

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

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The 81st Legislature, 2009, passed House Bill (HB) 1295 and Senate Bill (SB) 2126. HB 1295 requires 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 allows 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 proposes to amend §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 proposes to amend the title of §291.106 to make it more concise.

The commission proposes to amend §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 proposal allows apartment houses to also collect this service charge for submetered water service. In addition, the proposal 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 is proposing to amend 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.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, determined that for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency or other units of state or local governments as a result of administration or enforcement of the proposed rules. The agency will use available resources to implement the proposed rules.

The proposed rules implement the provisions of HB 1295 and SB 2126 by amending subchapters G and H in Chapter 291. The proposed rules require notice of CCN applications to counties and groundwater conservation districts that are wholly or partially included in the proposed CCN area. The proposed rules also allow owners or managers of apartment complexes to add up to a nine percent service charge to water utility bills of tenants in submetered apartments unless their properties receive low income housing tax credits or their residents receive tenant based voucher assistance. In addition, owners or managers of apartment houses and mobile home rental communities may also add up to a nine percent service charge to the wastewater portion of tenants' utility bills. Service charges may cover billing and administrative costs, but may not cover the cost of the meters themselves. Service charges will vary depending on the administrative and billing costs incurred and the number of tenants in the complex.

The proposed rules will not have a significant fiscal impact on counties and groundwater conservation districts, but it will provide them with more notice of CCN applications.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be compliance with state law, more informed local governments, and the encouragement of submetering in apartment complexes which may promote more water conservation.

Applicants for CCNs will have to provide notice to more local government officials under the proposed rules. Any cost increase in providing this notice is expected to be minimal and may be as much as \$20 per application.

There are an estimated 1,154 apartment complexes and mobile home parks currently registered as submeterers with the agency. Apartment complex owners and mobile home parks can choose whether or not to install submeters, and the proposed rules will allow them to choose whether or not to bill service charges. Apartment complex owners will be allowed to add up to a nine percent service charge to water and wastewater utility bills of tenants under the proposed rules.

Tenants could see an increase in their bills if the apartment owner or mobile home community owner adds the service charges (up to 18 percent) to the water and wastewater bills of their tenants, although staff does not expect that a significant number of owners will add service charges of the maximum allowed amount. The amount of the service charge will vary depending on the number of submeters and associated administrative and billing costs. Tenants are expected to modify their water and wastewater consumption to minimize the impact of any increases to their utility bills associated with a service charge.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules since small businesses that own apartment complexes or mobile home communities can choose whether or not to submeter and to add a service charge to tenants' water and wastewater utility bills.

There may be as many as 740 investor owned utilities that may have to provide notices of CCN applications to additional governmental entities; however, the cost of doing so is expected to be minimal and equal to the costs that would be incurred by a large business.

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 rules are required to comply with state law, to protect the environment, and do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect.

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 rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking 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 proposed rulemaking is to implement legislative changes enacted by HB 1295, which requires 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 proposed 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 proposed 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 proposed 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 proposed rulemaking does not meet the four applicability requirements, because the proposed 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 proposed rules; and (4) are not an adoption of a rule solely under the general powers of the commission as the proposed rules are required by HB 1295 and SB 2126.

The commission invites public comment of the draft regulatory impact analysis determination. 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 to this preamble.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed amendments and performed an assessment of whether the proposed amendments constitute a taking under Texas Government Code, Chapter 2007. The primary

purpose of the proposed 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 proposed amendments would substantially advance this purpose by amending the Chapter 291 rules to incorporate the new statutory requirements.

Promulgation and enforcement of these proposed rules would be neither a statutory nor a constitutional taking of private real property. The proposed 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 proposed 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 proposed 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 proposed rulemaking would not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rules are not subject to the Texas 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 to this preamble.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on February 22, 2010, at 2:00 p.m. 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 Michael Parrish, 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 2009-039-291-OW. The comment period closes on March 1, 2010. 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 Ms.

Tammy Benter, Utilities & Districts Section, Water Supply Division, at (512) 239-6136.

SUBCHAPTER G: CERTIFICATES OF CONVENIENCE AND NECESSITY

§291.106

STATUTORY AUTHORITY

The amendment is proposed 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, §13.246(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 [for Applications for Certificates of Convenience and Necessity and Requirements for Recording Maps and Descriptions of Areas Covered by Certificates of Convenience and Necessity].

(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 proposed 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; [and]

(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.

