

No. 25-0564

In the Supreme Court of Texas

SAN ANTONIO BAY ESTUARINE WATERKEEPER, TEXAS
CAMPAIGN FOR THE ENVIRONMENT, AND S. DIANE WILSON,
Petitioners,

v.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY AND MAX
MIDSTREAM, LLC,
Respondents.

On Petition for Review from the Fifteenth Court of Appeals
No. 15-24-00036-CV

**BRIEF OF AMICUS CURIAE FERMI, INC. IN SUPPORT OF
NEITHER PARTY**

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GLOSSARY OF SHORTHAND REFERENCES

ALJ	Administrative Law Judge
APA	Administrative Procedure Act
Applicant	Max Midstream, LLC
CCH or Hearing	Contested Case Hearing
Commission	The Three Commissioners of the Texas Commission on Environmental Quality
ED	Executive Director of the TCEQ (and her staff)
EPA	U.S. Environmental Protection Agency
Fermi	Fermi, Inc. d/b/a Fermi America
Max Midstream	Max Midstream, LLC
Petitioners	San Antonio Bay Estuarine Waterkeeper, Texas Campaign for the Environment, and S. Diane Wilson
Respondents	Texas Commission on Environmental Quality and Max Midstream, LLC
RTC	Response to Comments
TCAA	Texas Clean Air Act, Tex. Health & Safety Code § 382.001, et seq
TCEQ	Texas Commission on Environmental Quality
S.B. 709	Senate Bill 709, enacted in 2015
SOAH	State Office of Administrative Hearings
State	The State of Texas by and through the Office of the Attorney General as counsel for the Texas Commission on Environmental Quality

INTEREST OF AMICUS CURIAE

Fermi America believes that our Nation is in an AI arms race powered by electricity, and that America’s innovators cannot wait for public power. Fermi is answering this national security imperative with Project Matador, the world’s largest private HyperGrid campus, a 5,800-acre, 17-gigawatt project to power 18 million square feet of AI data centers located in the Texas Panhandle. For Fermi and its hyperscaler tenants, speed and certainty are critical. But while Texas may “move at the speed of business,” it has been impeded by an unnecessarily Byzantine environmental permitting process.

Environmental protection is intrinsic to Project Matador, which integrates clean natural gas-fueled generation with zero-emissions nuclear energy, solar power, and battery energy storage systems. Fermi is committed to meeting stringent State and federal emission limitations and air quality standards. But more administrative process is not synonymous with more environmental protection, and the procedural redundancies and do-loops of Texas’s permitting practices can be counter-productive.

Fermi is just starting the yet-unfinished journey on which the parties to this case embarked three years ago: In February, the Texas Commission on Environmental Quality issued an air permit authorizing construction of the first approximately six gigawatts of generation for Fermi’s staged development of Project Matador. TCEQ’s decision to issue that permit is the subject of petitions for review now pending in Travis County District Court. An application to authorize an additional five gigawatts of generation capacity is now pending with TCEQ. It is Fermi’s hope—for the sake of all involved—that its journey will require far less time and trouble than has Max Midstream’s. That can be accomplished with a clearer map, which this case and this Court have the opportunity to draw.

Fermi offers here some insights gained from its counsel’s four decades of experience navigating the TCEQ air permitting process. The brief that follows explains how the Court can and should construe existing law to maintain a very meaningful role for interested citizens to participate in and inform TCEQ’s decision-making and for the courts to police that decision-making, while providing relative speed and certainty to those subject to TCEQ permitting requirements.

SUMMARY OF ARGUMENT

The Texas Legislature, Texas courts, and Texas Commission on Environmental Quality have tripped over each other for decades in their efforts to define the processes that govern issuance of environmental permits. This case presents an opportunity to align all three branches on such critical questions as the use of adjudicatory hearings (contested cases) to resolve disputed facts before TCEQ, the hurdles to obtaining judicial review of permitting decisions, and the standard of review of TCEQ decisions in the cases able to clear those hurdles into the courthouse. Although the Fifteenth Court of Appeals got much right, its opinion does not fully meet the moment.¹

What the Court of Appeals got (mostly) right was (1) its conclusion that the decision to use the contested case process to resolve disputed facts—or not—is discretionary with the Commission, and (2) that the “substantial evidence” standard governs judicial review of the

¹ The Fifteenth Court of Appeals reversed the District Court and rendered judgment affirming TCEQ’s order. *Texas Comm’n on Env’tl. Quality v. San Antonio Bay Estuarine Waterkeeper*, 714 S.W.3d 270 (Tex. App.—15th Dist. 2025, pet. filed) (hereinafter “*Waterkeeper*”).

Commission's decision.² The Fifteenth Court's errors lie with its conclusions (1) that the Commission's decision to use or not use the contested case tool to make its decision on the merits is severable from its decision on the merits, and (2) that the requirements to obtain a referral from the Commission for a contested case hearing are the same as to obtain judicial review, such that (3) a permit opponent whose request for a contested case is denied also is denied judicial review of the Commission's simultaneous decision to issue the permit.³

This Court has not addressed the contested case process in the context of environmental permitting since the 84th Texas Legislature

² As the Court is aware, TCEQ is a nearly 3,000-employee agency charged with protecting the environment by, among much else, administering permit programs through which proposed releases to the air or water or soil are assessed against technical requirements designed to minimize adverse environmental effects and to confirm the safety of the proposed releases. *See, e.g.*, TEX. WATER CODE § 5.013 (granting the Commission jurisdiction over various air, water, and waste programs) and TEX. HEALTH & SAFETY CODE § 382.011 (granting the Commission authority to administer the Texas Clean Air Act). The day-to-day management of TCEQ's many delegated responsibilities rests with its Executive Director (effectively the CEO of TCEQ), who reports to a full-time three-member Commission appointed by the Governor (effectively TCEQ's board of directors). The governing statutes and internal TCEQ rules and delegations assign most responsibilities for permitting to the Executive Director and her staff (colloquially, "the ED"), but ultimate responsibility for TCEQ's decisions rests with the Commission. Throughout this Brief, we refer to the overall State agency as TCEQ, the Executive Director and staff as the ED, and the three appointed Commissioners as the Commission.

³ Because this case arises out of TCEQ's air permitting function, we focus on the law governing that program, but the law applied in this case is generally common to the other permitting programs administered by TCEQ.

enacted Senate Bill 709 in 2015 (“S.B. 709”), even though—as we shall see—that law significantly changed the answers to the questions presented.⁴ But old habits die hard, and so the parties to this case come to this Court in a familiar but now outdated posture. Neither side is fully correct, because both still proceed from the mistaken premise that a permit challenge presents a quasi-judicial dispute between private parties, with that dispute to be adjudicated by TCEQ with the assistance of the State Office of Administrative Hearings (“SOAH”), with participation in that dispute limited to those with “Article III standing.”⁵

⁴ See Act of May 23, 2015, 84th Leg., R.S., ch. 116, 2015 Tex. Gen. Laws 1117 (S.B. 709). The Court’s sole opinion on review of a TCEQ permit post-S.B. 709 addressed the substantive merits of a wastewater discharge permit after the Commission had granted a contested case hearing, with no need to address the process by which that decision had been made or reviewed. See *Save Our Springs All., Inc. v. Tex. Comm’n on Env’tl. Quality*, 713 S.W.3d 308 (Tex. 2025) (finding TCEQ’s technical and regulatory determinations to have been supported by substantial evidence). That opinion does not address the Commission’s authority to resolve disputed fact issues, its discretion in deploying the contested case tool, exhaustion of administrative remedies, or the standard of review *absent* a contested case. Those subjects are squarely before the Court in this appeal.

⁵ Per the opinion below, “[a]ll parties agree that the Commission’s affected person regulations embody federal Article III standing requirements.” *Waterkeeper* at 282. Amicus notes that Article III applies, at least literally, only to cases in federal court. *Texas Ass’n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993) (“Because standing is a constitutional prerequisite to maintaining a suit under both federal and Texas law, we look to the more extensive jurisprudential experience of the federal courts on this subject for any guidance it may yield.”). Amicus also notes that some Texas State court opinions, including the one for which review is sought here, disclaim perfect identity between Article III standing, per se, and the standing needed to obtain a contested case at TCEQ. *Waterkeeper* at 288-89 (disclaiming

This leaves them fighting over the answer to the wrong question. What should be at issue is not whether substantial evidence supported the Commission's subsidiary decision to decline referral to SOAH, but whether the administrative record generated by TCEQ's Executive Director (the "ED") and adopted by the Commission provided substantial evidence to support granting Max Midstream its permit.

Petitioner-opponents understand the Commission's permitting function as resolving a dispute about private rights for which a quasi-judicial contested case is indispensable, and universally available upon request to any person who would have Article III standing to challenge the permitting decision in court. They argue that the Commission lacks the discretion to resolve disputed issues of fact except through a contested case, such that a requester's assertions must be taken as given for purposes of determining whether their interests create a "right" to a contested case. Further, according to Petitioners, substantial evidence review of the Commission's ultimate order is inappropriate absent

relevance of federal court Clean Air Act cases applying Article III standing). That said, "Article III" has become a short-hand to describe the multi-part consideration of how a requestor may be "affected" by the authorization of air emissions from a proposed project (injury not common to general public, traceability, and redressability). For ease of discussion and except as otherwise required for clarity, use of that shorthand is preserved in this brief.

formally stated, comprehensive findings of fact and conclusions of law. Petitioners also maintain that the Commission's denial of a contested case request and motion for rehearing of that denial exhaust administrative remedies, such that judicial review is available both for the contested case denial and for permit issuance.

Respondents (the Applicant and TCEQ) agree with Petitioners that a permit opponent is entitled to a contested case hearing when the Commission finds that the requestor demonstrates "affectedness" according to Article III standing principles. Contra Petitioners, they argue that the "affectedness" determination and resolution of any fact issue related to it is within the Commission's discretion—with or without a contested case hearing. Respondents maintain that permit opponents have a right to judicial review of the Commission's denial of their hearing requests, but that the Commission's decision to issue a permit is beyond judicial review unless the request for a hearing is *granted*. One result of Respondents' construction is that judicial review becomes focused on the process by which the Commission reached its decision, rather than on its ultimate merits. Respondents' paradigm also risks multiple trips to the courthouse, should a reviewing court disagree with the Commission's

answer to the amorphous question of what amount of projected exposure turns a local protestant from an “affected person” into the “general public.” A final result, which causes Petitioners understandable consternation, is that the Commission controls not only the occurrence of any contested case, but also the judicial reviewability of its own permitting decisions.

