

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S ANNUAL REPORT TO THE
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
FOR FISCAL YEAR 2017**

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:

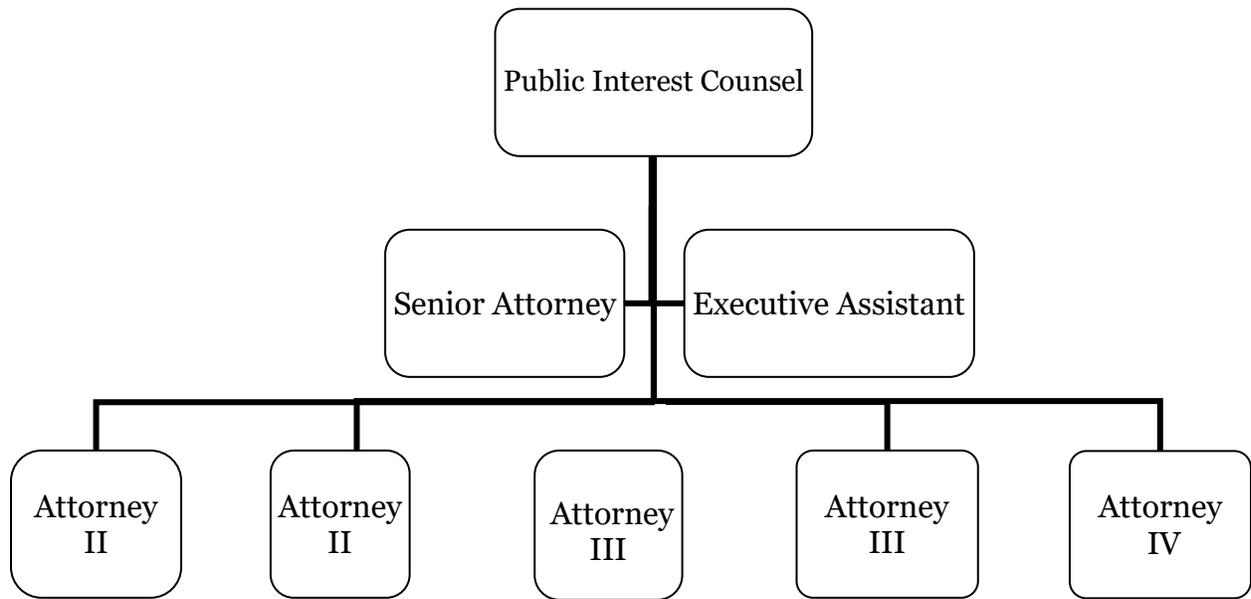
- Participating as a party in contested case hearings;

- 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.

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

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, 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, 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

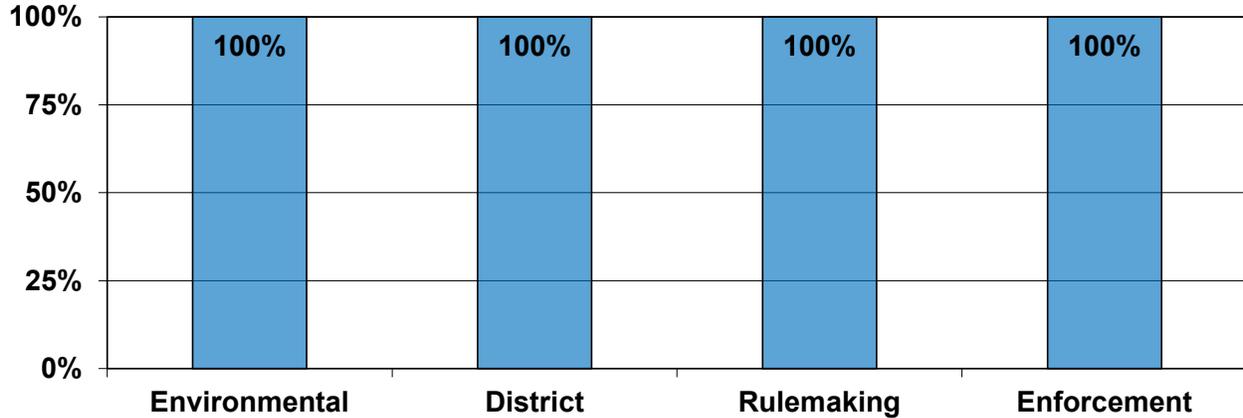
OPIC's performance measures for environmental, district, rulemaking and enforcement proceedings are expressed as percentages of all such proceedings in which OPIC could have participated. For purposes of this report, OPIC uses the TCEQ Commissioners' Integrated Database and a reporting process that allows 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 11, 2017: work assignments tracked by the Office during fiscal

