APPENDIX C

Office of Public Interest Counsel Annual Report to the TCEQ

— FISCAL YEAR 2016 —

Introduction

Texas Water Code, Chapter 5, Subchapter G prescribes the role, responsibilities and duties of the Office of Public Interest Counsel (OPIC or Office) at the Texas Commission on Environmental Quality (Commission or TCEQ). Included among these statutory duties is the requirement under Section 5.2725 of the Texas Water Code for OPIC to make an Annual Report to the Commission containing:

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.

OPIC must make its Annual Report in time for the Commission to include the reported information in the Commission's reports under Texas Water Code, Section 5.178(a) and (b), and in the Commission's biennial legislative appropriations requests, as appropriate. Accordingly, OPIC respectfully submits this Annual Report to comply with the requirements of Section 5.2725 of the Texas Water Code.

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 in matters before the Commission affecting the public interest, including environmental permitting proceedings, enforcement proceedings, district creation and oversight proceedings, and rulemaking proceedings. The Office is 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;
- 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;

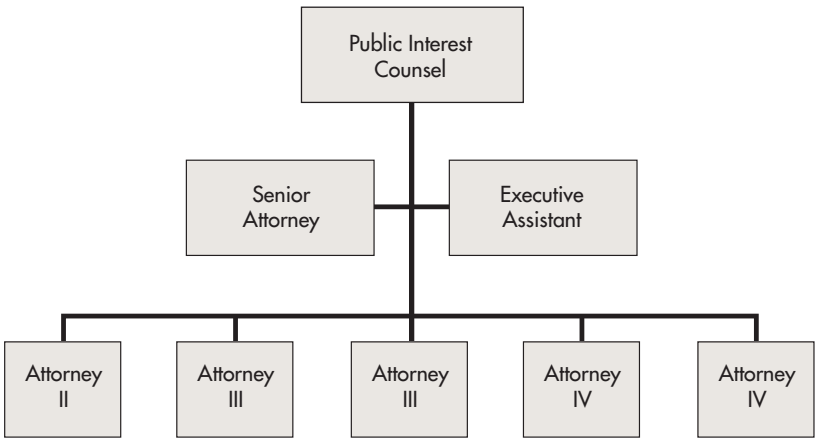
- Reviewing and commenting on rulemaking proposals and petitions;
- Reviewing and recommending action on other matters considered by the Commission, including, but not limited to, proposed enforcement orders and proposed orders on district matters;
- Participating in public meetings on permit applications with significant public interest; and
- Responding to inquiries from the public related to agency public participation procedures and other legal questions related to statutes and regulations relevant to the agency.

As a party to Commission proceedings, OPIC is committed to providing independent analysis and recommendations that serve the integrity of the public participation and hearing process. OPIC is committed to ensuring that relevant information and evidence on issues affecting the public interest is developed and considered in Commission decisions. OPIC's intent is to facilitate informed Commission decisions that protect human health, the environment, the public interest, and the interests of affected citizens of Texas to the maximum extent allowed by applicable law.

The Public Interest Counsel (Counsel) is appointed by the Commission. The Counsel supervises the overall operation of OPIC by managing the Office's budget, hiring and supervising staff, ensuring compliance with agency operating procedures, and establishing and ensuring compliance with Office policies and procedures. OPIC has eight full-time equivalent positions: the Counsel; Senior Attorney; five Assistant Public Interest Counsels; and the Office's Executive Assistant.

Figure C-1

Office of Public Interest Counsel



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 OPIC to 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 (TAC) 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; 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 hearing 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.

District proceedings include proceedings at SOAH and at the Commission related to the creation and dissolution of districts and any other matters within the Commission's jurisdiction relating to the oversight of districts.

