APPENDIX C

Office of Public Interest Counsel's Annual Report to the TCEQ

FISCAL YEAR 2018

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 Texas Water Code, Section 5.2725 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 Texas Water Code, Section 5.273.

In even-numbered years the report must be submitted 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. Though there is no statutory deadline for the submission of the report in odd-numbered years, OPIC is committed to providing this information to the Commission near the end of each fiscal year for purposes of reporting consistency. Accordingly, OPIC respectfully submits this Annual Report to comply with the requirements of Texas Water Code, Section 5.2725.

OPIC Mission

OPIC was created in 1977 to ensure that the Commission promotes the public's interest. To fulfill the statutory directive of Texas Water Code, Section 5.271, 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;

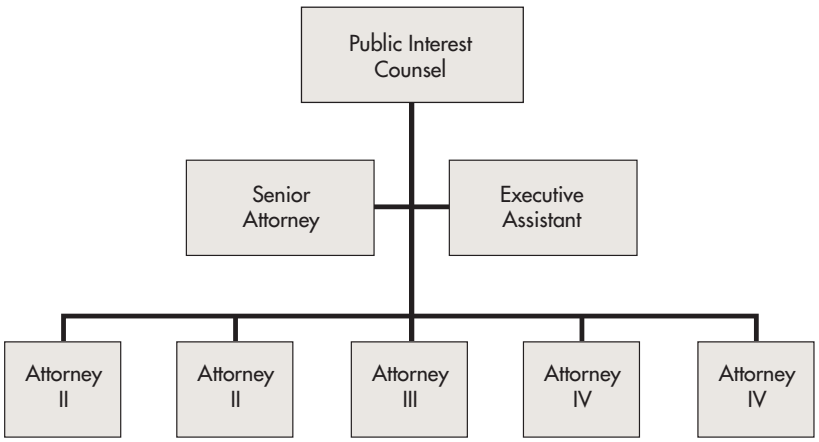
- Reviewing and commenting on rulemaking proposals and petitions;
- Reviewing and recommending action on other matters considered by the Commission, including, but not limited to, proposed enforcement orders and proposed orders on district matters;
- Participating in public meetings on permit applications 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.

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.

Figure C-1. **Office of Public Interest Counsel**



Evaluation of OPIC'S Performance

Texas Water Code, Section 5.2725(a)(1) 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, 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, watermaster 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, permit and licensing denials, suspensions, revocations, and emergency orders.

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 and Commission proceedings related to the consideration of proposed orders. For purposes of this report, enforcement proceedings do not include other agreed enforcement orders issued by the Executive Director.

OPIC's Performance Measures

As required by Texas Water Code, Section 5.2725(b), 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 8, 2018: work assignments tracked by the Office during fiscal year 2018; SOAH quarterly reports; and matters considered by the Commission at its public meetings.

Fiscal Year 2018

In fiscal year 2018, OPIC participated in a total of 653 proceedings consisting of: 78 environmental proceedings; 7 district proceedings, 40 rulemaking proceedings; and 528 enforcement proceedings. OPIC's participation in 78 of 78 total environmental proceedings resulted in a participation percentage of 100%. OPIC's participation in 7 of 7 district proceedings resulted in a participation percentage of 100%. OPIC's participation in 40 of 40 rulemaking proceedings, including the review of all petitions, proposals, and adoptions considered by the Commission during fiscal year 2018, resulted in a participation percentage of 100%. OPIC's participation in 528 of 528 enforcement proceedings, including the review of enforcement matters considered at Commission agendas and the participation in or monitoring of docketed cases at SOAH during fiscal year 2018, 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 2018**

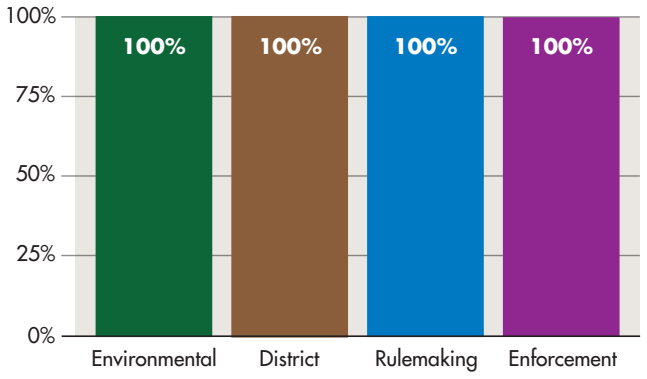


Figure C-3. **Outcomes Table**

Outcome	Projected FY 2018	Actual FY 2018
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

Texas Water Code, Section 5.2725(a)(2) 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 2018 totaled $629,502.

