

Office of Public Interest Counsel Annual Report to the TCEQ

— FISCAL YEARS 2013 & 2014 —

Introduction

In 2011, the 82nd Legislature passed House Bill 2694, which continued the Texas Commission on Environmental Quality (commission or TCEQ) and made changes to several functions of the commission. In particular, Article 3 of the bill addressed the responsibilities of the Public Interest Counsel (Counsel) and amended certain provisions of Chapter 5 of the Texas Water Code relating to the duties of the Office of Public Interest Counsel (OPIC or office).

As required by Article 3, Section 3.03 of the legislation, Section 5.2725 of the Texas Water Code, this report contains:

1. An evaluation of the office's performance in representing the public interest;
2. An assessment of the budget needs of the office, including the need to contract for outside expertise; and
3. Any legislative or regulatory changes recommended pursuant to Section 5.273 of the Texas Water Code.

In even-numbered years, the report must be submitted in time to be included with the reported information in the commission's reports under Texas Water Code, Sections 5.178 (a) and (b), and in the commission's biennial legislative appropriations requests, as appropriate. This report is provided to comply with the requirements of Section 5.2725 of the Texas Water Code and is respectfully submitted to the commission for its consideration.

OPIC Mission

OPIC was created in 1977 to ensure that the commission promotes the public's interest. To fulfill the statutory directive

of Section 5.271 of the Texas Water Code, OPIC participates in contested case hearings and other commission proceedings to ensure that decisions of the commission are based on a complete and fully developed record. In these proceedings, OPIC also protects the rights of the citizens of Texas to participate meaningfully in the decision-making process of the commission to the fullest extent authorized by the laws of the State of Texas.

OPIC Philosophy

To further its mission to represent the public interest, OPIC provides sound recommendations and positions supported by applicable statutes and rules and the best information and evidence available to OPIC. OPIC is dedicated to performing its duties professionally, ethically, and fairly.

Overview and Organizational Aspects

OPIC develops positions and recommendations on all matters affecting the public interest, including environmental permitting, compliance and enforcement, and rulemaking. The office is also committed to a process that encourages the participation of the public and seeks to work with the commission to create an environment to further this goal.

OPIC works independently of other TCEQ divisions and parties to a proceeding to bring to the commission the office's perspective and recommendations on public interest issues arising in various matters. To accomplish this objective, OPIC engages in a number of activities on behalf of the public and the commission, including:

- Participating as a party in contested case hearings on all matters under the Commission's jurisdiction;

- Preparing briefs for commission consideration regarding hearing requests, requests for reconsideration, motions to overturn, motions for rehearing, use determination appeals, and various other matters set for briefing by the Office of General Counsel;
- Providing review and comment on rulemaking proposals;
- Participating in public meetings on permit applications with significant public interest; and
- Responding to inquiries from the public to ensure that their concerns are brought before the commission and addressed in the decision-making process.

As a party to commission proceedings, OPIC is committed to providing independent analysis and recommendations that serve the integrity of the application and hearings process. OPIC’s participation is intended to ensure that relevant evidence on issues affecting the public’s interest is developed and made part of the record. As a result, the Commission is better able to make informed decisions, issue permits that are protective of human health and the environment and take into account the greater public interest, as well as the interests of affected parties.

The Counsel is appointed by the Commission. The Counsel supervises the overall operation of OPIC by establishing policy and administrative processes, managing the Office’s budget, hiring staff, and ensuring compliance with agency and office policy and administrative requirements. Currently, OPIC has eight full-time equivalent positions: the Counsel; a senior attorney; five assistant public interest counsels and an executive assistant.

OPIC is committed to fulfilling its statutory duty to represent the public interest in commission proceedings

by hiring, developing and retaining knowledgeable staff who are dedicated to OPIC’s mission. To maintain high quality professional representation of the public interest, OPIC ensures that attorneys in the office receive continuing legal education and other relevant training. OPIC further ensures that its staff undertakes all required agency training and is fully apprised of the agency’s operating policies and procedures.