Amicus Fermi instead understands environmental permitting as an executive function that the Legislature entrusted to TCEQ, which is tasked to issue permits that meet legislatively established standards that define the public good. Rather than adjudicating private rights (*e.g.*, proper well spacing among competing oil and gas producers), the Legislature directs TCEQ to apply a complex regulatory regime to protect equally every member of the public. Because disposition of an air permit application is not an adjudication of competing private rights, no reason of administrative or constitutional law compels a contested case as the mechanism for making permit decisions. Fermi maintains that current law instead gives the Commission complete discretion to decide when an adjudicatory hearing would help it resolve factual disputes arising in its consideration of contested permit applications. The possibility,

traceability, and redressability of injury to a requestor are now just a part of the Commission's consideration in deciding whether its ultimate decision on a permit application warrants the time and expense of a contested case hearing. The Commission's decision to issue a permit is then judged not on whether it should first have sent the matter to SOAH, but on whether the administrative record—adjudicated at SOAH or not—provides substantial evidence to support that decision.

It is important to bear in mind that almost all of TCEQ's work and decision-making is undertaken in the first and usually final instance by the ED (through her staff in TCEQ's Air Permits Division). The ED is charged by law and by express delegation from the Commission with reviewing each application, ensuring it meets technical requirements, soliciting public input, evaluating that input in a written response to comments ("RTC"), drafting the permit, and issuing it. The Commission becomes involved right before final issuance only if a concerned citizen has requested (1) reconsideration of the ED's decision as reflected in the administrative record brought to the Commission and/or (2) a contested case to test or expand that record. If no such requests are pending, the ED issues the permit.

Contested applications, including the application and the administrative record, are presented to the Commission at one of its twice-monthly “agenda meetings” to decide whether to issue the permit. Should the requests for hearing and/or reconsideration persuade the Commission that there is some short-coming in the ED decision, it can (1) grant reconsideration by itself amending the permit and the ED’s RTC or by remanding to the ED for that purpose, or (2) conclude that its decision would benefit from adjudication of one or more factual disputes and send those to SOAH for a recommended resolution (proposal for decision).⁶ If the Commissioners are not persuaded by either a request for reconsideration or for a contested case hearing that there is potential error in the ED decision, they issue an order that adopts the ED’s RTC, denies reconsideration and a contested case hearing, approves the application, and issues the permit.⁷

⁶ The Appendix provides a flow chart to illustrate TCEQ’s permitting scheme and the administrative remedies available to permit protestants. Although similar-sounding and therefore potentially confusing, such mechanisms as “motions to overturn,” “requests for reconsideration,” “requests for hearing,” and “motions for rehearing” are quite distinct, each serving different functions within the TCEQ permit process.

⁷ The primacy of the ED’s evaluation of the application and permit terms, even when the Commission decides to send it to SOAH, is confirmed by the law’s presumption that the ED decision’s is correct, shifting the burden to the protestant to rebut that presumption. *See* TEX. GOV’T CODE § 2003.047(i-1).

Anyone who timely files comments may seek Commission review of an ED decision by request for reconsideration. But the Legislature limited the availability of a contested case to those with potentially meritorious challenges to the sufficiency of the administrative record to support the ED decision *and* who show to the Commission’s satisfaction that they would be personally affected by the errors they allege. Either remedy—reconsideration or referral to SOAH—requires the opposition to convince the Commission of potential error in the ED’s decision.

Finally, and departing from the opinion below, Fermi reads the Texas Clean Air Act (“TCAA”) to allow for judicial review of permit issuance regardless of the Commission’s decision to deny a request for a contested case, subject only to a court’s usual jurisdictional limitations including standing and exhaustion of *available* remedies. Where, as here, the Commission expressly denies a request for one, participation in a contested case could hardly be described as “available.” What is available—a remedy Petitioners failed to exhaust in this case—is to request reconsideration, a remedy available to *any person* to ask the Commission to correct asserted errors in the ED’s decision.

Accordingly, Amicus Fermi responds to the issues as framed by Petitioners as follows:

- The Commission must resolve disputed issues of fact when issuing an air permit and, relatedly, it has complete discretion to choose whether a contested case hearing would be useful in deciding its merits;
- The deferential substantial evidence standard is the appropriate one for review of the Commission's issuance of an air permit, regardless of the occurrence, *vel non*, of any contested case hearing or the inclusion, *vel non*, of enumerated findings of fact in the Commission's final order; and
- Participation in a contested case is not required to exhaust administrative remedies. Those whose *request* for a hearing on an air permit is denied may seek judicial review under Health & Safety Code § 382.032(a) so long as they have standing (as determined by the court) and have exhausted all other available administrative remedies, which include the filing of a request for reconsideration of the ED's decision and then a motion for rehearing of the Commission's decision to issue the permit.

Per Fermi’s response to the last issue, the Petitioners here—like any seeking judicial review—were obligated to file both a contested case request and a request for reconsideration in order to have exhausted administrative remedies. The court below, in accordance with the case presented to them by the parties, focused only and erroneously on the former and ignored the latter, but nonetheless came to the correct ultimate conclusion: Petitioners’ claims are without jurisdiction for failure to exhaust administrative remedies.

BACKGROUND

I. THE ORIGIN OF THE CONTESTED CASE.

Texas's environmental permitting programs emerged in the 1970s, when the administrative state was far less developed than it has become. Before that decade, the Legislature had created administrative agencies primarily to take pressure off the courts, delegating to such agencies as the Railroad Commission the task of resolving disputes about complex private and pecuniary rights created or controlled by statute, such as, for example, spacing oil wells or assigning common carrier rights to freight routes. *See, e.g., Trapp v. Shell Oil Co.*, 198 S.W.2d 424 (Tex. 1946) (challenging agency order granting drilling permit); *Alamo Express, Inc. v. Railroad Comm'n*, 407 S.W.2d 479 (Tex. 1966) (challenging agency order authorizing competitor's use of route). Accordingly, and as reflected in the Administrative Procedure and Texas Register Act that emerged in the mid-1970s, Texas agency decision-making was tantamount to adjudication among competing private claims, with the law written to support quasi-judicial decision-making. This familiar tool being the only one in the shed, the Legislature applied it to the nascent

function of environmental permitting as it wrote the environmental laws of the 1970s, largely to implement emerging federal law mandates.⁸

And so the Texas Legislature made contested case hearings available to “affected persons” who wished to be heard on the agency’s environmental permitting decisions, even though contested cases are not required by the federal laws the State implements. For decades, TCEQ (and its predecessor agencies) would grant a hearing if a requestor residing near a project simply asserted vague concerns about air pollution.

At the hearing, the applicant would be required to re-prove to the satisfaction of an administrative law judge (“ALJ”) that the application fulfilled all applicable technical and regulatory requirements. This practice was at best redundant to the many preceding months of review, analysis, and public process undertaken by the ED staff, specially qualified and statutorily directed to scrutinize permit applications. At

⁸ See Eric Allmon & David Frederick, *A Defense of the Contested Case Process for Texas Commission on Environmental Quality Permit Decisions*, 44 TEX. ENVTL. L.J. 175 (2014). This wide-ranging discussion of the contested case in Texas, authored by members of Petitioners’ law firm in this case, not only provides some pre-history, but also illustrates the project-opponent community’s strong commitment in favor of a near-universal right to a contested case. But the conclusions the authors draw from Texas administrative law history, even if ever correct, no longer remain so, as this article was published before S.B. 709 in 2015.

worst, the practice re-directed decision-making to ALJs less well versed in the requirements for permit issuance than TCEQ's expert staff.⁹

II. THE LEGISLATURE HAS, OVER TIME, IMPOSED RESTRICTIONS ON THE USE AND AVAILABILITY OF THE CONTESTED CASE IN ENVIRONMENTAL PERMITTING.

Over the last thirty years, the Legislature has undertaken amendments aimed to restrict this practice of convening a contested case merely upon request of anyone claiming a concern about air pollution. This retreat from a virtual “right” to a contested case can be attributed to many factors, including:

- Increases in the number and types of activities requiring a permit, stressing the Agency's capacity to timely issue them;
- Growing recognition that the contested case process is not federally mandated;¹⁰

⁹ This was all the more true after contested case hearings were transferred from hearing examiners at the Texas Natural Resource Conservation Commission (TCEQ's predecessor agency) to ALJs at SOAH. *See* Act of May 27, 1995, 74th Leg., R.S., ch. 106, § 1, 1995 Tex. Gen. Laws 898.

¹⁰ Indeed, Texas's contested case process *frustrates* one obligation imposed by the federal Clean Air Act, which is to issue permits within one year of declaring an application administratively complete. *See* Clean Air Act § 165(c), 42 U.S.C. § 7475(c). Significant permitting actions typically take about a year from the ED's determination that an application is administratively complete to a final Commission decision—even without a contested case hearing, which adds another year, give or take.

- Increasing sophistication, formalization, length, and documentation of reviews by the assigned ED staff, which reduces the need for Commission-level (or SOAH) oversight of the permitting process;
- The addition of public participation processes other than contested case opportunities;
- Abuses of the contested case process to delay projects or leverage concessions from project developers;
- Court of Appeals decisions compelling hearings in cases in which the Commission tried to demur; and
- A recognition that the contested case process rarely yields any change from the result that would have obtained without one.

The primary statutory changes occurred in 1995, 1999, and 2015:

- In 1995, Texas's 74th Legislature enacted S.B. 1546 to provide clarity and very modest restrictions on what had been a functional right to a contested case. *See* Act of Jun. 16, 1995, 74th Leg., R.S., ch. 882, 1995 Tex. Gen. Laws 4380 (S.B. 1546). The Bill provided a statutory definition for an “affected person,” reaffirming that (1) the requestor must have personal justiciable interest not common with

the general public; (2) the request must be reasonable; and (3) the request must be supported by competent evidence. *Id.* But these changes did little to prevent the granting of a hearing basically upon request.¹¹

- In 1999, Texas’s 76th Legislature enacted H.B. 801, which removed requirements adopted in 1995 that the hearing request be reasonable and supported by competent evidence and added a requirement that the request be based on timely comments. *See* Act of Jun. 19, 1999, 76th Leg., R.S., ch. 1350, 1999 Tex. Gen. Laws 4570 (H.B. 801). It also empowered the Commission to limit the issues referred to SOAH and the time available for SOAH to complete its work. *Id.* Notably, the same legislation added and enhanced other procedural requirements, including multiple public notices, extended comment periods, public meetings, and the

¹¹ *See, e.g., Heat Energy Advanced Tech., Inc. v. W. Dallas Coal. For Envtl. Justice*, 962 S.W.2d 288 (Tex. App.—Austin 1998, pet. denied) (reversing denial of a hearing request challenging air permit renewal, holding that a hearing request premised solely on the protestant’s assertion that he experienced odors from the facility sufficed to make him an “affected person”); *United Copper Indus. v. Grissom*, 17 S.W.3d 797 (Tex. App.—Austin 2000, pet. dism’d) (remanding Commission denial of a hearing request based on requestor’s two-mile distance from proposed site and his failure to have raised any relevant issues or provided any evidence in support of his request, concluding that the Commission needed to provide the protestant with a hearing on standing to decide whether he should be entitled to a hearing on the merits).