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 other proceedings initiated with the issuance of an Executive Director's Preliminary Report and Petition (Petition). For purposes of this report, enforcement proceedings do not include other agreed enforcement orders issued by the Executive Director for violations resolved prior to the issuance of a 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 September 1, 2012:

Goal 1: To provide effective representation of the public interest as a party in all environmental 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 district proceedings heard by the TCEQ

Outcome Measure:

- Percentage of environmental proceedings in which OPIC participated
- Percentage of 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 Measure:

- 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 in 75 percent of enforcement proceedings heard by the TCEQ

Outcome Measure:

- Percentage of enforcement proceedings in which OPIC participated

Evaluation of OPIC Under Its Performance Measures

OPIC's performance measures for environmental, district, rulemaking and enforcement proceedings are expressed as percentages of all such proceedings in which OPIC could have participated. For purposes of this report, OPIC uses the TCEQ Commissioners' Integrated Database and a reporting process that allows OPIC to track its work on matters active at any point within a fiscal year regardless of the date such matters were opened or closed. Assignments tracked include active matters carried forward from the past fiscal year, as well as matters assigned during the relevant fiscal year. Performance measure percentages were derived from reviewing

the following information available through August 15, 2016: work assignments tracked by the Office during fiscal year 2016; SOAH quarterly reports; TCEQ Litigation Division Reports; and matters considered by the Commission at its public meetings.

Fiscal Year 2016

In fiscal year 2016, OPIC participated in a total of 921 proceedings: 92 environmental proceedings; 10 district proceedings; 55 rulemaking proceedings; and 764 enforcement proceedings. OPIC's participation in 92 of 92 total environmental proceedings resulted in a participation percentage of 100%. OPIC's participation in 10 of 10 district proceedings resulted in a participation percentage of 100%. OPIC's participation in 55 rulemaking proceedings, including all active rule assignments carried forward from fiscal year 2015, as well as the review of all petitions, proposals, and adoptions considered by the Commission during fiscal year 2016, resulted in a participation percentage of 100%. OPIC's participation in 764 of 764 enforcement proceedings, including the review of enforcement matters considered at Commission agendas and the participation in or monitoring of docketed cases where a Petition had been issued during fiscal year 2016 or the matter was otherwise pending at SOAH during fiscal year 2016, resulted in a participation percentage of 100%. Figures 2 and 3 below summarize the measures of OPIC's performance.

Figure C-2

Proceedings with OPIC Participation Fiscal Year 2016

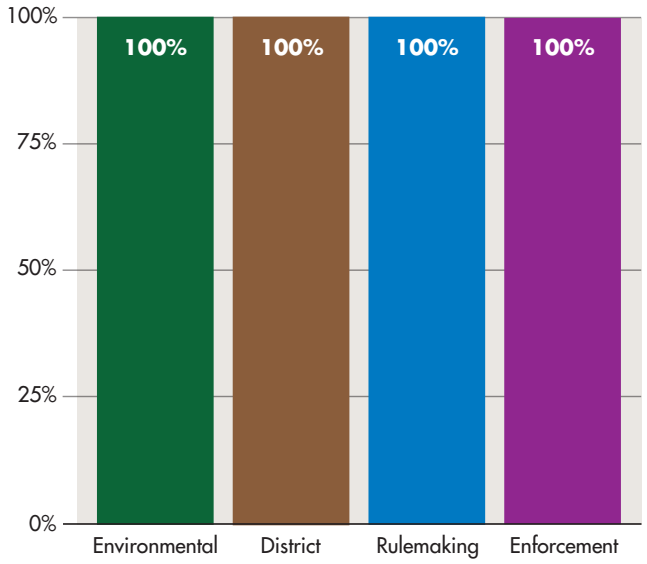


Figure C-3

Outcomes Table

Outcome	Projected FY 2016	Actual FY 2016
Goal 1A: Percentage of environmental proceedings in which OPIC participated	75%	100%
Goal 1B: Percentage of district proceedings in which OPIC participated	75%	100%
Goal 2: Percentage of rulemaking proceedings in which OPIC participated	75%	100%
Goal 3: Percentage of enforcement proceedings in which OPIC participated	75%	100%

Assessment of Budget Needs

Section 5.2725(a)(2) of the Texas Water Code directs OPIC to provide the Commission with an assessment of its budget needs, including the need to contract for outside expertise. The operating budget for OPIC in fiscal year 2016 totaled $547,099.

