The Texas Commission on Environmental Quality (commission or agency) adopts amendments to §291.106 and §291.124.

Sections 291.106 and 291.124 are adopted *without changes* to the proposed text as published in the January 29, 2010, issue of the *Texas Register* (35 TexReg 575) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The 81st Legislature, 2009, passed House Bill (HB) 1295 and Senate Bill (SB) 2126. HB 1295 required notice for Certificate of Convenience and Necessity (CCN) applications to counties and groundwater conservation districts that are wholly or partially included in the proposed area. SB 2126 allowed owners or managers of apartment houses to add up to a nine percent service charge to the water portion and wastewater portion of the utility bills of tenants in submetered apartments.

SECTION BY SECTION DISCUSSION

The commission adopts the amendment to §291.106(b)(1) and (2), Notice for Applications for Certificates of Convenience and Necessity and Requirements for Recording Maps and Descriptions of Areas Covered by Certificates of Convenience and Necessity, which will modify notice provisions to include notice to counties and groundwater conservation districts that are affected by the application as authorized by the 81st Legislature, 2009. Further, the commission adopts the amendment to the title of §291.106 to make it more concise.

The commission adopts the amendment to §291.124(d)(3), Charges and Calculations. Currently, only

manufactured home rental communities can impose a service charge of up to nine percent of the tenant's charge for submetered water service. The amendment allows apartment houses to also collect this service charge for submetered water service. In addition, the amendment allows both manufactured home rental communities and apartment houses to impose a service charge of up to nine percent of a tenant's charge for submetered wastewater service. The commission adopts amendments to the rule to allow the surcharge for both water and wastewater submetered service to promote water conservation efforts and to more closely track the legislative intent of SB 2126 from the 81st Legislature, 2009.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission evaluated the adopted rules in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and 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 the Texas Administrative Procedure Act. A "major environmental rule" is a rule that is specifically intended to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

This rulemaking does not meet the statutory definition of a "major environmental rule" because it is not the specific intent of the rule amendments to protect the environment or reduce risks to human health from environmental exposure. The specific intent of the adopted rulemaking is to implement legislative changes enacted by HB 1295, which require that notice for an application to obtain or amend a CCN be given to each county and groundwater conservation district that is wholly or partially included in the

proposed area; and by SB 2126, which allows apartment houses to impose up to a nine percent service charge to the water portion and wastewater portion of utility bills of tenants in submetered apartment dwelling units in certain instances.

Further, the rulemaking does not meet the statutory definition of a "major environmental rule" because the adopted rule amendments will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or public health and safety of the state or a sector of the state. The cost of complying with the adopted amendments is not expected to be significant with respect to the economy. SB 2126 could provide a financial benefit to local apartment houses that choose to assess the water service fee, wastewater service fee, or both.

Furthermore, the adopted rulemaking is not subject to Texas Government Code, §2001.0225 because it does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). This section 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. The adopted rulemaking does not meet the four applicability requirements, because the adopted amendments: (1) do not exceed a standard set by federal law as there is no federal equivalent for the provisions in the Texas Local Government Code; (2) do not exceed an express requirement of state law; (3) do not exceed a requirement of federal delegation

agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program as no such federal delegation agreement exists with regard to the adopted rules; and (4) are not an adoption of a rule solely under the general powers of the commission as the adopted rules are required by HB 1295 and SB 2126.

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

TAKINGS IMPACT ASSESSMENT

The commission evaluated the adopted amendments and performed an assessment of whether the amendments constitute a taking under Texas Government Code, Chapter 2007. The primary purpose of the adopted rulemaking is to implement legislative changes enacted by HB 1295, which requires CCN applicants to give notice to affected counties and groundwater conservation districts; and by SB 2126, which allows apartment houses to impose a service charge on the water portion and wastewater portion of tenants' utility bills in submetered apartment dwelling units. The adopted amendments would substantially advance this purpose by amending the Chapter 291 rules to incorporate the new statutory requirements.