year 2017; SOAH quarterly reports; and matters considered by the Commission at its public meetings.

Fiscal Year 2017

In fiscal year 2017, OPIC participated in a total of 809 proceedings consisting of: 90 environmental proceedings; 5 district proceedings, 40 rulemaking proceedings; and 674 enforcement proceedings. OPIC's participation in 90 of 90 total environmental proceedings resulted in a participation percentage of 100%. OPIC's participation in 5 of 5 district proceedings resulted in a participation percentage of 100%. OPIC's participation in 40 rulemaking proceedings, including the review of all petitions, proposals, and adoptions considered by the Commission during fiscal year 2017, resulted in a participation percentage of 100%. OPIC's participation in 674 of 674 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 2017, resulted in a participation percentage of 100%. Figures 2 and 3 below summarize the measures of OPIC's performance.

**Figure 2
Proceedings with OPIC Participation
Fiscal Year 2017**



**Figure 3
Outcomes Table**

OUTCOME	PROJECTED FY 2017	ACTUAL FY 2017
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 2017 totaled \$606,111.

Figure 4
OPIC Budget, FY 2017

Budget Category		FY 2017 Budget
31	Salaries	\$589,111
37	Travel	\$7,100
39	Training	\$5,500
43	Consumables	\$500
46	Other Operating Expenses	\$1,600
54	Facilities, Furniture & Equipment	\$2,300
TOTAL		\$606,111

Budget Needs for Retaining Outside Technical Expertise

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

During fiscal year 2014, further contracting procedures were established with the assistance and guidance of the Executive Director’s purchasing staff. Through an additional funding request (AFR), OPIC requested and received \$4,200 to retain consulting services for purposes of OPIC’s participation in 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. 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 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 has used these funds to retain technical expertise regarding sewage sludge land application issues in proceedings on the application of Beneficial Land Management, LLC for renewal and amendment of Permit No. WQ0004666000.

For fiscal year 2017, OPIC's budget did not include funds that could be used for retaining technical expertise and OPIC submitted no additional funding requests for this purpose.

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

LEGISLATIVE RECOMMENDATIONS

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

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

Texas Health and Safety Code, Section 341.049 provides that if a person causes, suffers, allows, or permits a violation of Texas Health and Safety Code, Subchapter C or a rule or order adopted under that subchapter, the Commission may assess a penalty of not less than \$50 nor more than \$1,000 for each violation. Enforcement orders are commonly seen that assess penalties as low as \$200 or less for drinking water violations such as exceedances of maximum contaminant limitations (MCLs). These low penalties result even when the Commission Penalty Policy's Environmental, Property, 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 - \$5,000 for each violation.

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

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

2. Proposal Concerning Changes to Permit Applications

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

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

complete when filed. The intended result is a more efficient and effective use of the time and resources of all parties to a proceeding.

Existing Texas Health and Safety Code, Section 382.0291(d) currently limits an air quality permit applicant's ability to amend applications. With some modifications, OPIC's proposal is based on Section 382.0291(d). OPIC proposes revisions to clarify the language of this statute and incorporate its requirements into the appropriate provisions of Texas Water Code, Chapters 5, 11, 13, 26 and 27 and Texas Health and Safety 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.

