

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S ANNUAL REPORT TO  
THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
FOR FISCAL YEAR 2015**

**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.

In even-numbered years the report must be submitted in time to be included with the reported information in the Commission's reports under Texas Water Code, Section 5.178 (a) and (b), and in the Commission's biennial legislative appropriations requests, as appropriate. Though there is no specific 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. This report is provided to comply with the requirements of Section 5.2725 of the Texas Water Code and is respectfully submitted to the Commission for its consideration.

**OPIC Mission**

OPIC was created in 1977 to ensure that the Commission promotes the public's interest. To fulfill the statutory directive of Section 5.271 of the Texas Water Code, OPIC participates in contested case hearings and other Commission proceedings to ensure that decisions of the Commission are based on a complete and fully developed record. In these

proceedings, OPIC also protects the rights of the citizens of Texas to participate meaningfully in the decision-making process of the Commission to the fullest extent authorized by the laws of the State of Texas.

## **OPIC Philosophy**

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

## **Overview and Organizational Aspects**

OPIC develops positions and recommendations 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:

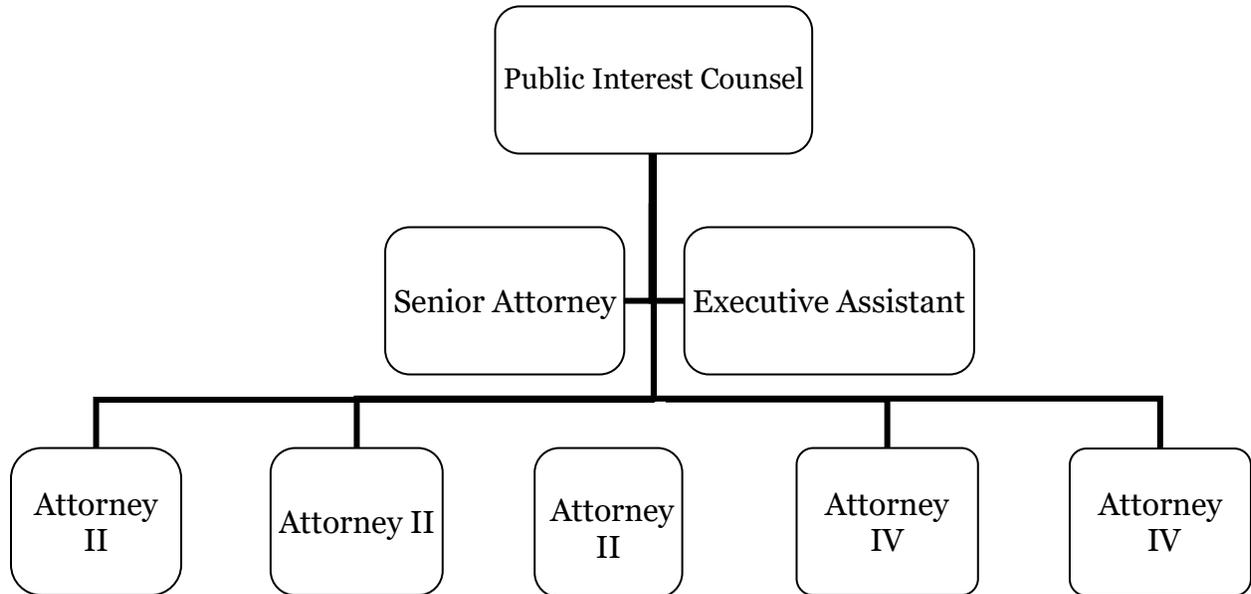
- Participating as a party in contested case hearings on all matters under the Commission's jurisdiction;
- Preparing briefs for Commission consideration regarding hearing requests, requests for reconsideration, motions to overturn, motions for rehearing, use determination appeals, and various other matters set for briefing by the Office of General Counsel;
- 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's interest is developed and considered in Commission decisions. As a result, the Commission is better positioned to make informed decisions that not only comply with applicable law, but also protect human health and the environment and consider the greater public interest, as well as the interests of affected parties.

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

**Figure 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 § 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 hearings requests, requests for reconsideration, motions to overturn, use determination appeals, and miscellaneous other environmental matters heard by the Commission. These include proceedings related to applications for municipal solid waste landfills and other municipal and industrial solid waste management and disposal activities, underground injection and waste disposal facilities, water rights authorizations, priority groundwater management area designations, water master appointments, municipal and industrial wastewater treatment facilities, sludge application facilities, concentrated animal feeding operations, rock and concrete crushers, concrete batch plants, new source review air permits, use determination appeals, various authorizations subject to the Commission's motion to overturn process,

single property designations, and permit suspension, revocation and emergency order proceedings.

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 proceedings initiated with the issuance of the Executive Director's preliminary report and petition.

