TCEQ DOCKET NO. 2025-1160-AIR

APPLICATION BY FORMOSA PLASTICS CORPORATION, TEXAS FOR AIR QUALITY PERMIT NOS. 140763, 19871, 91780, 19200, 19168, 107518, 20203, 40157, 19201, PSDTX1500M1, PSDTX1236M1, PSDTX1240M1, PSDTX1237M1 PSDTX1226M1, PSDTX1383M2 PSDTX1224M1, PSDTX1222M1 PSDTX1232M1, GHGPSDTX46M1 GHGPSDTX221, GHGPSDTX223 GHGPSDTX218, GHGPSDTX224 GHGPSDTX48M1, GHGPSDTX222 GHGPSDTX225, AND GHGPSDTX219, CALHOUN AND JACKSON COUNTIES, TEXAS	§ § § § § § § § § § § §	**BEFORE THE** **TEXAS COMMISSION ON** **ENVIRONMENTAL QUALITY**

FORMOSA PLASTICS CORPORATION, TEXAS'S REPLY TO AFFECTED PERSON BRIEFS

FPC files this Reply[1] to briefs filed by Waterkeeper and OPIC to demonstrate:

State Law Governs Affected Person Determinations at TCEQ

- TCEQ has exclusive jurisdiction for Clean Air Act permit decisions in Texas.
- TCEQ's ***threshold*** affected person test is not a preliminary or "facial" standing inquiry.
- Texas statutes grant the Commission discretion to evaluate and resolve substantive issues in determining whether a requestor is an affected person.

State Law is Consistent with Article III

- TCEQ's affected person determination is consistent with federal standing principles.
- Texas law requires a ***legally protected interest distinct from the general public*** to qualify as an affected person.
- Texas courts have held that generalized, unsupported claims of recreational interests and intermittent use of a resource do not ***demonstrate*** a personal justiciable interest.

Waterkeeper Failed to Meet its Article III Demonstration Burden

- Record evidence shows that proposed emissions from the Application are ***unlikely*** to have more than an ***indiscernible or minimal*** potential impact to Ms. Wilson and the public.
- Waterkeeper failed to provide any evidence or credible support for any alleged concern.
- Waterkeeper offered only conclusory statements without any factual application of injury in fact, causation, or redressability.
- Waterkeeper's unsupported recreational and volunteer monitoring assertions do not establish a personal justiciable interest.

[1] FPC's Reply Brief adopts all defined terms previously provided in FPC's Response to Hearing Requests (September 15, 2025) ("***FPC Response***") and FPC's Supplemental Affected Person Determination Brief (October 17, 2025) ("***FPC Supp.***").

I. STATE LAW APPLIES TO THE COMMISSION'S CONSIDERATION OF HEARING REQUESTS

Standing must be assessed in light of the specific legal framework that authorizes participation—whether in court or before an administrative agency.[2] The same is true of an affected person determination.[3] This requires a court—or other reviewing tribunal—to look at the justiciability of the claim by analyzing the explicit requirements of the relevant statute.[4]

The Texas Legislature granted TCEQ exclusive jurisdiction and discretion over air permit applications.[5] Indeed, TCEQ has subject matter expertise in air permitting that guides the affected determination, which involves a factual evaluation of the permit application to determine the likely impact proposed new emissions will have on a specific requestor that is not common to the general public.[6]

The EPA's approval of Texas's State Implementation Plan ("***SIP***") further affirms the state's authority to issue permits under the CAA.[7] The Fifteenth Court of Appeals recently confirmed that "[t]he Water Code clearly outlines the statutory procedure the Commission must follow in determining affected person status, and the Commission has no authority to depart from this procedure."[8] And that the statute confers discretion on the Commission to weigh and resolve disputed facts in determining the need for a contested case hearing.[9]

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2 *Save Our Springs Alliance, Inc. v. City of Dripping Springs*, 304 S.W.3d 871, 882, n. 7 (Tex. App.—Austin 2010, pet. denied) (where standing is based on a statute, review of Article III requirements may be informed by that statutes provisions).

3 *Tex. Comm'n on Envtl. Quality v. City of Waco*, 413 S.W.3d 409, 417 (Tex. 2013) ["***TCEQ v. City of Waco***"] (citing appeals court conclusion that affected person determination embodies constitutional principles of standing).

4 *See Tex. Comm'n on Envtl. Quality v. San Antonio Bay Estuarine Waterkeeper*, 714 S.W.3d 270, 288 (Tex. App—Austin [15th Dist.] 2025, pet. filed) (remedy created and defined by statute provides scope of Commission review).

5 *Boerne to Bergheim Coalition for Clean Env't v. Tex. Comm'n on Env't Quality*, 657 S.W.3d 382, 389 (Tex. App.—El Paso 2022, no pet.), citing TEX. HEALTH & SAFETY CODE § 382.051.

6 *Sierra Club*, 455 S.W.3d 223 (citing *Gerst v. Nixon*, 411 S.W.2d 350, 360 n.8 (Tex. 1966)).

7 40 C. F. R. § 52.2270.

8 *TCEQ v. Waterkeeper*, 714 S.W.3d at 287.

9 *Id.*

The Commission's evaluation in determining "affected person" status under Texas law is not meant to be a carbon copy of Article III standing evaluations under federal law. Waterkeeper cites two sets of federal cases having no connection to Texas law or any standing challenge for an air quality permit application.[10] None of the cases Waterkeeper cites determined that TCEQ must resolve all disputed facts in a hearing requestor's favor.

One set of cases spans assorted federal statutes—Administrative Procedure Act, National Environmental Policy Act, Fair Credit Reporting Act, National Forest Management Act, Organic Act, Multiple-Use Sustained-Yield Act, Endangered Species Act, Wilderness Act, Federal Land Policy and Management Act, Mineral Leasing Act, Air Tour Management Act, All Writes Act, FAA Modernization and Reform Act of 2012, Appeal Reform Act, Forest and Rangeland Renewable Resources Planning Act.[11] Another set of federal cases also has no connection to Texas law; rather, they are Clean Water Act and Clean Air Act citizen suits where standing arises from those acts' citizen suit provisions.[12] Such provisions allow anyone with an interest that "is or may be adversely affected" to bring suit,[13] and courts have recognized that such statutory language ***modifies*** the traditional Article III inquiry.[14] No statutory right to standing exists in this context.

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[10] *See* Waterkeeper Supp. At 8-11.

[11] *See* Waterkeeper Supp. at 8-11 citing, *e.g.*, *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972) (APA suit); *WildEarth Guardians v. Jewell*, 738 F.3d 298, 306 (D.C. Cir. 2013) (NEPA, FLPMA, MLA suit); *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973) (ICA suit); *Spokeo v. Robbins*, 578 U.S. 330 (2016) (FCRA suit); *Tex. Comm. on Nat. Res. v. Bergland*, 573 F.2d 201, 204 n.1 (5th Cir. 1978) (NFMA, Organic Act, MUSYA, ESA, Wilderness Act suit); *In Re Public Employees for Environmental Responsibility*, 957 F.3d 267, 272 (D.C. Cir. 2020) (ATMA, AWA, FAA Modernization and Reform Act of 2012 suit); *Bensman v. U.S. Forest Service*, 408 F.3d 945, 963 (7th Cir. 2005) (ARA, FRRRPA suit).

[12] *See* Waterkeeper Supp. at 8-11, citing CAA cases *Utah Physicians for a Healthy Environment v. Diesel Power Gear LLC*, 21 F.4th 1229, 1246 (10th Cir. 2021; *Sierra Club v. Franklin Co. Power*, 546 F.3d 918, 925 (7th Cir. 2008) and CWA cases *Ca. Coastkeeper All. v. Cosumnes Corp.*, No. 2:20-cv-1703 DB, 2023 WL 5280260, at *4 (E.D. Cal. Aug. 16, 2023); *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 528 U.S. 167, 181–183 (2000); *Sierra Club, Lone Star Ch. v. Cedar Point Oil Co.*, 73 F.3d 546, 556 (5th Cir. 1996); *Ecological Rights Found. v. Pacific Lumber Co.*, 230 F.3d 1141, 1149–50 (9th Cir. 2000); *Wis. Res. Prot. Council v. Flambeau Mining Co.*, 903 F.Supp.2d 690, 705 (W.D. Wisc. 2012); *Ca. Coastkeeper All. v. Cosumnes Corp.*, No. 2:20-cv-1703 DB, 2023 WL 5280260, at *4 (E.D. Cal. Aug. 16, 2023).

[13] *See, e.g.*, 33 U.S.C. § 1365(a), (g).

[14] *Save Our Springs Alliance, Inc. v. City of Dripping Springs*, 304 S.W.3d 871, 878 (Tex. App.—Austin 2010, pet. denied) (*citing Friends of the Earth, Inc. v. Gaston Copper Recycling Corp*., 204 F.3d 149, 156-57 (4th Cir. 2000)

In *TCEQ v. Waterkeeper*, the court expressly rejected the relevance of Waterkeeper's and Ms. Wilson's citations to federal cases involving "federal citizen actions and federal rulemaking challenges."[15] In contrast to federal case law, TCEQ's affected person analysis requires a demonstrated showing of a personal, justiciable interest—specific to the requestor and not shared broadly with the general public—that falls within the legal categories of interest, including property interests outlined in Commission rules.[16] The Commission must evaluate a requestor's demonstration under the required factors and may also consider other relevant discretionary factors.[17] As reflected in the ***statutory*** discretionary factors and affirmed in ***applicable*** case law, the Commission has authority to weigh and resolve factual disputes when determining affected person status.[18]

Waterkeeper also cited the Fifth Circuit's decision in *Port Arthur Community Action Network v. TCEQ.*[19] There, the petitioner appealed TCEQ's issuance of an air permit after participating in a contested case hearing. The Court's standing assessment in the appeal is typical of a facial challenge to standing—where the opposing party merely labels the complaint's factual allegations as insufficient without presenting contrary evidence—a preliminary determination. Like the other federal cases Waterkeeper relies on, the facial challenge for which *PACAN* was cited is out of place in the Commission's consideration of the Application.

Waterkeeper conflates the constitutional requirements for an Article III case or controversy

(explaining that an injury under Article III standing can arise when a statute creates a legal right where none previously existed).

15 *TCEQ v. Waterkeeper*, 714 S.W.3d at 288-89.

16 *See* FPC Response at 11-15; FPC Supp. at 2-4.

17 30 TEX. ADMIN. CODE § 55.203(c)-(d).

18 *TCEQ v. Waterkeeper*, 714 S.W.3d at 287; *Tex. Comm'n on Envt'l Quality v. Sierra Club*, 455 S.W.3d 228, 235 (Tex. App. – Austin 2014, pet. denied) ["***TCEQ v. Sierra Club***"]; *TCEQ v. City of Waco*, 413 S.W.3d at 424-25.

19 147 F.4th 560, 566 (5th Cir. 2025).

with the more lenient standard applied to facial standing challenges.[20] This suggestion is inconsistent with Texas law because it disregards the criteria the Commission is required to follow, the Commission's authority to weigh evidence, and would broadly allow standing to individuals alleging generalized harm. TCEQ's affected person rule does not limit access to contested case hearings arbitrarily; rather, the Commission applies the statutory and regulatory requirements, considers evidence and arguments, and makes a substantive determination whether a requestor meets the threshold for affected person status.[21]

A. Waterkeeper's Portrayal of Article III Misstates the Governing Standard.

Waterkeeper contends that the Texas Attorney General and the Commission have endorsed Article III as the exclusive standard for evaluating "affected person" status under Section 55.203 of the Texas Administrative Code.[22] But its blanket assertion disregards the Water Code's clear statutory framework for evaluating a hearing request. This interpretation would effectively override Texas statutory law and constrain the Commission's "discretion to weigh and resolve matters that may go to the merits of the underlying application, including the likely impact the regulated activity will have on the health, safety, and use of property by the hearing requestor and on the use of natural resources."[23]

No inherent conflict exists between Article III standing and Texas's affected person

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20 *See generally*, Waterkeeper Supp. at 6 (stating that only some "particularized interest" is required, but without demonstrating burden of proof).

21 30 TEX. ADMIN. CODE § 55.203.