Executive Director's obligation to analyze and respond to comments in writing, expressly signaling an intent to rely on those procedures rather than the contested case as the primary means of gathering and processing information from the public. *See id.* The Bill also added language to indicate that the granting of a contested case is not compulsory in any circumstance, instead describing the circumstances under which the Commission is *prohibited* from granting a hearing request. *See* TEX. WATER CODE § 5.556(c) (prohibiting a contested case referral unless made by an affected person). While narrowing access to a contested case, the Legislature provided a new method for soliciting Commission involvement in the ED's permitting decisions, namely the request for reconsideration. *Id.* § 5.556(a).

- In 2015, the 84th Texas Legislature enacted S.B. 709 to create the permit processing framework as it stands today. *See* Act of May 23, 2015, 84th Leg., R.S., ch. 116, 2015 Tex. Gen. Laws 1117 (S.B. 709).

Among else, the Legislature:

- (1) Eliminated the need for an applicant to re-prove the entirety of its application upon referral to SOAH. Senate Bill

709 did so by creating the presumption that the administrative record generated by the ED's review suffices to establish the merits of the application, with the burden shifted to the permit's opponent to rebut that prima facie case with evidence of its own, *see* TEX. GOV'T CODE § 2003.047(i-1)-(i-3); and

(2) Expressly allowed the Commission's decision on whether to grant a contested case, and on what issues, to be fully informed by the record available at the time of that decision.

See TEX. WATER CODE §§ 5.115(a-1) & 5.556.

The Commission has always been charged by statute with the responsibility to serve as final judge of any contested permit. Since 2015, it now gets to decide whether the ED's record leaves enough doubt to warrant dispelling that doubt through a contested case hearing.

III. SENATE BILL 709 TRANSFORMS THE USE OF THE CONTESTED CASE.

It is perhaps unfortunate that the Legislature chose to undertake its transformation of the role of the contested case at TCEQ largely by amendments to the provisions describing an "affected person," causing

undue focus on the identity and circumstances of the requestor rather than the nature or merits of the request.¹² This also has conflated (1) what is needed to obtain a contested case (which is simply a procedural mechanism available to TCEQ in support of the executive function of deciding whether an air permit application meets the requirements for its issuance) with (2) standing to obtain judicial review of that executive decision (which is subject to Article III considerations within the purview of the judicial branch). But the law nonetheless is now clear that even the closest of neighbors are not “affected persons” unless they establish to the Commission’s satisfaction that the draft permit may suffer a legal defect or is otherwise lacking sufficient evidentiary support such that, if not cured, could allow emissions that will harm them in contravention of the TCAA. Conversely, it also is true that the Commission can use the contested case tool even in the absence of an “affected person” asking for one.¹³

¹² The Legislature’s decision to make this fundamental change through amendments to the definition of “affected person,” although confusing, is understandable, given that the governing statutes had long used “affectedness” as the filter through which contested case requests must pass.

¹³ See 30 T.A.C. § 55.211(d)(1) (allowing for a contested case if deemed in the public interest). Even then, any prospective participants still must prove to the ALJ that

In short, once treated as a right, the contested case instead now serves as an option for the Commission to adjudicate disputes concerning the sufficiency of the record generated by the ED's permit review, under circumstances in which the Commission is persuaded that an "affected person" may be injured by a mistaken determination of the ED or that a hearing would otherwise be in the public interest.

Not by accident, the Legislature narrowed the opportunity for a contested case¹⁴ as it added other public participation processes.¹⁵ As of 1999, those processes include: (1) obligations to inform the public of the pendency of the application, including in second languages, 30 T.A.C. §

they are indeed "affected persons." *See* 30 T.A.C. § 80.109(b)(5) (regarding the designation of parties in contested cases).

¹⁴ In addition to procedural changes that narrow the availability of contested cases for any air permit, the Legislature flatly prohibited contested cases for several types of air permits, including those lacking a meaningful exercise of TCEQ discretion or the development of project-specific permit terms, such as "permits by rule." *See* 30 T.A.C. § 55.201(i) (listing permit types for which a contested case hearing is not available).

¹⁵ *See, e.g.,* House Comm. On Env'tl. Regulation, Bill Analysis, Tex. H.B. 801, 76th Leg., R.S. (enrolled, Jul. 26, 1999) ("In 1975, the Legislature passed the Administrative Procedures and Texas Register Act, which established the current process for contested case hearings. This process pre-dates many of the refinements to administrative decision-making and public involvement that have occurred both at the federal level and in other states. H.B. 801 modifies the current permitting process for certain environmental permit programs administered by the commission for which public notice and opportunity for hearing are currently required. This bill requires early public notice, encourages early public involvement, and requires substantive public comment and agency response.").

39.405(f); (2) multiple and extended opportunities to submit written comments (including evidence to support them), 30 T.A.C. § 55.152; (3) public meetings to share information about proposed projects with the community and for the public to express their views, 30 T.A.C. § 55.154; (4) publication of the ED's RTC, informing the public of the basis of TCEQ's proposed decision, 30 T.A.C. § 55.156; (5) notifications to elected officials, who can intercede on behalf of their constituents, 30 T.A.C. § 39.411; (6) obligatory notice to or consultations with federal officials, 30 T.A.C. § 39.413(7); (7) the opportunity to request Commission reconsideration of the ED's permitting decisions, 30 T.A.C. § 55.201; and (8) the opportunity for judicial review for those who believe they were inadequately heard during the foregoing administrative processes, 30 T.A.C. § 55.156. Even without a contested case process, Texas law would fully satisfy federal requirements and provide the public with meaningful opportunities to participate in each permit decision. *See Shrimpers and Fishermen of the RGV, et al. v. Texas Comm'n on Env'tl. Quality*, 968 F.3d

419, 422 (5th Cir. 2020) (“Texas exceeds these requirements by giving TCEQ the discretion to hold contested-case hearings before SOAH.”).¹⁶

¹⁶ Federal law requires only (1) the opportunity to file written comments, (2) a legislative-type “public hearing” (what Texas calls a public meeting), and (3) provision for judicial review. 42 U.S.C. § 7475(a)(2); 40 C.F.R. § 51.166(a)(5); 42 U.S.C. § 7661a(b)(6). Nowhere does that law, or any other, compel an evidentiary adjudication.

ARGUMENT

The Commission's role in permitting actions follows that of its Executive Director, whose disposition of permit applications is final unless challenged by a request for reconsideration or contested case hearing. The request for reconsideration is the public's opportunity to present to the Commission any claims of error or deficiency in the ED's decision, including her response to their comments (the "RTC"). If reconsideration requestors further believe they would be directly injured by the ED error(s) and that resolving the alleged error(s) would benefit from an adjudication of disputed factual issues, they can accompany their request for reconsideration with a request for contested case hearing.

The ultimate question presented to the Commission at its public sessions ("Agenda meetings") held twice monthly to consider challenged permits is whether it is satisfied with the ED's recommendation to grant those permits. The correct understanding of current law is that a contested case is an optional fact-finding tool available to the Commission, at its sole discretion, to evaluate the information submitted for and against a pending application. In deciding whether to refer an application for a contested case, the Commission necessarily must, and

as explicitly authorized by statute may, rely on evidence in the record to assess (and thereby resolve) the validity and import of factual issues raised by concerned citizens about the merits of the application and draft permit. If the Commission remains satisfied with the recommendations of its ED notwithstanding any evidence to the contrary submitted by project opponents, it denies any pending requests for reconsideration or for further fact-finding through contested case hearing and grants the permit. If the Commission instead cannot resolve the dispute based on the record presented, and its resolution “is relevant and material” to its decision, the Commission may refer the dispute to SOAH. TEX. WATER CODE § 5.556(d)(3).

Further, because permit issuance implements public policy that the Legislature has entrusted to the Commission’s exclusive jurisdiction, judicial review must be under the deferential “substantial evidence” standard to preserve separation of powers.

The Commission’s mandate with regard to any permit application, contested or not, is to weigh and resolve its merits as measured against the standards for its issuance, which are established by law to protect everyone equally. If a permit is supported by substantial evidence, no

person is adversely affected by a decision to grant it, at least in any way that can be redressed on judicial review. This is true whether or not the substantial evidence was generated with any quasi-adjudicatory process. The granting or denial of a hearing request is therefore immaterial to the validity of a Commission order issuing a permit.

Finally, judicial review requires exhaustion of all available administrative remedies. An aggrieved party can request both reconsideration of the ED decision and a contested case hearing, so both those keys must be turned to unlock the courthouse door. If the Commission denies a hearing request, that remedy is not available, and so an aggrieved party is not precluded from judicial review of the permit on that basis, any more than denial of reconsideration would preclude review. To conclude otherwise would, among else, allow the Commission to control judicial review of its own decisions.

I. IN DECIDING WHETHER TO APPROVE A PERMIT, THE COMMISSION MAY RESOLVE DISPUTED FACT ISSUES WITHOUT A CONTESTED CASE HEARING.

Fermi agrees with Respondents that the Commission has the discretion to resolve disputed fact issues, and that the court's role upon judicial review of a Commission order that denies a contested case and

grants a permit is to evaluate whether that exercise of discretion was supported by substantial evidence. However, Fermi disagrees with all parties, as well as the court below, that judicial review is limited to one sentence in the order, the one that denies the contested case request.¹⁷

There is but one Commission order under review: The order from which Petitioners appeal culminates the Commission's decision-making on Max Midstream's permit application, not just its decision to deny Petitioners' hearing requests. As developed below, the Commission's evaluation of the merits of the application and ED-recommended permit informs all aspects of that singular order, and it is that singular order that is the subject of judicial review. The Commission's disposition of the hearing requests and the permit application are inseparable. We start with an explanation of why the Commission cannot address the validity of a hearing request separately from the merits of the application.

