

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts the repeal of §291.126 *without changes* as published in the September 10, 2010, issue of the *Texas Register* (35 TexReg 8299).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

In September 1987, the submetering program was transferred by the legislature from the Public Utility Commission (PUC) to the Texas Water Commission, a predecessor agency of the TCEQ. While at the PUC, the submetering program adopted rules to allow an owner to disconnect a tenant's water utility service for non-payment to conform to other PUC rules. When the submetering program was transferred, the Texas Water Commission adopted rules similar to the PUC's, including the provision allowing an owner to disconnect a tenant's water utility service for non-payment. The TCEQ's current rules still contain this provision in Chapter 291, Subchapter H, Utility Submetering and Allocation, §291.126, Discontinuation of Service.

In 1995, the 74th Legislature amended Texas Property Code, §92.008, by passing House Bill (HB) 2803. In 2009, Texas Property Code, §92.008 was amended again when the 81st Legislature passed HB 882. Currently, Texas Property Code, §92.008(b) states that a landlord may not interrupt or cause interruption of water, wastewater, gas, or electric service furnished to a tenant by the landlord as an incident of tenancy or by other agreement unless the interruption results from bona fide repairs, construction, or an emergency. Non-payment is not a reason for interruption of service under Texas Property Code, §92.008. Therefore, the commission proposes this rulemaking to ensure that the commission's rules conform with the Texas Property Code.

SECTION DISCUSSION

The commission adopts the repeal to §291.126. Section 291.126 provided that a tenant's water utility service may be disconnected if payment was not received by the due date, and the owner issues a disconnection notice after the due date at least ten days prior to a stated date of disconnection. Texas Property Code, §92.008(b), does not allow a landlord to interrupt water services furnished to a tenant by the landlord as an incident of tenancy or by other agreement unless the interruption results from bona fide repairs, construction, or emergency. Until now, the commission held that its rule did not conflict with the Texas Property Code. However, recent legal analysis by the commission has resulted in the determination that the rule is not consistent with the statute. Specifically, since Texas Property Code, §92.008, only allows for the disconnection of water services that are provided to a tenant by the landlord as an incident of tenancy or by other agreement for the three previous reasons listed, the commission's rule that allows for disconnection due to non-payment was in conflict with this section. To ensure that the commission's rules and the Texas Property Code conform, the commission adopts this repeal.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted 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, a sector of 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 repeal to protect the environment or reduce risks to human health from environmental exposure. The specific intent of the adopted rulemaking is to ensure that the TCEQ rule on disconnection of submetered water utilities conforms with the Texas Property Code on disconnection. Section 291.126 allowed an owner to disconnect submetered or allocated water utility service for non-payment of that service. Texas Property Code, §92.008(b), states that a landlord may not interrupt water service furnished to a tenant by the landlord as an incident of tenancy or by other agreement unless the interruption results from bona fide repairs, construction, or an emergency. Non-payment is not a reason for interruption of service under this statute.

Further, the rulemaking does not meet the statutory definition of a "major environmental rule" because the adopted rule repeal will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The cost of complying with the adopted repeal is not expected to be significant with respect to the economy.

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). There are no federal standards governing submetering in the State of Texas. Second, the adopted rulemaking does not exceed an express requirement of state law. Third, the adopted rulemaking does not 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. Finally, the rulemaking is adopted pursuant to the commission's specific authority in Texas Water Code, Chapter 13, Subchapter M. Therefore, the repeal is not adopted solely under the commission's general powers.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. The commission did not receive any comments regarding the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the adopted repeal of §291.126 and performed an assessment of whether the adopted repeal constituted a taking under Texas Government Code, Chapter 2007. The primary purpose of the adopted rulemaking is to ensure that TCEQ rules conform with the Texas Property Code. The adopted rule repeal substantially advances this purpose by repealing §291.126 to accomplish this conformity.

Promulgation and enforcement of this adopted rule repeal would be neither a statutory nor a constitutional taking of private real property. The adopted repeal does 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 adopted rule repeal will primarily affect those owners who

have tenants with submetered or allocated water utility service; this would not be 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 repeal 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 repeal is not subject to the Texas Coastal Management Program.

The commission invited public comment regarding consistency with the coastal management program during the public comment period. The commission did not receive any comments regarding the consistency with the coastal management program.

PUBLIC COMMENT

The commission held a public hearing for this rule on October 5, 2010 in Austin, Texas. At the hearing, the commission received a comment from the Texas Apartment Association. The comment period closed on October 11, 2010. The commission received no written comments.

RESPONSE TO COMMENT

The Texas Apartment Association commented that they support the rule.

The commission acknowledges the comment in support of the rule.

SUBCHAPTER H: UTILITY SUBMETERING AND ALLOCATION

[\$291.126]

STATUTORY AUTHORITY

The repeal is adopted under Texas Water Code (TWC), §5.102, which provides the commission the general powers to carry out its duties under the 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. Additionally, TWC, §13.503 states that the commission shall adopt rules and standards under which owners of properties that are not individually metered for water may install submetering equipment for each rental or dwelling unit for the purpose of fairly allocating the cost of each individual rental or dwelling unit's water consumption. Therefore, the TWC authorizes rulemaking that repeals §291.126, which allows an owner to disconnect submetered or allocated water utility service for non-payment of that service.

The adopted repeal implements TWC, §13.503.

[\$291.126. Discontinuance of Service.]

[(a) Disconnection for nonpayment. A tenant's water utility service may be disconnected if payment was not received by the due date, and the owner issues a disconnection notice after the due date at least ten days prior to a stated date of disconnection.]

[(b) Disconnection notice. The notice issued by an owner under this section shall include the following:]

[(1) the words "disconnection notice" prominently displayed;]

[(2) the amount and date payment must be received by the owner to avoid disconnection;]

[(3) the date service will be disconnected if payment is not received; and]

[(4) a local address where the tenant can go during normal business hours to make arrangements for payment of the bill and for reconnecting service.]

[(c) Disconnection on holidays and weekends. Unless a dangerous condition exists which is related to the type of service provided, or unless the tenant requests disconnection, service shall not be disconnected on a day, or on a day immediately preceding a day, when the owner or his representative is not available to collect payments and reconnect service.]