

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S ANNUAL REPORT TO THE
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
FOR FISCAL YEAR 2021**

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 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 advocates for meaningful public participation in the decision-making process of the Commission to the fullest extent authorized by the law. The Office 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 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 proceedings relate to municipal and industrial solid waste and hazardous waste management and disposal activities, underground injection activities, water rights authorizations, priority groundwater management area designations, watermaster appointments, municipal and industrial wastewater discharge permits, land application of septage and sludge, concentrated animal feeding operations, rock and concrete crushers, concrete batch plant standard permit registrations, facilities requiring state and federal 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, state implementation plans, and general permits 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 2021 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 assigned 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 2021 as of August 31, 2021. In fiscal year 2021, OPIC participated in a total of 618 proceedings consisting of: 99 environmental proceedings; 11 district proceedings; 37 rulemaking proceedings; and 471 enforcement proceedings.

OPIC's participation in 99 of 99 total environmental proceedings resulted in a participation percentage of 100%.

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

OPIC's participation in 37 of 37 rulemaking proceedings, including the review of all petitions, proposals, and adoptions considered by the Commission during fiscal year 2021, resulted in a participation percentage of 100%.

OPIC's participation in 471 of 471 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 2021, 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 2021 was \$619,259 as shown in Figure 1 below.

Figure 1
OPIC Budget, FY 2021

Budget Category		FY 2021 Budget
31	Salaries	\$602,259
37	Travel	\$7,100
39	Training	\$5,500
43	Consumables	\$500
46	Other Operating Expenses	\$1,600
54	Facilities, Furniture & Equipment	\$ 2,300
TOTAL		\$619,259

The changed circumstances of working remotely during the COVID-19 pandemic created savings in budget category 37 for travel, and savings in budget category 54 for facilities, furniture, and equipment. Funds from category 37 were transferred to category 35 for professional and temporary services and used for participation in the 2021 Mickey Leland Environmental Internship Program. Funds from category 54 were transferred to budget category 42, phones and utilities, and used to procure basic state agency cell phones. While OPIC staff works remotely, these phones are used to return calls from the public and make other calls as necessary for work purposes. For fiscal year 2022, OPIC will transfer funds from category 54 to category 42 to continue funding this phone service and facilitate OPIC’s communication with the public.

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. In recent years, OPIC’s initial

budgets have not included funds that could be used for retaining technical expertise. Instead, sporadic needs, timely identified in specific cases, have been addressed through the additional funding request (AFR) process. During fiscal year 2021, an AFR of \$5,000 was granted to pay for expert consulting services for purposes of preparing for a complex contested case hearing. That matter settled before an expert was retained. OPIC is now using this funding for technical assistance in developing future legislative and regulatory change proposals.

The need to retain outside consulting services in contested case hearings usually does not become apparent in time for OPIC to identify, obtain, and use technical expertise in an effective way. The complex permit applications OPIC tracks during the comment period do not all proceed to a contested case hearing. Also, the abbreviated schedules for SB 709 hearings do not allow much time to search for appropriate experts and jump through the administrative hoops necessary to retain them. Nevertheless, OPIC remains open to possibilities for retaining outside technical expertise in novel and complex cases when the timing and circumstances allow.

LEGISLATIVE & REGULATORY CHANGE RECOMMENDATIONS

Texas Water Code, Section 5.273(b) authorizes OPIC to recommend needed legislative and regulatory changes. Texas Water Code, Section 5.2725(a)(3) provides that any such recommendations are to be included in OPIC's Annual Report. OPIC has no recommendations for purposes of this year's report.

CONCLUSION

OPIC appreciates this opportunity to review its work and recommits to its statutory directive to protect the public interest.