Promulgation and enforcement of these adopted rules would be neither a statutory nor a constitutional taking of private real property. The adopted regulations do not affect a landowner's rights in private real property because this rulemaking does not relate to or have any impact on an owner's rights to property. The amendment to HB 1295 will only affect the notice required by CCN applicants who are requesting to obtain or amend a CCN that is wholly or partially included in a county or groundwater conservation

district. The amendment to SB 2126 will only affect those apartment tenants whose managers choose to assess the water service fee, wastewater service fee, or both; if assessed, this would not have an effect on real property. Therefore, the adopted rulemaking would not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rulemaking and did not find the adoption is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will it affect any action/authorization identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the adopted rules are not subject to the Texas 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 February 22, 2010. Three individuals attended the public hearing but did not present oral statements for the record on the proposed rulemaking. The comment period closed on March 1, 2010.

The commission received written comments from Texas Apartment Association (TAA); the City of Houston; and one individual on the proposed submetering rules. No comments were received regarding the proposed CCN notice rules.

TAA states that it supports the proposed submetering rule. The City of Houston suggested, to avoid the potential for confusion, that the commission consider adding a new 30 TAC §291.125(g)(4) that reads: "the amount of any submetering service fee calculated under §291.124 of this title (relating to Charges and Calculations) as a separate line item, including a statement that the charge is not from the utility."

RESPONSE TO COMMENTS

One individual disagrees with apartment home renters being assessed the service charge for water and sewer utilities. The individual commented about renters' actively conserving water on their own. The individual also commented that this service charge is punitive towards renters.

The commission acknowledges that water conservation is important. Submetering promotes conservation and this rule will allow apartment home owners/managers the ability to recoup all or a portion of the costs associated with submetering. The intention of the rule is not meant to be punitive to renters, it is to promote conservation. The commission made no change to the rule in response to this comment.

The TAA offers support for the submetering rule.

The commission acknowledges the TAA's support for the adoption of this rulemaking.

The City of Houston suggested that, to avoid the potential for confusion, the commission should consider adding a new §291.125(g)(4) that reads: "the amount of any submetering service fee calculated under §291.124 of this title (relating to Charges and Calculations) as a separate line item, including a statement that the charge is not from the utility."

The commission agrees that there is a potential for confusion if the submetering service fee is not a separate line item. However, §291.125 is outside the scope of this rulemaking as that section was not open for public comment. In addition, §291.125(f)(5) states that the bill must include "the name of the retail public utility and a statement that the bill is not from the retail public utility." The commission made no change to the rule in response to this comment.

SUBCHAPTER G: CERTIFICATES OF CONVENIENCE AND NECESSITY

§291.106

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.102, which provides the commission the general powers to carry out duties under TWC and §5.103, which provides the commission with the authority to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC and other laws of this state. In addition, TWC, §13.041 states that the commission may regulate and supervise the business of every water and sewer utility within its jurisdiction and may do all things, whether specifically designated in TWC, Chapter 13 or implied in TWC, Chapter 13, necessary and convenient to the exercise of this power and jurisdiction. Further, TWC, §13.041 also states that the commission shall adopt and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules governing practice and procedure before the commission.

Therefore, the TWC authorized rulemaking that implements the language added to TWC, §13.246(a) by House Bill 1295, 81st Legislature, 2009, which requires that notice for an application to obtain or amend a Certificate of Convenience and Necessity be given to each county and groundwater conservation district that is wholly or partially included in the proposed area.

§291.106. Notice and Mapping Requirements for Certificate of Convenience and Necessity Applications.

(a) If an application for issuance or amendment of a certificate of public convenience and necessity (CCN) is filed, the applicant will prepare a notice or notices, as prescribed in the commission's application form, which will include the following:

(1) all information outlined in the Administrative Procedure Act, Texas Government Code, Chapter 2001;

(2) all information stipulated in the commission's instructions for completing an application for a CCN; and

(3) a statement that persons who wish to intervene or comment upon the action sought should contact the Utilities and Districts Section, Water Supply Division, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, within 30 days of mailing or publication of notice, whichever occurs later.