¹⁷ The Court of Appeals confined its opinion to "whether in making that determination [to deny a contested case hearing] the Commission may weigh and resolve disputed facts." *Waterkeeper*, 714 S.W.3d at 282. Similarly, the State frames its position as follows: "Texas law and the Commission's regulations authorize it to consider all evidence when deciding whether to grant a contested case hearing." TCEQ Br. at 18. Max Midstream also isolates the disposition of the hearing requests from the disposition of the permit application. See App. Br at 11-12.

A. BECAUSE A REQUESTOR’S ACCESS TO A CONTESTED CASE HEARING IS CONSTRAINED BY THE COMMISSION’S AUTHORITY ON A PERMIT APPLICATION, THE COMMISSION CANNOT DETERMINE WHETHER A REQUESTOR IS AN AFFECTED PERSON WITHOUT RESOLVING DISPUTED FACTS ABOUT THE PERMIT APPLICATION.

The Legislature has granted TCEQ exclusive jurisdiction over the regulation of air quality, including issuance of air quality permits. *See generally* TEX. HEALTH & SAFETY CODE §§ 382.001, et seq. (the Texas Clean Air Act); § 382.051 (Permitting Authority of Commission); *Boerne to Bergheim Coal. for Clean Env’t v. Texas Comm’n on Env’tl. Quality*, 657 S.W.3d 382, 389 (Tex. App.—El Paso 2022, no pet.) (“The Commission’s discretion to grant or deny permit applications arises from a legislative grant of exclusive jurisdiction over specific permits for regulated activities.”). The law establishes what is protective of public health and the environment, and TCEQ issues permits to meet those standards.

In considering contested permit applications, the Commission’s authority is limited accordingly: The sole question is whether the application and the Agency’s permit conditions properly apply those standards to the project being proposed. *See* TEX. HEALTH & SAFETY CODE § 382.0518(b) & (d).

These limits on the Commission’s authority, in turn, constrain access to a contested case. A hearing requestor must have a “justiciable interest . . . affected by the administrative hearing.” TEX. WATER CODE § 5.115(a). A requestor may only bring issues that are “relevant and material to the [Commission’s] decision on the application.” *Id.* § 5.556(d)(3). A requestor’s interest must be “protected by the law under which the application will be considered.” 30 T.A.C. § 55.203(c)(1). Thus, access to a contested case is limited to requestors whose interests lie in the merits of the permit application.

Even a requestor’s emissions-based health concerns are beyond the Commission’s jurisdiction and are no basis for a hearing unless the concern is connected to questions about the merits of the application and draft permit. Emissions within the limits established under the TCAA implicate no legally cognizable private interest. *Cf. Taco Cabana, Inc. v. Exxon Corp.*, 5 S.W.3d 773 (Tex.App.—San Antonio 1999, pet. denied) (rejecting purchaser’s claim of trespass by contamination where, after seller’s remediation, remaining contaminants were below State action levels); *Z.A.O., Inc. v. Yarbrough Drive Center Joint Venture*, 50 S.W.3d 531, 543–44 (Tex. App.-El Paso 2001, no. pet.) (quoting approvingly of

Taco Cabana to the effect that “common law duties . . . have been displaced by the Water Code and implementing administrative regulations because the Legislature has delegated to the Texas Water Commission [now TCEQ] the task of determining appropriate cleanup standards”). Nor is speculation that activity under a lawfully issued permit may someday cause harm properly before the Commission on a permitting matter.¹⁸

Were the Commission to respond to such concerns by imposing conditions beyond those required by law or by rejecting a lawful application, it would violate the *applicant’s* rights, rendering the action arbitrary and invalid. Per the TCAA, “[t]he commission *shall grant* within a reasonable time a permit” if it finds that the applicant has demonstrated that its proposed facilities will use the “best available control technology” and that any permitted emissions will not cause exceedances of ambient air quality standards established to protect

¹⁸ Future harm is redressable in the future, for example, through agency enforcement, Clean Air Act citizen suits, or tort claims. *See, e.g., Manchester Terminal Corp. v. Texas TX TX Marine Transp., Inc.*, 781 S.W.2d 646 (Tex. App.—Houston [1st Dist.] 1989, writ denied) (allowing private trespass and nuisance action concurrent with agency enforcement related to air emissions). This includes harms from unauthorized emissions. *See* TEX. HEALTH & SAFETY CODE § 382.085 (prohibiting unauthorized emissions); 30 T.A.C. § 101.4 (prohibiting nuisance from air emissions).

public health and welfare. TEX. HEALTH & SAFETY CODE § 382.0518(b) (emphasis added).

Permit applications come before the Commissioners to decide their merits. Because the merits of an application and draft permit delimit who and which issues could be eligible for a contested case, the Commission cannot determine whether a hearing requestor is an “affected person” without also interrogating the merits of the application and draft permit. This necessarily involves the assessment and resolution of facts, including those disputed by permit-opponents. In short, the disposition of challenges to the merits of an application are inseparable from the evaluation of a request to challenge them in a contested case hearing.

B. THE LEGISLATURE CODIFIED THE COMMISSION’S OBLIGATION TO CONSIDER THE PERMIT APPLICATION’S MERITS IN DECIDING THE NEED FOR A CONTESTED CASE HEARING.

In 2015, the Legislature made this connection explicit. Senate Bill 709 directed TCEQ to adopt rules for determining who is an “affected person” and listed the factors the Commission may consider in making that determination, including:

- (A) the merits of the underlying application, including whether the application meets the requirements for permit issuance;
- (B) the likely impact of regulated activity on the health, safety, and use of the property of the hearing requestor;
- (C) the administrative record, including the permit application and any supporting documentation;
- (D) the analysis and opinions of the executive director; and
- (E) any other expert reports, affidavits, opinions, or data submitted on or before any applicable deadline to the commission by the executive director, the applicant, or a hearing requestor.

TEX. WATER CODE § 5.115(a-1)(1)(A)-(E); 30 T.A.C. § 55.203(c)-(d) (implementing § 5.115(a-1)(1)). Notably, the very first factor is “the merits of the underlying application, including whether the application meets the requirements for permit issuance.”

Petitioners argue at length that this provision does not authorize the Commission to “weigh and resolve” the merits of a permit application. *See, e.g.*, Pet. Br. at 29. And they are right: The authority to weigh and resolve the merits of a permit application instead is elsewhere and amply provided by the Legislature’s granting to the Commission the sole authority to order the issuance of a permit. *See* TEX. HEALTH AND SAFETY CODE §§ 382.011(a)(1) (“The commission shall administer [the TCAA]...”); 382.023(a) (“The commission may issue orders and make

determinations as necessary to carry out the purposes of this chapter. Orders authorized by this chapter may be issued only by the commission unless expressly provided by this chapter.”); 382.024 (enumerating the factors for the Commission to consider in issuing orders); 382.029 (granting the Commission the power to hold hearings); 382.051 (authorizing the Commission to issue permits to construct or modify facilities that emit air contaminants); 382.0513 (authorizing the Commission to impose conditions on a permit); 382.0518 (outlining the requirements for permit issuance). Section 5.115(a-1)(1) of the Water Code simply identifies the factors that the Commission may consider in determining whether to use a quasi-adjudicatory hearing in fulfillment of its obligation to weigh and resolve an application’s merits.

Because S.B. 709 authorizes the Commission to determine “affectedness” based on the merits of the permit application, it fundamentally changes the “affectedness” analysis from that in cases applying prior versions of Section 5.115. *E.g., City of Waco v. Tex. Comm’n on Env’tl. Quality*, 346 S.W.3d 781, 822 (Tex. App.—Austin 2011), *rev’d on other grounds*, 413 S.W.3d 409 (Tex. 2013) (concluding, in evaluating the Commission’s affectedness determination, that “it is the

existence of some impact from a permitted activity, and not necessarily the extent or amount of impact, that is relevant.”). Such pre-2015 cases, which predominate Petitioners’ briefing, have little to offer the Court today.

Recognizing that the 2015 legislation conclusively ended their long-held and -enjoyed ability to obtain contested cases on request, Petitioners reach for a straw: They claim that Section 5.115’s reference to Section 5.556 of the Water Code somehow means that the enumerated considerations apply only to cases *after* they are referred. Pet. Br. at 29-30. This makes no sense. The preamble of this section describes its very purpose as enumerating the factors for the Commission to consider in determining whether to refer. The reference to Section 5.556 in Section 5.115(a-1) instead simply distinguishes the normal referral decision (under Section 5.556) from “direct referrals” under Section 5.557, where the applicant decides it wants a contested case (perhaps for community relations purposes) and “direct refers” it without any consideration by the Commission of whether the Commission wants to refer one. *Accord* TEX. GOV’T CODE § 2003.047(e-1)-(e-2) (making the same distinction). For direct referrals at the election of the applicant, the decisional criteria of

Water Code § 5.115(a-1) do not apply because there is no Commission decision at all.

C. ARTICLE III STANDING PRINCIPLES DO NOT DICTATE THE COMMISSION’S CONTESTED CASE REFERRAL DECISION.

Fermi disagrees with Petitioners’ and Respondents’ view that the circumstances of the requestor, as determined by an Article III standing analysis, governs the Commission’s decision on whether to refer issues to a contested case. The court below also too easily agreed that a “personal justiciable interest’ not common to the ‘general public’ is the cornerstone of section 5.115’s affected-person definition,” citing only Section 5.115(a) and ignoring (a-1). *Waterkeeper*, 714 S.W.3d at 286.

But Article III standing principles emerged to keep the executive and judicial branches in their assigned lanes.¹⁹ Article III standing

¹⁹ As summarized by Justice Scalia,

to permit Congress to convert the undifferentiated public interest in executive officers’ compliance with the law into an “individual right” vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive’s most important constitutional duty, to “take Care that the Laws be faithfully executed,” Art. II, 3. It would enable the courts, with the permission of Congress, “to assume a position of authority over the governmental acts of another and coequal department,” *Massachusetts v. Mellon*, 262 U.S. at 489, and to become ‘virtually continuing monitors of the wisdom and soundness of Executive action.’” *Allen*, 468 U.S., at 760 (quoting *Laird v.*

precedents, therefore, have nothing directly to say about whether an agency *within* the executive branch (TCEQ) chooses to use quasi-judicial mechanisms to sort through disputed fact issues before making a decision that may then be considered by the judicial branch (if pursued by someone with standing as determined by the court). While the definition of an “affected person” includes elements in common with Article III principles, the “affectedness” determination is a different inquiry—functionally and substantively—especially so post-S.B. 709. *See* TEX. WATER CODE § 5.115(a)-(a-1).