22 Waterkeeper Supp. at 1.

23 TEX. WATER CODE § 5.115(a-1)(1)(A)–(E); 30 TEX. ADMIN. CODE § 55.203; *Sierra Club v. TCEQ*, 455 S.W.3d at 223-224 (Tex.App.—Austin 2014, pet. denied) ["***Sierra Club v. TCEQ***"]*; TCEQ v. City of Waco*, 413 S.W.3d at 420-421 (Tex. 2013) (affirming TCEQ's discretion to rely on evidentiary information such as the permit application, attached expert reports, the analysis and opinions of professionals on its staff, and any reports, opinions, and data before the Commission).

standard.[24] But since a state agency only has those powers conferred upon it by the Legislature,[25] TCEQ must follow clear and unambiguous procedures and substantive requirements established by the Texas Legislature in the Health & Safety Code and the Water Code. "[T]the remedy sought by [the Requestor]—a contested case hearing—is a remedy created and defined by state statute."[26] As Texas courts have recognized, "[a]n agency must follow 'the clear, unambiguous language of its own regulations.'"[27]

B. Waterkeeper Repeats a Previously Rejected Legal Theory

Waterkeeper inaccurately portrays TCEQ's rules for ***evaluating*** an affected person determination as being the same as ***evaluation*** to establish Article III standing at the pleading stage in court. In doing so, Waterkeeper proposes to redefine the Commission's substantive evaluation under the agency's existing rules and state law to include individuals who have alleged facts at face value towards an interest or injury sufficient to satisfy Article III. Here, the TCEQ ED and the Applicant presented evidence to controvert Waterkeeper's assertions, and the Water Code confers discretion on TCEQ to consider and make substantive determinations. Waterkeeper wants the ease of a facial standing evaluation in federal court but what they want is not the same thing as the substantive evaluation the applicable framework actually requires.

This is not the first time Waterkeeper has advocated for a more relaxed standard of standing review for Commission affected person evaluations.[28] Waterkeeper tried and failed in *TCEQ v.*

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[24] *City of Waco v. Tex. Comm'n on Envtl. Quality*, 346 S.W.3d 781, 801-03 ["***City of Waco v. TCEQ***"], *rev'd on other grounds*, 413 S.W.3d 409 (Tex. 2013), citing *Brown v. Todd*, 53 S.W.3d 297, 305 (Tex. 2001); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Save Our Springs Alliance, Inc. v. City of Dripping Springs*, 304 S.W.3d 871, 878 (Tex. App.—Austin 2010, pet. denied)) (applying personal justiciable interest standing principles to TCEQ contested case hearing requests).

[25] *Dyer v. Tex. Comm'n on Envtl. Quality*, 646 S.W.3d 498, 512 (Tex. 2022).

[26] *TCEQ v. Waterkeeper*, 714 S.W.3d at 288.

[27] *Davis v. Morath*, 624 S.W.3d 215, 227 (Tex. 2021) (citing *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 438 (Tex. 2011)).

[28] *See id*.

Waterkeeper, a directly relevant 2025 decision of the Fifteenth Court of Appeals that Waterkeeper conveniently omits from its filings (attached to this Reply). The case involved similar asserted interests by Ms. Wilson in an appeal of the Commission's denial of her hearing request and issuance of an air permit to a neighboring terminal near the Complex. There, the organization asserted a theory that a facial standing assessment under federal case law before evaluation of the merits of the dispute appropriately defines the contours of Article III standing.[29] The arguments presented then, as now, are inconsistent with state law, as they suggest that merely raising a disputed factual issue should automatically entitle a requestor to a contested case hearing. The court declined to adopt Waterkeeper's theory and reviewed the Commission's affected person determination denying Ms. Wilson' hearing request as outlined by the Water Code and TCEQ rules.

The court also determined that two principles are both true: the Article III standing requirements explained in *Lujan v. Defenders of Wildlife* are relevant to the Commission's affected person determination, and the Commission has "discretion in reviewing competing evidence and resolving fact issues in its determination of whether Appellees were affected persons under the statute."[30] The court further confirmed that the Commission is bound by the statutory procedure outlined in the Water Code, which explicitly allows Commissioners to weigh and resolve disputed facts.[31] This is distinguishable from a plaintiff's burden to demonstrate Article III standing against a ***facial standing challenge*** and is, instead, akin to the standard required during a ***factual standing***

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29 *See, e.g.*, Response Brief of Appellees S. Diane Wilson, Texas Campaign for the Environment and San Antonio Bay Estuarine Waterkeeper, No. 15-24-00036-CV, Tex. App. –Austin [15th Dist.] (June 28, 2024) at 19-20 (citing a CWA citizen suit to suggest that "an identifiable trifle will suffice" for an injury-in-fact). *But see, TCEQ v. Waterkeeper*, 714 S.W.3d at 284 (requiring injury-in-fact be "concrete, particularized, actual, or imminent").

30 *TCEQ v. Waterkeeper*, 714 S.W.3d at 287; *Lujan* 504 U.S. at 560-61.

31 *Id*.

challenge.[32] There, as here, the person seeking standing has the burden to demonstrate jurisdiction by a preponderance of the evidence.[33] When the parties are given an opportunity to present evidence to support their positions, the court—or in this case the Commission as the relevant tribunal—may weigh the evidence presented to determine whether the requestor has met their burden of proof.

II. STATE LAW IS CONSISTENT WITH ARTICLE III

The Texas Supreme Court determined that TCEQ's definition of an affected person "tracks the jurisprudence" to inherently reflect Article III constitutional principles of standing.[34] Waterkeeper's criticism of the TCEQ ED's and FPC's conclusions that Ms. Wilson is not an affected person—based on her residence over 20 miles away and her intermittent, generalized interests—are somehow not aligned with Article III is misplaced.[35] FPC's and the TCEQ ED's analysis and the TCEQ ED's recommendation are consistent with Article III jurisprudence and Texas law, which each require a concrete and particularized injury.

TCEQ's affected person evaluation is consistent with Article III and grounded in state law and judicial precedent. For years TCEQ has established that judicial review of its air permitting decisions under the Health and Safety Code is functionally equivalent to judicial review under Article III,[36] and is SIP approved.[37] Waterkeeper's suggestion—that Ms. Wilson should not have

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[32] *See Sierra Club v. TCEQ*, 455 S.W.3d at 221 (explaining that facial conformity of a contested case hearing request is not sufficient, review is subject to a "deeper inquiry" including the Commissions power to resolve factual disputes); *see also Gilkerson v. Chasewood Bank*, 1 F. Supp. 3d 570, 578 (S.D. Tex. 2014) (citing *Irwin v. Veterans Admin.*, 874 F.2d 1092, 1096 (5th Cir. 1989) (distinguishing that facial challenges accept the complaint's allegations as true, while factual ones allow the court to weigh evidence after it's presented.).

[33] *Id*.

[34] *TCEQ v. City of Waco*, 413 S.W.3d at 417 ("[T]he definition of an 'affected person' or 'person affected' as one having a 'justiciable interest' not common with the 'general public' tracks the jurisprudence addressing constitutional standing requirements in court").

[35] Waterkeeper Supp. at 7, citing ED Response at 6; FPC Response at 19.

[36] *See, e.g.*, 40 Tex. Reg. 9651, 9655 (December 25, 2015) (citing Texas Attorney General statements of legal authority from 1993, 1996, 1998, and 2001); *see also* 35 Tex. Reg. 5198, 5201 (June 18, 2010); Tex. Health & Safety Code § 382.032.

[37] 40 C.F.R. § 52.2270(e).

to make substantive demonstrations under Article III for TCEQ's affected person evaluation[38]—is legally unfounded.

Waterkeeper's assertions conflict with TCEQ's statutory and regulatory framework and flatly ignore relevant Texas court decisions. Moreover, Waterkeeper fails to explain how interests common to the general public conflicts with Article III principles. The Commission should reject Waterkeeper's attempt to bypass these standards.

A. The Commission's Consideration of Discretionary Factors Is Aligned with Article III

TCEQ rules expressly allow the Commission to consider the factors listed in 30 Tex. Admin. Code § 55.203(d) "to the extent consistent with case law," thereby incorporating judicial principles into its determinations.[39] Historically, TCEQ has applied these factors in a manner consistent with both Article III and relevant precedent, including consideration of the merits of an application when assessing whether a hearing requestor qualifies as an affected person.[40]

When reviewed as a whole, the Texas Attorney General's statement of legal authority affirms that TCEQ will only consider discretionary factors that are consistent with Article III standing requirements. While the Attorney General's statement cites consideration of the merits as an example, it does not assert—or imply—that such consideration is inherently inconsistent with Article III.[41] In fact, the Attorney General certified that that Texas Supreme Court's decision in *TCEQ v. City of Waco* found that TCEQ's "affected person" standard reflects constitutional

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38 *See* Waterkeeper Supp. at 6 (suggesting how the term "affected person" may or may not be read to limit access to a contested case hearing).

39 30 TEX. ADMIN. CODE § 55.203(e) ("In determining whether a person is an affected person for the purpose of granting a hearing request for an application filed before September 1, 2015, the commission may also consider the factors in subsection (d) of this section to the extent consistent with case law").

40 *See, e.g., Sierra Club v. TCEQ*, 455 S.W.3d at 223-24 ("TCEQ enjoys the discretion to weigh and resolve matters that may go to the merits of the underlying application, including the likely impact the regulated activity . . . will have on the health, safety, and use of property by the hearing requestor and on the use of natural resources").

41 *See, e.g.*, Op. Texas Att'y Gen., *Statement of Legal Authority to Regulate Oil and Gas Discharges under the Texas Pollutant Discharge Elimination System Program* at 22 (Sept. 18, 2020).

standing principles.[42] The Supreme Court recognized the Third Court of Appeals' holding that the affected person definition aligns with Article III and sets the minimum constitutional threshold for standing to challenge governmental action. Specifically, a hearing requestor must demonstrate a concrete and particularized injury that is:

1. Actual or imminent;
2. Fairly traceable to the proposed permit; and
3. Likely to be redressed by a favorable decision.[43]

Waterkeeper's claim that Ms. Wilson qualifies as an affected person—despite residing over 20 miles away and asserting interests common to the general public—misrepresents both Article III and Texas law. Texas courts, applying Article III standing principles, have held that general concerns do not establish standing without a property interest to particularize the legally protected interest.[44] While a property interest is not strictly required, proving a sufficiently particularized legal interest without one is a significant challenge. These decisions align with the "affected person" standard and are not merely discretionary considerations for the Commission—they are mandatory. Waterkeeper fails to explain how generalized interests could satisfy the constitutional requirement for a particularized injury, which explicitly excludes generalized grievances.[45]

III. WATERKEEPER DID NOT SATISFY ITS ARTICLE III DEMONSTRATION BURDEN

Hearing requestors must satisfy all elements of Article III standing reviewed under Texas affected person statutory requirements. Yet Waterkeeper offered no explanation in its Requests or briefing of how Ms. Wilson meets these requirements under either Article III or TCEQ's rules. Instead, the organization relies on conclusory assertions, claiming Ms. Wilson has demonstrated

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42 *Id.* at 21.

43 *TCEQ v. City of Waco*, 413 S.W.3d at 417.

44 *Save Our Springs Alliance, Inc.*, 304 S.W.3d at 878-82; *City of Kyle v. Knight*, No. 03- 21-00378-CV, 2023 WL 5597360, at *7-8 (Tex. App.—Austin 2023, no pet.).

45 *See Shrimpers & Fishermen of RGV v. TCEQ*, 968 F.3d 419, 424 (5th Cir. 2020).

sufficient interest without addressing the necessary elements: a concrete and particularized injury that is actual or imminent, fairly traceable to the Draft Permits, and likely to be redressed by a favorable outcome. This approach mirrors what courts have rejected as "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements," which are insufficient to establish jurisdiction under Article III—and equally inadequate to support affected person status under TCEQ's framework.[46]

At most, Waterkeeper simply states that Ms. Wilson's ***interest in the outcome of this matter*** is different than the general public's and that this alone satisfies standing.[47] But neither the Health and Safety Code, the Water Code, nor TCEQ's rules recognize "interest in the outcome" as a valid basis for a particularized justiciable interest sufficient for a hearing request. Moreover, TCEQ lacks authority to consider factors such as aesthetics, or general quality-of-life concerns when evaluating air permit applications,[48] which Waterkeeper also suggested in its Requests.

Waterkeeper failed to assess or apply Article III standing requirements to its allegations.[49] It did not identify an "injury-in-fact" or explain how that injury relates to a "particularized, legally protected interest that is actually or imminently affected by the alleged harm."[50] Nor did it provide evidence showing that any alleged injury to Ms. Wilson—which any such injury is hypothetical and unsupported by evidence on the record—is fairly traceable to the Draft Permits or that a favorable decision would redress the harm—again unsupported by evidence. Each element of standing remains unaddressed and unsupported in the record.

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46 *Gilkerson v. Chasewood Bank*, 1 F. Supp. 3d at 578 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1940, 173 L. Ed. 2d 868 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1964-65, 167 L. Ed. 2d 929 (2007)).

47 Waterkeeper Supp. at 6.

48 RTC, Response 14.

49 Waterkeeper Supp. at 6-7; Waterkeeper Reply (September 29, 2025) at 4-5.

50 *Save Our Springs Alliance, Inc. v. City of Dripping Springs*, 304 S.W.3d 871, 882 (Tex. App.—Austin 2010, pet. denied).

