

The Texas Commission on Environmental Quality (agency or commission) adopts an amendment to §291.127 *without changes* to the proposed rule as published in the October 23, 2009 issue of the *Texas Register* (34 TexReg 7305) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

In 2009, the 81st Legislature passed House Bill (HB) 2667, relating to performance standards for plumbing fixtures sold in this state. HB 2667 amends Texas Water Code (TWC), §13.506(b) to remove the specification for installation of toilets that meet the old standards (1.6 gallons) for apartments that are required to retrofit toilets due to submetering rules.

In a corresponding rulemaking published in this issue of the *Texas Register*, the commission adopts revisions to 30 TAC Chapter 290, Public Drinking Water.

SECTION DISCUSSION

§291.127, Submeters or Point-of-Use Submeters and Plumbing Fixture

The commission adopts an amendment to §291.127 to remove the specification for installation of toilets that meet the old standards (1.6 gallons) for apartments that are required to retrofit toilets due to submetering rules. The amendment is required by TWC, §13.506(b), as amended by HB 2667.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission evaluated the adopted rulemaking and performed an analysis of whether the adopted rulemaking requires a regulatory impact analysis under Texas Government Code, §2001.0225. The adopted rulemaking may be a "major environmental rule" under Texas Government Code, §2001.0225.

Although the specific intent of the rulemaking does not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, or the public health and safety of the state or a sector of the state, this rule does result in protecting the environment, or conserving water resources. The purpose of this rulemaking is to implement HB 2667 to require owners of rental property or managers of condominiums, not later than the first anniversary they begin to bill for submetered or allocated water service, to remove toilets that exceed a maximum flow of 3.5 gallons per flushing with toilets that meet the standards prescribed in Texas Health and Safety Code (THSC), §372.002. Because plumbing fixtures that meet the new standards should not cost any more than they would under existing standards, there is no impact on the economy or jobs. Also, the rulemaking does not exceed a standard set of federal law that is not specifically required by state law, exceed an express requirement of state law, exceed a requirement of a federal delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program, and is not being adopted solely under the general powers of the agency instead of under a specific state law. Therefore, no regulatory impact analysis is required under Texas Government Code, §2001.0225 for this rulemaking.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the adopted rulemaking and performed an analysis of whether the adopted rulemaking constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of the adopted rulemaking is to implement HB 2667 to require owners of rental property or managers of

condominiums, not later than the first anniversary they begin to bill for submetered or allocated water service, to remove toilets that exceed a maximum flow of 3.5 gallons per flushing with toilets that meet the standards prescribed in THSC, §372.002. The adopted amendment would substantially advance this stated purpose by placing the revised standard in the rule. Promulgation and enforcement of the adopted amendment would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject adopted regulations do not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally) nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. There are no other reasonable or practicable alternatives to this rulemaking because it is required by statute.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rulemaking and found that it is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the adopted rule is not subject to the Coastal Management Program.

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No comments were received regarding the consistency of this rulemaking with the coastal management program.

PUBLIC COMMENT

The commission held a public hearing on November 17, 2009 in Austin, Texas. The comment period closed on November 23, 2009. The commission received one written comment from an individual but it was outside the scope of this rulemaking.

RESPONSE TO COMMENT

One individual commented on the one meter per residence requirements and the quality of their drinking water.

This rulemaking did not address revisions to the one meter per residence requirements nor did it address drinking water quality; therefore, these comments are outside the scope of this rulemaking.

The commission made no changes in response to these comments.

SUBCHAPTER H: UTILITY SUBMETERING AND ALLOCATION

§291.127

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.102, concerning General Powers, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules as necessary to carry out its power and duties under the TWC. The amendment is also adopted under TWC, §13.506(b), concerning Plumbing Fixtures, which requires owners of rental property or managers of condominiums not later than the first anniversary they begin to bill for submetered or allocated water service, to remove toilets that exceed a maximum flow of 3.5 gallons per flushing with toilets that meet the standards prescribed in Texas Health and Safety Code, §372.002.

The adopted amendment implements TWC, §13.506(b).

§291.127. Submeters or Point-of-Use Submeters and Plumbing Fixtures.

(a) Submeters or point-of-use submeters.