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

This recommended legislative change would expand the right to a hearing for Standard Permit registrations pursuant to Texas Health 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.

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.

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 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.

REGULATORY RECOMMENDATIONS

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

1. Proposal Concerning Mandatory Direct Referrals

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

Texas Water Code, Section 5.557(a) provides that an application may be

referred to SOAH for a contested case hearing immediately following issuance of the Executive Director's preliminary decision. Under this statutory authority, and under Commission rules at 30 TAC Section 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.**

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

OPIC submits the proposal described below in order to avoid penalizing new innocent purchasers of a site under enforcement based on the bad acts of prior site owners and to facilitate the sale of troubled sites to new owners who are willing to bring sites into compliance.

Texas Water Code, Section 7.053(3)(A) states that with respect to an alleged violator, the history and extent of previous violations shall be considered in the calculation of an administrative penalty. Under 30 TAC Section 60.1(b), the Commission considers compliance history for a five year period. Under 30 TAC Section 60.1(d), “for any part of the compliance history period that involves a previous owner, the compliance history will include only the site under review.” Therefore, while a prior owner’s entire compliance history cannot be used against a new owner, a prior owner’s bad acts committed during the compliance period at the site under review are considered in calculating the compliance history of a current owner. OPIC proposes that this rule be changed.

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

This rule revision would remove an impediment to a sale of a site to a potentially more responsible owner who could improve operations. Additionally,

those who inherit a site and were not afforded an opportunity to conduct due diligence would be better able to operate or sell a site to a new owner free of the burden of a previous owner's bad acts. The effect would be better ownership and operation of previously poor performing sites as well as promoting economic activity by removing a barrier to a sale of a site. The public may benefit from 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, the proposed rule language could minimize the potential for abuse.

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

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

3. Proposal Concerning Improved Public Participation in Permitting Through Website Posting of Applications, Draft Permits, Technical Review Memoranda and Related Documents, and Contested Case Hearing Request Forms

With a few exceptions,² TCEQ does not require that copies of permit applications, draft permits, or technical memoranda produced by the Executive Director's staff

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

be made available online. At present, members of the public interested in reviewing these documents must arrange an in-person visit at either the TCEQ in Austin or a designated public place (such as a local library or county courthouse) in the county where the facility is located or is proposed to be located.³ Additionally, the public is usually required to pay a fee to have these documents copied.

OPIC first notes that some or all aspects of the proposal below to post applications and related materials of interest to the public on the Commission's website could be implemented through policy changes without the need for rulemaking. If implemented through rulemaking, the first component of the rule proposal would be to require the Executive Director to provide an electronic copy of the permit application to the Chief Clerk for website posting once the application is declared administratively complete. The Executive Director would have discretion to obtain the electronic version from the applicant.

This rulemaking would improve public participation in environmental permitting by giving members of the public with computer access an easy way to review permit applications. Additionally, the rule would further implement and promote the purposes of Texas Water Code, Section 5.1733 which requires the Commission to post public information on its website. Finally, the posting of this additional information would complement and complete the existing universe of documents related to public participation in permitting actions which are already required to be available on the Commission's website, such as the Executive Director's Decision and Response to Comments.⁴

The following provision would be added as 30 TAC Section 39.405(l)⁵ and

³ See 30 TAC Section 39.405(g).

⁴ See 30 TAC Section 55.156(g).

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

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.

The proposal described above envisions the Executive Director requiring electronic versions of the application from the applicant, and the Executive Director then forwarding these electronic versions to the Chief Clerk. This transfer of electronic versions of documents could ease the burden of scanning or otherwise processing applications for posting. If the process of posting applications is still considered too resource-intensive and burdensome for TCEQ staff, the changes below concerning website availability of draft permits and technical summary material could stand alone.

