CAUSE NO. D-1-GN-22-002153

IN THE DISTRICT COURT OF
TRAVIS COUNTY, TEXAS
201st JUDICIAL DISTRICT

SAN ANTONIO BAY ESTUARINE WATERKEEPER, TEXAS CAMPAIGN FOR THE ENVIRONMENT, and S. DIANE WILSON,
***Plaintiffs*,**

v.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY,
***Defendant*.**

PLAINTIFFS' INITIAL BRIEF

On Judicial Review from
the Texas Commission on Environmental Quality
TCEQ Docket No. 2022-0157-AIR

IDENTITY OF PARTIES AND COUNSEL

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GLOSSARY OF TECHNICAL TERMS

Technical Term	Meaning
AR	Administrative Record
BACT	Best Available Control Technology
CO	Carbon monoxide
Commission	Texas Commission on Environmental Quality
Commissioners	TCEQ's Commissioners
DRE	Destruction and Removal Efficiency
ED	TCEQ's Executive Director
EPA	Environmental Protection Agency
NAAQS	National Ambient Air Quality Standards
NO_2	Nitrogen dioxide
NO_X	Nitrogen oxides
NSR	New Source Review
OPIC	TCEQ's Office of Public Interest Counsel
Permit	Max Midstream's minor source air Permit No. 162941
Plaintiffs	San Antonio Bay Estuarine Waterkeeper, Texas Campaign for the Environment, and S. Diane Wilson
PM	Particulate matter
PSD	Prevention of Significant Deterioration
PSIA	Pounds per Square Inch Absolute
PTE	Potential to Emit
Seahawk Terminal	Max Midstream's Seahawk Crude Oil Terminal
SIP	State Implementation Plan
SO_2	Sulfur dioxide
TCAA	Texas Clean Air Act
TCEQ	Texas Commission on Environmental Quality
TCE	Texas Campaign for the Environment
Terminal	Max Midstream's Seahawk Crude Oil Terminal
TPY	Tons per year
VCUs	Vapor Combustion Units
VOC/VOCs	Volatile organic compounds
Waterkeeper	San Antonio Bay Estuarine Waterkeeper

STATEMENT OF THE CASE

This is an administrative appeal of an order by the Texas Commission on Environmental Quality ("TCEQ") under the Texas Clean Air Act. Tex. Health & Safety Code § 382.032; 40 C.F.R. § 52.2270(e) (incorporating Vernon's Ann. Tex. Civ. Stat. Art. 4477-5 § 6.01 as amended June 13, 1979—a previous version of § 382.032— into Texas' federal Clean Air Act State Implementation Plan). In October 2020, Max Midstream filed an application for a minor source air permit seeking TCEQ authorization for an expansion of the Seahawk Terminal. AR1 at 1-5.[1] During the notice and comment periods for the proposed agency action, Plaintiffs requested a contested case hearing on, *inter alia*, whether the proposed authorized emissions and site design complied with applicable major source requirements under the Texas and Federal Clean Air Acts. AR70 at 362-64, 368-402, 406-33, 435-42, 1907-08. On April 8, 2022, TCEQ issued an order denying Plaintiffs' contested case hearing requests and granting Max Midstream a minor-source air permit. AR64. Plaintiffs requested a rehearing of that order which was denied as an operation of law. AR66.

[1] Citations to the Administrative Record will be to "AR" followed by the item number and if a pincite is provided, "at [pdf page numbers]," from the documents in the certified administrative record filed by Defendant TCEQ on April 19, 2023. For example, "AR1 at 1-5" is a citation to Item 1 (Max Midstream's Permit Application) at pdf pages 1-5.