Figure C-4

OPIC Budget, FY 2016

Budget Category		FY 2016 Budget
31	Salaries	$530,099
37	Travel	$7,100
39	Training	$5,500
41	Postage	$50
43	Consumables	$550
46	Other Operating Expenses	$1,600
54	Facilities, Furniture & Equipment	$2,200
TOTAL		$547,099

Budget Needs for Retaining Outside Technical Expertise

For context, OPIC first provides an overview of how its budget has addressed retaining outside technical expertise in the recent past. Fiscal year 2013 was the first year OPIC's budget included funding for retaining outside technical expertise. OPIC's fiscal year 2013 budget category number 35, temporary and professional services, included $30,000 specifically earmarked for such purposes. OPIC worked with agency staff to develop administrative and contracting procedures to hire outside consultants. Because establishing these procedures required more time than expected, OPIC was unable to implement this process in time to use the funding included in the fiscal year 2013 budget. OPIC's initial budgets since fiscal year 2013 have not included funding designated for retaining outside technical expertise.

During fiscal year 2014, further contracting procedures were established with the assistance and guidance of the Executive Director's purchasing staff. Through an additional funding request (AFR), OPIC requested and received $4,200 to retain consulting services for purposes of OPIC's participation in a complex air permitting contested case hearing.

During fiscal year 2015, an AFR of $5,000 was granted to pay for expert consulting services for purposes of OPIC's participation in complex proceedings relating to a water use permit application to construct and maintain a reservoir on Bois d' Arc Creek. Pursuant to OPIC's contract for services from LaCosta Environmental LLC, OPIC received a report evaluating the applicant's water conservation plan that facilitated OPIC's understanding of applicant's compliance with applicable statutory and regulatory requirements. Another AFR of $5,000 was granted to retain expert consulting services for purposes of proceedings on an air permit application submitted by Columbia Packing, Inc. Because the decision to grant a requested contested case hearing on this application was not made until after fiscal year 2015 ended — and the application was subsequently withdrawn – OPIC requested a release of these funds to the Commission's general operating budget.

For fiscal year 2016, OPIC's initial budget did not include funds in the category of professional and temporary services that could be used for retaining technical expertise. During the course of the year, however, OPIC received additional funding of $5,000 for this purpose. OPIC has used these funds to retain technical expertise regarding sewage sludge land application issues in proceedings on the application of Beneficial Land Management LLC for renewal and amendment of Permit No. WQ0004666000.

OPIC continues to work with other agency staff to utilize appropriate contracting procedures to allow OPIC the ability to retain experts quickly and effectively. Accordingly, OPIC could retain experts expeditiously in more complex environmental proceedings should future budgets include funding upfront for such purposes.

Legislative Recommendations

Texas Water Code, Section 5.273(b), authorizes OPIC to recommend needed legislative changes. Texas Water Code, Section 5.2725(a)(3) provides that such recommendations are to be included in OPIC's annual report. Accordingly, OPIC's recommendations for legislative changes, including both new proposals and proposals incorporated from prior reports, are discussed below.

1. Proposal Concerning Penalties for violations of Public Water Supply and Drinking Water Statutes, Rules, and Orders

Texas Health and Safety Code, Section 341.049 provides that if a person causes, suffers, allows, or permits a violation of Texas Health and Safety Code, Subchapter C or a rule or order adopted under that subchapter, the Commission may assess a penalty of not less than $50 nor more than $1,000 for each violation. Enforcement orders are commonly seen that assess penalties as low as $200 or less for drinking water violations such as exceedances of maximum contaminant limitations (MCLs). These low penalties result even when the Commission Penalty Policy's Environmental, Property, Human-Health Matrix classifies such violations as actual or potential releases or exposures to contaminants with the possibility of major or moderate harm.

Under the current statutory limitation, violations of public drinking water standards are often so low they seem unlikely to deter future violations or encourage compliance. Objectives of encouraging compliance and protecting human health may be better served by increasing Commission penalty authority to a range of $1,000-$5,000 for each violation.

For these reasons, OPIC recommends the following changes to Texas Health and Safety Code, Section 341.049(a):

> If a person causes, suffers, allows, or permits a violation of this subchapter or a rule or order adopted under this subchapter, the commission may assess a penalty against that person as provided by this section. The penalty shall not be less than $1,000 nor more than $5,000 for each violation. Each day of a continuing violation may be considered a separate incident.