"[P]robabilistic standing based on a non-particularized increased risk," *i.e.*, "an increased risk that equally affects the general public," also fails to satisfy Article III.[51] Even if Waterkeeper had demonstrated a particularized risk, the alleged injury must be "certainly impending" harm or at least result in a "substantial risk" of harm.[52] Again, Waterkeeper provided no evidence "of the extent to which those risks would be increased for those members by the expected emissions."[53]

A. THE PERMITTING RECORD BEFORE THE COMMISSION SUPPORTS A DECISION TO DENY WATERKEEPER'S HEARING REQUEST

As detailed in FPC's Response Brief and Supplemental Brief, the Application was prepared in full compliance with all legal and technical standards.[54] The TCEQ ED conducted an extensive technical review, including a full audit of FPC's AQA, and confirmed the Draft Permits are protective of public health and welfare. Without exception the maximum modeled off-site ground level concentrations of pollutants (*i.e.*, GLC_{max}) proposed in the Application are less than relevant state and federal air quality standards and ESLs.[55] The AQA, approved for all pollutants and review types, demonstrates that proposed emissions from the Project Facilities represented in the Application will neither cause nor contribute to an air quality violation at FPC's fenceline or beyond.[56]

The technical merits of the Application—specifically, the AQA and Health and Welfare Effects Evaluation—remain unchallenged by the evidence contained in the robust permitting record. Mr. Srackangast's air dispersion modeling analysis and expert opinions and Dr. Fraiser's

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51 *Shrimpers & Fishermen of RGV v. TCEQ*, 968 F.3d 419, 424 (5th Cir. 2020).

52 *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 & n.5 (2013); *Tex. Comm'n on Envtl. Quality v. City of Aledo*, No. 03-13-00113-CV, 2015 Tex. App. LEXIS 6940, 2015 WL 4196408 at 14 (representations of "health and safety concerns" among other cited issues with nothing more specific fails to meet a hearing requestor's burden); *Collins v. Tex. Nat. Res. Conservation Comm'n*, 94 S.W.3d 876, 883 (Tex. App. –Austin 2002, no pet) (predictions of possible future violations of a TCEQ permit do not satisfy a hearing requestor's burden).

53 *Id*.

54 FPC Response at 23-31; FPC Supp. at 11-14.

55 Exhibit AS-2; Fraiser Affidavit ¶ 19.

56 Srackangast Affidavit ¶ 18.

toxicological analysis and expert opinions directly refute Waterkeeper's unsupported assertions regarding likelihood of potential impacts.

For example, in her Health and Welfare Effects Evaluation, Dr. Fraiser concluded that emissions from the Flare Improvement Project do not pose adverse health or welfare threats and that no individual residing near or frequently visiting the Complex would be affected in a manner different from the broader population:

> … potential impacts of the air emissions from the Project are expected to be ***indiscernible*** for members of the general public, including Ms. Wilson. . .The application of these conservative procedures in setting NAAQS and ESLs ensures that the likelihood of adverse health and welfare effects below these levels is ***exceedingly small***. In other words, ***no person who owns property, resides, or who regularly visits areas near the Complex will be impacted any differently than the general public***. Moreover, impacts at locations farther from the FPC Complex fenceline (e.g., at Ms. Wilson's residence, more than 20 miles away), or that occur on a more intermittent basis (e.g., during Ms. Wilson's recreational and volunteer activities), would be ***even less discernible***.[57]

In contrast, Waterkeeper repeatedly offered speculative claims without supporting evidence, despite having opportunities to do so.[58] In its filings subsequent to its Requests, Waterkeeper has inconsistently described Ms. Wilson's visitation frequency, offering shifting narratives with no evidentiary support.[59] Not only is altering key assertions without substantiation improper, but "unsupported factual conclusions cannot support a reasonable inference that those facts exist."[60] Moreover, any relevant information should have been included in the original, timely hearing request as required by TCEQ's rules, rather than being supplemented after the fact.[61]

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57 Fraiser Affidavit ¶ 21.

58 Waterkeeper Supp. at 6-7; Waterkeeper Reply at 4-5.

59 *Compare* 2022 Request at 2 *with* 2025 Request at 2 *with* Waterkeeper Reply at 10 *with* Waterkeeper Supp. at 3-4.

60 *City of Waco v. TCEQ*, 346 S.W.3d at 826.

61 30 TEX. ADMIN. CODE §§ 55.201(a)(information required by TCEQ Rules must have been provided in the hearing request and before the 30-day deadline); 55.211(b)(2) (If request fails to meet the requirements, the Commission must deny and act on application); 55.211(c)(2)(D) (Commission required to grant request only if it complies with § 55.201); 55.201(g) (Chief Clerk shall not process late filed requests and although the Commission can extend time allowed to file requests, it has not done so in this matter).

Furthermore, Waterkeeper has not demonstrated that the Draft Permits would cause more than a hypothetical impact.[62] As applicable Texas case law precedent confirms, requestors are not affected persons if the proposed "activity will have *minimal* effect on their health, safety, use of property, and use of natural resources."[63] Waterkeeper alleges a litany of generalized health concerns and speculative future concerns of the Application, but it never alleged with the requisite specificity how increased emissions would affect any individualized legal right of Ms. Wilson's. Such generality falls short of Article III's factual standing requirements and does establish Ms. Wilson as an affected person under Texas law. Mere claims of illness or harm are insufficient; a demonstrable showing is required.[64]

Waterkeeper asserts that the Commission should consider the affected person determinations in the *Port of Corpus Christi* and *Corix* water quality applications as relevant to their standing theory applied to Ms. Wilson's affected person demonstration in the context of FPC's air quality application.[65] That comparison is misplaced. Each application is evaluated on its own facts, the TCEQ ED's technical review, analysis, and opinions, and the Commission does not issue binding "holdings" as Waterkeeper implies.[66] The facts are distinguishable from those here. In both examples, the TCEQ ED considered the requestors' residence locations—consistent with evaluating potential impacts on health, safety, and property use.[67] And importantly, both examples

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62 Waterkeeper Supp. at 6-7; Waterkeeper Reply at 4-5.

63 *TCEQ v. Sierra Club*, 455 S.W.3d 240 (emphasis added); *see also Sierra Club v. TCEQ*, 455 S.W.3d 225.

64 *TCEQ v. Waterkeeper*, 714 S.W.3d at 286 (citing *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304-05 (Tex. 2008); *Texas Disposal Sys. Landfill, Inc. v. Texas Comm'n on Envtl. Quality*, 259 S.W.3d 361, 363-64 (Tex. App.—Amarillo 2008, no pet.) (holding hearing requestor's purported injury was "mere speculation, and as such, [fell] short of establishing a justiciable interest and standing").

65 *See* Waterkeeper Brief at 8, 12 (citing *Application by Port of Corpus Christi Nueces Authority for TPDES Permit No. WQ0005253000*; TCEQ Docket No. 2019-1156-IWD; *Application by Corix Utilities Texas, Inc. For Major Amendment to TPDES Permit No. WQ0013977001*, Docket No. 2023-1591-MWD).

66 *See* 30 TEX. ADMIN. CODE § 55.211(e).

67 *See generally, Application by Port of Corpus Christi Nueces Authority for TPDES Permit No. WQ0005253000*; TCEQ Docket No. 2019-1156-IWD; *Application by Corix Utilities Texas, Inc. For Major Amendment to TPDES Permit No. WQ0013977001*, Docket No. 2023-1591-MWD).

involved water quality—not air quality—applications.[68] Under TCEQ rules, the Commission must consider whether a reasonable relationship exists between the claimed interest and the regulated activity.[69] Texas law and the Attorney General's guidance confirm that the alleged interest must be tied to the specific natural resource at issue.[70]

The Commission's affected person evaluation is an individualized inquiry. Whether other members of the public choose to engage in similar publicly available activities as Ms. Wilson is immaterial to the Commission's determination—regardless of how "remarkable" Waterkeeper may find the TCEQ ED's analysis.[71] That individual members of the public have the same access or opportunity is indeed the relevant issue in evaluating affectedness. The Commission is not obligated under any law to conduct a comparative analysis of the activities of members of the public at large to assess whether Ms. Wilson is affected in a manner not common to the public. As previously discussed, it is not the Commission's burden to demonstrate that a requestor is an affected person. That onus is on Waterkeeper. In its attempt to shift the focus onto other people, Waterkeeper avoids its own obligation to present evidence demonstrating that Ms. Wilson is uniquely affected and fails to meet this burden. Thus, the Commission has no discretion to grant its unqualified request.[72]

OPIC mistakenly credits the bald assertions in Waterkeeper's Request and Reply as having

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68 *Id*.

69 30 TEX. ADMIN. CODE § 55.203(c)(3).

70 *See* 30 TEX. ADMIN. CODE § 116.111 (requirements for an air permit application do not include a demonstration of water quality or watershed protection); *TCEQ v. Sierra Club*, 455 S.W.3d 228, 240 (Tex. App. – Austin 2014, pet. denied) (TCEQ only has authority over issues in the application under their jurisdiction); Op. Texas Att'y Gen., *Statement of Legal Authority to Regulate Oil and Gas Discharges under the Texas Pollutant Discharge Elimination System Program* at 19 (Sept. 18, 2020).

71 Waterkeeper Supp. at 11.

72 TEX. WATER CODE § 5.556(C); TEX. HEALTH & SAFETY CODE § 382.056(n).

evidentiary value.[73] Again, statements made in legal briefs, without evidentiary support, do not carry weight in establishing facts.[74] Additionally, OPIC presumptively credits Ms. Wilson with an economic interest as a basis for affected person status, though its brief does not cite any factual basis for this conclusion.[75] OPIC's interpretation to suggest that Ms. Wilson is still employed as a "shrimper, oysterman, fin fisher, and fish house manager"[76] is false. Waterkeeper has not attributed any economic harm to Ms. Wilson, who is retired from her fishing career and no longer earns income from work in the Bays.[77] As a volunteer member of Waterkeeper—a nonprofit organization that provides no economic benefit—Ms. Wilson does not meet the criteria for affectedness based on economic interest.[78]

Ultimately, the protectiveness of the Application is supported by verified scientific data, expert analysis, and a comprehensive technical review by the TCEQ ED's professional staff. The ED's recommendation is grounded in this stout record, and the Commission should rely on it in issuing the Draft Permits.

IV. CONCLUSION

Waterkeeper has not met its demonstration burden prescribed by law, while FPC's Application is supported by uncontroverted, verified scientific and technical evidence. Waterkeeper's arguments invite the Commissioners to go against established rules, statutes and case law that apply to the Application instead of presenting a proper application of existing law. The suggestion of a preliminary standing determination based on unsubstantiated facts alone

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73 OPIC Response at 8-10 (Sept. 15, 2025) (listing the assertions made in the Requests as valid support for the conclusory claims made); *see also* OPIC Position Letter at 1 (Oct. 17, 2025) (reiterating support for arguments and conclusions in its response brief).

74 *City of Waco v. TCEQ,* 346 S.W.3d at 826.

75 OPIC Response at 8-10.

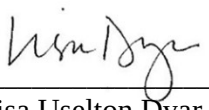
76 *Id*.

77 2022 Request at 2; 2025 Request at 2; *TCEQ v. Waterkeeper,* 714 S.W.3d at 279.

78 2022 Request at 2 (Waterkeeper "is a volunteer-run . . . non-profit organization"); 2025 Request at 2 (same).

serves to eliminate the Commission's delegated discretion and responsibility to substantively evaluate the TCEQ ED's analysis and recommendation, expert affidavits, and merits in determining affected person status. Such an interpretation runs counter to the Commission's statutory authority and rules and should be rejected. The Commission should deny the Requests and issue the Draft Permits.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I filed a true and correct copy of the foregoing Formosa Plastics Corporation, Texas's Reply to Affected Person Briefs through TCEQ's efile system and served a copy on the following persons via electronic mail on October 24, 2025:

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pay Campos the sanction now and then wait until after a final judgment to appeal, it may not be able to recover the sanction from Campos at that future juncture. *See id.* Further, Monson would incur additional expense in pursuing an appeal and such an appeal would be a waste of judicial resources. *See id.* 136–37 (granting mandamus review when trial court's order would have wasted public and judicial resources, lacked legal authority, and would have negatively impacted the legal system). Finally, we consider the circumstances of this case to be extraordinary for the reasons set forth above. *See id.*

Under these circumstances, we conclude that Monson lacks an adequate remedy by appeal to assail the sanctions assessed against it.

VII. Conclusion

The Court, having examined and fully considered the petition for writ of mandamus, Campos's response, Monson's reply, and the record, is of the opinion that Monson has met its burden to obtain mandamus relief. Accordingly, we lift the stay that we previously imposed in this original proceeding. *See* Tex. R. App. P. 52.10 ("Unless vacated or modified, an order granting temporary relief is effective until the case is finally decided."). We conditionally grant the petition for writ of mandamus, and we direct the trial court to vacate its February 3, 2025 sanction order. We are confident the trial court will promptly comply, and our writ will issue only if the trial court fails to act in accordance with this opinion.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY and Max Midstream, LLC, Appellants

v.