Evaluation of OPIC’S Performance

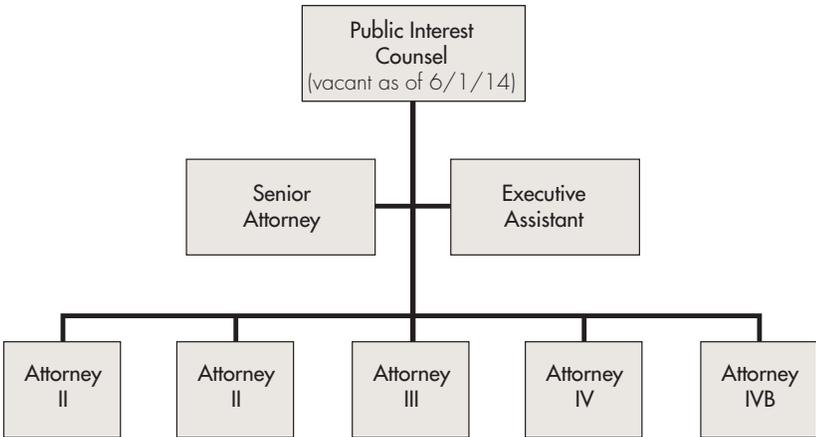
Section 5.2725(a)(1) of the Texas Water Code requires that OPIC provide the commission with an evaluation of OPIC’s performance in representing the public interest. In determining the matters in which the office will participate, OPIC applies the factors stated in 30 Texas Administrative Code Section 80.110 (Public Interest Factors) including:

1. The extent to which the action may impact human health;
2. The extent to which the action may impact environmental quality;
3. The extent to which the action may impact the use and enjoyment of property;
4. The extent to which the action may impact the general populace as a whole, rather than impact an individual private interest;
5. The extent and significance of interest expressed in public comment received by the commission regarding the action;
6. The extent to which the action promotes economic growth and the interests of citizens in the vicinity most likely to be affected by the action;
7. The extent to which the action promotes the conservation or judicious use of the state’s natural resources; and
8. The extent to which the action serves commission policies regarding the need for facilities or services to be authorized by the action.

OPIC’s performance measures classify proceedings in four categories: environmental proceedings, utility and

Figure C-1

Office of Public Interest Counsel



district proceedings, rulemaking proceedings, and enforcement proceedings.

Environmental proceedings include environmental permitting proceedings at the State Office of Administrative Hearings (SOAH) and commission proceedings related to consideration of hearings requests, requests for reconsideration, motions to overturn, use determination appeals, and miscellaneous other environmental matters heard by the commission. These include proceedings related to applications for municipal solid waste landfills and other municipal and industrial solid waste management and disposal activities, underground injection and waste disposal facilities, water rights authorizations, priority groundwater management area designations, water master appointments, municipal and industrial wastewater treatment facilities, sludge application facilities, concentrated animal feeding operations, rock and concrete crushers, concrete batch plants, new source review air permits, use determination appeals, various authorizations subject to the commission's motion to overturn process, single property designations, and permit suspension, revocation, and emergency order proceedings.

Utility and district proceedings include proceedings at SOAH and at the commission related to water and sewer ratemaking and rate appeals, impact fee and standby fee assessments, cost of service appeals, certificates of necessity and convenience, sales, transfers and mergers, and the creation of districts and other miscellaneous utility or district related matters.

Rulemaking proceedings include commission proceedings related to the consideration of rulemaking actions proposed for publication, rulemaking actions proposed for adoption, and consideration of rulemaking petitions.

Enforcement proceedings include enforcement proceedings active at SOAH, commission proceedings related to the consideration of proposed orders, and proceedings initiated with the issuance of the executive director's preliminary report and petition.