2. Proposal Concerning Changes to Permit Applications

OPIC proposes uniform limitations on the ability of permit applicants across all agency programs to change applications after the 31st day before the date the preliminary hearing at SOAH is scheduled to begin. OPIC notes this proposal is not intended to limit the ability of the Commission to adopt changes to any draft permit or incorporate special permit provisions into permits when considering any proposal for decision following a contested case hearing.

Members of the public often express concern about perceived unfairness when permittees change their applications late in the public participation process in response to issues or evidence brought to light by protesting parties. These parties contend that when such changes are allowed – and the need to address deficiencies has been made known only through efforts and expenses of protesting parties – the subject of the hearing becomes a "moving target." OPIC's proposal is intended to address the "moving target" concern by discouraging application changes late in the public participation process. The proposal seeks to encourage the regulated community to ensure applications are accurate and complete when filed. The intended result is a more efficient and effective use of the time and resources of all parties to a proceeding.

Existing Texas Health and Safety Code, Section 382.0291(d) currently limits an air quality permit applicant's ability to amend applications. With some modifications, OPIC's proposal is based on Section 382.0291(d). OPIC proposes revisions to clarify the language of this statute and incorporate its requirements into the appropriate provisions of Texas Water Code, Chapters 5, 11, 13, 26 and 27 and Texas Health and Safety, Chapters 361, 382 and 401, and any other statutory provisions relating to permits that are issued by the Commission and subject to contested case hearings. Such legislative changes would promote consistency across agency permitting programs by imposing a uniform limitation on application revisions across all media under the Commission's jurisdiction.

For these reasons, OPIC recommends the following language be incorporated into the necessary provisions of the Texas Water Code and the Texas Health and Safety Code:

> An applicant for a license, permit, registration, or similar form of permission required by law to be obtained from the commission may not request changes to the application after the 31st day before the first date scheduled for a preliminary hearing in a contested case hearing on the application. If an applicant determines that it will not proceed to hearing with the application that was on file with the commission on the 31st day before the first date scheduled for the preliminary hearing, the applicant shall withdraw the application with or without prejudice in accordance with procedures provided by commission rules. If an applicant withdraws the application without prejudice and subsequently submits a revised application, the applicant must again comply with notice requirements and any other requirements of law or commission rule in effect on the date the revised application was submitted to the commission. The prohibition on changes to applications imposed by this subsection will not apply if, following a preliminary hearing and the naming of parties to the hearing, all parties to the hearing on the application agree in writing to the applicant's proposed changes to the application and noticing of the revised application is not otherwise required by applicable law.

3. Affected Persons in Contested Case Hearings on Concrete Batch Plant Registrations

This recommended legislative change would expand the right to a hearing for Standard Permit registrations pursuant to Texas Health & Safety Code Section 382.05195. At present, Texas Health & Safety Code Section 382.058(c) extends the right to request a hearing as an affected person to "only those persons actually residing in a permanent residence within 440 yards of the proposed plant." By narrowing the universe of affected persons to only those persons actually residing in a permanent residence, the law does not consider potential impacts to the health of potentially sensitive receptors of particulate matter who may be present at places such as schools,

places of worship, licensed day-care facilities, hospitals and other medical facilities.[1] Furthermore, the current version of the law does not protect a citizen residing in a trailer or mobile home if their home is not considered a "permanent residence."

The apparent intent of Texas Health & Safety Code Section 382.058(c) is to limit the universe of affected persons entitled to protest a concrete batch plant registration for the sake of efficiency of the hearing process, given the relatively minimal presumed potential impact to persons beyond 440 yards from a facility. However, the public interest is best served when efficiency does not impair the TCEQ's mission of controlling or abating air pollution and the emission of air contaminants and when such efficient action is consistent with protection of public health and general welfare as required by Texas Health & Safety Code Section 382.002. OPIC's proposal is intended to balance efficiency interests served in limiting affected person status under Section 382.058(c) with the TCEQ's mandate to protect public health and general welfare under Section 382.002.