Figure C-4. **OPIC Budget, FY 2018**

Budget Category		FY 2018 Budget
31	Salaries	$612,502
37	Travel	$7,100
39	Training	$5,500
43	Consumables	$500
46	Other Operating Expenses	$1,600
54	Facilities, Furniture & Equipment	$2,300
TOTAL		$629,502

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, professional and temporary 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 the contested case hearing on the air permit application of Corpus Christi Liquefaction, LLC.

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. OPIC received a report evaluating the applicant's water conservation plan that facilitated OPIC's understanding of the 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 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. The parties settled this case prior to completion of the contested case hearing.

For fiscal years 2017 and 2018, OPIC's budget did not include funds that could be used for retaining technical expertise. Based on knowledge of contracting procedures gained in the matters discussed above, OPIC could retain technical expertise more expeditiously 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 with updates and revisions, are discussed below.

1. Proposal Concerning a Task Force Study to Address Increasing Interest in Concrete Manufacturing Facilities and Concrete and Rock Crushing Facilities

During the 85th legislative session, several bills were filed addressing public concern about potential health effects and nuisance conditions caused by concrete manufacturing facilities and rock and concrete crushing facilities. These facilities may be authorized by the Commission through a variety of authorizations including new source review permits, standard permits for rock or concrete crushers, standard permits for concrete batch plants (CBPs), and standard permits for CBPs with enhanced controls.

Since the last legislative session, these facilities have continued to draw a high level of public concern in Harris County, where they are already highly concentrated, as well as in the Texas Hill Country and surrounding areas of Central Texas. Whether the authorizations were issued, withdrawn, or awaiting completion of applicable review and public participation procedures at the time of this report, the following are examples of more-recent TCEQ registrations or applications that have generated increasingly-escalated levels of community opposition:

Anderson Colombia Co., Inc. #146806L001 (rock crushing; Comal County);

Anderson Colombia Co., Inc. #74746L004 (rock crushing; Comal County);

Aurora Ready Mix Concrete, LLC #138224 (CBP; Harris County);

Asphalt, Inc. #148928 (rock crushing; Williamson County);

Asphalt, Inc. #148112 (rock crushing; Burnet County);

Boerne Ready Mix (Vulcan) #150104 (CBP; Kendall County);

CemTech Concrete Ready Mix, Inc. #138309 (CBP; Harris County);

Cherry Crushed Concrete, Inc. #139955 (concrete crushing; Harris County);

Collier Materials, Inc. #146397L001 (rock crushing; Burnet County);

Collier Materials, Inc. #152072L001 (rock crushing; Llano County);

Corvara West #147733 (CBP; Kendall County);

East First Recycling #146263 (rock crushing; Tarrant County);

Integrity Ready Mix Concrete, LLC #78606 (CBP; Harris County);

Soto Ready Mix, Inc. #149713 (CBP; Harris County);

Soto Ready Mix, Inc. #151715 (CBP; Harris County);

Texas Concrete Enterprise Ready Mix, Inc. #150603 (CBP; Harris County); and

Vulcan Construction Materials #147392L001 (rock crushing; Comal County).

Given the high level of expressed public interest in these types of facilities, OPIC supports creation of a task force broader in scope than the similar task force proposed in SB 2034 during the last legislative session. The purpose of such a task force would be to examine concerns that have been expressed by affected communities regarding concrete manufacturing facilities and rock and concrete crushers and to consider:

(1) proposals for minimizing the effects of such operations on neighboring communities;

(2) proposals for limiting operating hours;

(3) proposals for routine audits or inspections to ensure compliance with permit terms and associated proposals for increased application fees to cover the cost of inspections;

(4) proposals for standardized buffer zone or setback requirements across all authorizations under which these facilities may operate;

(5) proposals for enhanced monitoring of particulate matter in geographic areas where these facilities are more concentrated; and

(6) proposals for reviewing and standardizing, as appropriate, the various types of authorizations and public participation processes that apply to the permitting of such facilities.