SAN ANTONIO BAY ESTUARINE WATERKEEPER, Texas Campaign for the Environment, and S. Diane Wilson, Appellees

NO. 15-24-00036-CV

Court of Appeals of Texas (15th Dist.).

Opinion filed May 20, 2025

Background: Environmental advocacy groups and their members filed suit for judicial review of decision by Texas Commission on Environmental Quality (TCEQ) to deny their requests for contested case hearing regarding TCEQ's approval of crude condensate terminal operator's application for minor source air permit to expand terminal. The 201st District Court, Travis County, reversed most of TCEQ's decision and remanded case to agency to hold contested case hearing. Operator and TCEQ appealed.

Holdings: The Court of Appeals, Farris, J., held that:

(1) substantial evidence supported TCEQ's decision that group members were not affected persons entitled to contested case hearing on basis of health and safety concerns;

(2) substantial evidence supported decision that group members were not affected persons on basis of use and enjoyment of property;

(3) substantial evidence supported decision that group members who had asserted recreational and aesthetic claims were not affected persons on basis of use of natural resource;

(4) substantial evidence supported decision that group members who had alleged potential impact on their livelihoods

were not affected persons on basis of use of economic interests;

(5) evidence did not establish that affected person status had been denied based on arbitrary one-mile standard of distance from site;

(6) TCEQ's application of state law "personal justiciable interest standard" was not arbitrary and capricious and was not abuse of discretion; and

(7) Court of Appeals lacked jurisdiction to review whether TCEQ erred in issuing permit.

Reversed.

1. Environmental Law ⚿708

On appeal of ruling, order, decision, or other act of Texas Commission on Environmental Quality (TCEQ) or of its Executive Director, focus of Court of Appeals' review, as in trial court, is on decision of TCEQ.

2. Administrative Law and Procedure ⚿1607

Judicial review of administrative agency decisions is generally governed by Administrative Procedure Act (APA), which addresses contested-case proceedings and framework of substantial-evidence test. Tex. Gov't Code Ann. § 2001.001 et seq.

3. Administrative Law and Procedure ⚿1836

When there is record that is basis of agency action, which is fundamental requirement for substantial-evidence review, standard of review is pursuant to substantial-evidence review. Tex. Gov't Code Ann. § 2001.001 et seq.; Tex. Water Code Ann. §§ 5.115, 5.556.

4. Administrative Law and Procedure ⚿1836

Review of administrative agency decision under substantial-evidence rule is highly deferential; issue is not whether agency's decision is correct, but whether record demonstrates reasonable basis for it.

5. Administrative Law and Procedure ⚿1743, 1836

Only in narrow circumstances will agency decision be reversed as arbitrary and capricious when it is supported by substantial evidence.

6. Administrative Law and Procedure ⚿1836

Evidence may preponderate against the decision of agency and nonetheless amount to substantial evidence for administrative agency decision; this rule precludes courts from usurping the agency's adjudicative authority even though the court would have struck a different balance.

7. Administrative Law and Procedure ⚿1931

In upholding agency's determination, reviewing court is not bound by agency's reasons for its decision when valid basis exists for action taken.

8. Environmental Law ⚿17

Person seeking to be admitted as party to contested case hearing before Texas Commission on Environmental Quality (TCEQ) has burden of making minimum jurisdictional showing of justiciable interest. Tex. Water Code Ann. § 5.115(a).

9. Environmental Law ⚿17

To have justiciable interest that would entitle complainant to be admitted as party to contested case hearing before Texas Commission on Environmental Quality (TCEQ), complainant must show that concrete, particularized, actual or imminent injury faces him or her due to decision; hypothetical or speculative injury is not enough. Tex. Water Code Ann. § 5.115(a).

10. Environmental Law ⚿293

Substantial evidence supported decision by Texas Commission on Environmental Quality (TCEQ) that environmental advocacy groups and members were not affected persons who were entitled, on basis of health and safety concerns, to contested case hearing regarding TCEQ's approval of crude condensate terminal operator's application for minor source air permit to expand terminal, even though complainants presented expert affidavits that quantifiable air quality impacts would be significantly greater than predicted; TCEQ was vested with discretion to weigh conflicting evidence and conclude, based on TCEQ health effects review and two air quality analysis audits, that groups and members were not affected persons because permitted activity would have minimal effect on their health and safety. Tex. Water Code Ann. § 5.115(a); Tex. Health & Safety Code Ann. § 382.056(n).

11. Environmental Law ⚿293

Substantial evidence supported decision by Texas Commission on Environmental Quality (TCEQ) that members of environmental advocacy groups who lived 1.79 miles from terminal were not affected persons entitled, on basis of use and enjoyment of property, to contested case hearing regarding TCEQ's approval of terminal operator's application for minor source air permit to expand terminal, even though their experts opined that increased air pollution and industrial activity would diminish their use and enjoyment of property; TCEQ's executive director and expert witnesses had concluded that individuals at that distance would not experience discernible impact on use and enjoyment of property, and members did not meet burden of establishing justiciable interest not common to general public. Tex. Water Code Ann. § 5.115(a); Tex. Health & Safety Code Ann. § 382.056(n).

12. Environmental Law ⚿293

Substantial evidence supported decision by Texas Commission on Environmental Quality (TCEQ) that members of environmental advocacy groups who had asserted recreational and aesthetic claims were not affected persons entitled, on basis of use of natural resource, to contested case hearing regarding TCEQ's approval of terminal operator's application for minor source air permit to expand terminal; members who alleged that they regularly engaged in recreational activities such as swimming, kayaking, boating, and fishing, or who expressed concerns that emissions would worsen local landscapes and ecosystems, had not carried their burden of establishing that potential impacts on their enjoyment of recreational activities and aesthetic beauty differed from concerns experienced by general public. Tex. Water Code Ann. § 5.115(a); Tex. Health & Safety Code Ann. § 382.056(n).

13. Environmental Law ⚿293

Substantial evidence supported decision by Texas Commission on Environmental Quality (TCEQ) that members of environmental advocacy groups who had alleged potential impact on their livelihoods of shrimping and oystering were not affected persons who were entitled, on basis of use of economic interests, to contested case hearing regarding TCEQ's approval of terminal operator's application for minor source air permit to expand terminal; purported economic injuries were merely speculative and were not supported by evidence, and group's expert's testimony that exposure to pollutants could aggravate one member's respiratory diseases was contradicted by testimony by operator's toxicology expert that impacts from emissions at distances greater than one mile would be indiscernible. Tex. Water

Code Ann. § 5.115(a); Tex. Health & Safety Code Ann. § 382.056(n).

14. Administrative Law and Procedure ⚿1743

Agency's decision is arbitrary for purposes of judicial review if agency failed to consider factor legislature directs it to consider, considers irrelevant factor, or weighs only relevant factors that legislature directs it to consider but still reaches completely unreasonable result.

15. Environmental Law ⚿218

Water Code clearly outlines statutory procedure Texas Commission on Environmental Quality (TCEQ) must follow in determining affected-person status, and TCEQ has no authority to depart from this procedure. Tex. Water Code Ann. §§ 5.115, 5.556.

16. Environmental Law ⚿219

Water Code confers discretion on Texas Commission on Environmental Quality (TCEQ) to weigh and resolve disputed facts in determining need for contested case hearing. Tex. Water Code Ann. §§ 5.115, 5.556; Tex. Health & Safety Code Ann. § 382.051.

17. Environmental Law ⚿293

Determination by toxicology expert for Texas Commission on Environmental Quality (TCEQ) that impacts further than one mile from terminal would be indiscernible from TCEQ's approval of terminal operator's application for minor source air permit to expand terminal on public health and welfare did not establish that TCEQ had improperly based its decision to deny affected person status to environmental advocacy groups and their members, which would have entitled them to contested case hearing regarding TCEQ's approval of permit, upon arbitrary one-mile standard of distance from site rather than on required statutory factors; record indicated that TCEQ had considered required factors and had not applied them in arbitrary and capricious manner. 30 Tex. Admin. Code § 55.203(c); Tex. Health & Safety Code Ann. § 382.056(n).

18. Environmental Law ⚿293

Texas Commission on Environmental Quality's (TCEQ) use of state law standard, rather than federal standard, that required environmental advocacy groups and their members to establish personal justiciable interest not common to members of general public in their recreational and aesthetic interests to warrant affected person status that would entitle them to contested case hearing regarding TCEQ's approval of terminal operator's application for minor source air permit to expand terminal was not arbitrary and capricious and was not abuse of discretion; contested case hearing sought by group and members was remedy created and defined by state statute, and TCEQ had acted within its legislatively granted authority. Tex. Water Code Ann. § 5.115(a).

19. Environmental Law ⚿708

Court of Appeals would address issue as to whether it lacked jurisdiction to consider challenge by environmental advocacy groups and their members to the merits of issuance of crude condensate terminal operator's minor source air permit to expand terminal by Texas Commission on Environmental Quality (TCEQ) on appeal from order on judicial review reversing TCEQ's denial of requests by advocacy groups and members for contested case hearing regarding TCEQ's approval of permit, even though trial court did not reach the issue, since issue impacted subject matter jurisdiction. Tex. Gov't Code Ann. § 2001.171; Tex. Water Code Ann. § 5.556(a); Tex. Health & Safety Code Ann. § 382.056(n).

20. Appeal and Error ⚿3211

Jurisdictional questions are subject to de novo review.

21. Administrative Law and Procedure ⚿1671

The Administrative Procedure Act (APA) creates a right to judicial review for those who satisfy the statute's threshold requirements, but the statute does not create an inherent right to judicial review. Tex. Gov't Code Ann. § 2001.171.

22. Administrative Law and Procedure ⚿2162

In addressing whether exhaustion of administrative remedies is required before person aggrieved by agency decision is entitled to judicial review under Administrative Procedure Act (APA), courts begin with the presumption that courts have jurisdiction to resolve legal disputes. Tex. Gov't Code Ann. § 2001.171.

23. Administrative Law and Procedure ⚿2162

A party may overcome the presumption that courts have jurisdiction to resolve legal disputes, applicable when determining whether exhaustion of administrative remedies is required before person aggrieved by agency decision is entitled to judicial review under Administrative Procedure Act (APA), by establishing that the Constitution or another law grants exclusive jurisdiction to another court or an administrative agency. Tex. Gov't Code Ann. § 2001.171.

24. Administrative Law and Procedure ⚿2110, 2162

A statute may grant an agency exclusive jurisdiction, as would overcome the presumption that courts have jurisdiction to resolve legal disputes applicable when determining whether exhaustion of administrative remedies is required prior to seeking judicial review, either expressly or by establishing a pervasive regulatory scheme that impliedly indicates that the Legislature intended for the regulatory process to be the exclusive means of remedying the problem to which the regulation is addressed. Tex. Gov't Code Ann. § 2001.171.

25. Administrative Law and Procedure ⚿2110, 2162

A state agency has exclusive jurisdiction, as would overcome the presumption that courts have jurisdiction to resolve legal disputes applicable when determining whether exhaustion of administrative remedies is required prior to seeking judicial review, when the Legislature grants it sole authority to make an initial determination in disputes that arise within the agency's regulatory arena. Tex. Gov't Code Ann. § 2001.171.

26. Administrative Law and Procedure ⚿2102, 2151

To establish exclusive agency jurisdiction over particular issue and thus require party to exhaust administrative remedies prior to seeking judicial review, there must be express or implied grant of exclusive jurisdiction, and issue must fall within that jurisdictional scope. Tex. Gov't Code Ann. § 2001.171.

27. Administrative Law and Procedure ⚿2102, 2151

If agency has exclusive jurisdiction over particular issue, trial court lacks jurisdiction over claim involving that issue until claimant has exhausted all available administrative remedies. Tex. Gov't Code Ann. § 2001.171.

28. Administrative Law and Procedure ⚿2151

Only a party that has exhausted all available administrative remedies may seek judicial review of an agency decision. Tex. Gov't Code Ann. § 2001.171.

29. Environmental Law ⚿652

Statute permitting party to appeal decision of Texas Commission on Environmental Quality (TCEQ) if appeal to TCEQ was not provided did not permit environmental advocacy groups and their members who did not participate in contested case hearing to seek judicial review of TCEQ's approval of crude condensate terminal operator's application for minor source air permit to expand terminal; statute did not provide an avenue for direct appeal of a permit by a party who did not participate in a contested case hearing, such that participation in contested case hearing was a prerequisite to judicial review. Tex. Gov't Code Ann. § 2001.171; Tex. Water Code Ann. § 5.556(a); Tex. Health & Safety Code Ann. §§ 382.032(a), 382.056(n).