OPIC's Performance Measures

As required by Section 5.2725(b) of the Texas Water Code, the commission developed the following OPIC performance measures, which were implemented on Sept. 1, 2012:

Goal 1: To provide effective representation of the public interest as a party in all environmental and utility and district proceedings before the Texas Commission on Environmental Quality

Objective: To provide effective representation of the public interest as a party in 75 percent of environmental proceedings and 75 percent of utility and district proceedings heard by the TCEQ

Outcome Measures:

- Percentage of environmental proceedings in which OPIC participated
- Percentage of utility and district proceedings in which OPIC participated

Goal 2: To provide effective representation of the public interest as a party in all rulemaking proceedings before the Texas Commission on Environmental Quality

Objective: To participate in 75 percent of rulemaking proceedings considered by the TCEQ

Outcome Measures:

- Percentage of rulemaking proceedings in which OPIC participated

Goal 3: To provide effective representation of the public interest as a party in all enforcement proceedings before the Texas Commission on Environmental Quality

Objective: To provide effective representation of the public interest as a party for 75 percent of enforcement contested case and other proceedings heard by the TCEQ

Outcome Measures:

- Percentage of enforcement hearings and other enforcement proceedings in which OPIC participated

Evaluation of OPIC Under Its Performance Measures

OPIC's performance measures for environmental, utility and district, rulemaking and enforcement proceedings are expressed as percentages of all such proceedings in which OPIC could have participated. The numerators for the performance measure percentages are derived from the work assignments tracked by the office during fiscal year 2013 and fiscal year 2014 and a review of matters considered by the commission at its public meetings held during each fiscal year. These assignments include active matters carried forward from the past fiscal year, as well as matters

assigned during the relevant fiscal year. The denominators for the performance measure percentages—all of the proceedings in which OPIC could have participated—are derived from SOAH quarterly reports, TCEQ Litigation Division Reports and a review of matters considered by the commission at its public meetings held during each fiscal year.

Fiscal Year 2013

In fiscal year 2013, OPIC participated in a total of 1,373 proceedings. Of this total, 65 were environmental proceedings, 46 were utility and district proceedings, and 64 were rulemaking proceedings. Furthermore, OPIC participated in 1,198 enforcement proceedings by reviewing enforcement matters considered at commission agendas, and by assigning attorneys to monitor or participate as needed in docketed cases where an executive director’s preliminary report and petition had been issued or the matter was pending at SOAH.

OPIC’s participation in 65 of 71 total environmental proceedings resulted in a participation percentage of 92 percent.

OPIC’s participation in 46 of 62 utility and district proceedings resulted in a participation percentage of 74 percent.

OPIC’s participation in 64 rulemaking proceedings, including all active rule assignments carried forward from fiscal year 2012 as well as the review of all proposals and adoptions considered by the commission during fiscal year 2013, resulted in a participation percentage of 100 percent.

OPIC’s participation in 1,198 of 1,356 enforcement proceedings resulted in a participation percentage of 88 percent.

The fiscal year 2013 OPIC participation percentages for environmental, utility and district, rulemaking, and enforcement proceedings are shown in Figure 2 below.

Fiscal Year 2014

In fiscal year 2014, OPIC participated in a total of 1,211 proceedings. Of this total, 76 were environmental proceedings, 42 were utility and district proceedings, and 49 were rulemaking proceedings. Furthermore, OPIC participated in 1,044 enforcement proceedings by reviewing enforcement matters considered at commission agendas, and by assigning attorneys to monitor or participate as needed in docketed cases where an executive director’s preliminary report and petition had been issued or the matter was pending at SOAH.

OPIC’s participation in 76 of 76 total environmental proceedings, resulted in a participation percentage of 100 percent.

OPIC’s participation in 42 of 44 utility and district proceedings resulted in a participation percentage of 95 percent.

OPIC’s participation in 49 rulemaking proceedings, including all active rule assignments carried forward from fiscal year 2013 as well as the review of all proposals and adoptions considered by the commission during fiscal year 2014, resulted in a participation percentage of 100 percent.

OPIC’s participation in 1,044 of 1,085 enforcement proceedings resulted in a participation percentage of 96 percent.

The fiscal year 2014 OPIC participation percentages for environmental, utility and district, rulemaking and enforcement proceedings are shown in Figure 3 (below).