### **OPIC's Performance Measures**

As required by Section 5.2725(b) of the Texas Water Code, the Commission developed the following OPIC performance measures which were implemented on 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 utility 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 for 75 percent of enforcement contested case and other proceedings heard by the TCEQ

**Outcome Measure:**

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

### **Evaluation of OPIC Under Its Performance Measures**

OPIC's performance measures for environmental, district, rulemaking and enforcement proceedings are expressed as percentages of all such proceedings in which OPIC could have participated. The numerators for the performance measure percentages are derived from the work assignments tracked by the Office during fiscal year 2015 and a review of matters considered by the Commission at its public meetings held during the fiscal year. These assignments include active matters carried forward from the past fiscal year, as well as matters assigned during the relevant fiscal year. The denominators for the performance measure percentages - all of the proceedings in which OPIC could have participated - are derived from SOAH quarterly reports, TCEQ Litigation Division

Reports and a review of matters considered by the Commission at its public meetings held during each fiscal year.

### **Fiscal Year 2015**

In fiscal year 2015, OPIC participated in a total of 988 proceedings: 80 environmental proceedings; 11 district proceedings; 53 rulemaking proceedings; and 844 enforcement proceedings.

OPIC's participation in 80 of 80 total environmental proceedings resulted in a participation percentage of 100%.

OPIC's participation in 11 of 11 district proceedings resulted in a participation percentage of 100%.

OPIC's participation in 53 rulemaking proceedings, including all active rule assignments carried forward from fiscal year 2014 as well as the review of all proposals and adoptions considered by the Commission during fiscal year 2015, resulted in a participation percentage of 100%.

OPIC's participation in 844 of 919 enforcement proceedings, including the review of enforcement matters considered at Commission agendas and the monitoring of and participation in docketed cases where an Executive Director's preliminary report and petition had been issued or the matter was pending at SOAH, resulted in a participation percentage of 92%.

The fiscal year 2015 OPIC participation percentages for environmental, district, rulemaking, and enforcement proceedings are shown in Figure 2 below.

**Figure 2  
Proceedings with OPIC Participation  
Fiscal Year 2015**



**Summary of OPIC Performance**

The Outcomes Table below summarizes the measure of OPIC’s performance in meeting its goals and objectives for fiscal year 2015.

**Figure 3  
Outcomes Table**

<b>OUTCOME</b>	<b>PROJECTED FY 2015</b>	<b>ACTUAL FY 2015</b>
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 hearings and other enforcement proceedings in which OPIC participated	75%	92%

**Use of Technology**

For purposes of this report, OPIC has a database and a reporting process that allows OPIC to track its work on any matters active at any point within a fiscal year regardless of the date such matters were opened or closed. For determining the total number of possible matters in which OPIC could have participated for each performance measure, OPIC also reviews SOAH’s quarterly reports, agendas from Commission public meetings, and reports from the Litigation Division of the Office of Legal Services.

**ASSESSMENT OF BUDGET NEEDS**

Section 5.2725(a)(2) of the Texas Water Code directs OPIC to provide the Commission with an assessment of the budget needs of the office, including the need to contract for outside expertise. The operating budget for OPIC in fiscal year 2015 totaled \$569,692.

**Figure 5**

**OPIC Budget, FY 2015**

	<b>Budget Category</b>	<b>FY 2015 Budget</b>
31	Salaries	\$544,992
35	Professional/Temporary	\$7,750
37	Travel	\$7,100
39	Training	\$5,485
41	Postage	\$50
43	Consumables	\$550
46	Other Operating Expenses	\$1,570
54	Facilities, Furniture & Equipment	\$2,195
<b>TOTAL</b>		<b>\$569,692</b>

***Outside Expertise***

For context, OPIC first provides an overview of how the office's budget has addressed retaining outside expertise in the recent past. Fiscal year 2013 was the first year OPIC's budget included sufficient funds in the category of professional and temporary services such that OPIC could retain outside expertise, in addition to paying for the services of a summer law clerk through the Commission's Mickey Leland Environmental Internship Program. The fiscal year 2013 budget category of temporary and professional services included \$30,000 specifically earmarked for OPIC to contract for outside expertise. OPIC worked with agency staff to develop the procedures for obtaining outside technical support. Because of complications and delays in establishing the process for OPIC to retain and contract with outside experts, OPIC was unable to implement this process in time to use the funding included in the fiscal year 2013 budget. Therefore, budgets since fiscal year 2013 have not included funding for OPIC to retain outside expertise.

During fiscal year 2014, however, contracting procedures were established with the assistance and guidance of the Executive Director's purchasing staff. As described in OPIC's prior Annual Report, during fiscal year 2014 OPIC requested and received \$4,200 in funding to retain outside expertise consulting services from Irvin L. Bilsky, P.E. for purposes of OPIC's participation in a complex air permitting contested case hearing.