ISSUES PRESENTED

1. Was TCEQ's denial of Plaintiffs' contested case hearing requests on the Permit invalid, arbitrary, or unreasonable where Plaintiffs demonstrated they are affected persons and satisfy Article III standing criteria based on their members' use of property, likely harms to health and safety, and/or recreational and aesthetic interests?
2. Was TCEQ's decision to issue a minor source air permit to Max Midstream invalid, arbitrary, or unreasonable where TCEQ applied the wrong legal threshold for minor vs. major sources?
3. In the alternative, was TCEQ's decision to issue a minor source permit authorizing the Terminal expansion invalid, arbitrary, or unreasonable where the expanded Terminal's potential to emit volatile organic compounds exceeds the applicable major source threshold of 100 tons per year?

STATEMENT OF FACTS

I. Max Midstream's Seahawk Crude Oil Terminal

Max Midstream's Seahawk Terminal ("Terminal" or "Seahawk Terminal") is a petroleum storage and transfer terminal in Point Comfort, Texas. AR1 at 5. The significantly expanded Terminal authorized by TCEQ would have the capacity to store 4,800,000 barrels of crude oil and condensate in 15 storage tanks and then

export that crude oil on vessels through nine marine loading docks. *See* AR12 at 112-19,[2] 123.[3]

The Terminal expansion is not a standalone project and its construction and operation will transform the use of the surrounding area. AR70 at 369 (citing *Max Midstream to Start Texas Crude Exports in May*, S&P Global Plats, April 6, 2021).[4] In addition to the Terminal expansion authorized by the Permit challenged in this matter, Max Midstream has pledged to: 1) fund a dredging project to deepen and widen the Matagorda shipping channel so that its Terminal can accommodate larger crude oil vessels; 2) further expand the storage and loading capacity of its Terminal; and 3) to build new storage tanks at an onshore facility in Edna, Texas connected to the Terminal. *Id*.

II. Lavaca, Cox, and Matagorda Bays and the Surrounding Communities

The proposed site of the Terminal is on a peninsula in Point Comfort, Texas, surrounded by the waters of Lavaca, Cox, and Matagorda Bays. *See* AR56 at 22. Port Lavaca is a town approximately 5 miles across the bay from the Terminal. *See id.*; *see* AR70 at 362. These bays are routinely used by Calhoun County residents for commercial and recreational oystering, shrimping, and fishing, along with other

[2] Tables showing emissions and capacity of tanks TK-06-01 to TK-06-15.
[3] Table showing emissions for marine loading docks MDOCK-1 to MDOCK-9.
[4] Available at https://www.spglobal.com/commodityinsights/ko/market-insights/latest-news/oil/040621-max-midstream-to-start-texas-crude-exports-in-may.

recreational activities, such as swimming and kayaking. S*ee e.g.*, AR70 at 362-64, 440-41; AR61 at 89-93. The harmful impacts to the bays and surrounding communities from the drastic changes proposed by Max Midstream have garnered widespread community opposition. AR51 at 34-37; *see generally* AR70.

III. Procedural History of Max Midstream's Minor Source Air Permit

A. Application and TCEQ Review

In October 2020, Max Midstream filed an application for a minor source air permit seeking TCEQ authorization for an expansion of the Seahawk Terminal. AR1 at 1-5, 134; *see generally* AR1. TCEQ determined Max Midstream's application was administratively complete and issued a first public notice in October 2020, and then issued a second public notice when the draft permit was available in May 2021. *See* AR51 at 3. TCEQ held a virtual public meeting in August 2021 and received over 2,500 comments and hearing requests opposing the permit. *Id.* at 3, 34-37 (Appendix A). TCEQ's Executive Director ("ED") issued a Response to Comments in December 2021 and made "[n]o changes to the draft permit … in response to public comment." *Id.* at 1, 33.

B. Plaintiffs' Comments and Hearing Requests

Plaintiffs filed timely comments and requests for a contested case hearing challenging Max Midstream's application, draft permit, and the ED's Response to

Comments on the Permit. AR70 at 362-64, 368-402, 406-33, 435-42, 1907-08. Plaintiffs also filed a timely Reply to the Responses to Hearing Requests. AR61.