The second component of the rulemaking would concern the posting of draft permits and other materials related to the technical review of the application. The rule would 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 following provisions would

be added to the Commission's Chapter 39 and 55 rules in 30 TAC Sections 39.419, 39.420, 55.156, and to 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.

If the Commission adopts any of the changes discussed above, 30 TAC Section 39.411 and any other applicable rules concerning the required content of public notices would also need to be amended to require notice that the public could view these materials on the agency's website.

Though not a regulatory change recommendation, OPIC offers the following policy proposal to serve public participation in permitting matters and provide clarity to the public on the required elements of a contested case hearing request. Members of the public often submit correspondence to the agency which is ambiguous as to the requestor's intent to request a contested case hearing. Also, while the intent to request a contested case hearing may be clear, a person who otherwise may be an affected person with a right to a contested case hearing may be denied a hearing if their request does not satisfy the form requirements of 30 TAC Section 55.201(d). For these reasons, OPIC's policy proposal is to make available on the Commission's website a form for a request for contested case

hearing that provides a checklist of the elements of a contested case hearing request required by 30 TAC Section 55.201(d). The form could be completed and filed electronically. Implementing this proposal would provide clarity to the public and promote efficiency in the agency's processing and classification of correspondence from the public filed on permit applications.

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

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

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

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

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

6. Proposal Concerning Procedural Schedules in Contested Case Hearings on Permit Applications Subject to SB 709

HB 801 established timeframes for procedural schedules in contested case hearings on applications filed on or after September 1, 1999. For these matters, hearings are required to last no longer than one year from the date of the preliminary hearing until the issuance of the proposal for decision (PFD). No

specific timeframe was set for the time between the close of the hearing record and the issuance of the PFD. Though not specified by statute or rule applicable to TCEQ environmental permit application hearings,⁶ the standard practice at SOAH has been for judges to set aside a 60-day period from the close of the hearing record until issuance of the PFD.

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

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

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

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. 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;

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.

7. 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.⁷ 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.⁸ 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.⁹ Currently, the City of Dripping Springs has applied to the TCEQ for a new TPDES Permit No. WQ0014488003 which has been the subject of significant public comment urging the City 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-

⁷ City of Wimberley City Council, Minutes of Special Meeting of City Council (Sept. 29, 2014).

⁸ Application by City of Wimberley for Major Amendment to Permit No. WQ0013321001; TCEQ Docket No. 2015-0482-MWD (permit issued June 14, 2016).

⁹ 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).

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 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.

RELATED LEGISLATIVE AND REGULATORY CHANGE RECOMMENDATION

1. Proposal Concerning Direct Referrals of Permitting Matters Subject to 30 TAC Chapter 55, Subchapter G

OPIC recommends statutory and regulatory changes discussed below in order to allow for more efficient and expedient direct referrals of applications subject to 30 TAC Chapter 55, Subchapter G. These applications include certain applications, including districts and water rights applications, which are not subject to HB 801 and SB 709 requirements. When the applicant or the Executive Director requests that such an application be directly referred to SOAH for a contested case hearing, 30 TAC Section 55.254(g) currently provides “an application may only be sent to SOAH under this subsection if the executive

director, the applicant, the public interest counsel and all timely hearing requestors agree on a list of issues and a maximum expected duration of the hearing.” 30 TAC Section 55.254(g).

In late 2001, the Commission’s procedural rules were amended to implement HB 801. As part of that effort, many sections of the Chapter 55 rules were revised to incorporate requirements for the Commission to specify disputed issues of fact and an expected duration of a hearing. Chapter 55, Subchapter G rules were adopted to apply to non-HB 801 applications, such as water rights and districts. 24 Tex. Reg. 9021 (October 15, 1999).

