

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S ANNUAL REPORT TO THE
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
FOR FISCAL YEAR 2019**

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

In furthering its mission to represent the public interest, OPIC develops positions and recommendations 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.

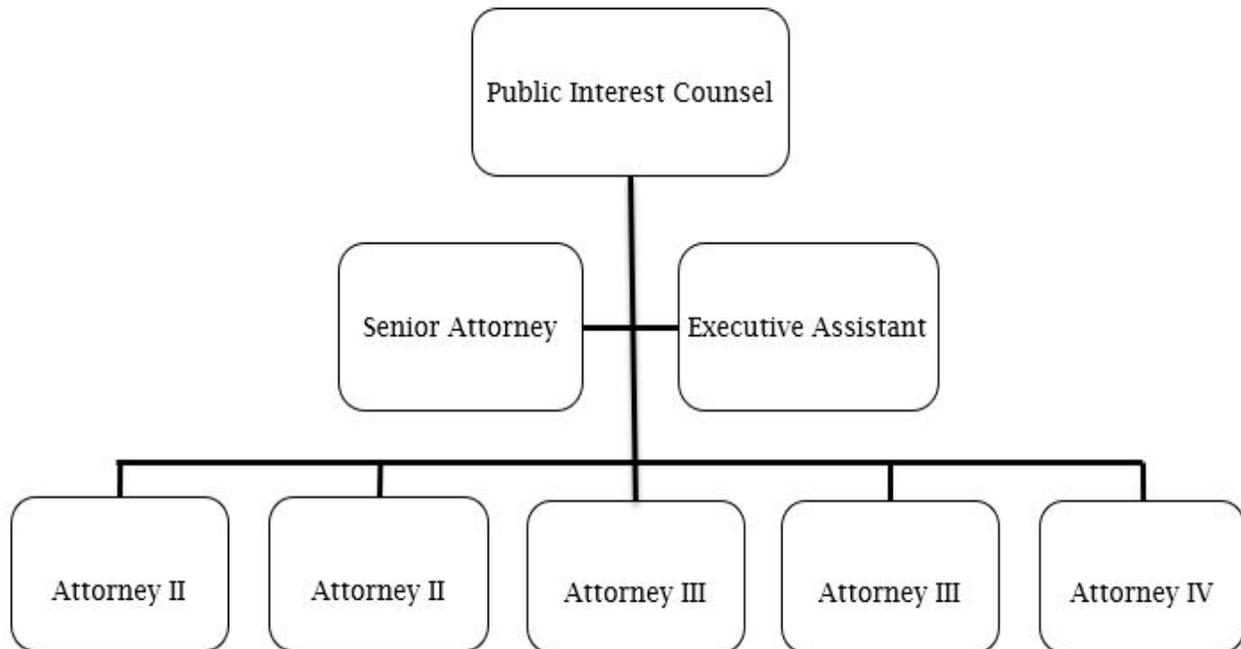
OPIC works independently of other TCEQ divisions and parties to a proceeding to bring to the Commission the Office's perspective and recommendations on public interest issues arising in various matters. To accomplish this objective, OPIC engages in a number of activities on behalf of the public and the 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, watermaster appointments,

municipal and industrial wastewater treatment facilities, sludge application facilities, concentrated animal feeding operations, rock and concrete crushers, concrete batch plants, new source review air permits, use determination appeals, various authorizations subject to the Commission's motion to overturn process, permit and licensing denials, suspensions, revocations, and emergency orders.

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

Rulemaking proceedings include Commission proceedings related to the consideration of rulemaking actions proposed for publication, rulemaking actions proposed for adoption, and consideration of rulemaking petitions.

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

OPIC's Performance Measures

As required by Texas Water Code, Section 5.2725(b), the Commission developed the following OPIC performance measures which were implemented on September 1, 2012:

Goal 1: **To provide effective representation of the public interest as a party in all environmental and district proceedings before the Texas Commission on Environmental Quality**

Objective: To provide effective representation of the public interest as a party in 75 percent of environmental proceedings and 75 percent of district proceedings heard by the TCEQ

Outcome Measure:

- Percentage of environmental proceedings in which OPIC participated
- Percentage of district proceedings in which OPIC participated

Goal 2: **To provide effective representation of the public interest as a party in all rulemaking proceedings before the Texas Commission on Environmental Quality**

Objective: To participate in 75 percent of rulemaking proceedings considered by the TCEQ

Outcome Measure:

- Percentage of rulemaking proceedings in which OPIC participated

Goal 3: **To provide effective representation of the public interest as a party in all enforcement proceedings before the Texas Commission on Environmental Quality**

Objective: To provide effective representation of the public interest as a party in 75 percent of enforcement proceedings heard by the TCEQ

Outcome Measure:

- Percentage of enforcement proceedings in which OPIC participated

Evaluation of OPIC Under Its Performance Measures

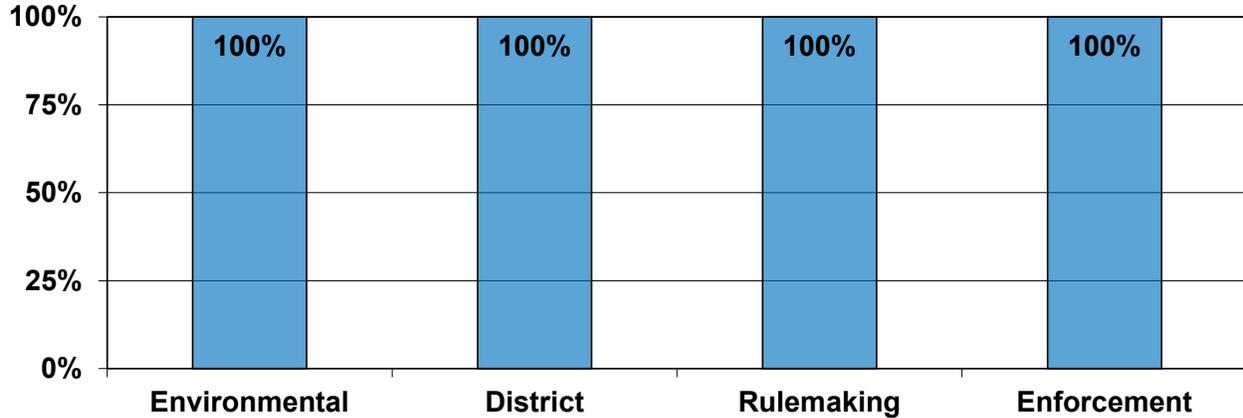
OPIC’s performance measures for environmental, district, rulemaking and enforcement proceedings are expressed as percentages of all such proceedings in which OPIC could have participated. For purposes of this report, OPIC uses the TCEQ Commissioners’ Integrated Database and a reporting process that allows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

percentages were derived by using information available for the fiscal year through August 14, 2019 regarding work assignments tracked by the Office and items set on the Commission's agenda for its open meetings.

Fiscal Year 2019

In fiscal year 2019, OPIC participated in a total of 693 proceedings consisting of: 75 environmental proceedings; 7 district proceedings, 36 rulemaking proceedings; and 575 enforcement proceedings. OPIC's participation in 75 of 75 total environmental proceedings resulted in a participation percentage of 100%. OPIC's participation in 7 of 7 district proceedings resulted in a participation percentage of 100%. OPIC's participation in 36 of 36 rulemaking proceedings, including the review of all petitions, proposals, and adoptions considered by the Commission during fiscal year 2019, resulted in a participation percentage of 100%. OPIC's participation in 575 of 575 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 2019, 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 2019**



**Figure 3
Outcomes Table**

OUTCOME	PROJECTED FY 2019	ACTUAL FY 2019
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 2019 totaled \$608,642.

Figure 4
OPIC Budget, FY 2019

Budget Category		FY 2019 Budget
31	Salaries	\$591,642
37	Travel	\$7,100
39	Training	\$5,500
43	Consumables	\$500
46	Other Operating Expenses	\$1,600
54	Facilities, Furniture & Equipment	\$2,300
TOTAL		\$608,642

Budget Needs for Retaining Outside Technical Expertise

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

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

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 2019, OPIC's initial budget did not include funds that could be used for retaining technical expertise. Also, OPIC did not request additional funding for

such purposes. Circumstances where OPIC may have benefited from outside technical expertise on specific technical issues were not fully known in time to identify and communicate with potential experts and timely move through the funding and contracting processes.

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. For purposes of this FY 2019 Annual Report, OPIC has no legislative change recommendations to report.

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. OPIC's recommendations for regulatory changes, including both new proposals and some proposals carried forward from prior Annual Reports, are discussed below.¹

1. Proposal Concerning Applicant's Rebuttal in SB 709 Cases

Under SB 709, the filing of the administrative record establishes a prima facie demonstration that the draft permit meets all applicable state and federal legal and technical requirements; and the draft permit would protect human health and safety, the environment, and physical property. SB 709 also provides that any party may present evidence to rebut the prima facie demonstration, and if

¹ Copies of prior OPIC Annual Reports may be obtained by contacting the office at 512-239-6363.

the prima facie demonstration is rebutted, the applicant or the Executive Director may present additional evidence to support the draft permit. After the passage of SB 709, these changes were incorporated into the Commission's procedural rules at 30 TAC Section 80.117(c).