D. BECAUSE THE COMMISSION MUST RESOLVE ALL DISPUTED FACT ISSUES CONCERNING A PERMIT APPLICATION, WHETHER TO GRANT A CONTESTED CASE IS WITHIN ITS SOLE DISCRETION.

The decision to decline a request for hearing or for reconsideration is the Commission’s pronouncement that it finds no need for correction, supplementation, or further examination of the record. A reviewing court evaluates whether that was a lawful decision based on the adequacy of

Tatum, 408 U.S. 1, 15 (1972)). We have always rejected that vision of our role.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 577 (1992).

the record to support permit issuance, not on whether the record might have benefitted from an adjudication.

The Commission’s discretion to use the contested case as a tool for supplemental fact-finding—regardless of the circumstances (“standing”) of those asking for one—is confirmed in the same section of the Water Code as the prohibition against granting a request unless made by an “affected person”: “This section does not preclude the commission from holding a hearing if it determines that the public interest warrants doing so.” TEX. WATER CODE § 5.556(f).²⁰ This potentially rule-swallowing exception establishes that the tool is available if the Commission finds value in a contested case to inform its decision-making, even if there are no requests for one being made by an “affected person.”

In sum, S.B. 709 established the contested case as an option to the Commission, freeing it to balance all relevant factors enumerated in Water Code § 5.115(a-1) when deciding whether it needs one to inform its evaluation of and final decision on a permit. If, for example, a request is

²⁰ It is subsection (c) of that same section that says “[t]he 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.” Whether and how those two provisions can be reconciled is not obvious, but also not necessary to the disposition of this appeal, as it does not involve a decision to grant a request but to deny one.

made by someone residing at a proposed project's fenceline, but their issue is trivial or unmeritorious, the Commission can decline that request. If, for converse example, a more distant requestor presents an important and well-supported claim of error that appears to undercut the ED's findings, the Commission may choose to grant that request.

But whether or not the Commission grants or denies the hearing request, it is the Commission's final order granting a permit that must be supported by substantial evidence, not how it weighed the factors in Section 5.115(a-1). That section liberated the Commission, not constrained it. The Commission did here what it has done in all of its considerations of contested case requests: It considered the factors in Section 5.115(a-1) and determined that a hearing was unnecessary. Having done what the statute allowed, there is no basis for a court to conclude that it somehow erred.

II. SUBSTANTIAL EVIDENCE IS THE APPROPRIATE STANDARD OF REVIEW FOR THE COMMISSION'S ISSUANCE OF AN AIR PERMIT.

A. THE SUBSTANTIAL EVIDENCE STANDARD OF REVIEW FOR THE COMMISSION'S PERMITTING DECISIONS PROTECTS CONSTITUTIONAL SEPARATION OF POWERS.

Fermi agrees with the decision below and endorses the well-developed demonstration by both Respondents that the appellate court properly applied substantial evidence review. We add only that the Texas and U.S. Constitution's separation of powers counsels that same conclusion: Because the Commission's actions on permit applications are within its exclusive jurisdiction to implement public policy to protect public interests, the deferential substantial evidence standard of review is needed to prevent the judiciary from exercising legislative or executive powers.

This Court's decision in *Scott v. Texas Medical Board*, 384 S.W.2d 686 (Tex. 1964) is instructive. There, the Court considered the appropriate standard of review for revocation of a medical license, holding that the standards for reviewing issuance and revocation are constitutionally distinct:

There is a difference . . . between an exercise of the power to examine and issue a medical license, and an exercise of the power to revoke a medical license for cause.

* * *

It is self-evident that the latter does not involve a question of public policy and the determination of legislative facts This points to what should be the controlling criteria of constitutionality. The validity of a full de novo appeal requirement turns on the nature of the act of the administrative agency contemplated by the statute to which the appeal requirement refers. An important consideration is whether the administrative action called for by the empowering legislative act involves public policy or is policy-making in effect, or whether the action concerns only the parties who are immediately affected.

Scott, 384 S.W.2d at 690-91 (citations omitted) (holding that the revocation process, unlike the issuance process, is subject to de novo review, reversing a Court of Appeals holding in favor of substantial evidence review). A more recent decision from the Austin Court of Appeals underscores this distinction: “In determining whether an administrative agency was acting in a legislative or judicial capacity, we ask whether the administrative action implements broad public policy or concerns only the parties immediately affected.” *City of Dallas v. Sabine River Auth.*, No. 03-15-00371-CV, 2017 WL 2536882, at *5 (Tex. App.—Austin 2017, no pet.) (mem. op.) (citations and quotations omitted).

These cases show that when an agency acts to implement legislatively established public policy, its decisions are subject to substantial evidence review.

That is precisely the case here. The Legislature has directed the Commission to issue permits that implement public policy. The Commission does so by exercising its judgment on issues within its expertise. The permitting process is informed in part by the public through their comments and, often, their hearing requests, but this does not form a private dispute. The Commission is not asked to determine liability or *mens rea*, nor whether a traffic light was green, nor to assign damages or exercise equitable powers. It does not decide private rights; it implements policy.

For example, Petitioners in this case dispute that the Applicant properly characterized the scope of its project and that it used the right margin of error in a loading loss equation; they therefore dispute the applicability of “minor source” permitting requirements. These are questions about policy implementation. In other cases, permit challenges frequently address the inputs to air quality models or the selection of modeling methods or whether the proposed pollution controls and

emission limits satisfy regulatory requirements such as the generically described obligation to apply “best available control technology.” More than competent, the Commission is uniquely qualified to make these technical regulatory judgments without an adjudicatory hearing and, given their nature, reviewing courts should give them deference.

B. USE OF THE SUBSTANTIAL EVIDENCE STANDARD OF REVIEW REQUIRES NEITHER A CONTESTED CASE NOR FINDINGS OF FACT.

Petitioners argue that substantial evidence review is improper where the Commission’s decisions are made without an adjudicatory hearing or without enumerated findings of fact. Pet. Br. at 36-38, 45-46. They anchor their argument in cases inapposite to TCEQ’s permitting process, including a pair of Railroad Commission cases that predate the Texas Administrative Procedure Act and a third²¹ applying the APA’s express requirement for findings of fact in matters decided by contested case. Pet. Br. at 40-41. These cases do not speak to the process applicable to TCEQ permitting, which results in a fulsome administrative record

²¹ See *Tex. Health Facilities Comm’n v. Charter Med.-Dall., Inc.*, 665 S.W.2d 446, 450 (Tex. 1984) (“Section 16(b) of the APTRA states: ‘A final decision must include findings of fact’”).

but does not require the Commission to hold a contested case or publish enumerated findings on decisions made without one. Petitioners' premise that a reviewing court has no basis to evaluate the Commission's decisions is mistaken, as the record includes, among much else, a structured written response to the comments made by permit opponents, which the Commission expressly adopts as its own if it denies a contested case request.²²

Petitioners' assertion that enumerated fact findings are helpful to reviewing courts, Pet. Br. at 41, is no more than a wish unmoored from applicable law. Indeed, Petitioners' counsel made this same wish in a recent TCEQ wastewater permitting case, which this Court declined to grant. *See Save Our Springs All., Inc. v. Tex. Comm'n on Env'tl. Quality*, 713 S.W.3d 308, 329 (Tex. 2025) ("To construe the statute as SOS wishes would result in an absurd extension of the APA's language that would infect every TCEQ order with potentially nullifying error for failing to identify and provide underlying findings of fact that a permit's issuance complies with every federal and state law, rule, and regulation.").

²² The Commission also can amend the RTC or permit terms if persuaded to do so by a request for reconsideration.

Appropriately, courts do not require an adjudicatory hearing or findings of fact to apply substantial evidence review, but only that the Commission provide an opportunity to present evidence for inclusion in the administrative record before its final decision. *See Tex. Comm’n on Envtl. Quality v. City of Waco*, 413 S.W.3d 409, 415 (Tex. 2013) (“Although the City was denied a contested case hearing, it was afforded several opportunities to make a record in the agency, including during the public comment period, at two public meetings, in a written request for contested case hearing, and in responses to the executive director’s written comments and analysis. There is no indication that the Commission prevented the City from filing any evidence it deemed relevant to the proposed amended permit.”); *Sierra Club v. Tex. Comm’n on Envtl. Quality*, 455 S.W.3d 214, 224 (Tex. App.—Austin 2014, pet. denied) (equating substantial evidence “with fair and reasonable conduct on the part of the agency” regardless of whether TCEQ held an evidentiary hearing “as long as the hearing requestor was afforded its regulatory rights to express his dissatisfaction with the proposed license and the agency did not refuse to consider the evidence offered in support of that dissatisfaction”).

C. THE RECORD REQUIRED BY LAW PROVIDES A REVIEWING COURT AMPLE BASIS TO DETERMINE WHETHER THE COMMISSION’S DECISIONS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

While not requiring findings of fact per se, the law does require the ED to weigh the evidence and explain her reasoning in a written response to all public comments. *See* 30 T.A.C. § 55.156(b)(1). That RTC is part of the record in every permitting matter that comes before the Commission. Importantly, as a matter of practice and in the present case, the Commission’s order that denies all requests for hearing and reconsideration and that issues the permit also expressly adopts the RTC.²³ Thus, the RTC ultimately becomes *the Commission’s* evaluation of the evidence, which, together with all other materials in the administrative record, provide a reviewing court with ample basis to determine whether the Commission acted lawfully.

²³ *See* Order of the Texas Commission on Environmental Quality concerning the application by Max Midstream, LLC for Air Quality Permit No. 162941, TCEQ Docket No. 2022-0157-AIR (Apr. 8, 2022) (“Executive Director’s Response to Public Comment is ADOPTED”).

III. THE DENIAL OF A CONTESTED CASE HEARING REQUEST DOES NOT, BY ITSELF, PRECLUDE JUDICIAL REVIEW OF THE COMMISSION’S ISSUANCE OF THE PERMIT.