30. Environmental Law ⚿665

Environmental advocacy groups and their members did not exhaust all available administrative remedies by filing motion for rehearing after issuance by Texas Commission on Environmental Quality (TCEQ) of crude condensate terminal operator's minor source air permit to expand terminal, and thus judicial review of merits of permit under Administrative Procedure Act (APA) was not permitted on such basis; motion for rehearing was not the only administrative remedy that was required to be exhausted before seeking judicial review, and advocacy groups and their members were not admitted as affected persons and failed to participate in a contested case hearing on the merits of the proposed permit, which was a necessary step and required for exhaustion of remedies. Tex. Gov't Code Ann. § 2001.171; Tex. Water Code Ann. §§ 5.115, 5.556; Tex. Health & Safety Code Ann. §§ 382.032(a), 382.056(n); 30 Tex. Admin. Code § 55.203.

31. Administrative Law and Procedure ⚿2153

A motion for rehearing is one of the administrative remedies that, under the Administrative Procedure Act (APA), must be exhausted before seeking judicial review, but it is not the only remedy. Tex. Gov't Code Ann. § 2001.171.

32. Environmental Law ⚿665

Statements by Texas Commission on Environmental Quality (TCEQ) to the Environmental Protection Agency (EPA) in a rulemaking proceeding that participating in a contested case hearing was not a prerequisite to judicial review did not dispense with requirement of exhaustion of administrative remedies under Administrative Procedure Act (APA) so as to permit environmental advocacy groups and their members, who did not participate in contested case hearing, to seek judicial review of merits of condensate terminal operator's minor source air permit to expand terminal approved by TCEQ; TCEQ's statement applied to scenarios in which contested case hearing was unavailable, and participation in a contested case hearing was a jurisdiction prerequisite to judicial review of TCEQ's decision to grant permit. Tex. Gov't Code Ann. §§ 311.034, 2001.171; Tex. Water Code Ann. § 5.556(c); Tex. Health & Safety Code Ann. §§ 382.032(a), 382.056(n).

On Appeal from the 201st District Court, Travis County, Texas, Trial Court Cause No. D-1-GN-22-002153, Honorable Amy Clark Meachum, Judge

Derek Leon Seal, April E. Lucas, Austin, Jordan Mullins, Tyler, for Appellant Max Midstream, LLC.

Sara J. Ferris, Austin, Erin Snody, for Appellant Texas Commission on Environmental Quality.

Ilan M. Levin, Austin, Erin Gaines, for Appellees Texas Campaign for The Environment, San Antonio Bay Estuarine Waterkeeper.

Karis Adams, Ethan Siegel, for Appellee Wilson, S. Diane.

Before Chief Justice Brister and Justices Field and Farris.

OPINION

April Farris, Justice

We withdraw our opinion and judgment of February 27, 2025, and substitute the following in its place. The Texas Commission on Environmental Quality (TCEQ or the Commission) granted Max Midstream LLC a minor source air permit to expand its Seahawk Terminal in Calhoun County. Various parties who had opposed Max Midstream's permit application before the agency, including appellees San Antonio Bay Estuarine Waterkeeper (Waterkeeper), Texas Campaign for the Environment (TCE), and S. Diane Wilson, filed requests for a contested case hearing before the Commission. The Commission denied Appellees' requests and Appellees filed suit for judicial review of the Commission's decision in Travis County District Court. The trial court reversed the bulk of the Commission's decision and remanded the case to the agency for a contested case hearing. Max Midstream and TCEQ appealed the trial court's judgment. We reverse the trial court's judgment and render judgment affirming the Commission's order.

I. Background

A. The Federal and State Clean Air Acts Set Out Procedures for Review of Air Permits.

The TCEQ regulates air pollution from stationary sources pursuant to a delegation of authority under the Federal Clean Air Act (FCAA). *See* 42 U.S.C. § 7410(a). The FCAA requires the U.S. Environmental Protection Agency (EPA) to identify emissions that cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare. *See id.* § 7408(a). The EPA sets primary and secondary National Ambient Air Quality Standards (NAAQS) for certain air pollutants. *See id.* §§ 7408(a), 7409(a)(1). NAAQS are levels of air quality determined to protect the public health and welfare. *Id.* § 7409(b). To implement these standards, each state is required to submit for EPA approval a State Implementation Plan (SIP). *See id.* § 7407(a). Each plan must include a New Source Review (NSR) preconstruction permitting scheme to control emissions from new or modified sources of air pollutants. *See id.* § 7410(a)(2)(C).

The FCAA's and EPA's applicable regulations provide extensive requirements for the construction and modification of "major" sources of air pollution under NSR permitting programs. *See Luminant Generation Co., L.L.C. v. E.P.A.*, 675 F.3d 917, 922 (5th Cir. 2012) (citing 40 C.F.R. §§ 51.165–51.166). Major sources are facilities that emit a pre-identified amount, usually 100 tons per year or more, of a regulated contaminant. *See Tex. v. U.S. E.P.A.*, 690 F.3d 670, 675 (5th Cir. 2012) (citing 42 U.S.C. §§ 7479(1), 7602(j) and 40 C.F.R. § 51.166(b)). Minor sources emit less than a pre-identified amount, usually 100 tons per year, of a regulated contaminant after construction or modification. *See U.S. E.P.A.*, 690 F.3d at 675.

Under the FCAA, each state submits a SIP specifying how the state will attain and maintain the NAAQS for EPA approval. 42 U.S.C. § 7407(a). SIPs must include provisions regulating the construction and modification of certain sources of air pollutants. *See, e.g., id.* § 7410(a)(2)(C). Two

NSR programs relevant to this case are the Prevention of Significant Deterioration (PSD) program for "major" sources of air pollution and the minor NSR program. *See id.*

The TCEQ administers the requirements of the FCAA for Texas under an EPA-approved SIP that includes a minor-source NSR permitting scheme. *See* 40 C.F.R. § 52.2270. Although the FCAA does not contain specific requirements for evaluating minor sources, the Texas Clean Air Act (Clean Air Act)[1], codified in the Health and Safety Code, requires both major and minor sources to apply the "best available control technology" (BACT)[2] in order to obtain a permit. Tex. Health & Safety Code § 382.0518.

Pursuant to the EPA-approved PSD Program, "[b]efore work is begun on the construction of a new facility or a modification of an existing facility that may emit air contaminants, the person planning the construction or modification must obtain a permit or permit amendment from the commission." *Id.* § 382.0518(a). The general requirements for a permit are set forth in Title 30 of the Texas Administrative Code, Section 116.111.

When the Executive Director of the TCEQ determines that the permit application is complete, the Commission conducts a technical review of the application to ensure that it meets all applicable rules and requirements. Tex. Health & Safety Code § 382.056(f); 30 Tex. Admin. Code § 116.114. When the technical review is complete, the applicant must publish public notice of the preliminary decision and the availability of a draft permit for public review in newspapers of general circulation and, in some cases, in alternative languages. Tex. Health & Safety Code § 382.056(a), –(b), –(g), –(i); 30 Tex. Admin. Code §§ 39.405, –.419, –.603(a)–(b). In reviewing a PSD permit application, Texas law provides an opportunity for public comment. *See* Tex. Health & Safety Code § 382.056.

After statutorily required public notices are posted, the Commission accepts public comments and responds to all timely, relevant, and material or significant public comments. *See* Tex. Health & Safety Code § 382.056(*l*); 30 Tex. Admin. Code §§ 55.152, –.156. The Commission must also hold a public meeting if requested by an interested member of the public or a member of the Texas Legislature. Tex. Health & Safety Code § 382.056(k)(1); 30 Tex. Admin. Code § 55.154(c)(1)–(3).

During the notice and public comment period, any person granted party status as an "affected person" may request and participate in contested hearings before the State Office of Administrative Hearings (SOAH). *See* Tex. Health & Safety Code § 382.056(n) (incorporating Tex. Water Code §§ 5.556, 5.557); 30 Tex. Admin. Code §§ 55.201–.211.

If a person requests a contested case hearing, the Executive Director considers the hearing requests in accordance with the procedures provided in section 5.556 of the Water Code.[3] *See* Tex. Health & Safety

1. Unless otherwise noted future references in this opinion to the ''Clean Air Act'' refer to the Texas Clean Air Act.

2. BACT is defined as a pollution-control method that ''through experience and research, has proven to be operational, obtainable, and capable of reducing or eliminating emissions[.]'' 30 Tex. Admin. Code § 116.10(1).

3. Section 5.556 provides:

(a) A person may request that the commission reconsider the executive director's decision or hold a contested case hearing. A request must be filed with the commission

Code § 382.056(n). To grant a contested case hearing the Executive Director must determine that the requestor is an affected person. *See* 30 Tex. Admin. Code § 55.203. The Administrative Procedure Act (APA) allows for judicial review of any permit decision. *See* Tex. Gov't Code § 2001.001, et seq.

B. The Commission, Max Midstream, and Appellees Participated in the Permitting Process.

Max Midstream owns and operates the Seahawk Crude Condensate Terminal (Seahawk Terminal) at the Calhoun Port Authority facilities near Port Comfort, Texas. The Seahawk Terminal has operated since October 2011 pursuant to a TCEQ permit; Max Midstream acquired the terminal in 2019. On October 6, 2020, Max Midstream submitted its application to the Commission to expand its existing activities at the Seahawk Terminal. Max Midstream sought authorization to increase air emissions from the same types of then-existing permitted air emissions sources. The expansion of the Seahawk Terminal projected new tanks for crude condensate storage, new marine loading docks, and new Vapor Combustion Units (VCUs). The application described the VCUs as devices that "shall achieve 99.9% control of the waste gas directed to it[.]" Because the proposed expansion of the Seahawk Terminal would increase air emissions beyond those permitted by the then-existing permit, the application sought the issuance of a minor NSR permit.

The Executive Director of the Commission conducted a technical review of the application and issued a draft permit. After statutorily required public notices were posted, the Commission received public comments and held a public meeting. The Commission accepted public comments on Max Midstream's application and the Executive Director responded to all timely, relevant, and material or significant public comments.

The Executive Director responded to 18 public comments including comments on air quality; the determination of whether the project triggered major source review; use of BACT; emission rates and calculations; application representations; demonstration of compliance with the permit; flora, fauna, and environmental concerns; water quality; greenhouse gases; expedited permitting; safety; compliance history of Max Midstream; public participation in the public meeting; environmental justice; jurisdictional issues; and the Commission's responsibility to the community. The Exec-

during the period provided by commission rule.

(b) The commission shall act on a request during the period provided by commission rule.

(c) The commission may not grant a request for a contested case hearing unless the commission determines that the request was filed by an affected person as defined by Section 5.115.

(d) The commission may not refer an issue to the State Office of Administrative Hearings for a hearing unless the commission determines that the issue:

(1) involves a disputed question of fact;

(2) was raised during the public comment period; and

(3) is relevant and material to the decision on the application.

(e) If the commission grants a request for a contested case hearing it shall:

(1) limit the number and scope of the issues to be referred to the State Office of Administrative Hearings for a hearing; and

(2) consistent with the nature and number of the issues to be considered at the hearing, specify the maximum expected duration of the hearing.

(f) This section does not preclude the commission from holding a hearing if it determines that the public interest warrants doing so.

utive Director also responded to comments about contested case hearings and explained the process for requesting a hearing and the necessity that the requestors demonstrate that they are affected persons under the Health and Safety Code.

The Commission received more than 2500 timely requests for contested case hearings during the public comment period. As applicable to this appeal the Commission received hearing requests from Appellees TCE, Waterkeeper, and Wilson. To support their requests for a hearing, Appellees asserted the following:

Diane Wilson, individually and as a member of Waterkeeper, alleged that she was affected by the modification to the Seahawk Terminal and entitled to a contested case hearing due to her routine visits to bodies of water near the Seahawk Terminal. As part of Wilson's work with Waterkeeper she visits these bodies of water to observe whether plastic pellets, powder, or flakes have been discharged from the Formosa Plastics facility in Point Comfort, Texas. During each of the trips Wilson is outdoors in a kayak, motorboat, or on foot between four and six hours. Wilson performs this work to monitor Formosa's compliance with an unrelated consent decree. Wilson visited the bodies of water three times in the previous four months. She identified one location as being "roughly 1300 feet" from the Seahawk Terminal. Wilson identified other areas she visited approximately as 1.85 miles and two miles from the terminal. She visited those areas once every two months. Wilson visits several other areas within five miles of the terminal once per week. Wilson lives within 15 miles of the Seahawk Terminal, and alleged she would be exposed to increased air pollution if the application for permit was approved. On behalf of Waterkeeper, she averred that members walk the beaches of Lavaca Bay and swim and boat in its waters. They worry that increased air pollution from the proposed expansion project will negatively affect their health, the health of their families, and interfere with the use and enjoyment of their property. Wilson worked as a commercial fisherman, shrimper, oysterman, fin fisher, and as a manager at a fish house. Though retired she relies on the fishing and shrimping industry and alleged her "deep connection with the waters and trades" encompassed interests not shared by the general public.