During fiscal year 2015, OPIC's budget for professional/temporary services was \$7,750. This amount only covered the cost of retaining a summer law clerk through the Commission's Mickey Leland Environmental Internship Program. However, during fiscal year 2015, an additional funding request (AFR) of \$5,000 was granted to pay for expert consulting services from LaCosta Environmental LLC 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. However, because the decision whether to grant a requested case hearing on this application has been continued beyond FY 2015, OPIC requested a release of these funds back to the Commission's general operating budget.

Contracting procedures are now in place and OPIC has the ability to retain experts more quickly. Accordingly, OPIC could retain experts expeditiously in more complex environmental proceedings should future budgets include funding upfront for such purposes.

### **REGULATORY RECOMMENDATIONS**

The Texas Water Code, Section 5.273, authorizes OPIC to recommend needed legislative and regulatory changes. Such recommendations are to be included in OPIC's annual reports under Texas Water Code, Section 5.2725(a)(3). OPIC proposes no legislative recommendations for purposes of this report. OPIC's recommendations for regulatory changes are discussed below.

#### **1. Proposal Concerning 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 § 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 rule 30 TAC § 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., § 5 (codified at Tex. Water Code (TWC) § 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 § 5.557(a).

Often when the agency receives a large volume of hearing requests from citizens who are in close proximity to a facility, there is little doubt that there are affected persons who will eventually be granted a contested case hearing. In these situations, a hearing is a reasonable certainty, even before the agency begins the laborious task of setting consideration of the requests for a Commission agenda and mailing notice and a request for briefs to a multitude of interested persons. OPIC's proposed rule change would require a mandatory direct referral under these circumstances. Such a rule change would conserve agency resources in a number of ways, including reducing the number of multiple mass mailings from multiple agency offices. This change would also conserve the agency's human resources otherwise required to process, review, analyze, and consider hundreds of hearing requests in circumstances where a hearing is already a reasonable certainty.

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

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

- (1) at least 100 timely hearing requests on the application have been filed with the chief clerk; and
- (2) for concrete batch plant authorizations subject to a right to request a contested case hearing, the Executive Director confirms that at least one of the timely hearing requests was filed by a requestor who resides in a permanent residence within 440 yards of the proposed facility; or
- (3) for wastewater discharge authorizations subject to a right to request a contested case hearing, the Executive Director confirms that at least 10 timely hearing requestors own property either adjacent to 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 § 7.053(3)(A) states that “with respect to the alleged violator,” “history and extent of previous violations” shall be considered in the calculation of an administrative penalty. Under 30 TAC § 60.1(b), the Commission considers compliance history for a five year period. Under 30 TAC § 60.1(d), “for any part of the compliance history period that involves a previous owner, the compliance history will include only the site under review.” Therefore, while a prior owner’s entire compliance history cannot be used against a new owner, 30 TAC § 60.1(d) currently requires that a prior owner’s bad

acts be considered in calculating the compliance history of a current owner if the ownership change happened within the previous five years. OPIC proposes that this rule be changed.

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

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

Notwithstanding a few exceptions,<sup>1</sup> 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 Office of the Chief Clerk 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.<sup>2</sup> 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,

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<sup>1</sup> See 30 TAC §§ 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.)

<sup>2</sup> See 30 TAC 39.405(g).

the rule would further implement and promote the purposes of Texas Water Code § 5.1733 which requires the commission to post public information on its website. Finally, since current statutes and rules already require website availability of numerous documents (notices, public comments, filings, the executive director's decision, and the executive director's response to comment),<sup>3</sup> the posting of the additional information required under the proposed rule language would complement and complete the existing universe of documents available on the website relevant to public participation in permitting actions.

The following provision would be added as 30 TAC § 39.405(l)<sup>4</sup> and/or 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 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.**

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<sup>3</sup> See 30 TAC § 55.156(g).

<sup>4</sup> At the time of this report, the rule proposal to implement SB709 has been approved for publication and includes proposed new § 39.405(k) requiring posting on the commission's website of notices of administrative completeness, but not posting of the application itself.

The following provisions would be added to the commission's Chapter 39 and 55 rules in 30 TAC §§ 39.419, 39.420, 55.156, and/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 § 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 TPDES permit is required by 30 TAC § 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 and the size, dimensions, and configuration of adjacent property may be such that property owners beyond the adjacent property can have substantial exposure to odors. This being the case, it is important to identify and notify potentially affected persons of their public participation rights as early as possible. Accordingly, this proposal would expand notice requirements so that owners of tracts within one-half mile of the facility, not just adjacent landowners, would receive mailed notice.

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 disposal facilities under the Commission's Chapter 312 rules. Those rules require mailed notice to persons who own property within specified distances from the facility, beyond just property 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 § 305.48(a)(2) and/or 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 a referral to SOAH pursuant to 30 TAC § 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 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. The ALJ also continued the hearing to June 24, 2015 because of the extenuating circumstances created by the flood recovery efforts. 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 §80.6, 80.105 (a) and/or 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.**

## **CONCLUSION**

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