All parties—and Amicus Fermi—agree with the opinion below that there is a right to judicial review of the Commission’s issuance of an air permit under the judicial review provision of the TCAA, Health & Safety Code § 382.032(a), but that judicial review is available only to those who have exhausted all available administrative remedies and who have standing. The question that divides the parties is what constitutes the exhaustion of administrative remedies.

A. WHERE THE COMMISSION DENIES THE REQUEST FOR ONE, PARTICIPATION IN A CONTESTED CASE HEARING IS NOT REQUIRED TO EXHAUST ADMINISTRATIVE REMEDIES.

The Fifteenth Court of Appeals held that *participation* in a contested case hearing is required, not merely a request for one. Both Respondents agree. Fermi does not. If the Commission rejects a request, and the requestor files a motion for Commission rehearing of that rejection (as happened here), then the challenger has exhausted that available remedy. Assuming the requestor has exhausted all *other*

available remedies (which, as it happens, Petitioners did not do here), it is entitled to seek judicial review.

The State argues that allowing judicial review to petitioners who are denied a contested case would deprive the Agency of “the first opportunity to hear and decide the merits through adjudication.” TCEQ Br. at 53 (quoting *Waterkeeper* at 291). But the Commission’s very consideration and denial of the hearing request represents its exercise of that “first opportunity to hear and decide the merits”: It does just that as it considers the application and the rest of the administrative record *together with* the hearings requests. This includes the opportunity to ventilate the merits through adjudication, if the Commission so wishes, or, as it did in this case, decide the merits of the application based on the record before it and deny all hearing requests, adopt the ED’s RTC, approve the application, and issue the permit.²⁴

Max Midstream similarly suggests that judicial review of permit issuance in the absence of a contested case would defeat use of TCEQ’s specialized understanding, and argues that “Petitioners are . . .

²⁴ See Order of the Texas Commission on Environmental Quality concerning the application by Max Midstream, LLC for Air Quality Permit No. 162941, TCEQ Docket No. 2022-0157-AIR (Apr. 8, 2022).

impermissibly asking the Court to make a decision on the merits of Max Midstream’s Application and Air Permit *in lieu of* TCEQ conducting [a] contested case hearing” App. Br. at 58-59. But the Commission’s order issuing the permit and denying all hearing requests *was* the exercise of its specialized understanding on the merits of Max Midstream’s application and permit.

Nor can it be said that a denial of a contested case hearing is defeating any use of TCEQ expertise: TCEQ does not conduct the contested case hearing; rather, such hearings are conducted by SOAH ALJs with varying and sometimes little experience with air permit applications. And of course the District Court is not being asked to “make a decision on the merits” of the application; it is asked to determine whether the *Commission’s* decision on the merits is supported by substantial evidence.

The Respondents’ arguments on exhaustion, as well as the opinion below, lean heavily on a pre-S.B. 709 memorandum opinion from the Third Court of Appeals. *See* App. Br. at 57, 59-60; TCEQ Br. at 47, 49, 52; *Waterkeeper* at 290-292. The opinion pertains to judicial review of a wastewater discharge permit under Water Code § 5.351. *See Sierra Club*

& Pub. Citizen v. Texas Comm’n on Env’tl. Quality, No. 03-14-00130-CV, 2016 Tex. App. LEXIS 3244, 2016 WL 1304928 (Tex. App.—Austin 2016, no pet.) (mem. op.) (fully briefed and argued before enactment of S.B. 709). The Third Court applied the standard for who is an “affected person” as it existed before the Legislature added Water Code § 5.115(a-1)(1)(A), which now emphasizes consideration of the merits of the permit application in any “affectedness” determination. As discussed, this new law significantly changed the role of the contested case, rendering the Third Court opinion stale.

Further, as discussed below, the Third Court’s opinion (as does the Fifteenth Court’s in this case) errs in identifying the contested case as the “exclusive administrative remedy.” *See id.* at *3 (“The Legislature has also provided an exclusive administrative remedy by which parties can challenge TCEQ’s permitting decisions and the factual bases for them—the contested case hearing.”).²⁵ But the request for reconsideration also is available to an affected person, indeed to *any* person. *See* TEX. WATER CODE § 5.556(a).

²⁵ Max Midstream also insists, incorrectly, that, except for the contested case, “[n]o other pathway has ever been taken in this type of case, and no other pathway has been legislatively provided.” App. Br. at 11.

Max Midstream also argues that the TCEQ rulemaking to implement S.B. 709 affirms that *participation* in a contested case is required to exhaust remedies when challenging an air permit of the type at issue here, quoting the following passage from that rulemaking's preamble:

Requesting or participating in a [contested case hearing] is not among the exhaustion requirements for judicial review of many permit actions under...[Tex. Health & Safety Code §382.032].

40 Tex. Reg. 9651, 9658 (Dec. 25, 2015) (quoted at App. Br. at 55) (in reference to permit actions for which the Legislature prohibits contested cases). But Applicant's conclusion elides the first two words of this passage ("Requesting or"), which error pervades its analysis of the exhaustion requirements under the Texas Clean Air Act. In fact, it is the request alone required for exhaustion; participation follows only if one is granted.

Accordingly, Fermi agrees with Petitioners that *participation* in a contested case is not required to exhaust administrative remedies. That said, a *request* for a contested case hearing is an available administrative remedy (along with a request for reconsideration), which must be exhausted prior to seeking judicial review. This is consistent with

Fermi’s reading of Water Code § 5.115(a-1) as providing the Commission complete discretion to use or not use a quasi-judicial hearing to resolve the fact issues before it, such that the Commission’s choice to forego a contested case should not—indeed, cannot—bind a court’s determination of its jurisdiction to review the Commission’s permitting decision.

In its comments on the Commission’s rulemaking to implement S.B. 709, the U.S. EPA directly asked the Commission “to explain whether hearing requestors, determined not to be ‘affected persons’ [under the new rules], could still have access to judicial review” 40 Tex. Reg. 9660, 9667 (Dec. 25, 2015). EPA’s question aimed to confirm consistency with its expectations for approvable air permitting programs, which includes the opportunity for judicial review of final decisions on air permits. TCEQ’s answer was framed to avoid jeopardizing delegation:

A finding by an ALJ or the commission concerning a person’s status as an affected person would not bind a Texas district court judge in considering that person’s standing to seek judicial review of the commission’s action on a permit application under TWC, §5.351 or THSC, §382.032. The “affected person” standard set out in TWC, §5.115(a) and §55.203 comes into play only in a decision on entitlement to a CCH, whereas the statutory availability of judicial review does not depend on requesting or participating in a CCH.

Id. This appears inconsistent with the position expressed in the State’s brief. TCEQ Br. at 56 (“[T]he Commission is determining that Petitioners are not entitled to a contested case hearing. As a result, Petitioners will not have satisfied the requirements that the Legislature set out for the waiver of the State’s sovereign immunity.”).

B. THE LOWER COURT MISCONSTRUED TCAA § 382.032 TO PRECLUDE JUDICIAL REVIEW ABSENT A CONTESTED CASE.

More to the point, the opinion below errs in its interpretation of the TCAA judicial review provision and in applying the APA judicial review provision. The TCAA 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). This law provides a clear and direct right of review of the specific Commission order challenged here, as well as that unambiguous waiver of sovereign immunity much emphasized by the State. *See* TCEQ Br. at 45. The Court of Appeals nonetheless held that this provision remains constrained by the APA provisions that govern judicial review following occurrence of a contested case. *Waterkeeper* at 291 (“The plain language

of the APA requires that a person seeking judicial review be aggrieved by a final decision in a contested case. * * * [N]ot having been aggrieved by a final decision in a contested case, Appellees did not exhaust administrative remedies”) (internal quotes omitted). It so held despite acknowledging the Third Court’s holding that the more specific Section 382.032 controls over a more general judicial review provision. *See TXI Operations LP v. Tex. Comm’n on Env’tl. Quality*, 665 S.W.3d 203, 211 (Tex. App.—Austin 2023, pet. denied) (referencing the more general Water Code provision). The Fifteenth Court’s holding embodies two errors.

1. Section 382.032 Requires Appeals to the Commission Only of the ED’s Decisions, Not the Commission’s Own.

First, the phrase, “if an appeal to the commission is not provided,” modifies only the reviewability of acts of the “executive director,” referenced immediately preceding the qualifying phrase. *See* TEX. HEALTH & SAFETY CODE § 382.032(a). The Fifteenth Court’s construction imputes the existence of an appeal to the Commission of the Commission’s own decision. But an “appeal” is a proceeding before a different, higher body, not a rehashing by the same body. *See Appeal*,

Black’s Law Dictionary (12th ed. 2024) (“a proceeding undertaken to have a decision reconsidered by a higher authority”).

2. A Contested Case Hearing is Not, in any Event, “An Appeal to the Commission.”

Even nonsensically assuming that it were possible for the Commission to appeal its own decision to itself, the contested case would not be such an appeal. *See Waterkeeper* at 291 (conflating an “appeal to the Commission” with “participation in a contested case hearing” as a “prerequisite to judicial review”). A contested case hearing occurs, if at all, only after the Commission determines upon evaluating a request for one that the record generated by the ED is insufficient to support final action, and that an adjudicatory hearing would help resolve the issue(s)—all of this *before* the Commission takes its final action on the application.²⁶ The ensuing contested case creates a new, expanded record of decision, accompanied by a proposal for decision from the SOAH ALJs—again *before* there is any action that could be appealed. For her part, the ED has no authority with respect to a contested permit

²⁶ Were the draft permit unopposed, meaning there are no pending requests for reconsideration or requests for contested case hearing, the ED issues the permit. *See* 30 T.A.C. § 50.133(a)(5). Contested permits can be issued only by the Commission.

application, except as a party appearing before the Commission for the purpose of completing the record. *See* 30 T.A.C. § 80.108. This does not fit the understanding of an appeal being heard by a higher authority, as the Commission in this instance is the *only* authority.

The State is also careless with what it describes as “an appeal,” equating an appeal not only with contested cases, but other “numerous avenues to challenge the Commission’s *proposed* permitting decision including submitting public comments; filing a motion for reconsideration, 30 T.A.C. § 55.201(e) . . . and filing a motion for rehearing” TCEQ Br. at 47 (emphasis added).^{27, 28} However, Section 382.032 does not refer to an appeal of a *proposed* decision, but to a decision (or ruling, order, or other act) of some finality. Of the “avenues to challenge” that the State identifies, only the motion for rehearing

²⁷ The State misapprehends the decision process. The Commission does not propose permitting decisions; it hears and decides proposals by the ED.