Curtis Miller as a member of Waterkeeper and TCE alleged that he was an affected person entitled to a contested case hearing as an owner and operator of a seafood company located approximately 4.8 miles from the Seahawk Terminal. Miller owns four commercial fishing boats on which he occasionally works but are mostly crewed by paid staff. Miller alleged that the dredging of Matagorda Ship Channel to accommodate larger crude tankers exporting oil from the Seahawk Terminal would impact oyster habitats, which would negatively impact Miller's business. Miller further alleged he would be impacted by air emissions from the terminal expansion as he spends 50-60 hours per week at his business. He also fishes one to two times per month from a reef located just over two miles from the Seahawk Terminal. Miller suffers from asthma and other respiratory issues he alleged will become worse with expansion of the terminal. Carbon dioxide emissions from the expanded terminal will contribute to the acidification of coastal waters, which is known to negatively impact oysters.

Maurice Blanco, also a member of Waterkeeper and TCE, lives approximately five miles from the Seahawk Terminal. Blanco alleged he was an affected

person entitled to a contested case hearing because he has made a living shrimping and oystering in Matagorda and Lavaca Bays for approximately 30 years. Blanco is concerned that air pollution from the expanded terminal will interfere with his livelihood and threaten his health and well-being along with the health and well-being of his family and the local fishing community.

John and Janet Maresh, members of Waterkeeper, live approximately 1.79 miles from the Seahawk Terminal. They are concerned that the proposed expansion of the terminal will contribute to existing air pollution problems and potentially "push the area into non-attainment for [NAAQS]." They are concerned that the "thick acrid smog" that occasionally settles over Point Comfort could be made worse if the expansion project was authorized by TCEQ. The Mareshes alleged they were affected persons entitled to a contested case hearing because the air pollution caused by the expansion of the Seahawk Terminal "may cause them deleterious health impacts[.]"

The Executive Director, Max Midstream, and the Commission's Office of Public Interest Counsel responded to Appellees' requests for hearings. The Executive Director considered the hearing requests in accordance with the procedures provided in section 5.556 of the Water Code. *See* Tex. Health & Safety Code § 382.056(n).

Attached to Max Midstream's response was the affidavit of Dr. Lucy Fraiser, a toxicologist who performs air quality health and welfare evaluations. Fraiser reviewed several documents related to the permit application including Appellees' comments and hearing requests. Fraiser conducted an analysis of the potential air quality effects of the Seahawk Terminal expansion, which included a review of air dispersion modeling to predict concentrations of pollutants from the proposed facility. Fraiser concluded that the proposed emissions from the Seahawk Terminal do not pose an adverse health or welfare effect because of the small magnitude of the modeled maximum ground level contaminants and the "highly conservative nature" of the TCEQ-derived effects screening level, which are designed to be protective of public health and welfare. Fraiser further concluded that impacts on public health and welfare farther than one mile from the terminal "would be indiscernible." At greater distances than one mile from the terminal, potential impacts "are expected to be even less."

Addressing the individuals who had sought contested case hearings, Fraiser noted that all of the locations that Wilson visited are more than one mile from the Seahawk Terminal except for the Formosa Outfalls 011 and 013. Based on the modeling and Fraiser's evaluation, Fraiser determined that Wilson would not experience impacts from visiting those locations that are more than one mile from the terminal. Fraiser also determined that exposure alone would not result in possible negative effects unless the exposure was of sufficient magnitude, duration, and frequency to cause impacts. Given the infrequency and short duration that Wilson reported being present in the areas less than one mile from the terminal, Fraiser did not expect Wilson to experience discernible impacts from any pollutant for which authorization was requested by the application. Fraiser acknowledged that there were competing affidavits disputing the precise location of Formosa Outfalls 011 and 013. Fraiser explained that her conclusions were the same regardless of which affidavit was correct with respect to the location.

Appellees replied to Max Midstream's response, attaching affidavits of Dr. Ranajit Sahu, a public health statistician, Dr. Loren Hopkins, and Blanco, a member of Waterkeeper and TCE. Hopkins opined that Seahawk Terminal emissions would adversely affect persons who lived, recreated, or worked within two miles of the terminal and that the health impacts would be especially harmful to individuals who experienced pre-existing respiratory illnesses. Sahu asserted that emissions from the terminal were expected to extend as far as five miles from the Seahawk Terminal and that Max Midstream's application understated the level of expected emissions. Blanco provided coordinates for where he oystered and shrimped with distances ranging between 1.38 miles and 2.32 miles from the Seahawk Terminal.

The Commission considered the requests for contested case hearings, the responses, and the replies during its open meeting. The Commission evaluated the requests for hearing under the applicable statutes and Commission regulations and denied all requests for hearing. The Commission further approved Max Midstream's application for air quality permit and adopted the Executive Director's response to public comment.

C. Appellees Appealed the Commission's Decision to the Trial Court.

After a timely filed motion for rehearing was denied by operation of law, Appellees filed a petition for judicial review in the trial court. In the trial court Appellees asserted the Commission erred in (1) denying their requests for a contested case hearing; and (2) issuing the air permit to Max Midstream.

Appellees asserted the Commission's denial of their contested case hearing requests was invalid, arbitrary, or unreasonable because they demonstrated they are affected persons and they satisfy federal Article III standing criteria based on their use of property, likely harms to health and safety, and/or recreational and aesthetic interests. Appellees also asserted the Commission's decision to issue a minor source air permit to Max Midstream was invalid, arbitrary, or unreasonable because the Commission applied the wrong legal standard for a minor versus a major source. In the alternative, Appellees asserted the Commission's decision to issue a minor source permit was invalid, arbitrary, or unreasonable because the Seahawk Terminal's potential to emit certain pollutants exceeds the applicable major source threshold.

The Commission and Max Midstream responded to Appellees' petition and asserted that the Commission's determination that Appellees were not affected persons and therefore not entitled to a contested case hearing was supported by substantial evidence pursuant to applicable statutes, Commission regulations, policies, and the Administrative Record. In response to Appellees' cause of action contesting the issuance of the minor source air permit, the Commission filed a plea to the jurisdiction in which it asserted that the trial court lacked jurisdiction to consider Appellees' challenge to the issuance of the air permit because they were not admitted as affected persons with standing to challenge the permit. Because Appellees were not parties they were unable to exhaust administrative remedies required for judicial review.

The trial court held a hearing at which the parties argued their respective positions and the Administrative Record was admitted into evidence. The trial court subsequently reversed the decision of the Commission denying the hearing requests and approving and issuing the permit. The trial court remanded to the Commission

for a contested case hearing. This appeal followed.

II. Analysis

The Commission and Max Midstream each filed a brief in this appeal. Both parties assert the same first issue challenging the trial court's reversal of the Commission's order denying Appellees' requests for a contested case hearing arguing the Commission's decision was supported by substantial evidence. Both parties also assert that Appellees cannot directly challenge the Commission's issuance of the air permit in this proceeding. The Commission also challenges the trial court's order on remand as a violation of separation of powers.

A. Standard of Review and Governing Law

[1] A person affected by a ruling, order, decision, or other act of the Commission or of the Executive Director may appeal the action by filing a petition in a district court of Travis County. Tex. Health & Safety Code § 382.032(a). On appeal, the focus of this Court's review, as in the trial court, is on the decision of the Commission. *See Montgomery Indep. Sch. Dist. v. Davis*, 34 S.W.3d 559, 562 (Tex. 2000).

In the appeal of a Commission decision governed by the Clean Air Act, other than cancellation or suspension of a variance, we determine whether the decision is invalid, arbitrary, or unreasonable. *See* Tex. Health & Safety Code § 382.032(e). All parties agree that the Commission's affected person regulations embody federal Article III standing requirements. The parties disagree, however, on whether that standard encompasses the substantial evidence standard of review. Appellees assert that under Article III standing requirements, the Commission may not weigh and resolve disputed fact issues in determining affected-person status. We therefore first determine what standard of review applies to the Commission's denial of a contested case hearing and whether in making that determination the Commission may weigh and resolve disputed facts.

[2, 3] Judicial review of administrative agency decisions is generally governed by the APA, which addresses contested-case proceedings and the framework of the substantial-evidence test. *See* Tex. Gov't Code §§ 2001.001–.902; *Cash Am. Int'l Inc. v. Bennett*, 35 S.W.3d 12, 17 (Tex. 2000). The Texas Supreme Court recognized and specifically extended the substantial-evidence standard in the APA to Commission decisions on contested case hearing requests, specifically including air permit applications. *Tex. Comm'n on Envtl. Quality v. City of Waco*, 413 S.W.3d 409, 424–25 (Tex. 2013). The Water Code clearly outlines the statutory procedure the Commission must follow in determining affected-person status, and the Commission has no authority to depart from this procedure. Tex. Water Code §§ 5.115, 5.556. Because there is a record that is the basis of agency action—the fundamental requirement for a substantial-evidence review—we conclude the standard of review in this case is pursuant to substantial-evidence review.

[4–7] "Review under the substantial-evidence rule is highly deferential—the issue is not whether the agency's decision is correct, but whether the record demonstrates a reasonable basis for it." *N. E. Indep. Sch. Dist. v. Riou*, 598 S.W.3d 243, 251 (Tex. 2020). Only in narrow circumstances will an agency decision be reversed as "arbitrary and capricious" when it is supported by substantial evidence. *See Tex. Health Facilities Comm'n v. Charter Med., Inc.*, 665 S.W.2d 446, 454 (Tex. 1984) ("In enacting the APTRA, it is clear that the legislature intended to distinguish be-

tween agency action that is not supported by substantial evidence and agency action that is arbitrary and capricious."). The evidence "may preponderate against the decision of the agency and nonetheless amount to substantial evidence." *Id.* at 452. This rule precludes courts from "usurping the agency's adjudicative authority even though the court would have struck a different balance." *Riou*, 598 S.W.3d at 251 (quoting *Tex. State Bd. of Dental Exam'rs v. Sizemore*, 759 S.W.2d 114, 117 (Tex. 1988)). "In upholding an agency's determination, a reviewing court is not bound by the agency's reasons for its decision when a valid basis exists for the action taken." *Riou*, 598 S.W.3d at 251 (citing *Pretzer v. Motor Vehicle Bd.*, 138 S.W.3d 908, 914 (Tex. 2004)).

B. Substantial Evidence Supports the Commission's Denial of Affected Person Status.

The Commission and Max Midstream assert in their first issue that the Commission's decision denying Appellees' requests for a contested case hearing was supported by substantial evidence and based on applicable law and decision making.

A contested case hearing must not be granted unless it is requested by an "affected person." Tex. Water Code § 5.556(c). The Water Code defines an "affected person" as "a person who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the administrative hearing." Tex. Water Code § 5.115(a). An interest common to members of the general public does not qualify as a personal justiciable interest. *Id.*

In applying the personal justiciable interest test to determine if a hearing requestor is an affected person, the Commission must consider the following factors:

> (1) whether the interest claimed is one protected by the law under which the application will be considered;
>
> (2) distance restrictions or other limitations imposed by law on the affected interest;
>
> (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
>
> (4) likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person;
>
> (5) likely impact of the regulated activity on use of the impacted natural resource by the person;
>
> (6) for a hearing request on an application filed on or after September 1, 2015, whether the requestor timely submitted comments on the application that were not withdrawn; and
>
> (7) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

30 Tex. Admin. Code § 55.203(c).

In addition, for the application in this case, filed after September 1, 2015, the Commission may consider additional factors in determining whether a person is an affected person:

> (1) The merits of the underlying application and supporting documentation in the Commission's administrative record, including whether the application meets the requirements for permit issuance;
>
> (2) The analysis and opinions of the Executive Director; and
>
> (3) Any other expert reports, affidavits, opinions, or data submitted by the executive director, the applicant, or hearing requestor.

Id. § 55.203(d).

[8, 9] An individual seeking party status as an affected person entitled to a contested case hearing must identify his or

her personal justiciable interest affected by the application—including the location and distance relative to the proposed facility—and explain how that interest will be adversely affected in a manner not common to members of the general public. 30 Tex. Admin. Code § 55.201(d)(2). Likewise, groups or associations, such as Waterkeeper and TCE, must also identify, "by name and physical address in a timely request for a contested case hearing, a member of the group or association who would be an affected person in the person's own right[.]" Tex. Water Code § 5.115(a-1)(2)(A). A person seeking to be admitted as a party has the burden of making a minimum jurisdictional showing of a justiciable interest. *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304–05 (Tex. 2008). To have a justiciable interest, the complainant must show that a concrete, particularized, actual or imminent injury faces him or her due to the decision; a hypothetical or speculative injury is not enough. *Id.*

The Commission made its decision based on expert affidavits and modeling, which concluded that conservative estimates of emissions from proposed sources will be sufficiently attenuated by dispersion such that they will not present danger to the health or welfare of the Appellees at the distances from which Appellees either reside or recreate. The Commission considered the required factors listed above and determined that Appellees did not meet their burden to show they were affected persons. We review whether substantial evidence supports the Commission's decision in light of the required factors.