The order of presentation of evidence at hearing under 30 TAC Section 80.117 (b) was not changed by SB 709. Section 80.117 (b) states that the applicant shall present evidence to meet its burden of proof on the application, followed by the protestants, OPIC, and the Executive Director. The rule further states that in all cases, the applicant shall be allowed a rebuttal, and any party may present a rebuttal case when another party presents evidence that could not have been reasonably anticipated.

The "additional evidence" opportunity provided by SB 709 has created confusion about what constitutes rebuttal. OPIC proposes to clarify that if an applicant presents "additional evidence" after the presentation of protesting parties' direct case (as allowed by SB 709 and 30 TAC Section 80.117(c)(3)), the presentation of applicant's "additional evidence" is the "rebuttal" allowed under Section 80.117(b). The proposal would also correct typographical errors in Section 80.117(c)(1)(B) and make the rule language more consistent with Texas Government Code, Section 2003.047(i-1)(2).²

Amended 30 TAC Section 80.117 would read as follows:

(b) The applicant shall present evidence to meet its burden of proof on the application, followed by the protesting parties, the public interest counsel, and the executive director. In all cases, the applicant shall be allowed a

² The revision to Section 80.117(c)(1)(B) may be under consideration in a current rulemaking proposal.

rebuttal. Any party may present a rebuttal case when another party presents evidence that could not have been reasonably anticipated. For applications subject to subsection (c) of this section, the applicant's presentation of evidence to meet its burden of proof may consist solely of the filing with the State Office of Administrative Hearings (SOAH), and admittance by the judge, of the administrative record as described in subsection (c) of this section.

(c) For contested cases regarding a permit application filed on or after September 1, 2015, and referred to SOAH under Texas Water Code, §5.556 or §5.557:

(1) The filing of the administrative record as described in §80.118(c) of this title (relating to Administrative Record) establishes a prima facie demonstration that:

(A) the draft permit meets all applicable state and federal legal and technical requirements; and

(B) a permit, if issued consistent with the draft permit in the administrative record, would protect human health and safety, the environment, and physical property.

(2) The applicant, protesting parties, the public interest counsel, and the executive director may present evidence after admittance of the administrative record by the judge.

(3) Any party may present evidence to rebut the prima facie demonstration by demonstrating that one or more provisions in the draft permit violate a specifically applicable state or federal requirement that relates to a matter directly referred to SOAH or referred by the commission. If the prima facie demonstration is rebutted, the applicant or the executive director may present additional evidence to support the executive director's draft permit. The applicant's presentation of additional evidence under this subsection shall constitute the applicant's rebuttal required to be allowed under subsection (b).

2. 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,³ 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 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.

Under the current SOAH practice to set aside 60 days of the maximum 180-day hearing schedule exclusively for preparation of the PFD, parties are 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 Administrative Law Judge (ALJ) has 60 days (approximately 2

³ 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.

months) to prepare the PFD, leaving the parties with only 120 days (approximately 4 months) to conduct all discovery, including the deposition of witnesses, resolve discovery disputes through motions and hearings as necessary, prepare and file pre-filed testimony and exhibits, object to such pre-filed testimony and exhibits and have objections and motions for summary disposition resolved through any needed pre-hearing conferences, conduct the hearing on the merits, await the transcript, and prepare closing arguments and replies to closing arguments.

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

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

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

Section 80.105(b)(3):

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

(1) name the parties;

(2) accept public comment in the following matters:

(A) enforcement hearings; and

(B) applications under Texas Water Code (TWC), Chapter 13 and TWC, §§ 11.036, 11.041, or 12.013;

(3) establish a docket control order designed to complete the proceeding within the maximum expected duration set by the commission. The order should include a discovery and procedural schedule including a mechanism for the timely and expeditious resolution of discovery disputes. 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.

3. 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.

4. 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 Texas Pollutant Discharge Elimination System (TPDES) permit applications for municipal wastewater treatment facilities, citizens frequently request applicants not to discharge effluent and, instead, apply for an authorization for re-use of domestic reclaimed water under the Commission's Chapter 210 rules (210 re-use authorization). Currently, applicants proposing to obtain a TPDES permit for a municipal wastewater treatment facility and a 210

re-use authorization may do so only in consecutive processes. Applicants first apply for a TPDES permit pursuant to 30 TAC Section 305. After this permit is obtained, applicants then apply for a 210 re-use authorization. In other words, the 210 re-use authorization can only be sought after a TPDES permit is obtained. For this reason, at the time a wastewater discharge application is filed, an applicant may only offer assurances that a 210 re-use authorization will be sought in the future.

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

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

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

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

City of Dripping Springs for TPDES Permit No. WQ0014488003, TCEQ Docket No. 2017-1749-MWD, the Commission received significant public comment questioning whether the City planned to operate a no-discharge facility.

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

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

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

5. 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 commitments to represent the public interest in Commission proceedings and to conduct its work and evaluate its performance transparently.