²⁸ The State’s brief misapplies the term, “motion for reconsideration.” A “*request* for reconsideration” under 30 T.A.C. § 55.201(e), like a request for a contested case, is a procedure to challenge the ED’s determination that the permit application and draft permit meet all applicable legal requirements. *See* 30 T.A.C. § 55.103(6). That ED determination authorizes nothing and is made *before* the Commission approves the application and issues the permit. Contrast this with a “motion for reconsideration,” which is a term interchangeable with a “*motion* to overturn” a final permitting decision delegated to the Executive Director, such as the decision at issue in *TXI*. *See* 30 T.A.C. § 50.139(a). The Appendix further illustrates these procedures.

occurs after there is a final *Commission* decision; of course, the State cannot argue that a motion for rehearing is “an appeal” that deprives the courts of jurisdiction to review the Commission’s permitting decision where the motion for rehearing is a prerequisite to judicial review. *See* 30 T.A.C. § 55.211(f) (“If all requests for reconsideration or contested case hearing are denied, § 80.272 of this title (relating to Motion for Rehearing) applies.”); § 80.272(b) (“A motion for rehearing is a prerequisite to appeal.”); § 80.273 (“If a party files a motion for rehearing, a decision or order of the commission is final and appealable on the date of the order overruling the final motion for rehearing or on the date the motion is overruled by operation of law.”); § 80.275(a) (“A person affected by a final decision or order of the commission may file a petition for judicial review . . .”).

With or without a contested case, there is no person affected, no final permit, no authorization whatsoever until after the Commission votes to issue the permit. Only then does the Chair, on behalf of the Commission, sign the order to issue the permit; only then does an applicant become a permittee who can undertake the activity authorized

by the permit; only then is there sufficient finality to seek judicial review under Section 382.032.

C. THE TCAA JUDICIAL REVIEW PROVISION PROVIDES AN INDEPENDENT AND SPECIFIC RIGHT OF REVIEW, AND SO THE APA'S JUDICIAL REVIEW PROVISION DOES NOT APPLY TO THE COMMISSION'S AIR PERMITTING DECISIONS.

The Fifteenth Court of Appeals erroneously buttressed its holding (that participation in a contested case hearing is prerequisite to judicial review) by concluding that the judicial review provision of the APA, Government Code § 2001.171, applies together with the TCAA review provision at Section 382.032(a). The court acknowledged the holding in *TXI* that the judicial review provision of Section 382.032(a) specific to air permitting controls over the more general review provision of Water Code § 5.351, which applies to Commission orders not under the TCAA. But the opinion below nonetheless invokes Section 2001.171 within the APA, which is even less specifically applicable to TCEQ permitting actions than Water Code § 5.351 and which governs judicial review only after a contested case hearing, to conclude that the Petitioners did not exhaust administrative remedies. *Waterkeeper* at 291. The Appeals Court chose to give effect to Section 2001.171 because, it concludes, APA Section

2001.171 and TCAA Section 382.032(a) are consistent with each other. *Id.* at 292 (citing *Tex. Nat. Res. Conservation Comm’n v. Sierra Club*, 70 S.W.3d 809, 812 (Tex. 2002)). But this conclusion rests on the error that “an appeal to the commission” and a contested case hearing are one and the same. *Id.* at 291. As discussed above, they are not: A contested case hearing is not an appeal.

The Fifteenth Court’s superimposition of the APA onto TCAA Section 382.032’s specifically stated right of review of air permit decisions also is a bit question-begging. The APA addresses only one process for case-by-case agency decision-making, the contested case. *See* TEX. GOV’T CODE Ch. 2001, Subchs. C-G. It is no surprise, then, that the APA’s judicial review provisions describe the judicial review requirements for contested cases, as they presume that one has occurred. *Id.*, Subch. G. Those provisions, including Section 2001.171, do not apply to situations, such as this, where a contested case was neither required nor convened. Instead, the express appealability provision in TCAA Section 382.032(a) controls and there is no cause to superimpose the requirements of a separate judicial review provision.

D. PETITIONERS FAILED TO EXHAUST ADMINISTRATIVE REMEDIES, NOT BECAUSE THEIR REQUEST FOR CONTESTED CASE HEARING WAS DENIED BUT BECAUSE THEY FAILED TO REQUEST RECONSIDERATION AT ALL.

While participation in a contested case is not required for exhaustion, the court below and all parties to this appeal neglect to acknowledge a remedy that is: The request for reconsideration procedure sits alongside the contested case hearing request as one of *two* mechanisms for challenging the ED's decision on a pending application. TEX. WATER CODE § 5.556(a) ("A person may request that the commission reconsider the executive director's decision or hold a contested case hearing."). TCEQ affirmed this in the preamble to its adoption of rules implementing Section 5.556:

Requests for reconsideration under HB 801 are mechanisms available to the public during the permitting process to request that the commission reconsider the executive director's decision prior to issuance of the permit. That is, *under HB 801 interested members of the public may not only request a hearing, they may also request that the commission reconsider the executive director's decision made in response to comment.* The request for reconsideration, like the request for hearing occurs in those matters that are contested by the public.

24 Tex. Reg. 9015, 9032 (Oct. 15, 1999) (emphasis added); *id.* at 9024 (“Those who are not satisfied by the Executive Director’s Response to comment may request reconsideration or a contested case hearing.”).

While a contested case is available only to an “affected person,” “[a]ny person . . . may file a request for reconsideration . . .” 30 T.A.C. § 55.201(e) (emphasis added). Requests for reconsideration and for contested case hearings are processed together. *See* 30 T.A.C. § 55.209. Where all requests for reconsideration and/or contested case hearing are denied and the Commission orders issuance of the permit, a motion for rehearing is available, 30 T.A.C. § 55.211(f), and is a “prerequisite to appeal.” 30 T.A.C. § 80.272(b).

Because there are two procedural paths for challenging a pending application, because the request for reconsideration is available to “any person,” and because judicial review is accessible only where a requester has exhausted “*all available* administrative remedies,” *Tex. Water Comm’n v. Dellana*, 849 S.W.2d 808, 810 (Tex. 1993) (emphasis added), a court lacks jurisdiction to review the Commission’s decision to issue a permit unless the challenger has filed both a request for reconsideration and a request for contested case *before* the Commission issues the permit

and a motion for rehearing *after* it does so. Petitioners failed to exhaust their administrative remedies here not because they failed to participate in a remedy that was denied to them (a contested case hearing), but by failing to ask for one that was (a request for reconsideration).

In their merits briefing to this Court, none of the Parties address requests for reconsideration or the role of reconsideration in providing the Commission an opportunity to correct any deficiencies in the application or draft permit *before* it issues the permit as recommended by the ED. The opinion below similarly ignores that procedure and errs in describing the contested case hearing as “an exclusive administrative remedy by which parties can challenge the Commission’s permitting decisions and the factual bases for them” *Waterkeeper* at 290. While the contested case is available exclusively to “affected persons,” it is not the exclusive administrative remedy, as requests for reconsideration are also available to “affected persons” and indeed to “any person.”

Moreover, neither reconsideration nor a contested case are challenges to the Commission’s final permitting decision (*i.e.*, the Commission’s order issuing the permit); they are challenges to the application as pending after the ED has determined that it meets the

requirements of applicable law but *before* the Commission addresses any objections then still pending. See 30 T.A.C. § 55.103(6) (“Request for reconsideration—A request that the commission reconsider the decision of the executive director on a permit application.”). The Chief Clerk’s notice of the Executive Director’s decision affirms its preliminary nature, and what Petitioners here could and should have done to exhaust remedies:

The executive director has made a decision that the above-referenced permit application meets the requirements of applicable law. **This decision does not authorize construction or operation of any proposed facilities.** This decision will be considered by the commissioners at a regularly scheduled public meeting before any action is taken on this application unless all requests for contested case hearing or reconsideration have been withdrawn before that meeting.

* * *

If you disagree with the executive director’s decision, and you believe you are an “affected person” as defined below, you may request a contested case hearing. In addition, anyone may request reconsideration of the executive director’s decision.

Letter from TCEQ Chief Clerk Laurie Gharis to All Interested Persons
re Permit No. 162941, A.R. 53 (Dec. 10, 2021).

IV. FERMI'S UNDERSTANDING OF THE LAW COMPORTS WITH SOUND PUBLIC POLICY.

As the processes for public participation in environmental permitting have evolved and accrued, the Legislature, incrementally and perhaps sometimes inelegantly, has changed the role of the contested case to require no more than an appropriate amount of process, balancing public input with administrative and judicial economy. As S.B. 709 made clear, the Commission's deliberations on "whether the application meets the requirements for permit issuance" are largely coextensive with, indeed the primary basis of, its deliberations on whether to convene a contested case. *See* TEX. WATER CODE § 5.115(a-1)(1). The decisions on these questions occupy the same final Commission order.

Respondents, misreading the provisions for judicial review, insist on bifurcating the Commission's order and cordoning off from a court's review the merits of permit issuance. They would limit judicial review to the Commission's denial of hearing requests, even though the merits of the permit inform the hearing denial. In so doing, Respondents would preserve a role for the contested case as something to which project opponents may be entitled (which, as Fermi has explained, they are not). Further, if a court determines that the Commission erred in denying a

hearing request, it would add roughly a year of administrative process (the contested case) before a second round of judicial review to finally reach the Commission's decision on permit issuance, delaying for many years final resolution of the Commission's original order. Fermi asks, process to what end?

Foreclosing judicial review of permit decisions made after the Commission denies a contested case likely fails to fulfill U.S. EPA's expectations for approvable State permitting programs. Consequently, Respondents' insistence that the only path to the courthouse is through participation in a contested case risks jeopardizing the State's primacy in air permitting. This seems a poor and unnecessary risk to take, especially given that the contested case is not a required element of an approvable program.

Applicants and their consultants are careful to present applications that meet all legal requirements; the Executive Director's expert staff reviews and confirms those demonstrations; the public has several opportunities to identify issues and provide input in person and in writing; and TCEQ is required to respond to those concerns in writing. Parties' briefs on requests for reconsideration and for contested case

hearing further supplement the record. As a result, errors are rare, the record presented to the Commission is almost always adequate to support its decisions on permit issuance, and the Commission's order issuing a permit is therefore almost always defensible on the merits.