1. Plaintiffs' comments disputed that the Terminal was properly permitted as a minor source

Plaintiffs' core concern is that pollution increases from this project, which was authorized as a **minor** modification to a minor source, triggered the federal Clean Air Act's stringent Prevention of Significant Deterioration ("PSD") preconstruction permitting requirements for **major** sources of air pollution. These stringent pollution control requirements are necessary to protect the public from the significant public-health risks presented by large industrial sources of air pollution. *See* 42 U.S.C. § 7470 (Congressional declaration of purpose for the PSD preconstruction permitting program). Plaintiffs' comments raised disputed issues of fact regarding TCEQ's decision that this Terminal is not subject to PSD requirements, calling into question the technical accuracy of Max Midstream's representations about the emission rates of various equipment at the Terminal and the sufficiency of monitoring, testing, and recordkeeping requirements established by the Permit to determine compliance with emission limits for volatile organic compounds ("VOC"), nitrogen oxides ("NOx"), and carbon monoxide ("CO") that TCEQ relied upon to determine that the Terminal expansion did not trigger PSD preconstruction permitting requirements. *See* AR70 at 370-71, 410-24, 435-39. These comments included an expert report by Dr. Ranajit Sahu detailing why the

Terminal expansion should be subject to PSD major-source air permitting requirements. AR70 at 373-402.[5]

2. Plaintiffs' contested case hearing requests & reply included extensive information about harms to individual members who live, work, and recreate near the Terminal

Plaintiffs' requests for a contested case hearing and reply to hearing requests established the factual bases for Plaintiffs' standing as "affected persons," including information about the organizations and individual members of Waterkeeper and TCE who would have standing in their own right.

San Antonio Bay Estuarine Waterkeeper ("Waterkeeper") is a non-profit membership organization whose mission is to protect Lavaca, Matagorda, and San Antonio Bays and to educate the public about these ecologically important estuarine systems. AR70 at 439. Waterkeeper is part of a national network of organizations in the Waterkeeper Alliance. *Id.*

Texas Campaign for the Environment ("TCE") is a non-profit membership organization dedicated to informing and mobilizing Texans to protect their health, communities, and the environment. *Id.* at 368. TCE works to promote

[5] Dr. Sahu's Resume establishing his qualifications to offer this testimony is included in the record. AR70 at 382-402. Dr. Sahu has testified as an expert on Clean Air Act permitting matters on behalf of the federal government, state and municipal governments, and nonprofit organizations before the State Office of Administrative Hearings and various state and federal courts. *Id.*

strict enforcement of anti-pollution laws designed to stop or clean up air, water, and waste pollution, including in the Matagorda Bay area. *Id.*

Diane Wilson, an individual hearing requestor and a member of Waterkeeper, is a retired fourth-generation shrimper and lifelong resident of the area who has long-standing recreational and aesthetic interests in the Bays surrounding the Terminal. *Id.* at 408-09. She has dedicated her life to protecting the Bays from pollution, and several times a week, Ms. Wilson spends hours within several hundred feet to 3 miles of the Terminal as part of her work with Waterkeeper monitoring for plastics discharges along the surrounding Bays and shoreline to enforce a federal Consent Decree against Formosa Plastics. *Id.* at 408-09, 425-33, 440-41; AR61 at 85-87; *see also* AR55 at 67-95 (Consent Decree). She is concerned about her health and safety from exposure to the Terminal's increased air pollution while she is doing this monitoring and is concerned about her diminished enjoyment of the Bays from new industrial equipment like flares and tanks that would be constructed. AR70 at 409, 440-41.