Figure C-2

Proceedings with OPIC Participation Fiscal Year 2013

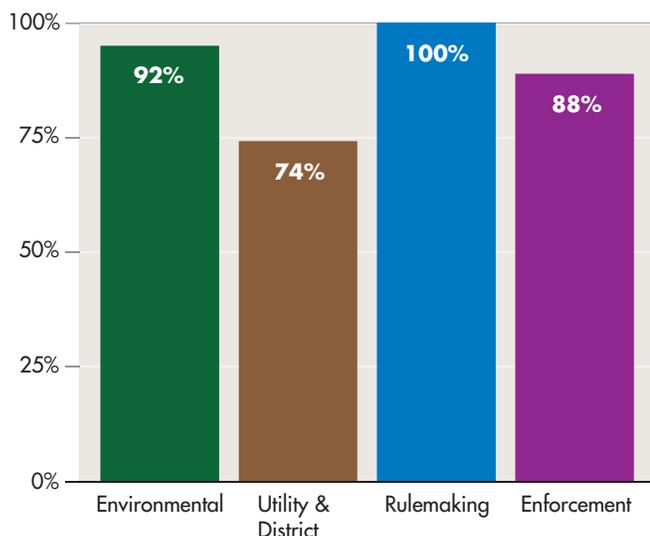
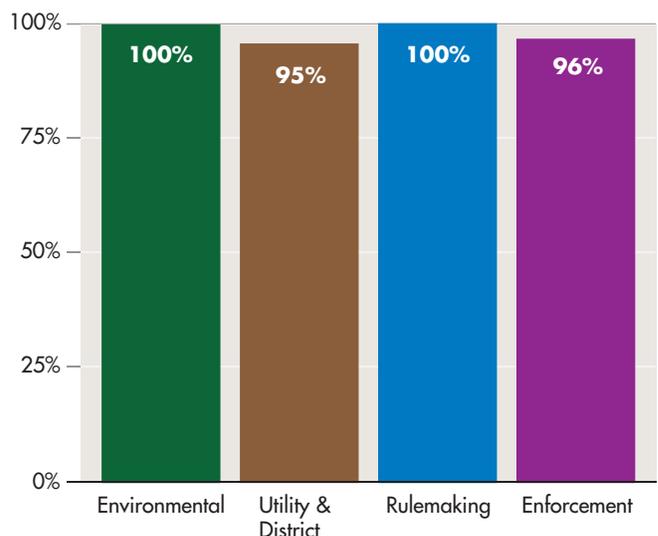


Figure C-3

Proceedings with OPIC Participation Fiscal Year 2014



Summary of OPIC Performance

The Outcomes Table below summarizes the measure of OPIC’s performance in meeting its goals and objectives for fiscal year 2013 and fiscal year 2014.

Figure C-4

Projected and Actual Outcomes of Goals

Outcome	Projected FY 2013	Actual FY 2013	Projected FY 2014	Actual FY 2014
Goal 1A: Percentage of environmental proceedings in which OPIC participated	75%	92%	75%	100%
Goal 1B: Percentage of utility & district proceedings in which OPIC participated	75%	74%	75%	95%
Goal 2: Percentage of rulemaking proceedings in which OPIC participated	75%	100%	75%	100%
Goal 3: Percentage of enforcement hearings and other enforcement proceedings in which OPIC participated	75%	88%	75%	96%

Use of Technology

The passage of House Bill 2694 requiring implementation of performance measures required OPIC to develop new administrative processes and case management reports. OPIC staff, with the assistance of the executive director’s Information Resources Division, developed a reporting process that allows OPIC to track its work on any matters active at any point within a fiscal year regardless of the date such matters were opened or closed. For determining the total number of possible matters in which OPIC could have participated for each performance measure, OPIC also reviewed SOAH’s quarterly reports, agendas from commission public meetings, and reports from the Litigation Division of the Office of Legal Services. While we now have a more effective system in place, we will continue to work with appropriate offices in the agency to take advantage of technological advancements to improve the ability to measure performance and ensure accountability to the public.

Legislative Changes Affecting Participation in Utility Cases

Through fiscal year 2014, OPIC has participated in water and sewer rate and district matters pursuant to our duty to represent the public interest in all proceedings before the commission. In 2013, the legislature amended Chapter 13 of the Texas Water Code to transfer the regulation of water and sewer utilities to the Texas Public Utility Commission (PUC), effective Sept. 1, 2014. The legislation further amended the law to give the Office of Public Utility Counsel authority to represent the interests of residential and small commercial consumers in water and sewer rate cases. The law authorized the Office of Public Utility Counsel to participate as a party in rate and sewer cases under Chapter 13 of the Texas Water Code anytime on or after Sept. 1, 2013, a year prior to the transfer of jurisdiction of these matters to the PUC.