Under the current law, vulnerable populations and sensitive receptors within 440 yards of a facility may not be afforded the procedural protections available to persons residing in permanent residences within 440 yards of a facility. For instance, on May 13, 2015, the Commission considered a hearing request made by CR Emergency Room, LLC (Hospital) regarding the Standard Permit registration of Munilla Construction Management, LLC under Texas Clean Air Act (TCAA) Section 382.05195. The Hospital was concerned that dust from the proposed plant would harm its patients, especially those with respiratory and pulmonary conditions, and sought a hearing. There was no dispute that the Hospital was directly across the street from and within 440 yards of the proposed facility. However, the Commission was compelled to deny the request because it was not filed by "a person actually residing in a permanent residence within 440 yards of the proposed plant" as required by Texas Health and Safety Code Section 382.058(c).

Briefs filed by OPIC and the Executive Director agreed that the Hospital did not meet the statutory definition of affected person; however, the issue of potential impact to human health raised by the Hospital was relevant and material to the Commission's decision on the registration. But for the limitation placed on the Commission by statute, the Hospital's concern about human health was an issue appropriate for referral to SOAH. While the Commission has authority under Texas Water Code Section 5.556(f) to hold a hearing if the public interest warrants doing so, it also must respect the current constraints on affected person determinations imposed by the Legislature. Without a change to Section 382.058(c), the Commission will continue to face a statutory obstacle to granting a hearing to certain vulnerable populations and other receptors within 440 yards of a registered concrete batch plant facility.

For these reasons, OPIC proposes the following amendment to Texas Health & Safety Code Section 382.058(c) to expand the definition of affected persons and allow for the protection of human health of vulnerable populations and other receptors within 440 yards of a proposed concrete batch plant:

> (c) For purposes of this section, only schools, places of worship, licensed day-care facilities, hospitals, medical facilities, and persons residing within 440 yards of the proposed plant may request a hearing under Section 382.056 as a person who may be affected.

Regulatory Recommendations

Texas Water Code, Section 5.273(b), authorizes OPIC to recommend needed regulatory changes. Such recommendations are to be included in OPIC's annual reports under Texas Water Code, Section 5.2725(a)(3). OPIC's recommendations for regulatory changes, including both new proposals and proposals carried forward from prior annual reports, are discussed below.

1. 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

[1] OPIC notes that for registrations under the concrete batch plant standard permit with enhanced controls that are not subject to the contested case hearing process, Texas Health & Safety Code Section 382.05198 (19) requires that the facility's baghouse be located at least 440 yards from "any building used as a single or multi-family residence, school, or place of worship" at the time of application if the facility would be located in an area without zoning.

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, Act of May 30, 1999, 76th Leg., R.S., Section 5 (codified at Tex. Water Code (TWC) Section 5.556) requires the Commission to specify issues referred to hearing when granting hearing requests; however, the Legislature apparently 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 for the Legislature 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 resource-intensive tasks of setting consideration of the requests for a Commission agenda, mailing notice and a request for briefs to a multitude of interested persons, having the Executive Director and OPIC prepare briefs analyzing a voluminous number of requests, and serving such briefs on a multitude of people. 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(a):

> 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 located 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 or within one-half mile of 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.

2. 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 an alleged violator, the 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, a prior owner's bad acts committed during the compliance period at the site under review are considered in calculating the compliance history of a current owner. 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. Furthermore, the Commission would be able to make better informed decisions on permits and enforcement matters based on more accurate assessments of the compliance history 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.

3. Proposal Concerning Website Notice of Application Materials

With a few exceptions,[2] TCEQ does not require that copies of permit applications, draft permits, or technical memoranda produced by Executive Director's staff be made available online. At present, members of the public interested in reviewing these documents must arrange an in-person visit at either the TCEQ in Austin or a designated public place (such as a local library or county courthouse) in the county where the facility is located or is proposed to be located.[3] Additionally, the public is usually required to pay a fee to have these documents copied.