John and Janet Maresh, members of Waterkeeper, are siblings who live in Point Comfort, 1.79 miles from the Terminal, and are concerned about harms to their respiratory health and aesthetic enjoyment of their property from increased air pollution due to the proximity of their home from the Terminal. AR70 at 408. For example, they are worried that the "thick acrid smog" that settles over Point

Comfort when the conditions are right will only become worse with the Terminal's additional air pollution. *Id.*

Curtis Miller, a member of TCE and Waterkeeper, runs his family seafood business and owns and operates a fleet of shrimping and oyster boats. *Id.* at 362-63. He has asthma and other respiratory illnesses that require the care of a pulmonologist and is concerned about his respiratory health from the Terminal's increased air pollution where he recreationally fishes approximately 2 miles from the facility and in nearby bays twice a month and works 50-60 hours a week at his commercial seafood shop less than 5 miles from the facility. *Id*.

Mauricio Blanco, a member of TCE and Waterkeeper, is a commercial oysterman and fisherman with a private right to shrimp and oyster in the bays surrounding the Terminal. *Id*. at 364; AR61 at 88-93. He is concerned about harms to his respiratory health from increased emissions from the Terminal because he spends between 1.5 and 4.5 months per year shrimping and/or oystering within 1.38 and 2.32 miles of the Terminal. AR61 at 88-93.

C. TCEQ and Max Midstream's Responses to Hearing Requests

In response to hearing requests on the Permit, Max Midstream and TCEQ's ED filed Responses to Hearing Requests in March 2022 recommending that TCEQ deny all contested case hearing requests. AR55 and 56. In particular, Max Midstream urged TCEQ to deny all hearing requests based on what it documented

as TCEQ's "quintessential test" for whether a person is an affected person based on "well-established Commission precedent" – "whether the purported interested (which is typically a person's residence) is located *within or only slightly further than one mile* from the facilities which would be authorized to emit air contaminants." AR55 at 6 (emphasis in original). Since none of the hearing requestors had a property interest within one mile of the Terminal, Max Midstream reasoned that no one qualified as an affected person. *Id.* at 6-9.

TCEQ's Office of Public Interest Counsel ("OPIC") filed a Response to Hearing Requests recommending that TCEQ grant a contested case hearing request for Waterkeeper and deny all other hearing requests. AR58 at 1, 4-5. In particular, OPIC determined that the Mareshes would qualify as affected persons in their own right based on their proximity to the Terminal and their concerns about air pollution, their health and recreational activities, and use and enjoyment of their property, and thus that Waterkeeper met all the requirements for group standing. *Id.* at 5.

TCEQ did not dispute that Ms. Wilson, Waterkeeper, and TCE submitted timely comments, that participating in this permit proceeding would be germane to the interests of the two organizations, or that resolution of the disputed permit would not require individual participation of the organizations' members. AR56 at 12-16; *accord* AR58 at 4-8 (OPIC Response). The only contested issue was

whether Ms. Wilson, or any other identified members of Waterkeeper or TCE, had standing in their own right to challenge the permit as an "affected person." AR56 at 12-16.

D. Expert Testimony about Health Impacts

In its response to Plaintiffs' hearing requests, Max Midstream submitted a declaration by a public health expert suggesting there would be no harm to an individual's respiratory health outside a one-mile radius from the Terminal. AR55 at 11-12. Plaintiffs rebutted this declaration with a declaration by their own public health expert, Dr. Loren Hopkins,[6] who stated that, based on Max Midstream's estimates of emissions in its application, harmful health impacts would be felt by individuals who live, recreate, or work within **two miles** of the Terminal, such as Plaintiffs' members, and these impacts would be especially harmful to individuals like Mr. Miller who suffer from pre-existing respiratory illnesses. AR61 at 67- 84. Plaintiffs also submitted a second declaration by Dr. Ranajit Sahu,[7] who asserted that health impacts would likely extend farther, as far as **five miles** from the facility, because Max Midstream's application understated the true quantity of emissions. *Id*. at 37-66.