1. Substantial Evidence Supports the Commission's Decision on the Basis of Health and Safety Concerns.

[10] The Commission's decision that Appellees were not entitled to a contested case hearing is supported by substantial record evidence establishing that operations under the terms of the permit will be protective of human health and will not discernibly impact Appellees. This evidence includes reviews conducted by the Executive Director including the health effects review conducted by the Toxicology, Risk Assessment, and Research Division of the Office of the Executive Director. The health effects review concluded that due to the rural nature of the property surrounding the Seahawk Terminal and the conservative nature of the predicted pollutants, the predicted short- and long-term emissions are allowable. In addition, two air quality analysis audits were conducted, which showed acceptable air quality for all pollutants.

Those documents aided the Commission in determining the expected geographical area that may be impacted by health and safety or other concerns as a result of emissions from the proposed expansion of the terminal. In the Executive Director's response to comments, the director stated that based on the staff review, it was not expected that "existing health conditions will worsen, or that there will be adverse health effects on the general public, sensitive subgroups, or the public welfare and the environment as a result of proposed emission rates associated with this project."

Max Midstream also presented evidence to the Commission in the form of expert affidavits, maps, and other documents related to health and safety effects and Appellees' respective locations. As stated above, Max Midstream's expert, Dr. Fraiser, reviewed the locations of the Appellees' residences, places of business, and preferred recreational areas and determined that the permitted emissions from the Seahawk Terminal would be a fraction of the conservative state and federal air quality standards, which are designed to be pro-

tective of public health and welfare. Fraiser further concluded that impacts on public health and welfare at distances greater than one mile would be indiscernible.

Appellees contradicted this evidence with affidavits from its expert, Dr. Sahu, who stated that quantifiable air quality impacts would likely extend as far away as five miles from the Seahawk Terminal because Max Midstream's application understated the true quantity of emissions. Sahu predicted that impacts from pollution emitted from the terminal would be significantly greater than the impacts predicted and demonstrated by Max Midstream.

In contrast, Fraiser explained that exposure to pollutants from the Seahawk Terminal would not result in negative effects to Appellees unless exposure was of sufficient "magnitude, duration, and frequency to cause impacts." Fraiser reviewed the reported activities of Appellees, the length of time they spent in particular places, and the distance from the terminal and determined Appellees' potential exposure was not of a greater magnitude, duration, and frequency to cause health and safety impacts significantly greater than the general public.

As the Commission is vested with discretion to weigh conflicting evidence, it was within the Commission's discretion to conclude that Appellees are not affected persons because the permitted activity will have a minimal effect on their health and safety. *See* 30 Tex. Admin. Code § 55.256.

2. Substantial Evidence Supports the Commission's Decision on the Basis of Use and Enjoyment of Property.

[11] Appellees alleged that "increased air pollution and industrial activity related to the Seahawk Terminal will diminish the Mareshes' use and enjoyment of their property." The Mareshes filed a request for hearing as members of Waterkeeper. Although the Mareshes did not provide an address on their application, as required by the Texas Administrative Code, the request states their residence is 1.79 miles from the Seahawk Terminal. *See* 30 Tex. Admin. Code § 55.205(b)(2).

Both the Executive Director and Dr. Fraiser concluded that individuals as far away as the Mareshes would not experience a discernible impact on the use and enjoyment of their property. Again, Appellees' experts stated otherwise. It was within the Commission's discretion to deny Waterkeeper party status as the Mareshes did not meet their burden to establish they had a justiciable interest not common to members of the general public. *See* Tex. Water Code § 5.115.

3. Substantial Evidence Supports the Commission's Decision on the Basis of Use of the Natural Resource.

[12] Appellees asserted recreational and aesthetic claims but did not meet their burden to establish that the permitted activity would affect them differently than members of the general public.

Wilson alleged she regularly engages in recreational activities such as swimming, kayaking, and boating in Lavaca and Matagorda Bays. Wilson asserted her enjoyment of these recreational activities and aesthetic beauty of the area would be diminished by increased exposure to air pollution. The Commission reviewed the affidavit of Tony Nguyen, a Senior Vice President at Max Midstream responsible for identifying and complying with regulatory requirements for Max Midstream. Nguyen reviewed maps and a list of locations where Appellees reported they participated in recreational activities. According to Nguyen, the Bays identified by Wilson where she swims, kayaks, and boats are approximately eight miles away from the Seahawk Terminal. Those Bays

are also open to the public and generally accessible to anyone. Wilson, therefore did not meet her burden to show that her enjoyment of recreational activities and aesthetic beauty was not common to members of the general public.

Miller, a member of Waterkeeper and TCE, alleged that he fishes once or twice a month at a location just over two miles from the Seahawk Terminal. According to Fraiser's affidavit, at a location two miles from the Seahawk Terminal, an individual would not experience discernible impacts from emissions. In addition, Miller did not meet his burden to establish that potential impacts on his recreational activities would be different from potential impacts to the general public.

As to aesthetic concerns, the Mareshes expressed concern that the emissions would "reshape and degrade the local landscape, destroy native wildlife habitat, and threaten sensitive ecosystems." The Mareshes also expressed concern that occasional smog outbreaks may worsen with increased emissions. The Mareshes did not meet their burden to establish that their environmental and aesthetic concerns differ from the concerns experienced by the general public. A "personal justiciable interest" not common to members of the "general public" is the cornerstone of Section 5.115's "affected person" definition. *See* Tex. Water Code § 5.115.

4. Substantial Evidence Supports the Commission's Decision on the Basis of Use of Economic Interests.

Blanco and Miller, both members of Waterkeeper and TCE, alleged party status as affected persons due to the potential impact on their livelihoods shrimping and oystering. Both individuals shrimp and oyster in Matagorda and Lavaca Bays, eight miles away from the Seahawk Terminal. Miller alleged that the dredging of the Matagorda Ship Channel to accommodate larger crude tankers exporting oil from the Seahawk Terminal would impact oyster habitats, which would negatively impact Miller's business. Miller suffers from asthma and other respiratory issues he alleged will become worse with expansion of the terminal. Carbon dioxide emissions from the expanded terminal will contribute to the acidification of coastal waters, which Miller alleged is known to negatively impact oysters.

[13] Initially we note that the potential dredging of the Bays is not at issue in this case. The Commission specifically reviewed air emissions and granted a minor source permit based on its own review and other experts' evaluations. To have a justiciable interest and establish standing as an affected person Blanco and Miller were required to show the perceived injury from air emissions to their business was concrete, particularized, actual, or imminent. *See DaimlerChrysler Corp.*, 252 S.W.3d at 304–05; *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex. 1995) (stating that a justiciable controversy exists when there is a real and substantial conflict of tangible interests and not merely a theoretical dispute). The injury Miller describes that could potentially be affected by air emissions is the "acidification of coastal waters," which Miller alleges is "known to negatively impact oysters." Each of the purported economic injuries alleged by Blanco and Miller are merely speculation and were not supported by evidence before the Commission or the trial court.

To be sure, Appellees' expert Dr. Hopkins stated that exposure to certain pollutants could aggravate respiratory diseases such as those from which Miller suffers. Hopkins' statement, however, was contradicted by the affidavit of Fraiser who stated that impacts from air emissions at distances greater than one mile would be

indiscernible. The Commission acted within its discretion in denying Waterkeeper and TCE party status as affected persons.

We hold that substantial evidence supported the Commission's decision to deny a contested case hearing. Because Appellees failed to demonstrate any likely adverse impact on, or any concrete or imminent injury to, their own personal health or safety different from that experienced by the general public, the Commission was required by law to deny their requests for a hearing. *See* Tex. Water Code § 5.556(c); 30 Tex. Admin. Code §§ 55.201(b), 55.211(c)(2).

C. Appellees did not Establish that the Commission's Decision was Arbitrary and Capricious.

[14] An agency decision may be reversed as arbitrary and capricious, independent of whether there is substantial evidence in the record, if its decision constitutes a clear abuse of discretion. *See Dyer v. Tex. Comm'n on Envtl. Quality*, 646 S.W.3d 498, 505 (Tex. 2022) (citing Tex. Gov't Code § 2001.174). An agency's decision is arbitrary if the agency: (1) failed to consider a factor the Legislature directs it to consider; (2) considers an irrelevant factor; or (3) weighs only relevant factors that the Legislature directs it to consider but still reaches a completely unreasonable result. *Pub. Util. Comm'n of Tex. v. Tex. Indus. Energy Consumers*, 620 S.W.3d 418, 427 (Tex. 2021).

In the trial court Appellees asserted the Commission's decision was arbitrary and capricious for three reasons: (1) Article III prohibits resolving the merits at the standing phase of a proceeding; (2) the Commission applied an arbitrary, uncodified "one mile test" for determining whether Appellees were affected persons; and (3) the Commission applied the wrong legal standard for what constitutes a particularized interest.

1. The Legislature Granted the Commission Discretion to Resolve Disputed Facts when Determining Affected-Person Status.

Appellees contend that they are entitled to affected-person status under Article III federal standing requirements if they raise a fact issue on whether they suffered a particularized injury. In other words, Appellees argue the Commission has no discretion to resolve disputed issues of fact when reviewing whether to grant party status to affected persons.

[15, 16] The Commission's discretion to grant or deny permit applications arises from a legislative grant of exclusive jurisdiction over specific permits for regulated activities—here the exclusive jurisdiction to issue air quality permits. *See* Tex. Health & Safety Code § 382.051. The Water Code clearly outlines the statutory procedure the Commission must follow in determining affected-person status, and the Commission has no authority to depart from this procedure. Tex. Water Code §§ 5.115, 5.556. The statute confers discretion on the Commission to weigh and resolve disputed facts in determining the need for a contested case hearing. *City of Waco*, 413 S.W.3d at 424–25.

The Commission therefore did not abuse its discretion in reviewing competing evidence and resolving fact issues in its determination of whether Appellees were affected persons under the statute.

2. The Administrative Record Does Not Support Application of an Arbitrary "One Mile Test."

The Commission is required to consider distance restrictions on the affected interest asserted by a person seeking party status. 30 Tex. Admin. Code § 55.203(c)(2) (listing distance restrictions as a factor to

be considered). In addition to distance restrictions, the Commission is required to consider whether a reasonable relationship exists between the interest claimed and the activity regulated; the likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person; and the likely impact of the regulated activity on use of the impacted natural resource by the person. *Id.* § 55.203(c).

[17] Appellees presented no evidence, however, that the Commission considered an arbitrary one-mile test rather than the factors required by the Administrative Code. In its brief in the trial court, Max Midstream included a statement from one of the TCEQ commissioners in which the commissioner specifically expressed that "the Commission has not created a one (1) mile standard to determine affectedness." [CR 165] Appellees did not present evidence to the contrary. The Administrative Record reflects that the Commission considered the appropriate factors required by its regulations and did not apply those factors in an arbitrary and capricious manner. *See Pub. Util. Comm'n of Tex.*, 620 S.W.3d at 430 (agency's decision was not arbitrary and capricious because it considered appropriate factors in setting a standard and "adhered to the standard it set forth.").

In Fraiser's affidavit, she noted that applicants for air permit applications use air dispersion modeling to predict concentrations of pollutants from proposed facilities at certain receptors where the Commission has identified as locations "where the public could be exposed to an air contaminant in the ambient air." Fraiser recognized that the concentration of a pollutant to which a member of the public is potentially exposed is critical to determining whether adverse health and welfare effects will occur. In a detailed analysis applying her expertise in air dispersion models and the conservative standards set by both state and federal governments, Fraiser determined that "[i]mpacts on public health and welfare further than 1 mile would be indiscernible." Fraiser went on to conclude that even the locations visited by Wilson that may be within one mile of the proposed facility would not present a discernible impact on Wilson's health because of the infrequency and short duration of Wilson's visits to the Formosa plastics facilities. In reviewing Fraiser's analysis of the proposed emissions, the record does not reflect that the Commission based its decision to deny affected person status on an arbitrary one-mile test.

3. The Commission Applied the Proper Standard in Determining Whether Appellees Asserted Justiciable Interests in Their Recreational and Aesthetic Interests.

Citing cases from federal circuit courts applying federal law, Appellees argue they were not required to establish that their environmental and aesthetic concerns differ from the concerns experienced by the general public. However, the remedy sought by Appellees—a contested case hearing—is a remedy created and defined by state statute. *See* Tex. Health & Safety Code § 382.056(n) (incorporating Tex. Water Code §§ 5.556, 5.557). A "personal justiciable interest" not common to members of the "general public" is the cornerstone of section 5.115's affected-person definition. *See* Tex. Water Code § 5.115(a). The Commission acted within its legislatively granted authority when determining that Appellees were not affected persons entitled to a hearing.