This rule proposal would require the Executive Director to provide an electronic copy of the permit application to the Chief Clerk once the application is declared administratively complete. The Executive Director would have discretion to obtain the electronic version from the applicant. The rule would also require the Executive Director to provide an electronic copy of the draft permit and any technical review memoranda to the Chief Clerk once technical review is completed. The Chief Clerk would post on the Commission's website the permit application, draft permit, and technical review memoranda. This rulemaking would improve public participation in environmental permitting by giving the public an easy way to review permit applications. Additionally, the rule would further implement and promote the purposes of Texas Water Code Section 5.1733 which requires the Commission to post public information on its website. Finally, the posting of this additional information would complement and complete the existing universe of documents related to public participation in permitting actions which are already required to be available on the Commission's website, such as the Executive Director's Decision and Response to Comments.[4]

The following provision would be added as 30 TAC Section 39.405(l)[5] and to such other rules deemed appropriate:

> After the executive director declares an application administratively complete, the executive director shall provide an electronic copy of the application to the chief clerk and the chief clerk shall post this copy on the commission's website. The posted copy of the application must be updated as changes, if any, are made to the application. The complete and updated application must be posted and must remain available on

[2] See 30 TAC Sections 39.419(e)(1) (in air quality permitting, requiring the chief clerk to post the executive director's draft permit and preliminary decision, the preliminary determination summary and air quality analysis on the commission's website); 330.57(i)(1) (requiring certain municipal solid waste facilities to provide a complete copy of any application, including all revisions and supplements, on a publicly accessible internet website.)

[3] See 30 TAC Section 39.405(g).

[4] See 30 TAC Section 55.156(g).

[5] 30 TAC Section 39.405(k) requires posting on the Commission's website of notices of administrative completeness, but not posting of the application itself.

> the commission's website until the commission has taken action on the application. If the application is submitted with confidential information, the posting must indicate that there is additional information maintained by the commission in a confidential file marked as confidential by the applicant. The executive director may require applicants to submit the electronic copy required by this subsection at the time the application, and any changes to the application, are submitted to the executive director for review.

The following provisions would be added to the Commission's Chapter 39 and 55 rules in 30 TAC Sections 39.419, 39.420, 55.156, or such other rules deemed appropriate:

> After the executive director has completed technical review of an application, the executive director shall provide to the chief clerk, and chief clerk shall post on the commission's website, electronic copies of the executive director's draft permit and preliminary decision, and, if applicable, the executive director's technical review memoranda, fact sheet, compliance history, and environmental analysis. After the close of the comment period and consistent with the requirements of Section 55.156(g), the executive director shall provide to the chief clerk and the chief clerk shall post on the commission's website, electronic copies of the executive director's decision and response to comments. The documents must be posted and remain available until the commission has taken action on the application.

4. Proposal Concerning Landowners to be Identified in Applications for Wastewater Discharge Permits

Currently, an applicant for a new or amended Texas Pollutant Discharge Elimination System (TPDES) permit is required by 30 TAC Section 305.48(a)(2) to submit as part of the application a list and map showing the ownership of the tracts of land adjacent to the treatment facility and for a reasonable distance along the watercourse from the proposed point of discharge. This list is obtained from the current county tax rolls or another reliable source. Pursuant to the Commission's Chapter 39 rules, the Chief Clerk of the TCEQ then uses this list to provide mailed notice (as opposed to notice by publication for the general public) of the application and for subsequent mailings concerning the application. The application when filed must include this landowners list in order to be declared administratively complete.

Odors have the potential to migrate over a considerable distance from a facility. The size, dimensions, and configuration of properties can affect the potential for owners of property beyond the tracts adjacent to a facility to experience odors. The goal of mailed notice is to identify and notify potentially affected persons of their public participation rights as early as possible. Accordingly, this proposal would require mailed notice to owners of tracts within one-half mile of the facility (not just adjacent landowners), in addition to landowners adjacent to the discharge route for a distance of one–mile downstream who already receive mailed notice under existing Commission rules.

Complaints alleging insufficient mailed notice to neighboring land owners are often heard at public meetings on wastewater permit applications. For example, at the public meeting held on June 18, 2015 in Spring, Texas regarding the application of Randolph Todd and Meyers Ranch Development for permit no. WQ0015314001, numerous individuals voiced concern that they were not notified of the application, despite their close proximity to the proposed site of the facility. The proposed revision is consistent with the notice provisions for sewage sludge land application and disposal activities regulated under the Commission's Chapter 312 rules. Those rules require mailed notice to persons who own property within specified distances from an application site (1/4 mile) or disposal facility (1/2 mile), beyond the universe of landowners adjacent to the facility. This rulemaking recommendation is intended to address this common situation and to provide adequate notice and an opportunity for earlier public participation to potentially affected persons.