[6] Dr. Hopkins' Resume establishing her qualifications to offer this testimony is included in the record as an attachment to her declaration. AR61 at 68-84. Dr. Hopkins is a Professor of Statistics at Rice University and serves at the Chief Environmental Science Officer for the City of Houston Health Department. *Id.* at 69. She has conducted extensive research in human health risk assessment, air pollution, and asthma. *Id.*

[7] For Dr. Sahu's qualifications, *see supra* note 5.

E. Final Order issuing the Permit

The Commissioners considered all contested case hearing requests at their open meeting on March 30, 2022 and issued an order on April 8, 2022 that 1) denied all hearing requests, 2) approved Max Midstream's application and issued Max Midstream's minor source air permit without making any changes to the draft permit, and 3) adopted the ED's Response to Comments. AR64 at 1-2; *see also* AR65.

The order does not provide any reasoning specific to this Permit for why TCEQ denied all hearing requests; instead, it includes the general boilerplate statement:

> The requests for hearing were evaluated under the requirements in the applicable statutes and Commission rules, including 30 Texas Administrative Code Chapter 55.… After evaluation of all relevant filings, the Commission denied all requests for hearing.
>
> AR64 at 1.

F. Motion for Rehearing

Plaintiffs filed a timely Motion for Rehearing on TCEQ's Order granting Max Midstream's Permit in May 2022. AR66. Plaintiffs' motion sought reconsideration of TCEQ's denial of Plaintiffs' contested case hearing requests and issuance of a minor source permit. *Id.*

SUMMARY OF ARGUMENT

Max Midstream's expanded Seahawk Terminal will add harmful air pollution and significant new industrial infrastructure like flares, storage tanks, and marine loading docks that will impact the nearby communities of Point Comfort and Port Lavaca as well as the Bays that community members enjoy and rely on for fishing and recreation. Despite significant community opposition and requests for a contested case hearing on Max Midstream's Permit to ensure that it met all requirements to protect public health and safety, TCEQ denied all hearing requests and issued the Permit without making any changes.

TCEQ issued a minor source air permit to Max Midstream for the Seahawk Terminal pursuant to its delegated authority from EPA under the federal Clean Air Act. Members of the public have a right to judicial review of TCEQ's issuance of a federal permit in state court if they meet federal standing requirements from Article III of the United States Constitution ("Article III"). In addition, Texas has affirmed that the public's access to TCEQ's state-created adjudicatory hearings, called contested case hearings, is also equivalent to Article III standing when a federal permit is at issue. This means that both the substance and procedure of Article III requirements must be followed in determining standing for those seeking access to a contested case hearing and for those seeking judicial review of a permit's merits. For example, recreational and aesthetic interests unrelated to

property interests can confer Article III standing in environmental cases and disputed issues of fact must not be resolved against the hearing requestor at the standing phase.

TCEQ's Order denying all contested case hearing requests and issuing Max Midstream's Permit must be reversed and remanded because it was invalid, arbitrary, or unreasonable. Plaintiffs raise two causes of action in this appeal of TCEQ's Order, either one of which is sufficient to require reversal and remand of the Permit to TCEQ.

First, as demonstrated by Plaintiffs comments and expert reports submitted to TCEQ, Ms. Wilson and other identified members of Waterkeeper and TCE, including Point Comfort residents Mr. and Ms. Maresh and commercial fishermen Mr. Miller and Mr. Blanco, are affected persons under Texas law based on their health, safety, recreational, and aesthetic interests where they live, work, or recreate. TCEQ therefore erred in denying Ms. Wilson, TCE, and Waterkeeper's requests for a contested case hearing, and the Court should remand the Permit for a contested case hearing.

Second, TCEQ relied on the incorrect major source threshold to determine that the Terminal expansion did not trigger federal major-source air permitting requirements. That is sufficient reason alone to reverse TCEQ's order issuing the permit and to remand this matter to TCEQ. While Max Midstream identified the

correct major source threshold of 100 tons per year ("TPY") of any pollutant, including VOCs, subject to a National Ambient Air Quality Standard ("NAAQS") in its application, TCEQ did not rely on this applicability demonstration to issue the Permit, and instead relied on the incorrect threshold of 250 TPY.

