

Texas Commission on Environmental Quality

INTEROFFICE MEMORANDUM

To: Commissioners **Date:** October 16, 2009
Thru: LaDonna Castañuela
Chief Clerk
From: Dorca Zaragoza-Stone, Deputy Director
Office of Administrative Services
Subject: Consideration of a Petition for Proposed Rulemaking
Docket No.: 2009-1531-RUL
Rule Project No. 2010-001-PET-NR

Who Submitted the Petition:

K-3 Resources, LP (K-3), a company engaged in the land application of Class B sewage sludge submitted the petition on September 18, 2009.

What the Petitioner Requests:

The petitioner is requesting deletion of 30 TAC §37.9105(b)(2), which requires Environmental Impairment insurance policies to offer the option of renewal of the expiring policy and prevents the insurer from cancelling the policy unless the operator fails to pay the premium. It reports this requirement has caused numerous insurance companies to deny providing a policy to K-3. This insurance is required to issue a Class B sewage sludge permit. The agency has notified K-3 that its pending 4 applications will be returned on December 1, 2009 should K-3 not provide the required coverage.

§37.9105(b)(2) provides that:

The policy must provide that the insurer may not cancel, terminate, or fail to renew the policy except for failure to pay the premium. The automatic renewal of the policy must, at a minimum, provide the insured with the option of renewal at the policy limit of the expiring policy. If there is a failure to pay the premium, the insurer may elect to cancel, terminate, or fail to renew the policy by sending notice by certified mail to the responsible person and the executive director. Cancellation, termination, or failure to renew may not occur, however, during 120 days beginning with the date of receipt of the notice of cancellation, termination, or failure to renew by both the executive director and the responsible person, as evidenced by the return receipts.

Additionally, the petitioner requests that the Commission adopt their recommendation on an emergency basis as allowed under Texas Government Code §2001.034 and 30 TAC §20.17.

§20.17 provides that:

If the commission finds that an imminent peril or extraordinary circumstance may threaten the public health, safety, or welfare or the integrity of the commission's regulatory programs, and requires the adoption of a rule on less than 30 day's notice, it may adopt an emergency rule without prior notice and hearing or with any abbreviated notice and hearing that it finds practicable under the circumstances. The commission shall make a written finding which shall be filed with the

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secretary of state setting forth its reasons for such determination. The emergency rule shall be effective immediately upon filing with the secretary of state and will continue in effect for a period of up to 120 days. The emergency rule may be renewed once before expiration for a period of 60 days.

Recommended Action and Justification:

The executive director recommends removing the requirement for an insurer to automatically offer a renewal at policy expiration as requested in part by the petitioner. This would allow an insurer and the site operator greater latitude in determining when a policy would end. However, the executive director does not recommend repeal of the entirety of 30 TAC §37.9105(b)(2) as the petitioner further recommends since the agency would not have knowledge that coverage will end. Receiving notice prior to policy cancellation would allow the agency the opportunity to make demand for any needed corrective action before the policy expires.

The executive director believes that these changes may allow site operators to obtain coverage while providing protection. He does not believe that the changes require an emergency rulemaking, however.

Applicable Law:

- Texas Government Code, §2001.021, which establishes the procedures by which an interested person may petition a state agency for the adoption of a rule;
- 30 TAC §20.15, which provides such procedures specific to the commission;
- Texas Health and Safety Code §361.121(h) and (j), which require persons applying for Class B sewage sludge facilities to provide proof of Environmental Impairment and Commercial Liability insurance with permit applications and maintain it for the duration of the permit;
- Texas Water Code, §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to conservation of natural resources and protection of the environment;
- Texas Water Code, §5.103 and §5.105, which establish the commission's general authority to adopt rules;
- Texas Health and Safety Code, §361.011, which provides the commission with the authority to manage municipal waste;
- Texas Health and Safety Code, §361.013, which provides the commission the authority to adopt rules and establish fees for the transportation and disposal of solid waste;
- Texas Health and Safety Code, §361.022, which provides the state's public policy for preferred methods for generating, treating, storing, and disposing of municipal sludge as reuse;
- Texas Health and Safety Code, §361.024, which provides the commission with authority to adopt rules consistent with the chapter and establish minimum standards of operation for the management and control of solid waste; and,
- Texas Health and Safety Code, §361.061, which provides the commission the authority to issue permits for the construction, operation, and maintenance of solid waste facilities that store, process, or dispose of solid waste.

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Affected Public:

Adjacent landowners and persons who could be harmed by sludge application may be affected if their ability to recover damages under the insurance policies is impaired.

Affected Agency Programs:

No appreciable effect on agency programs is anticipated.

Agency Contacts:

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Anthony Tatu, Staff Attorney, 239-5778
Michael Parrish, Texas Register Coordinator, 239-2548

Attachment: Petition

cc: 5 copies to the Chief Clerk for distribution
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