced with appropriate references to the Tier I Table and the ERL.

TTC, §26.045(g) requires the TCEQ to update the list adopted under §26.045(f) at least once every three years. This list was Part B of the ECL, which is being repealed and replaced with the ERL. The ERL has been reviewed and no changes are being proposed.

B.) Scope required by federal regulations or state statutes:

HB 1897 requires the TCEQ to implement the requirements of §11.31(e-1) by September 1, 2014. The review of the ERL is required by TTC, §11.31(l) and §26.045(g).

C.) Additional staff recommendations that are not required by federal rule or state statute:

Proposed amendments to Chapter 18 to bring it into agreement with Chapter 17 are not required by federal or state statute but are proposed to improve the administration of Chapter 18.

Statutory authority:

TTC, §11.31 and §26.045.
Texas Water Code, §5.102 and §5.103.

Effect on the:

A.) Regulated community:

It is anticipated that the impact of this review of the ERL and the Tier I Table on the regulated community will be limited. If it is determined that some items on the Tier I Table routinely provide a production benefit, the items will be removed from the table. For these items, applicants will need to file a Tier III application to obtain a partial use determination. Applicants would be required to pay a higher application fee (\$2,500 rather than \$150) to offset increased costs in processing a more complex application. The opposite may be true if items on the ERL were moved to the Tier I Table, thereby allowing applicants to pay the reduced Tier I fee.

The proposed amendment to 30 TAC §17.4(c) is administrative in nature and will have no impact on any group. The proposed amendment of 30 TAC §17.12 will impact the regulated community by limiting the number of opportunities applicants have to provide additional

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information during the technical review process. The current process allows for up to three technical notices of deficiency to be issued with the applicants having 33 days from the day the letter is mailed to respond. Currently, staff has the discretion to grant extensions of up to 14 days on the notice of deficiency response deadline. Staff also has 60 days to conduct the initial technical review and the technical reviews associated with each notice of deficiency response. To meet the statutory timeframe, technical notices of deficiency letters will be limited to two, and no extensions to response deadlines will be granted. The amendment will benefit the regulated community and appraisal districts by expediting the use determination issuance and appeal process.

Impacts related to the replacement of the ECL with the updated Tier I Table and the ERL and the other proposed amendments to Chapter 18 are anticipated to be limited. To qualify for rollback relief, a political subdivision must install equipment or make process changes that are intended to meet a requirement of a permit issued by the TCEQ and be funded out of maintenance and operations funds as defined in TTC, §26.012(16). This process limits the applicability of the exemption to cases where a political subdivision knows that expenditure must be made in a future fiscal year in time to budget for the expenditure out of maintenance and operations funds. These capital items are traditionally funded with bond money. This section of the tax code has been in place for 20 years and only two applications have been approved; i.e., one in 1995 and one in 2001.

B.) Public:

The legislative changes and the proposed amendments to §§17.4, 17.12, and 17.14 and §§18.2, 18.10, 18.15, 18.25, 18.30, and 18.35, and the proposed new §18.26 will have no impact on the public.

C.) Agency programs:

The proposed amendments to §§17.4, 17.12, and 17.14 will have a limited impact on staff. The changes required by HB 1897 will require staff to track application review times in order to ensure that use determinations are issued in a timely manner. The proposed amendment to Chapter 18 will have no impact on staff. Since no change is proposed to the appeals time frame no impact is expected on the General Counsel staff.

Stakeholder meetings:

The members of the Tax Relief for Pollution Control Property Advisory Committee established under TTC, §11.31(n) were informed at their September 6, 2013 meeting that the Expedited Review List and the Tier I Table are under review. The committee was provided with the opportunity to provide comment on the lists at their December 4, 2013 meeting. No comments were received.

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Potential controversial concerns and legislative interest:

It is anticipated that industry may request that certain items included on the ERL be moved to the Tier I Table and that specific use determination percentages be applied. Taxing entities are expected to argue that these items should remain on the ERL and that each application containing an ERL item should be given an individual, robust technical review.

External stakeholders may also have concerns about limiting the opportunity to extend the notice of deficiency response deadlines and limiting the opportunities for providing additional information requested by agency staff.

Since the review time frame being implemented in 30 TAC §17.12 is in response to HB 1897, there may be legislative interest in order to ensure that TTC, §11.31(e-1) is effectively implemented.

Staff does not anticipate any controversy or legislative interest in the amendments to Chapter 18.

Will this rulemaking affect any current policies or require development of new policies?

The Standard Operating Procedures for the Tax Relief for Pollution Control Property program will need to be updated to reflect the changes made to the application review process.

What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking?

Failure to adopt amendments to §17.12 in order to meet the requirement to implement TTC, §11.31(e-1) and failure to conduct the required review on the equipment lists would result in the TCEQ being out of compliance with the TTC.

Key points in the proposal rulemaking schedule:

Anticipated proposal date: February 26, 2014

Anticipated *Texas Register* publication date: March 14, 2014

Anticipated public hearing date (if any): April 3, 2014

Anticipated public comment period: March 14 - April 14, 2014

Anticipated adoption date: August 2014

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Attachments

HB 1897

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