

The Texas Commission on Environmental Quality (agency, commission, or TCEQ) adopts the amendment to §37.9105.

The amendment to §37.9105 is adopted *without change* to the proposed text as published in the June 18, 2010, issue of the *Texas Register* (35 TexReg 5172) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

The purpose of the adopted amendment is to eliminate a requirement of environmental impairment insurance policies for Class B sewage sludge facilities.

SECTION DISCUSSION

Existing §37.9105, Environmental Impairment Insurance, is amended to remove the requirement in §37.9105(b)(2) that the environmental impairment insurance policy required of Class B sewage sludge operators must provide an automatic renewal option to the insured, who is the facility operator. The adopted paragraph allows the insurer to cancel, terminate, or non-renew the policy as long as it provides 120 days prior notice to the executive director.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the adopted rule is not subject to §2001.0225 because it does not meet the criteria for a major environmental rule as defined in that statute.

A major environmental rule means a rule the specific intent of which is 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.

The specific intent of the adopted rule is to remove a policy requirement of the environmental impairment insurance required of Class B sewage sludge facilities. Therefore, it is not anticipated that the adopted rule will 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 commission concludes that the adopted rule does not meet the definition of a major environmental rule.

Furthermore, even if the adopted rule did meet the definition of a major environmental rule, the adopted rule is not subject to Texas Government Code, §2001.0225, because it does not meet any of the four applicable requirements specified in §2001.0225(a). Texas Government Code, §2001.0225(a) applies to a rule adopted by an agency, 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.

In this case, the adopted rule does not meet any of these requirements. First, there are no applicable federal standards that this rule would address. Second, the adopted rule does not exceed an express requirement of state law but instead streamlines existing rules adopted pursuant to state law. Third, there is no delegation agreement that would be exceeded by this adopted rule because none relates to this subject matter area. Fourth, the commission is not adopting this rule solely under the commission's general powers, but also under the authority of 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; 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; and Texas Health and Safety Code, §361.121, which provides that a permit is required for the land application of Class B sewage sludge, that a fee shall be charged for the issuance of a permit, and that the commission shall adopt rules to require an applicant to submit certain information with a permit application, including information relating to commercial liability insurance and environmental impairment insurance.

The commission invited public comment regarding the draft regulatory impact analysis

determination during the public comment period and no comments were received.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the rule and performed an assessment of whether the rule constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of the rule is to eliminate a requirement of environmental impairment insurance policies for Class B sewage sludge facilities. The rule substantially advances this stated purpose by removing the requirement that the environmental impairment insurance policy required of Class B sewage sludge operators must provide an automatic renewal option to the insured, who is the facility operator.

Promulgation and enforcement of this rule is neither a statutory nor a constitutional taking of private real property because the rule does not affect real property.

In particular, there are no burdens imposed on private real property, and the rule amends agency rules regarding financial assurance for Class B sewage sludge facilities. Because the regulation does not affect real property, it does not burden, restrict, or limit an owner's right to property or reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. Therefore, this rule will not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found the proposal is a rulemaking identified in

the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to rules subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process. The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the adopted rule is consistent with CMP goals and policies because the rulemaking is an administrative rule that includes financial assurance, notice, and other procedural requirements for permit holders of Class B sewage sludge; will not have a direct or significant adverse effect on any coastal natural resource areas; will not have a substantive effect on commission actions subject to the CMP; and promulgation and enforcement of the rule will not violate (exceed) any standards identified in the applicable CMP goals and policies.

The commission invited public comment regarding the consistency with the coastal management program during the public comment period and no comments were received.

PUBLIC COMMENT

The commission held a public hearing on this proposal in Austin on July 15, 2010 at 10:00 a.m. No comments were received at the hearing. The comment period closed on July 19, 2010. No written comments were received.

**SUBCHAPTER V: FINANCIAL ASSURANCE FOR CLASS B SEWAGE SLUDGE FOR
LAND APPLICATION UNITS**

§37.9105

STATUTORY AUTHORITY

The amendment is adopted under 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; 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; and Texas Health and Safety Code, §361.121, which provides that a permit is required for the land application of Class B sewage sludge, that a fee shall be charged for the issuance of a permit, and that the commission shall adopt rules to require an applicant to submit certain information with a permit application, including information relating to commercial liability insurance and environmental impairment

insurance.

The adopted amendment implements Texas Health and Safety Code, §361.121.

§37.9105. Environmental Impairment Insurance.

(a) A responsible person subject to this subchapter shall obtain and maintain an environmental impairment insurance policy that must:

(1) reflect the responsible person as the insured;

(2) reflect total coverage of not less than \$3 million per occurrence with a policy limit of not less than \$3 million, exclusive of legal defense costs;

(3) be issued by an insurance company licensed to transact the business of insurance in Texas or eligible to provide insurance as an excess or surplus lines insurer in Texas that has a rating of A- or better by A.M. Best Company;

(4) designate the Texas Commission on Environmental Quality as an additional insured; and

(5) be evidenced by a certificate of insurance worded identically to the wording specified in §37.9155 of this title (relating to Certificate of Insurance for Environmental Impairment).

(b) The insurance afforded under the policy must provide the following.

(1) The insurance policy must guarantee that funds be available to provide for corrective action related to the facility. The policy must also guarantee that once corrective action begins, the insurer shall be responsible for paying out funds, up to an amount equal to the policy limit, upon the direction of the executive director, to such party or parties as the executive director specifies.

(2) 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.

(3) Cancellation, termination, or failure to renew may not occur and the policy must remain in full force and effect in the event that on or before the date of expiration:

(A) corrective action is ordered by the executive director or by a United States district court or other court of competent jurisdiction;

(B) the responsible person is named as debtor in a voluntary or involuntary proceeding under Title 11 (Bankruptcy), United States Code; or

(C) the premium due is paid.

(4) Each policy must contain a provision allowing assignment of the policy to a successor responsible person. Such assignment may be conditional upon consent of the insurer, provided such consent is not unreasonably refused.

(5) Whenever requested by the executive director, the insurer agrees to furnish to the executive director a signed duplicate original of the policy and all endorsements.

(c) A single \$3 million policy limit and per occurrence limit may be obtained for all facilities for which the responsible person is required to provide environmental impairment insurance.

(d) The responsible person must maintain the policy in full force and effect until the executive director consents to termination of the policy as provided in §37.9140 of this title (relating to Termination of Mechanisms). Failure to pay the premium, without substitution of alternate environmental impairment insurance coverage as specified in this subchapter, shall constitute a violation of these regulations, warranting such remedy as the executive director deems necessary including revocation of the permit.

(e) The policy may not contain an exclusion for intentional, willful, knowing, or deliberate noncompliance with a statute, regulation, order, notice, or government instruction.