However, even if TCEQ had relied on Max Midstream's demonstration and applied the correct 100 TPY major source threshold, reversal and remand of TCEQ's order issuing Max Midstream's permit would still be required based on this record. Annual VOC emission limits in the permit meant to constrain potential emissions from the Terminal's storage tanks, vapor combustion units ("VCUs"), and uncontrolled marine loading activities to less than the applicable 100 TPY minor-source threshold are untethered from enforceable physical or operating limits. They are based on unreliable and unjustified presumptions that do not reflect worst-case emissions. They are not practically enforceable. Unenforceable, inaccurate, emission limits that are untethered from a source's design, as a matter of law, are not a proper basis for determining a source's potential to emit. Accordingly, Max Midstream has not demonstrated that the Terminal is a minor source and TCEQ's issuance of the Permit was arbitrary and capricious.

ARGUMENT

I. Standard of Review

Under the Texas Clean Air Act ("TCAA"), a person affected by a TCEQ order "may appeal the action by filing a petition in a district court of Travis County." Tex. Health & Safety Code § 382.032(a). In an appeal of a TCEQ order, "the issue is whether the action is invalid, arbitrary, or unreasonable." *Id*. at § 382.032(e). The TCAA's "invalid, arbitrary, or unreasonable" standard "incorporates the entire scope of the review allowed by the 'substantial evidence' standard codified in the Administrative Procedure Act." *Tex. Com. on Envtl. Quality v. Friends of Dry Comal Creek*, NO. 03-21-00204-CV, 2023 WL 2733426, at *5 (Tex. App.—Austin 2023, no pet. h.) (*citing TJFA, L.P. v. Tex. Comm'n on Envtl. Quality*, 632 S.W.3d 660, 666 (Tex. App.—Austin 2021, pet. denied)).

Under the substantial evidence standard a court:

> shall reverse or remand the case for further proceedings if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (A) in violation of a constitutional or statutory provision;
> (B) in excess of the agency's statutory authority;
> (C) made through unlawful procedure;
> (D) affected by other error of law;
> (E) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or
> (F) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Tex. Gov't Code § 2001.174; *see also Friends of Dry Comal Creek*, 2023 WL 2733426, at *5. This Court's review of TCEQ's denial of Plaintiffs' request for a contested case hearing and its order issuing Max Midstream LLC's air pollution permit must be overturned if it violates any of these standards.

An agency decision is "arbitrary and capricious" under Tex. Gov't Code § 2001.174(F) if the agency: (1) failed to consider a factor the legislature directs it to consider; (2) considers an irrelevant factor; or (3) weighs only relevant factors that the legislature directs it to consider but still reaches a completely unreasonable result. *City of El Paso v. Public Util. Com'n of Texas*, 883 S.W.2d 179, 184 (Tex. 1994); *see also Tex. Dep't of Ins. v. State Farm Lloyds*, 260 S.W.3d 233, 245 (Tex. App.—Austin 2008, no pet.); *Tex. Comm'n on Envtl. Quality v. Save Our Springs Allliance, Inc.*, 668 S.W.3d 710, 727 (Tex. App.—El Paso 2022, pet. filed). Similarly, "if an agency does not follow the clear, unambiguous language of its own regulation in making a decision, the agency's action is arbitrary and capricious and will be reversed." *Harris County Appraisal Dist. v. Tex. Workforce Comm'n.,* 519 S.W.3d 113, 119 (Tex. 2017) (citing *Tex. Indus. Energy Consumers v. CenterPoint Energy Hous. Elec.*, LLC, 324 S.W.3d 95, 104 (Tex. 2010)); *see also Friends of Dry Comal Creek*, 2023 WL 2733426, at *6 (identifying six circumstances under which the court has found agency orders to be arbitrary and

capricious, including "the agency's failure to follow the clear, unambiguous language of its own regulations").