(b) After reviewing and, if necessary, modifying the proposed notice, the commission will send the notice to the applicant for publication and/or mailing.

(1) For applications for issuance of a new CCN, the applicant shall mail the notice to cities and neighboring retail public utilities providing the same utility service whose corporate limits or certificated service area boundaries are within five miles of the requested service area boundaries, and any city with an extraterritorial jurisdiction that overlaps the proposed service area boundaries. Applicants are

also required to provide notice to the county judge of each county and to each groundwater conservation district that is wholly or partly included in the area proposed to be certified.

(2) For applications for an amendment of a CCN, the applicant shall mail the notice to cities and neighboring retail public utilities providing the same utility service whose corporate limits or certificated service area boundaries are within two miles of the requested service area boundaries, and any city with an extraterritorial jurisdiction that overlaps the proposed service area boundaries. If decertification or dual certification is being requested, the applicant shall provide notice by certified mail to the current CCN holder. Applicants are also required to provide notice to the county judge of each county and to each groundwater conservation district that is wholly or partly included in the area proposed to be certified.

(3) Except as otherwise provided by this subsection, in addition to the notice required by subsection (a) of this section, the applicant shall mail notice to each owner of a tract of land that is at least 25 acres and is wholly or partially included in the area proposed to be certified. Notice required under this subsection must be mailed by first class mail to the owner of the tract according to the most current tax appraisal rolls of the applicable central appraisal district at the time the commission received the application for the certificate or amendment. Good faith efforts to comply with the requirements of this subsection shall be considered adequate mailed notice to landowners. Notice under this subsection is not required for a matter filed with the commission under:

(A) Texas Water Code, §13.248 or §13.255; or

(B) Texas Water Code, Chapter 65.

(4) Applicants previously exempted for operations or extensions in progress as of September 1, 1975, must provide individual mailed notice to all current customers. The notice must contain the information required in the application.

(5) Utilities that are required to possess a certificate but that are currently providing service without a certificate must provide individual mailed notice to all current customers. The notice must contain the current rates, the effective date those rates were instituted, and any other information required in the application.

(6) Within 30 days of the date of the notice, the applicant shall submit to the commission an affidavit specifying the persons to whom notice was provided and the date of that notice.

(c) The applicant shall publish the notice in a newspaper having general circulation in the county or counties where a CCN is being requested, once each week for two consecutive weeks beginning with the week after the notice is received from the commission. Proof of publication in the form of a publisher's affidavit shall be submitted to the commission within 30 days of the last publication date. The affidavit shall state with specificity each county in which the newspaper is of general circulation.

(d) The commission may require the applicant to deliver notice to other affected persons or

agencies.

(e) In this section, utility service provider means a retail public utility other than a district subject to Texas Water Code, §49.452.

(f) A utility service provider shall:

(1) record in the real property records of each county in which the service area, or a portion of the service area is located, a certified copy of the map of the CCN and of any amendment to the certificate as contained in the commission's records, and a boundary description of the service area by:

(A) a metes and bounds survey certified by a licensed state land surveyor or a registered professional land surveyor;

(B) the Texas State Plane Coordinate System;

(C) verifiable landmarks, including a road, creek, or railroad line; or

(D) if a recorded plat of the area exists, lot and block number; and

(2) submit to the executive director evidence of the recording.

(g) The recording required by this section must be completed not later than the 31st day after the date a utility service provider receives a final order from the commission granting an application for a new certificate or for an amendment to a certificate that results in a change in the utility service provider's service area.

(h) The recording required by this section for holders of certificates of public convenience and necessity already in existence as of September 1, 2005 must be completed not later than January 1, 2007.