The duties of the task force would include, without limitation, an evaluation of proposals from bills filed during the 85th legislative session including:

HB 838 (relating to the consideration of the cumulative effects of air contaminant emissions in the emissions permitting process);

HB 2086 (relating to plot plan requirements for an application for a standard permit for a concrete batch plant);

HB 2088 (relating to the operating hours of concrete plants in certain counties); and

SB 793 (relating to restrictions on the location and operation of concrete crushing facilities).

Among other representative stakeholders to consider for task force membership, appropriate participants may include representatives from local governments such as Burnet County, Comal County, Harris County, Kendall County, Kerr County, City of Boerne, City of Houston, City of New Braunfels, City of Marble Falls, as well as representatives of community groups active in these matters such as Air Alliance Houston, Public Citizen, Lone Star Legal Aid Equitable Development Initiative, Texas Environmental Protection Coalition, and Boerne to Bergheim Coalition for Clean Environment.

2. Proposal to Clarify the Deadline for Seeking Judicial Review of Agency Action on Matters Delegated to the Executive Director

In 2017, HB 3177 was passed to address a problem encountered by persons seeking judicial review of Commission actions on matters delegated to the Executive Director. Prior to the law, persons appealing many decisions delegated to the Executive Director were required to file two separate petitions for judicial review in district court. The first petition would be filed within 30 days of the effective date of the decision (as previously required by statute), while the person simultaneously exhausted administrative remedies through the motion to overturn process. A second petition would be filed after any motion to overturn had either been denied by the Commission or overruled by operation of law.

HB 3177 sought to remedy this confusing and duplicative set of circumstances by amending Texas Water Code, Section 5.351 to delay the requirement for petition filing until after the Commission had acted on any timely filed motion to overturn. The bill analysis explained that "stopping the 30-days-to-appeal clock while the motion to overturn is pending improves judicial efficiency, eliminates the possibility of multiple appeals, and addresses a potential procedural trap for those who do not routinely appear before the agency."

Although the bill sought to clarify and bring efficiency to the judicial appeal process, questions have arisen since the legislation took effect as to whether it applies to permitting matters under Chapters 361 and 382 of the Texas Health and Safety Code which contain separately-stated requirements about the timing of judicial appeals. Given the placement of Section 5.351 in Chapter 5 of the Texas Water Code that enumerates the general powers and duties of the Commission across all media under its jurisdiction, the plain wording of the statute, and the legislative intent discussed above, OPIC's position is that Texas Water Code, Section 5.351 in its current form controls any contrary provisions in media-specific statutory provisions. Nevertheless, to provide certainty about the deadlines for seeking judicial review, OPIC recommends the following change to Texas Water Code, Section 5.351, and changes to other provisions such as Texas Health and Safety Code, Sections 361.321 and 382.032 that may be helpful in harmonizing these timing requirements concerning the filing of an appeal in district court.

Amended Texas Water Code, Section 5.351(c) would read as follows:

> Notwithstanding Subsection (b) <u>or any other statutory provisions within the commission's jurisdiction authorizing the filing of a petition to review, set aside, modify, or suspend an act of the commission</u>, a person affected by a ruling, order, or other law may, after exhausting any administrative remedies, file a petition to review, set aside, modify, or suspend the ruling, order, or decision not later than the 30th day after:
>
> (1) the effective date of the ruling, order, or decision; or
>
> (2) if the executive director's ruling, order, or decision is appealed to the commission as authorized by Section 5.122(b) or other law, the earlier of:
>
> (A) the date the commission denies the appeal; or
>
> (B) the date the appeal is overruled by operation of law in accordance with commission rules.

3. Proposal Concerning 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 and Safety Code, Section 382.05195. At present, Texas Health and 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 and 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 and 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. 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

[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 and 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.

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 and 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.

4. 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 Code, 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.

5. 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. These low penalties result even when the Commission Penalty Policy's Environmental, Property, and 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 to $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.

