

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

FY 2023-FY 2024

Turtles in Caddo Lake. [Credit: iStock]

## 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 (TCEQ or Commission). Included among these statutory duties is the requirement under Texas Water Code § 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 § 5.273.

Accordingly, OPIC respectfully submits this Annual Report to comply with the requirements of Texas Water Code § 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 § 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;
- Participating in rulemaking processes, including hearings, and reviewing and commenting on rulemaking petitions, proposals, and adoptions;
- Reviewing and recommending action on other matters considered by the Commission, including 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 are 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 TCEQ's operating policies and procedures.



*Aerial view of Colorado River in Austin, Texas. [Credit: iStock]*

## EVALUATION OF OPIC'S PERFORMANCE

Texas Water Code § 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) § 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.

For reporting purposes, environmental proceedings include contested case hearing proceedings on permits 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 other miscellaneous matters heard by the Commission. These proceedings relate to municipal and industrial solid waste and hazardous waste management and disposal activities, underground injection activities, waste disposal wells, water rights authorizations, priority groundwater management area designations, watermaster appointments, industrial wastewater discharge permits, municipal wastewater discharge permits, land application of wastewater 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, pollution control equipment use determination appeals, and various authorizations subject to the Commission's motion to overturn process. OPIC also includes permit revocation petitions, appeals of decisions on occupational licenses, authorizations to construct (ATC), post-closure orders, and emergency orders in numbers reported for this category.

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

Rulemaking proceedings include Commission proceedings related to rulemaking actions, state implementation plans (SIP), general permits, standard permits, rulemaking petitions, Total Maximum Daily Load (TMDL) matters, and quadrennial rule reviews.

Enforcement proceedings include enforcement contested case hearings 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 § 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 TCEQ**

#### *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 and 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 TCEQ**

#### *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 TCEQ**

#### *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 2024 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 (CID) that allows OPIC to track its work on assigned matters active at any point within a fiscal year. For the fiscal year, OPIC also tracks and records Agenda item totals by performance measure category. The proceedings totals are intended to reflect all Commission Agenda items which fall into one of these four categories, plus active OPIC cases that are not captured by Agenda totals.

Performance measure percentages were derived by using information available for FY 2024 through July 31, 2024. Due to the filing deadline for this report, we were not able to include August in our numbers. In fiscal year 2024, OPIC participated in a total of 761 proceedings, consisting of: 150 environmental proceedings; 28 district proceedings; 135 rulemaking proceedings; and 448 enforcement proceedings.

OPIC's participation in 150 of 150 total environmental proceedings resulted in a participation percentage of 100%.

OPIC's participation in 28 of 28 district proceedings resulted in a participation percentage of 100%.

OPIC's participation in 135 of 135 rulemaking proceedings, including the review of all petitions, rule proposals and adoptions, SIP proposals and adoptions, standard permits, general permits, TMDL matters, and quadrennial rule reviews considered by the Commission during fiscal year 2024, resulted in a participation percentage of 100%.

OPIC's participation in 448 of 448 enforcement proceedings, including the review of all orders considered at Commission Agendas and participation in additional cases that were active at SOAH during fiscal year 2024, resulted in a participation percentage of 100%.

## Representing the Public Interest

OPIC would like to take this opportunity to highlight and provide a concrete example of work we have done in fiscal year 2024 to represent the public interest.

By law, the applicant for an occupational license that is denied may appeal the denial of that license by requesting a contested case hearing. Most applicants who become appellants do not have legal representation. Through multiple cases, it has become evident to OPIC that license applicants often do not understand agency processes regarding the appeal of a license denial. In other words, pursuing their appeal can be unnecessarily challenging.

As an advocate for due process and fairness in the contested case hearing process, OPIC considers this situation to be a public interest concern, and we are taking steps to address it. OPIC's participation continues to prioritize developing a complete record for Commission consideration, as well as advocating for meaningful access and fairness in the contested case hearing process. Specifically, OPIC has heightened its focus on the mandate of Texas Occupations Code § 53.003. Section 53.003 concerns legislative intent and liberal construction of the subchapter. The statute states:

(a) It is the intent of the legislature to enhance opportunities for a person to obtain gainful employment after the person has:

- (1) been convicted of an offense; and
- (2) discharged the sentence for the offense.

(b) This chapter shall be liberally construed to carry out the intent of the legislature.

Recognizing the express intent of the legislature, OPIC has implemented new internal procedures to increase pre-hearing communication with licensing applicants and assist their attempts to navigate the contested case hearing process. Our experience confirms that proactive communication with licensing applicants helps them better understand how to gather and send requested mitigation evidence to Executive Director staff prior to hearing. In several cases, these efforts have resulted

in an applicant being able to secure their license, and all parties avoided the time and expense of a hearing. OPIC facilitates communication among the parties so that evidence of mitigation goes to the right people at the right time. However, we also note the possibility that agency processes could be adjusted to make this submittal of mitigation evidence more efficient. For now, OPIC is successfully helping applicants meet the submittal requirements. It appears that improved proactive communication with occupational licensing applicants has led to an observed increase in the settlement of denial appeals, resulting in both a clear benefit to applicants and a savings of time and resources for the agency.

In conclusion, OPIC offers this example of our work to illustrate one of the ways in which we fulfill our statutory duty to represent the public interest.



View of a wildflower field behind a Texas winery. [Credit: iStock]

# ASSESSMENT OF BUDGET NEEDS

Texas Water Code § 5.2725(a)(2) directs OPIC to provide the Commission with an assessment of its budget needs, including the need to contract for outside technical expertise. The operating budget for OPIC in fiscal year 2024 was \$736,789 as shown below.