(1) Same type submeters or point-of-use submeters required. All submeters or point-of-use submeters throughout a property must use the same unit of measurement, such as gallon, liter, or cubic foot.

(2) Installation by owner. The owner shall be responsible for providing, installing, and maintaining all submeters or point-of-use submeters necessary for the measurement of water to tenants and to common areas, if applicable.

(3) Submeter or point-of-use submeter tests prior to installation. No submeter or point-of-use submeter may be placed in service unless its accuracy has been established. If any submeter or point-of-use submeter is removed from service, it must be properly tested and calibrated before being placed in service again.

(4) Accuracy requirements for submeters and point-of-use submeters. Submeters must be calibrated as close as possible to the condition of zero error and within the accuracy standards established by the American Water Works Association (AWWA) for water meters. Point-of-use submeters must be calibrated as closely as possible to the condition of zero error and within the accuracy standards established by the American Society of Mechanical Engineers (ASME) for point-of-use and branch-water submetering systems.

(5) Location of submeters and point-of-use submeters. Submeters and point-of-use submeters must be installed in accordance with applicable plumbing codes and AWWA standards for water meters or ASME standards for point-of-use submeters, and must be readily accessible to the tenant and to the owner for testing and inspection where such activities will cause minimum interference and inconvenience to the tenant.

(6) Submeter and point-of-use submeter records. The owner shall maintain a record on each submeter or point-of-use submeter which includes:

(A) an identifying number;

(B) the installation date (and removal date, if applicable);

(C) date(s) the submeter or point-of-use submeter was calibrated or tested;

(D) copies of all tests; and

(E) the current location of the submeter or point-of-use submeter.

(7) Submeter or point-of-use submeter test on request of tenant. Upon receiving a written request from the tenant, the owner shall either:

(A) provide evidence, at no charge to the tenant, that the submeter or point-of-use submeter was calibrated or tested within the preceding 24 months and determined to be within the accuracy standards established by the AWWA for water meters or ASME standards for point-of-use submeters; or

(B) have the submeter or point-of-use submeter removed and tested and promptly advise the tenant of the test results.

(8) Billing for submeter or point-of-use submeter test.

(A) The owner may not bill the tenant for testing costs if the submeter fails to meet AWWA accuracy standards for water meters or ASME standards for point-of-use submeters.

(B) The owner may not bill the tenant for testing costs if there is no evidence that the submeter or point-of-use submeter was calibrated or tested within the preceding 24 months.

(C) The owner may bill the tenant for actual testing costs (not to exceed \$25) if the submeter meets AWWA accuracy standards or the point-of-use submeter meets ASME accuracy standards and evidence as described in paragraph (7)(A) of this subsection was provided to the tenant.

(9) Bill adjustment due to submeter or point-of-use submeter error. If a submeter does not meet AWWA accuracy standards or a point-of-use submeter does not meet ASME accuracy standards and the tenant was overbilled, an adjusted bill must be rendered in accordance with §291.125(k) of this title (relating to Billing). The owner may not charge the tenant for any underbilling that occurred because the submeter or point-of-use submeter was in error.

(10) Submeter or point-of-use submeter testing facilities and equipment. For submeters, an owner shall comply with the AWWA's meter testing requirements. For point-of-use meters, an owner shall comply with ASME's meter testing requirements.

(b) Plumbing fixtures. After January 1, 2003, before an owner of an apartment house, manufactured home rental community, or multiple use facility or a manager of a condominium may implement a program to bill tenants for submetered or allocated water service, the owner or manager shall adhere to the following standards:

(1) Texas Health and Safety Code, §372.002, for sink or lavatory faucets, faucet aerators, and showerheads;

(2) perform a water leak audit of each dwelling unit or rental unit and each common area and repair any leaks found; and

(3) not later than the first anniversary of the date an owner of an apartment house, manufactured home rental community, or multiple use facility or a manager of a condominium begins to bill for submetered or allocated water service, the owner or manager shall:

(A) remove any toilets that exceed a maximum flow of 3.5 gallons per flush; and

(B) install toilets that meet the standards prescribed by Texas Health and Safety Code, §372.002.

(c) Plumbing fixture not applicable. Subsection (b) of this section does not apply to a manufactured home rental community owner who does not own the manufactured homes located on the property of the manufactured home rental community.