[18] The federal cases cited by Appellees involved federal citizen actions and

federal rulemaking challenges.[4] By applying the standard in the Texas Clean Air Act, the Commission did not act arbitrarily and capriciously and did not abuse its discretion in determining that Appellees lacked affected-person status that would entitle them to a contested case hearing.

Substantial evidence supports the Commission's determination that Appellees were not entitled to a contested case hearing. We further conclude the Commission did not abuse its discretion in denying the requests for a contested case hearing and did not act arbitrarily and capriciously. We therefore sustain the Commission and Max Midstream's first issues on appeal.

D. This Court Lacks Jurisdiction to Consider Appellees' Challenge to the Merits of the Air Permit.

In their second issue, TCEQ and Max Midstream allege that this Court lacks jurisdiction to consider a challenge to the merits of the Commission's issuance of the permit. We agree.

[19, 20] In the trial court, Appellees asserted they had a right to judicial review of the Commission's final order granting the permit to Max Midstream. [CR 305] The Commission filed a plea to the jurisdiction in which it asserted that the trial court lacked jurisdiction to consider Appellees' challenge on the merits because (1) Appellees lacked standing not having been admitted as affected or aggrieved parties; and (2) since Appellees were not parties, they did not adjudicate the permit's merits, and failed to exhaust administrative remedies required for judicial review. [CR 127-29] The trial court did not reach this issue because it determined Appellees were entitled to a contested case hearing. Even though the trial court did not reach the issue, we address this issue because it impacts subject matter jurisdiction. *See Rattray v. City of Brownsville*, 662 S.W.3d 860, 868 (Tex. 2023). Because this is a jurisdictional question, we review it de novo. *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 222 (Tex. 2002).

[21] The APA provides that "[a] person who has exhausted all administrative remedies available within a state agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter." Tex. Gov't Code § 2001.171. The APA creates a right to judicial review for those who satisfy the section's threshold requirements, but the statute does not create an inherent right to judicial review. *Texas Dep't of Protective & Regul. Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 172; 196 (Tex. 2004). TCEQ and Max Midstream assert in this case that exhaustion of remedies is required and Appellees failed to exhaust their administrative remedies.

[22–25] In addressing whether exhaustion of administrative remedies is required, we begin with the presumption that courts have jurisdiction to resolve legal disputes. *CPS Energy v. Elec. Reliability Council of Tex.*, 671 S.W.3d 605, 617 (Tex. 2023). A party may overcome that presumption by establishing that the Constitution or another law grants exclusive jurisdiction to another court or an administrative agency.

4. *See e.g., Sierra Club v. EPA,* 939 F.3d 649, 664 (5th Cir. 2019) (member of association met case-or-controversy requirement under the Federal Clean Air Act); *WildEarth Guardians v. EPA,* 759 F.3d 1064, 1067 (9th Cir. 2014) (challenge to Nevada's SIP under the Federal Clean Air Act); *Sierra Club v. Tenn. Valley Auth.,* 430 F.3d 1337, 1344 (11th Cir. 2005) (reviewing citizen standing under Federal Clean Air Act); *Nat'l Parks Conservation Ass'n v. Manson,* 414 F.3d 1, 6 (D.C. Cir. 2005) (federal citizen standing to challenge impact of plant on visibility).

Id. "A statute may grant an agency exclusive jurisdiction either expressly or by establishing a 'pervasive regulatory scheme' that impliedly 'indicates that the Legislature intended for the regulatory process to be the exclusive means of remedying the problem to which the regulation is addressed.' " *Id.* (quoting *Oncor Elec. Delivery Co. v. Chaparral Energy, LLC*, 546 S.W.3d 133, 138 (Tex. 2018)). A state agency has exclusive jurisdiction when the Legislature grants it sole authority to make an initial determination in "disputes that arise within the agency's regulatory arena." *Clint Indep. Sch. Dist. v. Marquez*, 487 S.W.3d 538, 544 (Tex. 2016).

[26, 27] To establish exclusive agency jurisdiction over a particular issue and thus require exhaustion of administrative remedies, there must be (1) an express or implied grant of exclusive jurisdiction, and (2) the issue must fall within that jurisdictional scope. *CPS Energy*, 671 S.W.3d at 617. If the agency has exclusive jurisdiction over a particular issue, a trial court lacks jurisdiction over a claim involving that issue until the claimant has exhausted all available administrative remedies. *Hensley v. State Comm'n on Judicial Conduct*, 692 S.W.3d 184, 194 (Tex. 2024).

The Commission has exclusive jurisdiction over air quality permits, such as the one issued to Max Midstream. Tex. Health & Safety Code § 382.051. The Legislature has also provided an exclusive administrative remedy by which parties can challenge the Commission's permitting decisions and the factual bases for them—the contested case hearing. Tex. Water Code § 5.556(a); *see* Tex. Health & Safety Code § 382.056(n) (providing for public hearing in accordance with Water Code procedures). The Legislature has not chosen to make contested case hearings available to the general public. To invoke this remedy, a party must be an "affected person" within the meaning of Water Code section 5.115. Tex. Water Code § 5.556(a).

[28] Because the Commission has exclusive original jurisdiction over this dispute and the Legislature has provided for the contested case hearing remedy, Appellees were required to fully participate in that hearing before seeking judicial review on the merits of Max Midstream's permit application. *See Thomas v. Long*, 207 S.W.3d 334, 340 (Tex. 2006) (concluding that when "an administrative body has exclusive jurisdiction to make the initial determination in a dispute, a party must exhaust all administrative remedies before seeking judicial review of the decision," so "[u]ntil the party has satisfied this exhaustion requirement, the trial court lacks subject matter jurisdiction."). Only a party that has exhausted all available administrative remedies may seek judicial review of an agency decision. *Tex. Water Comm'n v. Dellana*, 849 S.W.2d 808, 810 (Tex. 1993).

A statutory prerequisite to suit is jurisdictional. Tex. Gov't Code § 311.034. Admission as an affected person to participate in a contested case hearing is a jurisdictional prerequisite to judicial review of a Commission decision to grant an air permit. *See* Tex. Gov't Code § 2001.171; *Sierra Club & Pub. Citizen v. Tex. Comm'n on Envtl. Quality*, No. 03-14-00130-CV, 2016 WL 1304928, at *4 (Tex. App.—Austin Mar. 31, 2016, no pet.) (mem. op.).

Appellees contend that admission as affected persons and a contested case hearing are not prerequisites for judicial review for three reasons, which we address in turn.

1. Health and Safety Code Section 382.032 Does Not Provide an Independent Avenue for Judicial Review.

[29] Appellees first argue they have a statutory right to judicial review under Section 382.032(a) of the Health and Safety Code, which provides:

> A person affected by a ruling, order, decision, or other act of the commission or of the executive director, *if an appeal to the commission is not provided*, may appeal the action by filing a petition in a district court of Travis County.

Tex. Health & Safety Code § 382.032(a) (emphasis added).

Appellees argue that the Health and Safety Code, not the APA, is the appropriate avenue for judicial review of the air permit because it is more specific and "is not silent on judicial review." Citing *TXI Operations LP v. Tex. Comm'n on Envtl. Quality*, 665 S.W.3d 203, 211 (Tex. App.—Austin 2023, pet. denied), Appellees contend that Section 382.032 controls over the more general Water Code provision requiring a contested case hearing. Indeed, the Third Court of Appeals held that Section 382.032 controls over a more general Water Code provision, but that court also held that Section 382.032 only allows direct judicial review if an appeal to the commission is not provided. *Id.* at 209 (concluding that where an appeal is provided, a party affected by the decision must first appeal to the Commission "and only afterwards may seek judicial review of the Commission's order disposing of that appeal"). Section 382.032 does not provide an avenue for direct appeal of a permit by a party who did not participate in a contested case hearing. Consequently, participation in a contested case hearing is a prerequisite to judicial review because the Commission must have the first opportunity to hear and decide the merits through adjudication. *See Sierra Club*, 2016 WL 1304928, at *4 ("Because TCEQ has exclusive original jurisdiction over this dispute and the Legislature has provided for the contested case hearing remedy, appellants were required to fully participate in that hearing before seeking judicial review").

2. Appellees Did Not Exhaust All Administrative Remedies.

[30, 31] Appellees further contend they exhausted all available administrative remedies by filing a motion for rehearing. To the contrary, under the regulatory scheme created by the Legislature, participation in a contested case hearing on the merits of the proposed permit was a necessary step and is required for exhaustion of remedies. A motion for rehearing is one of the administrative remedies that, under the APA, must be exhausted before seeking judicial review, but it is not the only remedy. *See Mosley v. Tex. Health & Human Services Comm'n*, 593 S.W.3d 250, 260 (Tex. 2019). The plain language of the APA requires that a person seeking judicial review be "aggrieved by a final decision in a contested case." Tex. Gov't Code § 2001.171. Appellees were not admitted as affected persons and did not participate in a contested case hearing. Therefore, not having been aggrieved by a final decision in a contested case, Appellees did not exhaust administrative remedies by filing a motion for rehearing.

3. TCEQ's Statements to the EPA in a Rulemaking Proceeding Do Not Dispense with the Requirement of Exhaustion of Remedies.

[32] Appellees contend that requiring exhaustion of remedies in this case contradicts prior Commission statements made when adopting amendments to the agency's rules in 2015. *See* 40 Tex. Reg. 9651, 9654 (Dec. 25, 2015). Appellees rely on a portion of the Commission's statements in which the TCEQ responded to the EPA's comment on whether participation in a contested case hearing was a prerequisite for review. TCEQ responded, "Requesting

or participating in a [contested case hearing] is not a prerequisite to judicial review in Texas, provided the person exhausted their administrative remedies prior to requesting judicial review." *Id.* The Commission responds that Appellees took this sentence out of context and that the scope of judicial review varies with the type of action under review.

As an example, the Commission rules provide a limited opportunity to challenge the differences between a draft permit and one finally approved under the general provisions governing requests for reconsideration or a contested case hearing. *See* 30 Tex. Admin. Code § 55.201(h). Other examples include proceedings that do not provide a right to a contested case hearing such as permits for certain controls for concrete batch plants. *See* Tex. Health & Safety Code § 382.05199. Other permit actions under the Water Code and Health and Safety Code do not require participation in a contested case hearing because one is not available in some instances. *See generally* Tex. Water Code § 5.351; Tex. Health & Safety Code § 382.032. The Commission's statements in the rule preamble demonstrate that judicial review is available without a contested case hearing in some scenarios. But when a contested case hearing is available, a person must participate in a contested case hearing to exhaust available administrative remedies on the contested issues. This statement is consistent with Health and Safety Code Section 382.032 as reviewed above and Supreme Court authority. *See Tex. Nat. Res. Conservation Comm'n v. Sierra Club*, 70 S.W.3d 809, 812 (Tex. 2002) (reasoning that when the agency's enabling legislation and the APA do not conflict, the court gives effect to both).

The Third Court of Appeals's opinion in *Texas Commissioner of Education v. Solis* is not to the contrary. 562 S.W.3d 591, 597–98, 602 (Tex. App.—Austin 2018, pet. denied). In that case, the Third Court of Appeals held that a teacher did not need to complete the local grievance procedure with the school district before she could appeal to the Commissioner of Education. *Id.* at 602. This was because the relevant statute requiring exhaustion of remedies did not limit appeals to review of the school district board of trustees' decisions that were made pursuant to a grievance proceeding, but simply required the Commissioner to base his decision on the record as it existed at the district level. *Solis* acknowledged and reaffirmed the longstanding requirement of exhaustion of administrative remedies at the agency level before seeking judicial review. *Id.* at 597–98. But here, Appellees seek to bypass the requirement that they be admitted as affected persons entitled to challenge the issuance of the permit before proceeding to judicial review of the permit. *Solis* does not support Appellees' contention.

Statutory prerequisites to suit against a governmental entity are jurisdictional. Tex. Gov't Code § 311.034. Participation in a contested case hearing is a jurisdictional prerequisite to judicial review of a Commission decision to grant an air permit. *See* Tex. Gov't Code § 2001.171; *Sierra Club*, 2016 WL 1304928, at *4 (court lacks jurisdiction when challengers do not exhaust all of their administrative remedies prior to judicial review). Appellees could only participate in a contested case hearing if they met the threshold requirement of establishing that they were affected persons under the statute. *See* Tex. Water Code § 5.556(c). Because Appellees did not meet that threshold, even under the Health and Safety Code provision on which they rely, they were required to participate in a contested case hearing in order to exhaust their administrative remedies. *See* Tex. Health & Safety Code § 382.032(a) (giving appeal rights only to

"person affected" by ruling or decision). We therefore lack jurisdiction to review whether the Commission erred in issuing a permit to Max Midstream. We sustain the Commission and Max Midstream's second issues on appeal.

III. Conclusion

The trial court erred by substituting its judgment in place of the Commission's decision, which was supported by substantial evidence. We lack jurisdiction to review the merits of issuance of the permit. We therefore reverse the judgment of the trial court and render judgment that the order of the Commission is affirmed.