

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

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

The purpose of the proposed 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 proposed for amendment by removing 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 proposed paragraph would allow the insurer to cancel, terminate, or non-renew the policy as long as it provided 120 days prior notice to the executive director.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rule is in effect, no significant fiscal implications are anticipated for the agency. Other units of state or local governments may experience fiscal impacts, although not anticipated to be significant, as a result of administration or enforcement of the proposed rule. The proposed rule could continue to ensure competition for the disposal of Class B sewage among large and small permitted operators and generate some cost savings for local governments.

The proposed rule eliminates current requirements for environmental impairment insurance to offer an

automatic renewal option when insuring Class B sewage sludge operators. Policies would still require the insurer provide 120-day notice to the executive director prior to policy cancellation, termination, or non-renewal. As permits for Class B sewage sludge operators have come up for renewal, the current requirement to offer an automatic renewal option has been reported to be an impediment for small operators to obtain the required insurance. If small operators cannot obtain insurance, their permits cannot be renewed, and the number of operators offering this method of Class B sludge disposal will be reduced. Currently there are 36 permits issued for Class B sludge disposal. Two companies operate 28 sites and have been able to obtain the required insurance. However, six companies operating a total of eight sites have indicated that they cannot obtain the required insurance causing them to be unable to renew existing permits or obtain new ones. It is anticipated that eliminating the auto renewal requirements of environmental insurance policies will allow some or all of existing operators and future operators to obtain insurance. If insurers are willing to insure both large and small operators, generators of Class B sludge are expected to have more competitors to choose from when disposing of sludge.

Local governments can dispose of Class B sludge using several options, one of which is to pay a commercial operator to dispose of the waste according to regulations. The proposed rule may allow more Class B sewage sludge operators to apply for or renew permits and provide local governments with a larger competitive pool from which to choose. More competition may allow local governments to experience some cost savings if this method of Class B sludge disposal is chosen.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed rule is in effect, the

public benefit anticipated from the changes seen in the proposed rule will be continued availability of a Class B sludge disposal option from a larger pool of commercial operators and continued protection of the environment.

There are two operators that operate 28 of the 36 permitted Class B disposal sites that have been able to obtain insurance under the current rules. Under the proposed rule, these operators should continue to be able to obtain insurance. It is not known whether insurers will offer environmental impairment insurance to these two operators at a less expensive rate than what is currently paid. Insurance premium rates will depend on the circumstances and risk criteria of each insurer.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rule. Small businesses that are Class B sewage sludge operators may be able to obtain insurance that insurers are not currently offering them under the current rule. Obtaining this insurance will enable these small businesses to renew their permits.

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 not adversely affect a small or micro-business in a material way for the first five years that the proposed rule is 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 rule does not adversely affect a local economy in a

material way for the first five years that the proposed rule is in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rule in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed 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 proposed 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 proposed 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 proposed rule does not meet the definition of a major environmental rule.

Furthermore, even if the proposed rule did meet the definition of a major environmental rule, the proposed 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 proposed rule does not meet any of these requirements. First, there are no applicable federal standards that this rule would address. Second, the proposed 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 proposed rule because none relates to this subject matter area. Fourth, the commission is not proposing 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.

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 this proposed rule and performed an assessment of whether the proposed rule constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of the proposed rule is to eliminate a requirement of environmental impairment insurance policies for Class B sewage sludge facilities. The proposed rule would substantially advance 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 proposed rule would be neither a statutory nor a constitutional taking of private real property because the proposed rule does not affect real property.

In particular, there are no burdens imposed on private real property, and the proposed 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 proposed rule will not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed 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 proposed 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.

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 July 15, 2010 at 10:00 a.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 Devon Ryan, 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 2010-014-037-AD. The comment period closes July 19, 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 Rob Norris, Revenue Section, (512) 239-6239.

SUBCHAPTER V: FINANCIAL ASSURANCE FOR CLASS B SEWAGE SLUDGE FOR LAND

APPLICATION UNITS

§37.9105

STATUTORY AUTHORITY

The amendment is proposed 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 proposed 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 [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.

(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.