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.[2]

1. Proposal to Clarify Commission Authority to Consider Characteristics, Functioning, Capacity, and Suitability of Discharge Routes in TPDES Permitting Decisions

Under the Texas Pollutant Discharge Elimination System (TPDES) permitting program, the TCEQ regulates water quality through the issuance of permits for the discharge of waste or pollutants into or adjacent to water in the state. Texas Water Code, Section 26.027. When reviewing applications for such permits, the Commission considers the suitability of the proposed site given its design features and operational functions. The purposes of 30 TAC Chapter 309, Subchapter B, Domestic Wastewater Effluent Limitation and Plant Siting requirements, include goals "to minimize the possibility of exposing the public to nuisance conditions" and "to prohibit issuance of a permit for a facility to be located in an area determined to be unsuitable or inappropriate, unless the design, construction, and operational features of the facility will mitigate the unsuitable site characteristics." 30 TAC Section 309.10(b).

Additionally, 30 TAC Section 309.12 provides that "the commission may not issue a permit for a new facility or for the substantial change of an existing facility unless it finds that the proposed site, when evaluated in light of the proposed design, construction or operational features, minimizes possible contamination of surface water and groundwater." OPIC asserts that proper functioning of the discharge route as modeled in the draft permit is relevant to assessing site suitability characteristics and the potential water quality and environmental impacts of proposed activities under TPDES permits. An unsuitable discharge route (such as an undefined route, a poorly defined route, or a route blocked with debris or obstructions) may fail to transport or channel properly the expected volume of effluent, may interfere with effluent mixing and the permittee's ability to meet effluent limitation parameters as modeled in the draft permit, and may cause nuisance conditions from standing water or the inundation of neighboring property with contaminants. Such conditions can render the siting of the facility unsuitable. Though such concerns may be combined in public comments or hearing requests along with interrelated comments about "flooding," these are not general flooding concerns, but rather site-specific issues about the suitability of the discharge route as an operational feature of the facility.

[2] Additional regulatory change proposals OPIC made in 2017 included proposals concerning:

Consideration of Site Compliance History Upon Change of Ownership; Improved Public Participation in Permitting Through Website Posting of Applications, Draft Permits, Technical Review Memoranda and Related Documents, and Contested Case Hearing Request Forms; Landowners to be Identified in Applications for Wastewater Discharge Permits; and Direct Referrals of Permitting Matters Subject to 30 TAC Chapter 55, Subchapter G. For a complete copy of the 2017 report, please contact OPIC at 512-239-6363.

In OPIC's experience, however, when concerned citizens file correspondence with the TCEQ that both questions the characteristics, functioning, capacity, and suitability of a proposed discharge route and raises concerns about flooding, such issues are often lumped together and collectively viewed as "general concerns about flooding" that are not under the Commission's jurisdiction to address within the context of the TPDES permitting program. OPIC acknowledges that Chapter 26 of the Texas Water Code authorizes the TCEQ to regulate water quality and not general concerns about flooding. However, as discussed above, site-specific concerns as to whether a proposed discharge route can function properly and other Chapter 309 site suitability considerations do relate to water quality and the prevention of nuisance conditions and are properly within the Commission's jurisdiction. OPIC respectfully submits that these concerns should not be dismissed because they also happen to mention, in an interrelated fashion, concerns about flooding. OPIC proposes to clarify the Commission's authority to consider the suitability of the discharge route in permitting decisions.

Amended 30 TAC Section 309.12 would add a new subsection 5 and read as follows:

> The commission may not issue a permit for a new facility or for the substantial change of an existing facility unless it finds that the proposed site, when evaluated in light of the proposed design, construction or operational features, minimizes possible contamination of surface water and groundwater. In making this determination, the commission may consider the following factors:
>
> (1) active geologic processes;
>
> (2) groundwater conditions such as groundwater flow rate, groundwater quality, length of flow path to points of discharge and aquifer recharge or discharge conditions;
>
> (3) soil conditions such as stratigraphic profile and complexity, hydraulic conductivity of strata, and separation distance from the facility to the aquifer and points of discharge to surface water;
>
> (4) climatological conditions; and
>
> (5) characteristics, functioning and capacity of the proposed discharge route, including the route's suitability to contain and channel the permitted volume of effluent, allow for mixing and water quality consistent with the permit's modeling and effluent limitations, and avoid causing or contributing to conditions of standing water, nuisance, or the inundation of surrounding property with discharged effluent.

2. Proposal to Clarify that Storm Water Discharges Into or Adjacent to Water in the State Require a Permit

OPIC recommends a change to 30 TAC Section 281.25(a)(4) to clarify that storm water discharge permits are required prior to discharging storm water into or adjacent to water in the state.