When adopting the direct referral provision of Subchapter G, TCEQ stated “adopted § 55.254(g) provides that an application may only be sent to SOAH under this subsection if the executive director, the applicant, the public interest counsel and all timely hearing requestors agree on a list of issues and a maximum expected duration of the hearing. This change was required by HB 801 which amended Chapter 2003 of the Texas Government Code which requires a list of issues and maximum duration of the hearing to be sent to SOAH by the Commission.” 24 Tex. Reg. 9038 (October 15, 1999)

OPIC acknowledges that Texas Government Code, Section 2003.047(e) does provide that “in referring a matter for hearing, the commission shall provide to the administrative law judge a list of disputed issues.” Further, Texas Government Code, Section 2003.047(f) provides that “the scope of the hearing is limited to the issues referred by the commission.” Because these statutory provisions do not expressly distinguish between HB 801 and non-HB 801 “matters,” OPIC understands why they could be interpreted to apply to all “matters” referred to SOAH. However, OPIC asserts that Texas Government Code, Section 2003.047 provisions should be read and interpreted in conjunction with the provisions of Texas Water Code Chapter 5, Subchapter M, Environmental

Permitting Procedures, Section 5.551 *et seq.*

Under Texas Water Code, Section 5.551, the requirements of HB 801 apply *only* to specific types of permit applications. Water rights applications, districts applications, and other applications subject to 30 TAC Chapter 55 Subchapter G are not, and never have been, subject to the HB 801 provisions found in Texas Water Code, Chapter 5, Subchapter M. Therefore, any referral of these applications should not require a limiting list of specific issues and an expected duration of hearing. Furthermore, no provision of HB 801 requires an agreement of the parties on referred issues for any application.

This statutory interpretation not only makes sense, it is the only interpretation that supports the express wording and application of other provisions of Chapter 55, Subchapter G. When the Commission considers and grants hearing requests of affected persons on non-HB 801 applications under current rule 30 TAC Section 55.255, the Commission directs the chief clerk to “refer the application to the State Office of Administrative Hearings (SOAH) for a hearing” *without* requiring the referral to include a list of specific issues and a maximum expected duration of the hearing. 30 TAC Section 55.255(a)(3)¹⁰ If requirements for referring specific discrete issues and expected hearing duration do not apply when granting a hearing request under 30 TAC Section 55.255, there is no reason why these requirements would apply for a direct referral under 30 TAC Section 55.254(g). OPIC’s proposal would clarify procedures for all referrals to SOAH under Chapter 55, Subchapter G.

To the extent Texas Government Code, Section 2003.047(e) and (f) limitations were ever intended to apply to any direct referrals, logic dictates they

¹⁰ See also [An Interim Order concerning the application by William D. Carroll and Mary L. Carroll to amend Water Use Permit No. 5161B](#); TCEQ Docket No. 2011-0086-WR (April 13, 2017) (referring the matter to “SOAH for a contested case hearing on the application”).

were intended to apply only to HB 801 applications. Even for HB 801 direct referrals, it was soon recognized that requiring an agreement of the parties on an expected duration of the hearing and a list of specific and discrete issues for referral was untenable. Shortly after passing HB 801, the Texas Legislature passed SB 688. This legislation amended Texas Water Code, Section 5.557(a) to provide for a direct referral of a HB 801 application for a contested case hearing on whether the application complies with all applicable statutory and regulatory requirements. The legislation further amended Texas Water Code, Section 5.557(b) to state that “Sections 2003.047(e) and (f) do not apply to an application referred for a hearing under Subsection (a).”

Following the passage of SB 688, the Commission adopted 30 TAC Section 55.210 to implement revised Texas Water Code, Section 5.557 relating to the direct referral of HB 801 applications. 30 TAC Section 55.210 no longer requires agreement between the parties on all issues or for a narrow list of specific issues to be referred to SOAH. Instead, it merely states that after the executive director files a statement that technical review of an application is complete and either the executive director or the applicant files a request that the application be sent directly to SOAH, the chief clerk shall refer the application directly to SOAH for a hearing on whether the application complies with all applicable statutory and regulatory requirements. 30 TAC Section 55.210(a), (b).

