

APPENDIX C

OFFICE OF PUBLIC INTEREST COUNSEL'S ANNUAL REPORT TO THE TCEQ

FISCAL YEAR 2020



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.

Overview of OPIC

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 help develop a complete record for the Commission to consider in its decision-making process. In these proceedings, OPIC develops positions and recommendations supported by applicable law and the best available information and evidence. OPIC also protects the rights of members of the public to participate meaningfully in the decision-making process of the Commission to the fullest extent authorized by the law.

OPIC works independently of other TCEQ divisions and parties to present a public interest perspective on matters that come before the Commission. OPIC does this work through activities that include:

- 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 members of the public 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: Public Interest Counsel; Senior Attorney; five Assistant Public Interest Counsels; and the Office's Executive Assistant.

OPIC is committed to fulfilling its statutory duty to represent the public interest in Commission proceedings by hiring, developing, and retaining knowledgeable

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

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, proposals for decision, and miscellaneous other environmental matters heard by the Commission. These include proceedings related to 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, other facilities requiring air permits, use determination appeals, various authorizations subject to the Commission's motion to overturn process, permit and licensing denials, suspensions, and 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 and state implementation plan matters proposed for publication and 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 in matters that were never active cases at SOAH.

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

FY 2020 Performance

OPIC's performance measures for environmental, district, rulemaking and enforcement proceedings are expressed as percentages of the proceedings in which OPIC could have participated. OPIC uses a reporting process within the TCEQ Commissioners' Integrated

Database that allows OPIC to track its work on permitting matters active at any point within a fiscal year. Other tools used by OPIC include worksheets that track fiscal year agenda item totals by performance measure category and track enforcement matters active at SOAH at any point during the fiscal year. Performance measure percentages were derived by using information available for FY 2020 as of August 14, 2020. In fiscal year 2020, OPIC participated in a total of 870 proceedings consisting of: 81 environmental proceedings; 6 district proceedings; 92 rulemaking proceedings; and 691 enforcement proceedings.

OPIC's participation in 81 of 81 total environmental proceedings resulted in a participation percentage of 100%.

OPIC's participation in 6 of 6 district proceedings resulted in a participation percentage of 100%.

OPIC's participation in 92 of 92 rulemaking proceedings, including the review of all petitions, proposals, and adoptions considered by the Commission during fiscal year 2020, resulted in a participation percentage of 100%.

OPIC's participation in 691 of 691 enforcement proceedings, including the review of orders considered at Commission agendas and the participation in additional cases that were active at SOAH during fiscal year 2020, resulted in a participation percentage of 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 2020 was \$581,525 as shown in Figure C-1.

The changed circumstances of working remotely during the COVID-19 pandemic created savings in budget category 54 for facilities, furniture and equipment funds. Toward the end of FY 2020, funds from category 54 were transferred to budget category 42, Phone and Utilities, and used to procure basic state agency cell phones. While OPIC staff works remotely, these phones will be used to return calls from the public and make other calls as necessary for work purposes.

Additional funding of approximately \$1840 in OPIC's fiscal year 2021 budget and beyond would allow OPIC to continue this phone service. This would facilitate OPIC's communication with the public in the event TCEQ has future periods of remote working. For the same reasons, OPIC would benefit from having the capability to exchange staff desktop computers for

agency-issued laptops if this option is offered to offices in the future.

Texas Water Code, Section 5.274(b) provides that OPIC may obtain and use outside technical support to carry out its functions. Texas Water Code, Section 5.2725(a)(2) requires this report to include information about OPIC's budget needs to contract for outside technical expertise. For context, OPIC provides an overview of how the Office has addressed retaining outside technical expertise since this reporting requirement was enacted.

Fiscal year 2013 was the only year OPIC's initial budget included funding for retaining outside technical expertise. OPIC's fiscal year 2013 budget category number 35, professional and temporary services, included \$30,000 specifically earmarked for such purposes. OPIC worked with agency staff to develop administrative and contracting procedures to hire outside consultants. Because establishing these procedures required more time than expected, OPIC was unable to implement this process in time to use the earmarked funding included in the fiscal year 2013 category 35 budget. OPIC's initial budgets since fiscal year 2013 have not included funding in budget category 35 specifically designated for retaining outside technical expertise. Instead, sporadic needs timely identified in specific cases have been addressed through the additional funding request (AFR) process.