In a recent enforcement action,[3] there was disagreement as to whether 30 TAC Section 281.25(a)(4) applies to all water in the state or only to waters of the United States. This provision adopts by reference Title 40 of the Code of Federal Regulations (C.F.R.) Section 122.26, which requires permits for storm water discharges associated with various industrial activities, to waters of the United States, as defined by 40 C.F.R. Section 122.2.

The definition of "waters of the United States" is complex and does not include all water that may be classified as "water in the state." For instance, certain ditches, artificial lakes, and puddles are not waters of the United States, but are water in the state. "Water in the state" has been defined broadly by the Legislature to include many types of water bodies, and has been described as "includ[ing] all water found within the environment—whether impounded or free-flowing, above or beneath the surface of the ground, in or out of a watercourse, salt or fresh, or publicly or privately owned." Watts v. State, 140 S.W.3d 860, 866 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd). Although all such water is not subject to federal regulation, it can still be regulated by Texas law. However, 30 TAC Section 281.25(a)(4) does not include a reference to "water in the state."

The reach of Section 281.25(a)(4) could be clarified by reference to Chapter 26 of the Texas Water Code, which addresses discharges into or adjacent to water in the state. This revision would ensure that, in addition to waters of the United States, the regulation applies to all water in the state.

Amended 30 TAC Section 281.25(a)(4) would read as follows:

[3] *Executive Director of the Texas Commission on Environmental Quality v. Texas Architectural Aggregate, Inc.*; SOAH Docket No. 582-17-0377; TCEQ Docket No. 2015-1825-WQ-E (2017).

(a) The following regulations contained in 40 Code of Federal Regulations (CFR) Part 122, which are in effect as of the date of TPDES program authorization, as amended, are adopted by reference.

(4) Part 122, Subpart B--Permit Applications and Special TPDES Program Requirements, §122.26, requiring permits for storm water discharges. Storm water discharges otherwise regulated under 40 CFR §122.26 require a TPDES permit regardless of whether the discharge is to waters of the United States or into or adjacent to water in the state as defined by Texas Water Code Chapter 26.

3. Proposal Concerning the Concurrent Filing of an Application for an Authorization for Re-Use of Domestic Reclaimed Water with an Application for a Wastewater Discharge permit

In public comment on TPDES permit applications for municipal wastewater treatment facilities, citizens frequently request applicants not to discharge effluent and, instead, apply for an authorization for re-use of domestic reclaimed water under the Commission's Chapter 210 rules (210 re-use authorization). Currently, applicants proposing to obtain a TPDES permit for a municipal wastewater treatment facility and a 210 re-use authorization may do so only in consecutive processes. Applicants first apply for a TPDES permit pursuant to 30 TAC Section 305. After this permit is obtained, applicants then apply for a 210 re-use authorization. In other words, the 210 re-use authorization can only be sought after a TPDES permit is obtained. For this reason, at the time a wastewater discharge application is filed, an applicant may only offer assurances that a 210 re-use authorization will be sought in the future.

In at least one instance, a city seeking a TPDES permit passed a resolution to assure its citizens of its commitment to submit a 210 re-use authorization application upon receipt of its TPDES permit.[4] The City of Wimberley applied to the Commission in 2014 for a major amendment to its TPDES permit. During the public comment period, TCEQ staff learned that the local community was very concerned about the potential of any discharge of effluent into a tributary of the Blanco River in light of the area's recent history of devastating floods. The community sought to have a no-discharge permit.[5] The City received its TPDES permit on June 14, 2016, but would not receive its 210 re-use authorization until October 17, 2016. The public's frustration with the inability to see a more tangible indicator of this municipal applicant's intent not to discharge at the time of its permit application filing exemplifies the public interest concern seen in many other proceedings.[6] Also, the application for TPDES Permit No. WQ0014488003 by the City of Dripping Springs has been the subject of significant protest and public comment questioning whether the City plans to operate a no-discharge facility.

OPIC recommends that TPDES applicants operating municipal wastewater treatment facilities be allowed to file concurrently an application for a 210 re-use authorization at the time of their TPDES application. Through the filing of concurrent applications, such applicants can better demonstrate their good faith and commitment not to discharge. The application processing time for a TPDES permit and a 210 re-use authorization would be shortened. Allowing concurrent applications may reduce a potential regulatory burden for reclaimed water re-use and allow the applicant to re-use water sooner than the current rules allow. This proposal addresses citizens' frequently-expressed interest in alternatives to discharging by providing a mechanism for applicants to act expeditiously in demonstrating their intent to re-use treated effluent.