SUBCHAPTER H: UTILITY SUBMETERING AND ALLOCATION

§291.124

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.102, which provides the commission the general powers to carry out duties under TWC and §5.103, which provides the commission with the authority to adopt any rules necessary to carry out the powers and duties under the provisions of the TWC and other laws of this state. In addition, TWC, §13.041 states that the commission may regulate and supervise the business of every water and sewer utility within its jurisdiction and may do all things, whether specifically designated in TWC, Chapter 13 or implied in TWC, Chapter 13, necessary and convenient to the exercise of this power and jurisdiction. Further, TWC, §13.041 also states that the commission shall adopt and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules governing practice and procedure before the commission.

Therefore, the TWC authorizes rulemaking that implements the language added to TWC, §13.503(c) and (d) by Senate Bill 2126, 81st Legislature, 2009, which allows owners or managers of apartment houses to add up to a nine percent service charge to the water portion and wastewater portion of utility bills of tenants in submetered apartment dwelling units.

§291.124. Charges and Calculations.

(a) Prohibited charges. Charges billed to tenants for submetered or allocated utility service may

only include bills for water or wastewater from the retail public utility and must not include any fees billed to the owner by the retail public utility for any deposit, disconnect, reconnect, late payment, or other similar fees.

(b) Dwelling unit base charge. If the retail public utility's rate structure includes a dwelling unit base charge, the owner shall bill each dwelling unit for the base charge applicable to that unit. The owner may not bill tenants for any dwelling unit base charges applicable to unoccupied dwelling units.

(c) Customer service charge. If the retail public utility's rate structure includes a customer service charge, the owner shall bill each dwelling unit the amount of the customer service charge divided by the total number of dwelling units, including vacant units, that can receive service through the master meter serving the tenants.

(d) Calculations for submetered utility service. The tenant's submetered charges must include the dwelling unit base charge and customer service charge, if applicable, and the gallonage charge and must be calculated each month as follows:

(1) water utility service: the retail public utility's total monthly charges for water service (less dwelling unit base charges or customer service charges, if applicable), divided by the total monthly water consumption measured by the retail public utility to obtain an average water cost per gallon, liter, or cubic foot, multiplied by the tenant's monthly consumption or the volumetric rate charged by the retail public utility to the owner multiplied by the tenant's monthly water consumption;

(2) wastewater utility service: the retail public utility's total monthly charges for wastewater service (less dwelling unit base charges or customer service charges, if applicable), divided by the total monthly water consumption measured by the retail public utility, multiplied by the tenant's monthly consumption or the volumetric wastewater rate charged by the retail public utility to the owner multiplied by the tenant's monthly water consumption;

(3) service charge for manufactured home rental community or the owner or manager of apartment house: a manufactured home rental community or apartment house may charge a service charge in an amount not to exceed 9% of the tenant's charge for submetered water and wastewater service, except when;

(A) the resident resides in a unit of an apartment house that has received an allocation of low income housing tax credits under Texas Government Code, Chapter 2306, Subchapter DD; or

(B) the apartment resident receives tenant-based voucher assistance under United States Housing Act of 1937 Section 8, (42 United States Code, §1437f); and

(4) final bill on move-out for submetered service: if a tenant moves out during a billing period, the owner may calculate a final bill for the tenant before the owner receives the bill for that period from the retail public utility. If the owner is billing using the average water or wastewater cost per gallon,

liter, or cubic foot as described in paragraph (1) of this subsection, the owner may calculate the tenant's bill by calculating the tenant's average volumetric rate for the last three months and multiplying that average volumetric rate by the tenant's consumption for the billing period.

(e) Calculations for allocated utility service.

(1) Before an owner may allocate the retail public utility's master meter bill for water and sewer service to the tenants, the owner shall first deduct:

(A) dwelling unit base charges or customer service charge, if applicable; and

(B) common area usage such as installed landscape irrigation systems, pools, and laundry rooms, if any, as follows:

(i) if all common areas are separately metered or submetered, deduct the actual common area usage;

(ii) if common areas that are served through the master meter that provides water to the dwelling units are not separately metered or submetered and there is an installed landscape irrigation system, deduct at least 25% of the retail public utility's master meter bill;

(iii) if all water used for an installed landscape irrigation system is

metered or submetered and there are other common areas such as pools or laundry rooms that are not metered or submetered, deduct at least 5% of the retail public utility's master meter bill; or

(iv) if common areas that are served through the master meter that provides water to the dwelling units are not separately metered or submetered and there is no installed landscape irrigation system, deduct at least 5% of the retail public utility's master meter bill.