OPIC Budget for FY 2024

Budget Category	Amount
Salaries	\$721,789
Travel	\$7,100
Training	\$5,500
Consumable Supplies	\$500
Other Operating Expenses	\$1,600
Facilities, Furniture, & Equipment	\$300
Total	\$736,789

## Outside Technical Support

Texas Water Code § 5.274(b) provides that OPIC may obtain and use outside technical support to carry out its functions. Texas Water Code §5.2725(a)(2) requires this report to include information about OPIC’s budget needs to contract for outside technical expertise. The need to retain technical consulting services in contested case hearings rarely becomes apparent in time for OPIC to identify, obtain, and use technical expertise by way of individually negotiated contracts. Also, the complex permit applications OPIC tracks during the comment period often settle prior to hearing. These factors create a disinclination to commit state resources for work on such matters until SOAH proceedings are imminent. As a result, OPIC’s initial budget typically does not include funds for temporary and professional services; however, when such needs have been identified, funds are made available through additional funding requests.

OPIC would like to stress that the Senate Bill 709 (S.B. 709) contested case hearing process requires compact timelines which exist regardless of the contract process potentially used to procure outside technical support. It is fair to say that the primary obstacle preventing OPIC from more often obtaining outside technical expertise is the contested case hearing timeline established by S.B. 709, not budget considerations.

However, as recommended by the Texas Sunset Advisory Commission, OPIC has considered, and will continue to consider, developing and using umbrella contracts to procure expert assistance. Though an umbrella contract could be the right tool for the job in certain circumstances, OPIC finds that developing and using umbrella contracts to procure expert assistance may not be a one-size-fits-all solution. Therefore, OPIC believes

it is prudent to pursue a hybrid approach that also includes the use of one-time purchase order contracts to procure outside expert assistance.

OPIC is currently working with the General Law Division (GLD) to develop a contract template that can be pre-approved by GLD and ultimately, the Procurements and Contracts Section (P & C). The pre-approved contract template would be used in an expedited purchase order process to streamline the retention of experts. The contract could then be finalized by inserting information specific to the expert sought.

To conclude, OPIC's need to obtain and use outside technical support in a given year is unpredictable. However, even within the time constraints of S.B. 709, OPIC remains committed to early detection of good candidate cases where outside technical support could help OPIC fulfill its mission.

## LEGISLATIVE & REGULATORY CHANGE RECOMMENDATIONS

Texas Water Code § 5.273(b) authorizes OPIC to recommend needed legislative and regulatory changes. Texas Water Code § 5.2725(a)(3) provides that any such recommendations are to be included in OPIC's Annual Report. OPIC's recommended regulatory change is included as Attachment 1 to this report.

## CONCLUSION

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



*Study Butte at sunset near Terlingua. [Credit: iStock]*



# ATTACHMENT 1

## OPIC'S REGULATORY CHANGE RECOMMENDATION

### Proposal Concerning Requirements for Motion to Overturn Executive Director's Decision

In Title 30 of the Texas Administrative Code, Chapter 50, Subchapter G, rule § 50.139 concerns a Motion to Overturn (MTO) the Executive Director's (ED) Decision. Section 50.139 states, "The applicant, public interest counsel, or other person may file with the chief clerk a motion to overturn the executive director's action on an application or water quality management plan (WQMP) update certification." The rule also addresses the required timing for filing, disposition of an MTO, and exhaustion of administrative remedies. Notably, the MTO rule is silent regarding content requirements or review standards.

Among the legal mechanisms available to challenge Commission or ED actions, the MTO is the only mechanism which wholly lacks any content requirements or review standards. A hearing requestor must qualify as an affected person by showing a personal justiciable interest. A request for reconsideration must give reasons why the ED's decision should be reconsidered. And finally, a motion for rehearing (MFR) must identify with particularity findings of fact or conclusions of law that are the subject of the complaint and any evidentiary or legal ruling claimed to be erroneous. The MFR must also state the legal and factual basis for the claimed error.

Currently, the rule's lack of any minimum requirements or standards can make it particularly challenging to assess, consider, and respond to an MTO. OPIC's proposal is not intended to raise or lower the MTO bar. Rather, by adding minimum content requirements to the MTO rule, the public, agency staff, and the Commission would be given a review standard, against which an MTO could be measured.

To draft our proposed language, OPIC borrowed from the TCEQ MFR rule, § 50.119. The TCEQ MFR rule in turn borrows from the Texas Administrative Procedure Act MFR statute, which can be found at Texas Government Code § 2001.146. Below, please see our recommended additional language, shown in underlined redline as new subsection (a)(1).

### RULE § 50.139 Motion to Overturn Executive Director's Decision

(a) The applicant, public interest counsel or other person may file with the chief clerk a motion to overturn the executive director's action on an application or water quality management plan (WQMP) update certification. Regardless of any other law, a state agency, except a river authority, may not file a motion to overturn the executive director's action on an application that was received by the commission on or after September 1, 2011 unless the state agency is the applicant. Wherever other commission rules refer to a "motion for reconsideration," that term should be considered interchangeable with the term "motion to overturn executive director's decision."

**(1) A motion to overturn the executive director's decision or action must raise sufficient legal or factual bases within the commission's jurisdiction to determine that the executive director acted erroneously under this subchapter. If the executive director's decision or action includes any findings of fact or conclusions of law, the motion must identify with particularity the findings or conclusions which are the subject of the complaint. The motion must also identify any evidentiary or legal ruling claimed to be erroneous.**