OPIC’s responsibility to represent the public interest in all proceedings before the commission did not change. Notwithstanding the Office of Public Utility Counsel’s authority to intervene and participate as a party, OPIC has continued to participate in all water and sewer rate cases before the commission and will continue to do so until the end of fiscal year 2014 when jurisdiction over these utility matters is transferred to PUC.

Assessment of Budget Needs

Section 5.2725(a)(2) of the Texas Water Code directs OPIC to provide the commission with an assessment of the budget needs of the office, including the need to contract for outside expertise. The operating budget for OPIC in fiscal year 2013 totaled \$624,452.44. The operating budget for OPIC in fiscal year 2014 totaled \$605,044.00.

Figure C-5
OPIC Budget, FY 2013 and FY 2014

Budget Category		FY 2013 Budget	FY 2014 Budget
31	Salaries	\$569,752.44	\$580,344.00
35	Professional/Temporary	\$37,750.00	\$7,750.00
37	Travel	\$7,100.00	\$7,100.00
39	Training	\$5,485.00	\$5,485.00
41	Postage	\$25.00	\$50.00
43	Consumables	\$500.00	\$550.00
46	Other Operating Expenses	\$1,645.00	\$1,570.00
54	Facilities, Furniture & Equipment	\$2,195.00	\$2,195.00
TOTAL		\$624,452.44	\$605,044.00

Outside Expertise

The fiscal year 2013 budget included \$30,000 in funding to allow OPIC to contract for outside expertise. OPIC worked with agency staff to develop the procedures for obtaining outside technical support. Creating and implementing the process for OPIC to retain and contract with outside experts proved complicated and time consuming. OPIC was unable to implement this process in time to use the funding included in the fiscal year 2013 budget. Therefore, the fiscal year 2014 budget did not include funding for OPIC to retain outside expertise. However, once contracting procedures were established with the assistance and guidance of the executive director’s purchasing staff, OPIC requested and received \$4,200 in funding to receive outside expertise in one specific case. OPIC received consulting services from Irvin L. Bilsky, P.E., for purposes of OPIC’s participation in a complex air permitting contested case hearing. Contracting procedures are now in place and OPIC has the ability to retain experts more quickly. Accordingly, OPIC could retain experts expeditiously in more complex environmental proceedings should future budgets restore the \$30,000 in funding for such purposes.

Regulatory Recommendations

The Texas Water Code, Section 5.273, authorizes OPIC to recommend needed legislative and regulatory changes.

Such recommendations are to be included in OPIC’s annual reports under Texas Water Code, Section 5.2725(a)(3). OPIC proposes no legislative recommendations for purposes of this report. OPIC’s recommendations for regulatory changes are discussed below.

1. Proposal concerning the timing of the filing of the executive director’s response to comments when there has been a direct referral of an application to the State Office of Administrative Hearings

OPIC submits this proposal for purposes of clarity and consistency for procedural timeframes when there is a direct referral of a permit application for a contested case hearing.

Texas Water Code Section 5.557(a) provides that an application may be referred to SOAH for a contested case hearing immediately following issuance of the executive director’s preliminary decision. Texas Water Code Section 5.557(c) states that the commission by rule shall provide for public comment and the executive director’s response to public comment to be entered into the administrative record of decision on the application when there is a direct referral.

Commission rules in 30 Texas Administrative Code Chapter 80 (TAC) carry out this statutory mandate. All parties in a contested case where there has been a direct referral have the right to respond to and present evidence on issues raised in public comment and the response to comment. 30 TAC Section 80.126. Public comment and the response to comment are to be sent to SOAH if they are filed subsequent to the referral. 30 TAC Section 80.6(b)(4)(B). However, the rules currently do not specify the timing or sequence of the issuance of the response to comments and the convening of a preliminary hearing when there is such a referral.