During fiscal year 2014, further contracting procedures were established with the assistance and guidance of the Executive Director's purchasing staff. In that year, through an AFR, OPIC requested and received \$4,200 to retain expert consulting services for purposes of OPIC's participation in the contested

Figure C-1. OPIC Budget, FY 2020

Budget Category		FY 2020 Budget
31	Salaries	\$564,525
37	Travel	\$7,100
39	Training	\$5,500
43	Consumables	\$500
46	Other Operating Expenses	\$1,600
54	Facilities, Furniture & Equipment	\$2,300
TOTAL		\$581,525

case hearing on the air permit application of Corpus Christi Liquefaction, LLC.

During fiscal year 2015, an AFR of \$5,000 was granted to pay for expert consulting services for purposes of OPIC's participation in complex proceedings relating to a water use permit application to construct and maintain a reservoir on Bois d'Arc Creek. OPIC received a report evaluating the applicant's water conservation plan that facilitated OPIC's understanding of the applicant's compliance with applicable statutory and regulatory requirements. Another AFR of \$5,000 was granted to retain expert consulting services for purposes of proceedings on an air permit application submitted by Columbia Packing, Inc. Because the decision to grant a 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.

During fiscal year 2016, OPIC requested and received additional funding of \$5,000 to retain technical expertise regarding sewage sludge land application issues in proceedings on the application of Beneficial Land Management, LLC for renewal and amendment of Permit No. WQ0004666000. The parties settled this case prior to completion of the contested case hearing.

For fiscal years 2017 through 2020, OPIC's initial budgets have not included funds that could be used for retaining technical expertise. Also, OPIC has not requested additional funding for such purposes. Circumstances where OPIC could have benefited from outside consulting on issues arising in specific cases were not fully known in time to identify, obtain, and use technical expertise in a timely and effective way. The complex permit applications OPIC tracks during the comment period do not all proceed to a contested case hearing. In the interest of conserving state resources, OPIC generally does not consider pursuing the possibility of retaining an expert consultant until the Commission refers an application to SOAH.

Most of the contested case hearings for which OPIC would use outside expertise are subject to SB 709. In these cases, Administrative Law Judges (ALJs) must issue a proposal for decision (PFD) no later than 180 days after a preliminary hearing. Some hearings are set with shorter durations of 120 days. Because ALJs reserve a full 60 days for preparing their decision after the close of the record, even in cases with the longest 180-day period allowed, 120 days at most are available for all aspects of the actual hearing before the close of



the record (written discovery and depositions, pre-filed testimony and exhibits, objections and motions, pre-hearing conferences, the hearing on the merits, and the filing of closing briefs and replies).

All of these factors result in a specific, narrow window of time to: (1) identify and communicate with potential experts regarding their qualifications and availability; (2) request and obtain funding; (3) move through the necessary procurement and contracting processes; and (4) have any retained expert review necessary materials and prepare a report to be delivered in time to be useful for hearing purposes. It is only useful for OPIC to consult with technical experts if their reports can be in hand a few weeks after the preliminary hearing—in time for use in reviewing pre-filed testimony, preparing for the hearing on the merits, and subsequently preparing written closing briefs and replies.

With the time allowed under SB 709 procedural schedules and SOAH's reservation of two months following the close of the record to issue a PFD, OPIC attorneys generally have found that their time during the weeks between the preliminary hearing and the hearing on the merits is better spent participating in the discovery process, reviewing pre-filed exhibits and pre-filed testimony, reviewing and responding to objections and motions, and preparing for the cross-examination of witnesses. Nevertheless, OPIC remains open to possibilities for retaining outside technical expertise in novel and complex cases when the timing and circumstances allow. Currently, as this report is being written, OPIC is in the process of submitting a request for additional funding for FY 2021 and interviewing consulting experts for possible assistance for a specific contested case hearing proceeding expected to progress and be active early in FY 2021. Also, we have explored

developing relationships with university environmental science institutions and organizations that may expedite identifying and retaining consulting experts when needed in the future.

