

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** November 18, 2011

Thru: Bridget C. Bohac, Chief Clerk

From: Blas Coy, Director
Public Interest Counsel

Docket No.: 2011-1065-RUL

Subject: Commission Approval for Proposed Rulemaking
Chapter 80, Contested Case Hearings
HB 2694 (3.04): Public Interest Factors
Rule Project No. 2011-035-080-AD

Background and reason(s) for the rulemaking:

House Bill (HB) 2694, §3.04 requires the commission by rule to establish factors the public interest counsel must consider before deciding to represent the public interest as a party to a commission proceeding.

Scope of the rulemaking:

A.) Summary of what the rulemaking will do: The rulemaking would establish factors the public interest counsel must consider before deciding to represent the public interest in a commission proceeding. The rulemaking includes factors to determine the nature and extent of the public interest and factors to consider in prioritizing the workload of the office of public interest counsel (OPIC).

B.) Scope required by federal regulations or state statutes: This rule is not required by federal regulations; however, this rule is required by state statute. HB 2694, §3.04, amended the Texas Water Code (TWC), by adding TWC, §5.276. TWC, §5.276 requires the commission to establish by rule factors that the public interest counsel must consider before deciding to represent the public interest in a commission proceeding. Rules adopted under TWC, §5.276 must include factors to determine the nature and extent of the public interest and factors to consider in prioritizing the workload of the office of public interest counsel. Therefore, the scope of the rulemaking is required by HB 2694, §3.04.

C.) Additional staff recommendations that are not required by federal rule or state statute: There are no additional staff recommendations that are not within the scope of HB 2694, §3.04.

Statutory authority:

HB 2694, §3.04 and Texas Water Code, §5.276.

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Effect on the:

A.) Regulated community: The regulated community will have transparency to see the factors the public interest counsel has considered when deciding whether to participate in any particular case.

B.) Public: Likewise, members of the public will have transparency to see factors the public interest counsel has considered when deciding whether to participate in any particular case. Furthermore, as noted in the Texas Sunset Advisory Commission Final Report, the rulemaking process will allow the public to provide input on what the factors should be.

C.) Agency programs: There will be no direct effect on agency programs.

Stakeholder meetings:

None.

Potential controversial concerns and legislative interest:

Since this rule is required by §3.04 of the TCEQ sunset legislation, the agency's efforts to implement §3.04 by promulgating this rulemaking will be of interest to the Legislature, as well as the Texas Sunset Advisory Commission.

Historically, determining what constitutes the public interest in commission proceedings has been the subject of discussion and debate among the public and the regulated community. It is expected that this debate and discussion will continue during the development, comment period and implementation of the rule required by HB 2694 §3.04. Controversial issues may include the extent to which the public interest counsel may consider factors such as potential economic benefits, the need for a permitted facility, or parties' lack of legal representation in particular cases where these considerations may not be expressly discussed in statutes applicable to the action under consideration.

Controversy may also arise concerning how any stated factors are to be weighed in any particular case. In recommending this rulemaking, the Texas Sunset Advisory Commission Final Report stated: "Recognizing the need for flexibility and that the public interest may change depending on the facts of an individual case, this recommendation is not intended to specifically define the public interest, but rather to identify guidelines OPIC must use in determining what the public interest is on a case-by-case basis."

Will this rulemaking affect any current policies or require development of new policies?

The rulemaking may require new internal policies and procedures for OPIC relating to the assignment of the office's workload.

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What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking?

If this rulemaking does not go forward, TCEQ's rules will be in conflict with HB 2694, §3.04. Therefore, there is no alternative to rulemaking because the rulemaking is statutorily required.

Key points in the proposal rulemaking schedule:

Anticipated proposal date: December 7, 2011

Anticipated *Texas Register* publication date: December 23, 2011

Public hearing date (if any): January 24, 2012

Public comment period: December 23, 2011 - January 30, 2012

Anticipated adoption date: May 16, 2012

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Attachments

HB 2694, Section 3.04

cc: Chief Clerk, 2 copies
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