

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to repeal §291.126.

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED 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 proposes to repeal §291.126. Section 291.126 provides 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 is in conflict with this section. To ensure that the commission's rules and the Texas Property Code conform, the commission proposes this repeal.

#### FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeffrey Horvath, analyst in the Strategic Planning and Assessment Section, determined that for the first five-year period the proposed repeal is in effect, no 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 repeal.

The proposed rulemaking would repeal §291.126 that allows an owner to disconnect water utility service to a tenant if payment was not received by the due date. The rulemaking is proposed in order to ensure that the commission's rules do not conflict with the Texas Property Code, §92.008(b). Texas Property Code, §92.008(b) states that a landlord may not interrupt or cause the 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. Texas Property Code, §92.008(b) resulted from the passage of HB 2803, 74th Legislature and has been in effect since 1995.

Based upon recent legal interpretation, it was determined that submetered and allocated utilities would fall under the provisions of Texas Property Code, §92.008(b) and, therefore, §291.126 would be in conflict with the statute. The repeal of §291.126 is not expected to result in fiscal implications for the agency, water utilities, or other units of state or local government.

#### PUBLIC BENEFITS AND COSTS

Mr. Horvath also determined that for each year of the first five years the proposed repeal is in effect, the public benefit anticipated from the changes seen in the proposed repeal will be clear and consistent with agency rules.

In general, no significant fiscal implications are anticipated for tenants, landlords, and owners of apartments, condominiums, multiple use facilities, or manufactured home rental communities with submetered or allocated water utilities. It is assumed that landlords and owners have been in compliance with Texas Property Code, §92.008(b). However, some owners and landlords have received agency guidance based on §291.126 that they could disconnect a tenant's water service for non-payment of the tenant's charge for service. For these owners and landlords, as well as for some tenants who may choose to delay or not to pay their water service bills since they are no longer subject to termination of service for non-payment, there may be fiscal implications.

According to agency staff, there are approximately 5,715 apartment houses, condominiums, multiple use

facilities, and manufactured home rental communities registered with the agency that provide submetered or allocated water utilities to their tenants. In order to recoup costs from late or non-paying tenants who have submetered water utilities, owners and landlords may have to pursue the use of small claims court or the use of the eviction process, which could result in increased business expenses. There may or may not be costs associated with these actions, and if there are, such costs cannot be estimated at this time. It is not known how many of the landlords, if any, at these facilities may have disconnected water utilities due to non-payment in the past and therefore it is difficult to predict how many landlords may not receive timely payments in the future. In addition, if landlords and owners are not able to disconnect submetered or allocated water utilities due to non-payment, there could be less incentive for them to install or use submetered water utilities.

#### SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the administration or enforcement of the proposed repeal. There are approximately 5,715 apartment houses, condominiums, multiple use facilities, and manufactured home rental communities that are registered with the agency. It is not known how many of the facilities would be small or micro-businesses. It is not known how many of the landlords at these facilities may have disconnected water utilities due to non-payment in the past and therefore it is difficult to predict how many landlords may not receive timely payments in the future. In order to recoup costs from late or non-paying tenants who have submetered water utilities, owners and landlords may have to pursue the use of small claims court or the use of the eviction process, which could result in increased business expenses. There may or may not be costs associated with these actions, and if there are, such costs cannot be estimated at this time. The proposed rulemaking would repeal §291.126 to ensure that the commission's rules do not conflict with Texas

Property Code, §92.008(b). However, because state law controls over any agency regulatory provisions, if there are any adverse fiscal implications for small or micro-businesses, they are not a result of this rulemaking.

#### 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 does adversely affect small or micro-businesses and is necessary to be consistent with other state law.

#### 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 repeal does not adversely affect a local economy in a material way for the first five years that the proposed repeal is 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, 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 proposed rulemaking is to ensure that the TCEQ rule on disconnection of submetered water utilities conforms with the Texas Property Code on disconnection. Currently, §291.126 allows 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 proposed 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 proposed repeal is not expected to be significant with respect to the economy.

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). There are no federal standards governing submetering in the State of Texas. Second, the proposed rulemaking does not exceed an express requirement of state law. Third, the proposed 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 proposed rulemaking will be 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.

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

Promulgation and enforcement of this proposed rule repeal would be neither a statutory nor a constitutional taking of private real property. The proposed 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 proposed 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 proposed 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 proposed repeal is 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 of this preamble.

#### ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on October 5, 2010 at 2:00 pm 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 2010-030-291-OW. The comment period closes October 11, 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](http://www.tceq.state.tx.us/nav/rules/propose_adopt.html)*. For further information, please contact Doug

Holcomb, Water Supply Division at (512) 239-6947.

## **SUBCHAPTER H: UTILITY SUBMETERING AND ALLOCATION**

### **[\§291.126]**

#### STATUTORY AUTHORITY

The repeal is proposed 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 proposed 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.]