(2) To calculate a tenant's bill:

(A) for an apartment house, the owner shall multiply the amount established in paragraph (1) of this subsection by:

(i) the number of occupants in the tenant's dwelling unit divided by the total number of occupants in all dwelling units at the beginning of the month for which bills are being rendered; or

(ii) the number of occupants in the tenant's dwelling unit using a ratio occupancy formula divided by the total number of occupants in all dwelling units at the beginning of the retail public utility's billing period using the same ratio occupancy formula to determine the total. The ratio occupancy formula will reflect what the owner believes more accurately represents the water use in units that are occupied by multiple tenants. The ratio occupancy formula that is used must assign a fractional portion per tenant of no less than that on the following scale:

(I) dwelling unit with one occupant = 1;

(II) dwelling unit with two occupants = 1.6;

(III) dwelling unit with three occupants = 2.2; or

(IV) dwelling unit with more than three occupants = 2.2 + 0.4 per each additional occupant over three; or

(iii) the average number of occupants per bedroom, which shall be determined by the following occupancy formula. The formula must calculate the average number of occupants in all dwelling units based on the number of bedrooms in the dwelling unit according to the scale below, notwithstanding the actual number of occupants in each of the dwelling unit's bedrooms or all dwelling units:

(I) dwelling unit with an efficiency = 1;

(II) dwelling unit with one bedroom = 1.6;

(III) dwelling unit with two bedrooms = 2.8;

(IV) dwelling unit with three bedrooms = 4 + 1.2 for each additional bedroom; or

(iv) a factor using a combination of square footage and occupancy in which no more than 50% is based on square footage. The square footage portion must be based on the total square footage living area of the dwelling unit as a percentage of the total square footage living area of all dwelling units of the apartment house; or

(v) the individually submetered hot or cold water usage of the tenant's dwelling unit divided by all submetered hot or cold water usage in all dwelling units;

(B) a condominium manager shall multiply the amount established in paragraph (1) of this subsection by any of the factors under subparagraph (A) of this paragraph or may follow the methods outlined in the condominium contract;

(C) for a manufactured home rental community, the owner shall multiply the amount established in paragraph (1) of this subsection by:

(i) any of the factors developed under subparagraph (A) of this paragraph; or

(ii) the area of the individual rental space divided by the total area of all

rental spaces; and

(D) for a multiple use facility, the owner shall multiply the amount established in paragraph (1) of this subsection by:

(i) any of the factors developed under subparagraph (A) of this paragraph; or

(ii) the square footage of the rental space divided by the total square footage of all rental spaces.

(3) If a tenant moves in or out during a billing period, the owner may calculate a bill for the tenant. If the tenant moves in during a billing period, the owner shall prorate the bill by calculating a bill as if the tenant were there for the whole month and then charging the tenant for only the number of days the tenant lived in the unit divided by the number of days in the month multiplied by the calculated bill. If a tenant moves out during a billing period before the owner receives the bill for that period from the retail public utility, the owner may calculate a final bill. The owner may calculate the tenant's bill by calculating the tenant's average bill for the last three months and multiplying that average bill by the number of days the tenant was in the unit divided by the number of days in that month.

(f) Conversion to approved allocation method. An owner using an allocation formula other than those approved in subsection (e) of this section shall immediately provide notice as required under

§291.123(c) of this title (relating to Rental Agreement) and either:

(1) adopt one of the methods in subsection (e) of this section; or

(2) install submeters and begin billing on a submetered basis; or

(3) discontinue billing for utility services.