

The Texas Commission on Environmental Quality (agency or commission) proposes an amendment to §291.127.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED 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 the 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 sub-metering rules.

SECTION DISCUSSION

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

The commission proposes to amend §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.

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

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeff Horvath, Analyst in the Strategic Planning and Assessment Section, has determined that for the first five-year period the proposed rule is in effect, no significant fiscal implications are anticipated for the agency or other units of state or local government as a result of administration or enforcement of the proposed rule.

The proposed rule implements HB 2667 and increases efficiency standards for plumbing fixtures sold in the state.

Owners of an apartment house, manufactured home rental community, or multiple use facility or a manager of a condominium that are required to retrofit toilets due to sub-metering rules will have to install toilets that meet more stringent water use standards, though these requirements are not expected to result in any additional costs over current requirements.

PUBLIC BENEFITS AND COSTS

Mr. Horvath has also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rule will be a reduction in the use of water due to more efficient plumbing fixtures. Staff estimates that the phase-in of more efficient plumbing fixtures over a five-year period could result in water savings of 20% or more for each plumbing fixture that is installed.

Homes, apartments, and businesses that install plumbing fixtures that comply with the new requirements will decrease their indoor water use and therefore may experience cost savings for their utility bills.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rule. Owners of an apartment house, manufactured home rental community, or multiple use facility or a manager of a condominium that are required to retrofit toilets due to sub-metering rules will have to

install toilets that meet more stringent water use standards, though these requirements are not expected to result in any additional costs over current requirements.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule is required to comply with state law and to protect the health, safety, environmental, and economic welfare of the state.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission evaluated the proposed amendment and performed an analysis of whether the proposed amendment requires a regulatory impact analysis under Texas Government Code, §2001.0225. The proposed amendment 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 proposed 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.

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed amendment and performed an analysis of whether the proposed amendment constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of the proposed amendment is to 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 proposed amendment would substantially advance this stated purpose by placing the revised standard in the rule. Promulgation and enforcement of the proposed amendment would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed 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 proposed 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 proposed rule is not subject to the Coastal Management Program.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on November 17, 2009 at 10:00 AM in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. 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 be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Charlotte Horn, Office of Legal Services at (512) 239-0779. Requests should be

made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Jessica Rawlings, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www5.tceq.state.tx.us/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2009-038-290-PR. The comment period closes November 23, 2009. Copies of the proposed rulemaking can be obtained from the commission's Web site at http://www.tceq.state.tx.us/nav/rules/propose_adopt.html. For further information, please contact Scott Swanson, Water Rights Section, (512) 239-0703.

SUBCHAPTER H: UTILITY SUBMETERING AND ALLOCATION

§291.127

STATUTORY AUTHORITY

The amendment is proposed 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 proposed 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 proposed 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 [1.6-gallon] 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.