The following provision would be added to the Commission's Chapter 305 rules in 30 TAC Section 305.48(a)(2) and such other TCEQ rules deemed appropriate:

> If the application is for the disposal of any waste into or adjacent to a watercourse, the application shall show the ownership of the tracts of land within one-half (1/2) mile of the treatment facility and for a reasonable distance along the watercourse from the proposed point of discharge.

5. Proposal Concerning Schedules in SOAH Cases where the Preliminary Hearing is Continued

Preliminary hearings are conducted at the commencement of contested case proceedings pursuant to 30 TAC Section 80.105. At a preliminary hearing, the Administrative Law Judge (ALJ) will take jurisdiction, name parties, and establish a procedural schedule. On occasion, because of potential defects in the notice of hearing or for other reasons, the preliminary hearing may be continued to subsequent dates.

For example, the preliminary hearing on the City of Wimberley's wastewater permit application was initially convened on June 2, 2015, but was continued to June 24, 2015 after the ALJ learned that many interested persons were unable to attend the proceedings in the aftermath of the historic floods that had just occurred in the area. Some parties who were able to attend the June 2 hearing were admitted as parties at that time. When the preliminary hearing was reconvened on June 24, 2015, the ALJ admitted several additional parties. However, these new parties did not have the same opportunities to argue issues relating to jurisdiction, party status, and the timing of the procedural schedule that were afforded the parties admitted earlier.

The object of this proposed rulemaking would be to protect party participation in the contested case hearing process and ensure that parties admitted during all phases of any continued preliminary hearing be afforded due process. Particularly in light of the time restrictions on the duration of the hearing under SB 709, it is important to protect all parties' full rights of public participation and allow input in determining the procedural schedule. The following provision would be added to the Commission's Chapter 80 rules in 30 TAC Section 80.6, 80.105 (a) and such other Chapter 80 rules deemed appropriate:

> If the judge determines a preliminary hearing should be continued, the judge shall not issue an order setting a procedural schedule until after all parties are named at the last day of the preliminary hearing and after the judge considers the positions of all parties, including parties admitted on the last day of the preliminary hearing. The scheduling order shall allow sufficient time for all parties to conduct discovery and shall consider the last day of the preliminary hearing as the starting date of the hearing for purposes of calculating the duration of the hearing in compliance with applicable law and any commission order. Discovery may commence among named parties after the first date of the preliminary hearing, however the discovery cut-off date shall not be established until the issuance of the scheduling order.

6. Proposal Concerning Procedural Schedules in Contested Case Hearings on permit applications subject to SB 709

HB 801 established timeframes for procedural schedules in contested case hearings on applications filed on or after September 1, 1999. For these matters, hearings are required to last no longer than one year from the date of the preliminary hearing until the issuance of the proposal for decision (PFD). No specific timeframe was set for the time between the close of the hearing record and the issuance of the PFD. Though not specified by statute or rule applicable to TCEQ environmental permit application hearings,[6] the standard practice at SOAH has been for judges to set aside a 60-day period from the close of the hearing record until issuance of the PFD.

SB 709 established new timeframes for procedural schedules in contested case hearings on applications filed on or after September 1, 2015. For these matters, hearings are required to last no longer than 180 days from the date of the preliminary hearing until the issuance of the PFD. There are no specific statutory requirements in SB 709 regarding the time between the close of the hearing record and the issuance of the PFD.