In the adoption preamble for 30 TAC Section 55.210, the Commission noted that the former statutory and regulatory scheme for direct referrals of HB 801 applications posed too many procedural obstacles to allow for efficient referrals when requested by the applicant or the executive director: “Since agreement regarding the list of disputed issues and maximum expected duration of the hearing had to be reached with all timely hearing requestors and all timely hearing requestors could not be identified until 30 days after transmittal of the executive director’s decision and response to comments, generally a direct

referral to SOAH was only practicable late in the permitting process.” 26 Tex. Reg. 10606 (December 21, 2001). When the Legislature addressed this problem through SB 688, it revised Texas Water Code, Section 5.557, which only applies to HB 801 applications.

OPIC speculates that the Legislature did not address the direct referral of non-801 applications in SB 688 because it was never envisioned nor intended that Texas Government Code, Section 2003.047(e) and (f) applied to non-HB 801 applications. This interpretation is consistent with Commission precedent in not applying such requirements when hearing requests are granted under 30 TAC 55.255(a)(3). However, for the sake of clarity, OPIC recommends consideration of the following statutory change that would leave no doubt that Texas Government Code, Section 2003.047(e) and (f) do not apply to any non-HB 801 application, regardless of how the application is referred to SOAH. The revision would clarify that these statutory restrictions apply only when the Commission considers and grants hearing requests on HB 801 applications under Texas Water Code, Section 5.556.

Texas Government Code, Section 2003.047(e) would be amended to read as follows:

(e) In referring a matter for hearing under Texas Water Code § 5.556, the commission shall provide to the administrative law judge a list of disputed issues and the commission shall specify the date by which the administrative law judge is expected to complete the proceeding and provide a proposal for decision to the commission. The administrative law judge may extend the proceeding if the administrative law judge determines that failure to grant an extension would deprive a party of due process or another constitutional right. The administrative law judge shall establish a docket control order designed to complete the proceeding by the date specified by the commission.

In referring an application for hearing under any authority other than Texas Water Code § 5.556, the Commission shall refer the application for a hearing on whether the application complies with all applicable statutory and regulatory requirements.

OPIC further recommends changes to the Commission's Chapter 55 rules and Chapter 80 rules set forth below to clarify that HB 801 requirements do not apply with respect to any referral of non-HB 801 applications.

Amended 30 TAC Section 55.254(g) would read as follows:

(g) After public notice is issued and the executive director has filed a statement that technical review is complete, the executive director or the applicant may file a request with the chief clerk that the application be sent directly to SOAH for a hearing on the application. If a request is filed under this subsection, the commission's scheduled consideration of any other hearing request will be canceled. After receipt of a request under this subsection, the chief clerk shall refer the application directly to SOAH for a hearing on whether the application complies with all applicable statutory and regulatory requirements.

Amended 30 TAC Section 55.255(a)(3) would read as follows:

(a) The determination of the validity of a hearing request is not, in itself, a contested case subject to the Texas Administrative Procedure Act (APA). The commission will evaluate the hearing request at the scheduled commission meeting, and may:

(3) determine that a hearing request meets the requirements of this subchapter, and direct the chief clerk to refer the application to the State Office of Administrative Hearings (SOAH) for a hearing on whether the application complies with all applicable statutory and regulatory

requirements;

Amended 30 TAC Section 80.6(b)(6) and 80.6(d) would read as follows:

(b) When a case is referred to the State Office of Administrative Hearings (SOAH), the chief clerk shall:

(6) send the commission's list of disputed issues and maximum expected duration of the hearing to SOAH unless the case is referred under § 55.210, § 55.254(g), or § 55.255(a)(3) of this title.

(d) When a case is referred to SOAH, only those issues referred by the commission or added by the judge under §80.4(c)(16) of this title (relating to Judges) may be considered in the hearing. The judge shall provide proposed findings of fact and conclusions of law only on those issues. This subsection does not apply to a case referred under §§55.210, 55.254(g), or 55.255(a)(3) of this title.

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.