On April 10, 2013, the commission considered direct referral of the application by Exxon Mobil Chemical

Corporation for new Air Quality Permit No. 102982; TCEQ Docket No. 2013-0657-AIR. On April 22, 2013, the commission issued an interim order that direct referred the application to SOAH and ordered that the preliminary hearing in this matter shall not convene until after the executive director has issued his response to comments.

In some prior proceedings where there has been a direct referral, however, there has been no such specific instruction and responses to comment have been sent to SOAH for inclusion in the record after the preliminary hearing was convened and while SOAH proceedings were underway. These matters include: El Paso Electric Company; TCEQ Docket No. 2012-2608-AIR; SOAH Docket No. 582-13-1520; EOG Resources, TCEQ Docket No. 2012-0971-AIR, SOAH Docket No. 582-12-6347; Tenaska Trailblazer Energy Center, TCEQ Docket No. 2009-1093-AIR, SOAH Docket No. 582-09-6185; IPA Coleta Creek, TCEQ Docket No. 2009-0032-AIR, SOAH Docket No. 582-09-2045; and NRG Limestone, TCEQ Docket No. 2007-1820-AIR, SOAH Docket No. 582-08-0861.

In earlier direct referrals, the convening of the preliminary hearing and setting of the procedural schedule prior to issuance of the response to comments presented timing difficulties and subsequent disputes over the need to modify the procedural schedule. Rule 80.126 affords parties the opportunity to present evidence on issues raised by the response to comments. After the response to comments was issued and parties perceived a need to conduct discovery and prepare prefiled testimony based on positions taken in the response to comments, they argued that they could not adequately prepare for hearing under the schedule that was set in advance of knowing when the response to comments would be issued. The commission's interim order in Exxon requiring that the preliminary hearing not be convened until the response to comments is issued avoids these procedural problems and, therefore, OPIC recommends that this position be set forth in rule.

The proposed rulemaking would delete or revise provisions in 30 TAC Section 55.210(c) (2) and (3) requiring that any public meeting held after direct referral be held on the same day as the preliminary hearing or as close to the hearing as practicable. If the comment period extends through a public meeting and if the response to comments must be issued prior to the preliminary hearing, it would not be practicable or possible to hold any public meeting so close to the preliminary hearing. Restrictions on the timing of the public meeting contained in these provisions would be meaningless since the driving consideration would be the timing of the response to comments.

The following provision would be added to the commission's Chapter 80 rules in 30 TAC Sections 80.6, 80.105(a), 80.126 and such other Chapter 80 rules deemed appropriate:

For applications referred to SOAH under Section 55.210 of this title (relating to Direct Referrals), the preliminary hearing shall not be convened until after the Executive Director has issued the response to comments under 30 TAC Section 55.156(b) and 55.210(d).

2. Proposal concerning Mandatory Direct Referrals

OPIC recommends the regulatory changes discussed below to conserve agency resources when processing a permit application which has triggered a large volume of hearing requests and when it is obvious that hearing requests have been filed by affected persons.

Texas Water Code Section 5.557(a) provides that an application may be referred to SOAH for a contested case hearing immediately following issuance of the executive director's preliminary decision. Under this statutory authority, and under commission rules at 30 TAC Section 55.210(a), the executive director or the applicant may request that an application be directly referred to SOAH for a contested case hearing. While the executive director has statutory as well as regulatory authority to request a direct referral, current practice is to defer to the applicant and never make such a request absent agreement from the applicant. In effect, this practice negates the executive director's statutory authority and renders it moot. In past cases, the executive director's justification for this practice is a purported right of applicants to go before the commission to request a narrowing of the scope of issues to be referred. OPIC agrees that House Bill 801 requires the commission to specify issues referred to hearing when granting hearing requests, however this is not an unfettered entitlement of applicants. The Legislature clearly envisioned that in some cases the executive director could request a direct referral without the consent of the applicant; otherwise, it would have been pointless to grant the executive director such independent authority under Texas Water Code Section 5.557(a).