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 legislative change recommendations are reported below.¹

1. Applicability of Requirement for Public Comment for Each Member of the Public Seeking Party Status at SOAH

OPIC recommends seeking clarification from the Legislature on the following question: Is the timely submittal of public comment a prerequisite for each person protesting an SB 709 permit and appearing at SOAH to request party status in a contested case hearing? Clarification of legislative intent may require changes to Texas Government Code, Section 2003.047 (Hearings for TCEQ) and Texas Water Code, Section 5.115 (Persons Affected in Commission Hearing). OPIC is not proposing the answer to this question; the only goal of this proposal is to resolve the uncertainty resulting from recurring arguments and different decisions in SB 709 contested case hearings.²

SB 709 changed several aspects of the public participation procedures for most TCEQ permitting programs, including Commission determinations on whether hearing requestors are affected persons. Texas Water Code, Section 5.115 (a-1)(2)(B) states: "For a matter referred under Section 5.556, the commission may not find that a *hearing requestor* is an affected person unless the *hearing requestor* timely submitted comments on the permit application." (emphasis added.) Accordingly, Commission rule 30 TAC Section 55.203(c)(6) provides that "for a hearing request" subject to SB 709, a factor to consider is whether the requestor submitted comments.

1. On April 15, 2020, OPIC also submitted these recommendations to the TCEQ Intergovernmental Relations Division.

2. In the context of SOAH proceedings, OPIC's position on this issue has not been neutral. In hearings convened after the *Vulcan* contested case hearing referenced in footnote 3 below, OPIC has argued that SOAH should follow the precedent of *Vulcan* and be consistent in its interpretation of existing statutory and regulatory requirements for party status.

Clearly, a hearing requestor must file timely comments as a prerequisite for being determined an affected person when the Commission evaluates hearing requests for SB 709 applications under 30 TAC Chapter 55; however, it is not as clear whether this requirement applies to party designations by SOAH ALJs under 30 TAC Chapter 80. The Commission's rules at 30 TAC Section 55.211(e) state: "If a request for a contested case hearing is granted, a decision on a request for reconsideration or contested case hearing is an interlocutory decision on the validity of the request or issue and is not binding on the issue of designation of parties under § 80.109 of this title (relating to Designation of Parties) or the issues referred to SOAH under this section." The rule also states: "A person whose request for reconsideration or contested case hearing is denied may still seek to be admitted as a party under §80.109 of this title if any hearing request is granted on an application."

Under 30 TAC Section 80.109(a), entitled "Designation of Parties", the Commission's rules further provide: "All parties to a proceeding shall be determined at the preliminary hearing or when the ALJ otherwise designates. To be admitted as a party, a person must have a justiciable interest in the matter being considered and must, unless the person is specifically named in the matter being considered, appear at the preliminary hearing in person or by representative and seek to be admitted as a party." This subsection allows the ALJ to admit parties in addition to the affected persons who had hearing requests granted by TCEQ.

Section 80.109 does not expressly require the filing of timely public comments as a prerequisite for being named a party by a SOAH ALJ. Under 30 TAC Section 80.109(b)(5), affected persons shall be parties to hearings "based upon the standards" set forth in 30 TAC Section 55.203. While arguments have been made that Section 55.203(c)(6) must apply to ALJ decisions on party status, this regulatory provision is worded narrowly to apply to Commission decisions on "hearing requests" by "requestors." Because of this narrow wording, the counterargument made in SOAH proceedings has been that Section 55.203(c)(6) does not apply to ALJ decisions on party designations after hearing requests have been granted and the hearing has been convened.

Whether a person must submit timely public comments as a prerequisite to being designated a party in SOAH proceedings has been decided on a

case-by-case basis with different outcomes. The predominant SOAH interpretation has been that failure to file public comment does not preclude a person from being named a party.³ However, in at least one hearing, an ALJ took a different approach.⁴ Because Texas Water Code, Section 5.115 does not expressly address party status determinations at SOAH, and because this issue has been argued in several separate SOAH hearings which resulted in different outcomes, the contested case hearing process would benefit from a clear legislative directive, possibly requiring amendments to both Texas Government Code, Section 2003.047 and Texas Water Code, Section 5.115.

2. Judicial Review of Matters Delegated to the Executive Director

The proposal would eliminate the need for appellants to “double file” petitions for judicial review on air and waste permitting matters delegated to the Executive Director. The proposal would clarify that the judicial review timeline established by Texas Water Code, Section 5.351, including HB 3177 passed in 2017 during the 85th Texas Legislative Session, applies to permitting matters under Texas Health and Safety Code Chapters 361 and 382.