Amended 30 TAC Section 210.5(a) would read as follows to allow applicants operating municipal wastewater treatment facilities to apply for a 210 re-use authorization at the time of their TPDES application:

(a) Prior to discharging any reclaimed water to the waters in the state, the provider or user shall obtain a permit from the commission

[4] City of Wimberley City Council, Minutes of Special Meeting of City Council (Sept. 29, 2014).

[5] Application by City of Wimberley for Major Amendment to Permit No. WQ0013321001; TCEQ Docket No. 2015-0482-MWD (permit issued June 14, 2016).

[6] Additional examples include Application by 633-4S Ranch, Ltd. and Stahl Lane, Ltd. for major amendment to TPDES Permit No. WQ0015095001, TCEQ Docket No. 2016-1402-MWD; SOAH Docket No. 582-17-0899 (permit issued February 14, 2017); Application by Trio Residential Developers, Inc. for new TPDES Permit No. WQ0015219001, TCEQ Docket No. 2015-0841-MWD, SOAH Docket No. 582-16-0594 (application withdrawn June 30, 2016); Application by Lerin Hills Municipal Utility District for renewal of Permit No. WQ0014712001, TCEQ Docket No. 2014-1706-MWD (permit issued March 9, 2015); Application by City of Liberty Hill for major amendment and renewal of TPDES Permit No. WQ0014477001, TCEQ Docket No. 2014-1720-MWD, SOAH Docket No. 582-15-2936 (permit issued September 22, 2015).

in accordance with the requirements of Chapter 305 of this title (relating to Consolidated Permits) except as provided for by §210.22(e) of this title (relating to General Requirements). For municipal reclaimed water producers, an application for authorization for re-use of domestic reclaimed water may be filed concurrently with a wastewater discharge permit application filed under Chapter 305 of this title.

4. Proposal Concerning Schedules in SOAH Cases where Requests for Party Status are Taken under Advisement or 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.

Another concern arises when some parties are designated at the preliminary hearing and other requests for party status are taken under advisement. In proceedings on the water use permit application of New Braunfels Utilities (TCEQ Docket Number 2016-0162-WR; SOAH Docket Number 582-16-6164), after one opposing party was admitted at the preliminary hearing and other requests were taken under advisement, the applicant and the one admitted opponent filed a motion to abate the proceedings for purposes of settlement discussions. Presumably, the intent of the motion was to dispose of the matter before other potential parties had the opportunity to participate. Both the Executive Director and OPIC opposed the motion and the ALJ denied it. The proposal below includes provisions to clarify that such motions should not be considered until all parties are named.

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 80.105(a) and such other Chapter 80 rules deemed appropriate:

> If the judge takes a request for party status under advisement or determines a preliminary hearing should be continued, the judge shall not abate the proceedings nor issue an order setting a procedural schedule until after all parties are named, either at the last day of the preliminary hearing or after the judge rules on all requests for party status. The judge shall issue the order setting a procedural schedule only after considering the positions of all parties, including parties admitted after their requests for party status were taken under advisement and 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.

5. 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,[7] 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 (approximately 2 months) to prepare the PFD, leaving the parties with only 120 days (approximately 4 months) to conduct all discovery, 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 Section 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, §§ 11.036, 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 TWC, §5.556, the order shall include a date for the issuance of the proposal for decision that is within the maximum expected duration set by the commission. For applications referred under TWC, §5.556 or §5.557, the date for issuance of the proposal for decision shall be 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>

[7] 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.

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, §5.556 or §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) Judge's proposal for decision regarding an application filed on or after September 1, 2015 and referred under Texas Water Code, §5.556 or §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 date of the preliminary hearing, the date specified by the commission, or the date to which the deadline was extended pursuant to Texas Government Code, §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.

6. 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, Act of May 30, 1999, 76th Leg., R.S. (HB 801), Section 5 (codified at Texas Water Code, 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 TCEQ 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 TCEQ 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 TCEQ resources in a number of ways, including reducing the number of multiple mass mailings from multiple agency offices. This change would also conserve TCEQ'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.

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.