Often when the agency receives a large volume of hearing requests from citizens who are in close proximity to a facility, there is little doubt that there are affected persons who will eventually be granted a contested case hearing. In these situations, a hearing is a reasonable certainty, even before the agency begins the laborious task of setting consideration of the requests for a commission

agenda and mailing notice and a request for briefs to a multitude of interested persons. OPIC's proposed rule change would require a mandatory direct referral under these circumstances. Such a rule change would conserve agency resources in a number of ways, including reducing the number of multiple mass mailings from multiple agency offices. This change would also conserve the agency's human resources otherwise required to process, review, analyze, and consider hundreds of hearing requests in circumstances where a hearing is already a reasonable certainty.

The following provision would be added to 30 TAC Section 55.210:

The Executive Director shall refer an application directly to SOAH for a hearing on the application if:

- (1) at least 100 timely hearing requests on the application have been filed with the chief clerk; and
- (2) for concrete batch plant authorizations subject to a right to request a contested case hearing, the Executive Director confirms that at least one of the timely hearing requests was filed by a requestor who resides in a permanent residence within 440 yards of the proposed facility; or
- (3) for wastewater discharge authorizations subject to a right to request a contested case hearing, the Executive Director confirms that at least 10 timely hearing requestors own property either adjacent to the proposed or existing facility or along the proposed or existing discharge route within one mile downstream; or
- (4) for all other applications subject to contested case hearings, the Executive Director confirms that at least 10 of the hearing requestors own property or reside within one mile of the existing or proposed facility.

3. Proposal Concerning Consideration of Site Compliance History Upon Change of Ownership

OPIC submits the proposal described below in order to avoid penalizing new innocent purchasers of a site under enforcement based on the bad acts of prior site owners

and to facilitate the sale of troubled sites to new owners who are willing to bring sites into compliance.

Texas Water Code Section 7.053(3)(A) states that "with respect to the alleged violator," "history and extent of previous violations" shall be considered in the calculation of an administrative penalty. Under 30 TAC Section 60.1(b), the commission considers compliance history for a five-year period. Under 30 TAC Section 60.1(d), "for any part of the compliance history period that involves a previous owner, the compliance history will include only the site under review." Therefore, while a prior owner's entire compliance history cannot be used against a new owner, 30 TAC Section 60.1(d) currently requires that a prior owner's bad acts be considered in calculating the compliance history of a current owner if the ownership change happened within the previous five years. OPIC proposes that this rule be changed.

The current system for calculating compliance history has resulted in owners of regulated entities being held responsible for acts that occurred years before their ownership of a site began. Because compliance history is used to make decisions on permitting and enforcement matters, current owners are being adversely affected, through no fault of their own. Additionally, the current system can have the effect of dissuading a potential buyer from purchasing a troubled site that could benefit from new ownership. While a purchaser of a site can conduct due diligence and make an informed decision as to whether to purchase a site, others who inherit a site have no such opportunity. Such individuals may become owners of a site with a poor compliance history which could complicate operations or sale of a site.

This rule revision would remove an impediment to a sale of a site to a potentially more responsible owner who could improve operations. Additionally, those who inherit a site and were not afforded an opportunity to conduct due diligence would be better able to operate or sell a site to a new owner free of the burden of a previous owner's bad acts. The effect would be better ownership and operation of previously poor performing sites as well as promoting economic activity by removing a barrier to a sale of a site. The public would benefit from potentially better operated sites that pose less risk to human health and the environment as well as increased economic activity. Furthermore, the commission would be able to make more accurate and informed decisions on permits and enforcement matters based on the acts of the current owners of a site.

While a rule change could create a potential for abuse by those who would transfer ownership between

affiliated entities, proposed rule language could minimize the potential for abuse.

The following revision is proposed for 30 TAC Section 60.1(d):

The compliance history will not include violations of a previous owner of a site under review unless the previous and current owners have or had shared officers, majority shareholders, or other majority interest holders in common.

Conclusion

OPIC appreciates the opportunity afforded by this statutory reporting requirement to reflect upon OPIC's mission and goals and evaluate its status and progress in meeting the office's performance measures. OPIC commits to continuing its work in a transparent manner and to ensuring that all information necessary to evaluate the work of the office in representing the public interest is readily available to the public.