In 2017, the Legislature passed HB 3177 to address a problem encountered by persons seeking judicial review of TCEQ actions on matters delegated to the Executive Director. Prior to enactment of this legislation, persons appealing many decisions delegated to the Executive Director were required to file two separate petitions for judicial review in district court. Then-current law required the first petition to be filed within 30 days of the effective date of the decision, while the person simultaneously exhausted administrative remedies through the motion to overturn process.

3. *In the Matter of the Application of Vulcan Construction Materials, LLC*, SOAH Docket No. 582-19-1955, TCEQ Docket No. 2018-1303-AIR (the issue was raised in oral arguments at the preliminary hearing and the ALJ decided to admit multiple parties who had not previously participated); *In the Matter of the Application by Bosque Solutions LLC*, SOAH Docket No. 582-19-6473, TCEQ Docket No. 2019-0665-AIR (the ALJ requested and received written briefing on the specific issue of whether timely submitted comments were required, then admitted a party who had not filed comments); *In the Matter of the Application of Ingram Concrete, LLC*, SOAH Docket No. 582-20-0884; TCEQ Docket No. 2019-0902-AIR (after hearing testimony from the person about their interests, ALJ admitted a party who had not previously submitted comments).

4. *In the Matter of Camp Champions Texas, LP*, SOAH Docket No. 582-20-1022, TCEQ Docket No. 2019-0901-MWD (landowners adjacent to a facility were conditionally admitted as parties based on their concerns and interests and their claim they had not received mailed notice; however, when the applicant later presented evidence of mailed notice that was not rebutted, the adjacent landowners were dismissed as parties for their failure to submit timely comment).

A second petition would then be filed after any motion to overturn had either been denied by the commission or overruled by operation of law. HB 3177 sought to remedy this confusing and duplicative set of circumstances by delaying the requirement for petition filing until after TCEQ had acted on any timely filed motion to overturn. While HB 3177 sought to create a more efficient and fair process, it inadvertently resulted in confusion as to which judicial appeal processes were governed by the new procedure.

Advocates for the passage of HB 3177 in 2017 thought that bill’s changes to Texas Water Code, Section 5.351 applied across all agency programs and established uniform timelines for appeals across media. This interpretation makes sense because Texas Water Code Chapter 5 establishes the general powers of the Commission and is not media specific. Given the placement of Section 5.351 in Chapter 5 of the Texas Water Code that enumerates the general powers and duties of the Commission across all media under its jurisdiction, the plain wording of the statute, and the legislative intent discussed above, Texas Water Code, Section 5.351 in its current form arguably should control any contrary provisions in media-specific statutory provisions.

Nevertheless, after motions to overturn were filed in waste and air matters after the passage of HB 3177, it was realized that contrary media-specific statutes had not been revised and uncertainty remained about the need to double file petitions for judicial review. To provide certainty about the deadlines for seeking judicial review, OPIC’s Annual Report for Fiscal Year 2018 proposed to amend Texas Water Code, Section 5.351(c) as follows:

Notwithstanding Subsection (b) or any other statutory provisions within the commission’s jurisdiction authorizing the filing of a petition to review, set aside, modify, or suspend an act of the commission, a person affected by a ruling, order, or other law may, after exhausting any administrative remedies, file a petition to review, set aside, modify, or suspend the ruling, order, or decision not later than the 30th day after:

- (1) the effective date of the ruling, order, or decision; or**
- (2) if the executive director’s ruling, order, or decision is appealed to the commission as authorized by Section 5.122(b) or other law, the earlier of:**

- (A) the date the commission denies the appeal; or
- (B) the date the appeal is overruled by operation of law in accordance with commission rules.

During the 86th Texas Legislative Session in 2019, Senator Zaffirini’s office sponsored SB 2354 which proposed similar changes to Texas Water Code, Section 5.351, and proposed additional corresponding changes to Texas Health and Safety Code, Sections 361.321 and 382.032. The Texas Senate passed SB 2354. The bill was reported favorably out of the House Committee; however, it was not scheduled for a House vote.

OPIC anticipates that the regulated community and the environmental community alike would welcome eliminating the need for double filing petitions and avoiding the potential procedural pitfalls that now exist when petitioning for judicial review of matters delegated to the Executive Director. The public interest would be served by streamlined and less confusing procedures. For these reasons, OPIC recommends changes to Texas Water Code, Section 5.351, and changes to other provisions such as Texas Health and Safety Code, Sections 361.321 and 382.032 that may be helpful in harmonizing these timing requirements concerning the filing of an appeal in district court.