If current SOAH practice continues to set aside 60 days of the maximum 180-day hearing schedule exclusively for preparation of the PFD, parties may be significantly impaired in their ability to develop and argue the merits of their positions through the contested case hearing process. This 60-day period consumes one-third of the 180-day maximum allowed statutorily-mandated procedural schedule. Following this practice, an ALJ has 60 days (basically 2 months) to prepare the PFD, leaving the parties with only 120 days (basically 4 months) to conduct all discovery,

[6] Texas Government Code Section 2001.058(f)(1) allows a state agency to provide by rule that a proposal for decision in an occupational licensing matter must be filed no later than the 60th day after the latter of the date the hearing is closed or the date by which the judge has ordered all briefs, reply briefs, or other post-hearing documents to be filed. By its wording, this statute applies to occupational licensing matters and not environmental permitting matters subject to HB 801 or SB 709.

including the deposition of witnesses, resolve discovery disputes through motions and hearings as necessary, prepare and file pre-filed testimony and exhibits, object to such pre-filed testimony and exhibits and have objections and motions for summary disposition resolved through any needed pre-hearing conferences, conduct the hearing on the merits, await the transcript, and prepare closing arguments and replies to closing arguments.

A reallocation of the 180-day time period would serve the public interest by allowing parties more time to develop the evidentiary record and present arguments in support of their respective positions. The public interest would be served by allowing 30 working days, rather than 60 days, from the close of the hearing record until issuance of the PFD.

The proposal is based in part on the 30 TAC Section 80.251(b) timeframe that applies to applications filed before September 1, 1999. Under rule 80.251(b), ALJs are required to issue a PFD within 30 working days after the close of the record. OPIC's proposal also incorporates language from Texas Government Code Section 2001.058(f)(1) that calculates the applicable time period for PFD issuance as running from the latter of close of the hearing or the date by which the judge has requested closing briefing. The proposed rule allows for requests for an extension of this timeline from the Commission. The object of this recommendation is to promote the public interest by allowing parties participating in the contested case hearing process more of the SB 709-required hearing schedule timeframe to develop the evidentiary record and present arguments in support of their respective positions.

The following provisions would amend the Commission's Chapter 80 rules in 30 TAC Sections 80.105(b)(3), 80.252(c) and/or such other Chapter 80 rules deemed appropriate:

Section 80.105(b)(3)

(b) If jurisdiction is established, the judge shall:

(1) name the parties;

(2) accept public comment in the following matters:

(A) enforcement hearings; and

(B) applications under Texas Water Code (TWC), Chapter 13 and TWC, Sections11.036, 11.041, or 12.013;

(3) establish a docket control order designed to complete the proceeding within the maximum expected duration set by the commission. The order should include a discovery and procedural schedule including a mechanism for the timely and expeditious resolution of discovery disputes. <u>In contested cases regarding a permit application filed with the commission on or after September 1, 2015, and referred under Texas Water Code, Section 5.556 or Section5.557, the order shall include a date for the issuance of the proposal for decision within the maximum expected duration set by the commission and no later than the 30th working day after the latter of the date the hearing is closed or the date by which the judge has ordered all briefs, reply briefs, or other post-hearing documents to be filed;</u>

Section 80.252. Judge's Proposal for Decision.

(a) Any application that is declared administratively complete on or after September 1, 1999, is subject to this section.

(b) Judge's proposal for decision regarding an application filed before September 1, 2015, or applications not referred under Texas Water Code, Section 5.556 or Section 5.557. After closing the hearing record, the judge shall file a written proposal for decision with the chief clerk no later than the end of the maximum expected duration set by the commission and shall send a copy by certified mail to the executive director and to each party.

(c) <u>Judge's proposal for decision regarding an application filed on or after September 1, 2015, and referred under Texas Water Code, Section 5.556 or Section 5.557. The judge shall file a written proposal for decision with the chief clerk no later than 30 working days after the latter of the date the hearing is closed or the date by which the judge has ordered all briefs, reply briefs, or other post-hearing documents to be filed. If the judge is unable to file the proposal for decision within 30 working days, the judge shall request an extension from the commission by filing a request with the chief clerk. In no event shall the proposal for decision be filed later than 180 days after the first day of</u>

the preliminary hearing, the date specified by the commission, or the date to which the deadline was extended pursuant to Texas Government Code, Section 2003.047(e-3). Additionally, the judge shall send a copy of the proposal for decision by certified mail to the executive director and to each party.

Conclusion

OPIC appreciates the opportunity afforded by this statutory reporting requirement to reflect upon the Office's work. OPIC continues in its commitments to represent the public interest in Commission proceedings and to conduct its work and evaluate its performance transparently.