Accordingly, attorneys who practice in this area of law will acknowledge that it is common for project opponents to challenge permits while having no realistic expectation of relief on the merits. Instead, because the contested case is so burdensome (*e.g.*, adding a year to the permitting process—before construction can begin), it is a tool for project opponents to create leverage, to extract extra-statutory benefits, or even, by delay, to kill projects that are otherwise protective of public health and the environment consistent with all applicable law. Often, project opponents withhold arguments and evidence during the public comment process, including them in hearing requests but thereby depriving the ED of the opportunity to consider that information in the first instance. This process carries significant costs for the parties as well as TCEQ, SOAH, the Texas Attorney General's Office, and Texas courts.

Fermi therefore asserts that judicial review of the merits of permit issuance in the first instance is not only the correct reading of the law

but also the best policy. The Commission and the courts should struggle less with subjective line-drawing to determine how many blocks away from an emissions source, or even which house on which block, is a person affected in a manner different from the general public. The Commission would not have the incentive created by such a subjective task to grant more process for the sake of process or to avoid litigation risk. The Commission's decision-making is better focused on the merits, rather than on whether the person questioning them lives too far away to have an opinion that matters. And rather than detour through the Commission's evaluation of alleged personal justiciable interests, the reviewing court could get to the heart of the matter: Whether the Commission's decision to issue the permit faithfully implemented public policy supported by substantial evidence.

CONCLUSION AND PRAYER

Senate Bill 709 makes clear that the Commission's deliberations on the merits of a permit application and the merits of any hearing request travel together. The Legislature has invited the Commission to consider "whether the application meets the requirements for permit issuance" as the primary basis for whether to grant a contested case. In determining

whether to grant a contested case, the Commission may consider the administrative record, including competing evidence offered by a hearing requestor, and decide disputed facts.

Given the Commission's authority, indeed obligation, to resolve disputed facts about the merits of a permit, and given that the Commission has no authority to impose obligations on an applicant beyond those required by law and so can offer project opponents nothing more than a lawful permit, whether to grant a contested case is at the Commission's sole discretion. That decision is wholly within the executive branch and so Article III is immaterial to it.

Because the Legislature has entrusted decisions about permit issuance and "affectedness" to the exclusive jurisdiction of the Commission, the deferential substantial evidence standard is appropriate on judicial review. Petitioners' plea that courts demand enumerated findings of fact or a contested case before applying the substantial evidence standard of review ignores the administrative record (including the Commission's responses to the comments of project opponents) against which a reviewing court can adjudge the Commission's action.

Further, the opinion below applies the judicial review provision of the APA, Government Code § 2001.171, where it does not belong and misreads the applicable TCAA judicial review provision, Health & Safety Code § 382.032, to conclude that a contested case is prerequisite to judicial review. The error is based in part on the mistaken notion that a contested case hearing is “an appeal,” an “administrative remedy by which parties can challenge the Commission’s permitting decisions . . .” *Waterkeeper* at 290. But any contested case hearing precedes and informs the Commission’s permitting decision; it is in no sense “an appeal” of a Commission decision that has not yet even been made.

Petitioners here failed to exhaust their administrative remedies not because they failed to participate in a contested case unavailable to them, but because they ignored the remedy available to any person, the request for reconsideration.

Finally, Amicus’ articulation of the role of the contested case and the law applicable to the exhaustion of administrative remedies reinforces sound public policy, preserving adequate channels for valuable public input while promoting administrative and judicial economy. Fermi’s paradigm also safeguards the separation of powers and the

judiciary's prerogative to determine its jurisdiction, rather than delegating that decision, functionally, to an executive branch agency.

Amicus therefore prays that the Court grant the Petition in order to settle and decide the parties' contentions regarding TCEQ's decision-making authority and the justiciability of TCEQ's permitting decisions. The Court's decision will affect not just the immediate parties but all those seeking environmental permits for the pursuit of their business endeavors in the State of Texas.

As for remedy, the petition for review as filed in the District Court should be dismissed for lack of jurisdiction, as Petitioners failed to exhaust an available remedy (the request for reconsideration). Accordingly, the Court need not reach the more nuanced and potentially difficult question of whether Petitioners' claims lack jurisdiction for the additional reason that they lack Article III standing to bring them to court. Because the Court of Appeals reached the correct result for the wrong reason, Fermi prays that the Court affirm on alternate grounds the 15th Court's opinion below and remand with instructions to dismiss for lack of jurisdiction the petition for review of the TCEQ order granting Max Midstream its permit.

Dated: June 1, 2026

Respectfully submitted,

/s/ Eric Groten

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the type-volume limitations of Rule 9.4(i)(2)(B) of the Texas Rules of Appellate Procedure because this brief, including footnotes and headings, contains 14,395 words, exclusive of those portions exempted by Rule 9.4(i)(1) of the Texas Rules of Appellate Procedure, according to the word count feature of Microsoft Word.

Further, in accordance with Rule 11(c), undersigned counsel certifies that this brief was prepared without any fee.



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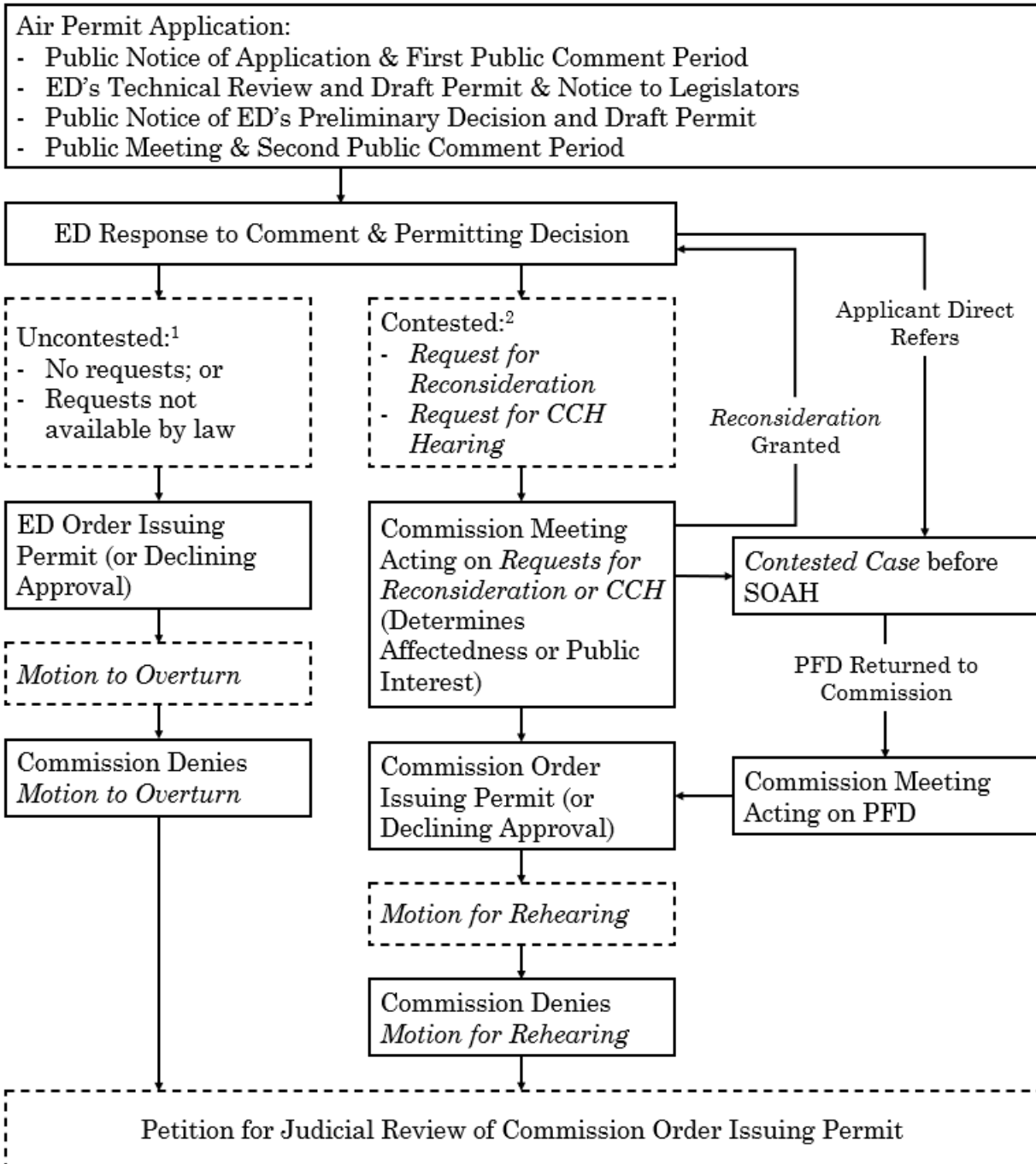
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APPENDIX

ADMINISTRATIVE REMEDY

GLOSSARY AND FLOWCHART FOR TCEQ PERMITS

Administrative Remedy	Citation	Definition
Motion to Overturn (a/k/a Motion for Reconsideration)	30 T.A.C. § 50.139	An administrative appeal to the Commission available after the ED takes final action on a permit. The ED may take final action on a permit for which no requests for reconsideration or hearing were filed, or for approval of non-discretionary permits-by-rule and similar actions for which such remedies are not provided.
Request for Reconsideration	TEX. WATER CODE § 5.556; 30 T.A.C. Ch. 55 (§§ 55.201, 211)	A filing, available to any member of the public after the ED issues her permit decision and Response to Comments (“RTC”), asking the Commission to reconsider and revise the permit’s terms. The Commission may revise the RTC and/or the permit terms itself or remand the matter to the ED for directed revisions.
Request for Contested Case Hearing (“CCH”)	TEX. WATER CODE § 5.556; 30 T.A.C. Ch. 55 (§§ 55.201, 211)	A filing, available to any “affected person” after the ED announces her permit decision and RTC, asking the Commission to refer disputed issues in the application or draft permit for quasi-judicial adjudication at SOAH.
Motion for Rehearing	30 T.A.C. § 80.272	A filing asking for the Commission to revisit its own final order on a permit, whether or not reconsideration occurred or a contested case was held.



1: For example, the permit issuance challenged in *TXI Operations LP v. Tex. Comm'n on Env'tl. Quality*, 665 S.W.3d 203 (Tex. App.—Austin 2023, pet. denied)

2: For example, the permit issuance challenged below in *Texas Comm'n on Env'tl. Quality v. San Antonio Bay Estuarine Waterkeeper*, 714 S.W.3d 270 (Tex. App.—15th Dist. 2025, pet. filed)

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