3. Changes Made to an Application for an Environmental Permit Before a Contested Case Hearing

This proposal would prohibit changes to permit applications after the 31st day prior to the date scheduled for the preliminary hearing, other than changes to correct clerical errors or to update non-technical application information. The proposal would track SB 1990 and companion bill HB 1006 filed in 2019 during the 86th Texas Legislative Session. Also, with some modifications, the proposal is based on existing Texas Health and Safety Code, Section 382.0291(d) which currently limits an air quality permit applicant’s ability to amend applications.

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, or at least 31 days before the hearing. The intended result is a more efficient use of the time and resources of all parties to a proceeding.

OPIC’s Annual Report for Fiscal Year 2018 included a similar proposal. During the 86th Texas Legislative Session, Senator Zaffirini filed SB 1990 to remedy the concerns raised in OPIC’s proposal. Representative Collier filed companion bill HB 1006. OPIC’s current proposal tracks these bills and would amend Texas Government Code, Section 2003.047 by adding subsection (d)(1) as follows:

This subsection only applies to an environmental permit governed by Texas Water Code Chapter 26 or 27 or Texas Health and Safety Code Chapters 361 or 382. 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, other than changes to correct clerical errors or update other non-technical information in the application, after the 31st day before the first date scheduled for a preliminary hearing on the application. If an applicant chooses not to proceed with the preliminary hearing on the application after the 31st day before the date scheduled for the preliminary hearing, the applicant must withdraw the application with or without prejudice in accordance with commission rule. If an applicant who has withdrawn an application without prejudice subsequently resubmits a revised application, the applicant must comply with applicable notice and other requirements in effect on the date the revised application was submitted to the commission. This subsection does not apply to a change made to an application for which:

- (1) all timely requests for a contested case hearing have been denied by the commission or withdrawn prior to the preliminary hearing; or**
- (2) a preliminary hearing has been held and parties to the hearing have been named;**
- (3) all parties to the hearing have agreed in writing to the proposed changes; and**

(4) the applicant has complied with applicable notice requirements.

Texas Health and Safety Code, Section 382.0291(d), which applies only to changes to air permit applications, would no longer be needed and could be repealed.

Regulatory Recommendations

Texas Water Code, Section 5.273(b) authorizes OPIC to recommend needed regulatory changes. Texas Water Code, Section 5.2725(a)(3) provides that such recommendations are to be included in OPIC's Annual Report. With some modifications, the recommendations discussed below have been carried forward from OPIC's FY 2019 Annual Report.

1. 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 PFD. No specific timeframe was set for the time between the close of the hearing record and the issuance of the PFD. At least since the implementation of HB 801, SOAH ALJs have reserved a 60-day period following the close of the hearing record for writing and issuing the PFD, though this practice is not expressly addressed by statute or rule applicable to TCEQ environmental permit application hearings.⁵

SB 709 established 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.

Because of the statutory limitation on the maximum time period allowed between a preliminary hearing and issuance of the PFD, SOAH's reservation of 60 days of the hearing schedule exclusively for preparation of the PFD negatively affects the rights of members of the public to challenge permit applications. These parties are impaired in their ability to develop and argue the merits of their positions through the contested case hearing process. If the Commission sets the duration of a hearing at 120 days, half of that schedule is reserved by SOAH to prepare the PFD. Even if the Commission sets the duration of a hearing at the maximum amount of time statutorily allowed, SOAH's 60-day PFD preparation period consumes one-third of the 180-day schedule.

When an ALJ reserves 60 days (approximately 2 months) to prepare the PFD, this leaves the parties with a maximum of 120 days (approximately 4 months) to conduct all discovery, including serving and responding to written discovery requests and participating in the depositions of any fact witnesses and testifying expert witnesses, resolve discovery disputes through motions and hearings as necessary, prepare and submit pre-filed testimony and exhibits, file and serve any objections to pre-filed testimony and exhibits, have objections and motions for summary disposition resolved through any needed pre-hearing conferences, conduct the hearing on the merits over a period of days, await the court reporter's transcript of the hearing, and then prepare comprehensive written closing arguments and replies to closing arguments. These aspects of the hearing process must happen sequentially; they must conclude before the record is closed; and the record must close before the 60-day clock for preparation of the PFD begins ticking.

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 former 30 TAC Section 80.251(b) that applied to applications filed before September 1, 1999. The rule was repealed effective

5. 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.

Texas Government Code, Section 2001.143 does provide that decisions or orders that may become final should be signed within 60 days of the close of the hearing. However, in interpreting and implementing this statutory directive for purposes of TCEQ hearings, the Commission adopted 30 TAC Section 80.267 which provides that: (a) the Commission shall make its decision 30 days or later following the service of the ALJ's PFD; and (b) the Commission's order (not the ALJ's PFD) should be signed not later than the 60th day after the hearing is finally closed. The rule does not require or reserve a 60-day period for preparing the PFD.

May 19, 2020 after a determination was made that there were no permit applications still pending that were filed before September 1, 1999. Under Section 80.251(b), ALJs were required to issue a PFD within 30 working days after the close of the record; though, notably, there was no statutorily mandated restriction on the duration of the hearing. 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. Preliminary Hearings

(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 judge closes the hearing record;

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 date the judge closes the hearing record. 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.

2. Proposal Concerning Mandatory Direct Referrals

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

Texas Water Code, Section 5.557(a) provides that an application may be referred to SOAH for a contested case hearing immediately following issuance of the Executive Director's preliminary decision. Under this statutory authority, and under Commission rules at 30 TAC Section 55.210(a), the Executive Director or the applicant may request that an application be directly referred to SOAH for a contested case hearing. While the Executive Director has independent statutory authority to request a direct referral, the practice has been to defer to the applicant and not request direct referral without the applicant's approval. 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 Texas Water Code, Section 5.556 requires the Commission to specify issues referred to hearing when granting hearing requests; however, the Legislature 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 persons located near a facility, there is little doubt that there are affected persons who will 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 the TCEQ's human resources required to process, review, analyze, and brief a multitude of voluminous 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 fifty timely hearing requests on the application have been filed with the chief clerk; and**
- (2) for concrete batch plant standard permit registrations 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 owns or 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 one of the timely hearing requests was filed by a requestor owning 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 a right to request a contested case hearing, the executive director confirms that at least five of the hearing requestors own property or reside within one mile of the existing or proposed facility.**

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

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

Additionally, 30 TAC Section 309.12 provides that "the commission may not issue a permit for a new facility or for the substantial change of an existing facility unless it finds that the proposed site, when evaluated in light of the proposed design, construction or operational features, minimizes possible contamination of surface water and groundwater." OPIC asserts that proper functioning of the discharge route as modeled

in the draft permit is relevant to assessing site suitability characteristics and the potential water quality and environmental impacts of proposed activities under TPDES permits. An unsuitable discharge route (such as an undefined route, a poorly defined route, or a route blocked with debris or obstructions) may fail to transport or channel properly the expected volume of effluent, may interfere with effluent mixing and the permittee's ability to meet effluent limitation parameters as modeled in the draft permit, and may cause nuisance conditions from standing water or the inundation of neighboring property with contaminants. Such conditions can render the siting of the facility unsuitable. Though such concerns may be combined in public comments or hearing requests along with interrelated comments about "flooding," these are not general flooding concerns, but rather site-specific issues about the suitability of the discharge route as an operational feature of the facility.

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

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

The commission may not issue a permit for a new facility or for the substantial change of an existing facility unless it finds that the proposed site, when evaluated in light of the proposed design, construction or operational features, minimizes possible contamination of surface

water and groundwater. In making this determination, the commission may consider the following factors:

- (1) active geologic processes;**
- (2) groundwater conditions such as groundwater flow rate, groundwater quality, length of flow path to points of discharge and aquifer recharge or discharge conditions;**
- (3) soil conditions such as stratigraphic profile and complexity, hydraulic conductivity of strata, and separation distance from the facility to the aquifer and points of discharge to surface water;**
- (4) climatological conditions; and**
- (5) characteristics, functioning and capacity of the proposed discharge route, including the route's suitability to contain and channel the permitted volume of effluent, allow for mixing and water quality consistent with the permit's modeling and effluent limitations, and avoid causing or contributing to conditions of standing water, nuisance, or the inundation of surrounding property with discharged effluent.**

Conclusion

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