An error of law is "a mistake about the legal effect of a known fact or situation." Mistake of Law and Error of Law Definitions, *Black's Law Dictionary* (11th ed. 2019), available at Westlaw. For instance, applying the wrong legal standard is an error of law. *See, e.g.*, *Tex. Dep't of Transp. v. Jones Bros. Dirt & Paving Contractors*, 24 S.W.3d 893, 898-900 (Tex. App.—Austin 2000), *rev'd on other grounds*, 92 S.W.3d 477, 478 (Tex. 2002). Ignoring relevant laws may also be a reversable legal error where the decision is not supported by a different, valid legal theory. *AEP Tex. Commercial & Indus. Retail Ltd. P'ship v. Pub. Util. Comm'n of Tex.*, 436 S.W.3d 890, 913-14 (Tex. App.—Austin 2014, no pet.).

In addition, it is an abuse of discretion to improperly resolve disputed issues of fact at the standing stage of an administrative proceeding. *See, e.g.*, *City of Waco v. Tex. Comm'n on Envtl. Quality*, 346 S.W.3d 781, 823-25 (Tex. App.—Austin, 2011), *rev'd on other grounds*, 413 S.W.3d 409, 410 (Tex. 2013).

II. Legal Background: Plaintiffs have a right to a contested case hearing and judicial review of Max Midstream's Permit equivalent to federal Article III standing

A. TCEQ's federally-delegated authority to issue permits under the Clean Air Act

TCEQ derives its authority to authorize the air permit at issue in this case from a delegation of EPA's authority under the federal Clean Air Act. *See* 42

U.S.C. § 7410(a); *see also Friends of Dry Comal Creek*, 2023 WL 2733426, at *1. The Clean Air Act, 42 U.S.C. §§ 7401-7671q, establishes a comprehensive program for protecting the nation's air quality through a system of shared federal and state responsibility, often referred to as "cooperative federalism." *Luminant Generation Co., L.L.C. v. EPA*, 675 F.3d 917, 921 (5th Cir. 2012) (quoting *Michigan v. EPA*, 268 F.3d 1075, 1083 (D.C. Cir. 2001)). The Clean Air Act requires EPA to promulgate health and welfare-based National Ambient Air Quality Standards ("NAAQS") along with baseline program requirements, including requirements for permitting programs authorizing the construction of new and modified sources of air pollution, necessary to protect these standards. 42 U.S.C. §§ 7408-10; *see* 40 C.F.R. §§ 51.160-66 (EPA's regulations for permitting programs). Each state must develop a State Implementation Plan ("SIP") that provides for the attainment and maintenance of the NAAQS and complies with program requirements promulgated by EPA. 42 U.S.C. § 7410(a), (k); *see generally Train v. NRDC*, 421 U.S. 60 (1975). Once finalized, states must submit their SIPs to EPA for approval. *Id*. § 7410(a)(1), (k). Once approved, SIPs have the force of federal law and may be enforced by states, EPA, and the public. *Id*. §§ 7604, 7413; *Union Elec. Co. v. EPA*, 515 F.2d 206, 211 (8th Cir. 1975). States may revise their SIPs, but revisions are not effective until EPA approves them. 40 C.F.R. § 51.105; *Gen. Motors Corp. v. United States*, 496 U.S. 530, 540 (1990).

And while states retain authority to establish separate state-only pollution control requirements, states generally may not modify SIP requirements with respect to any source of air pollution. 42 U.S.C. §§ 7410(i), 7416.

The Texas SIP, as approved by EPA, is codified at 40 C.F.R. § 52.2270. The Texas SIP includes New Source Review ("NSR") Permits regulations,[8] as well as many, but not all, of the Public Notice and Public Comment regulations TCEQ relied upon to issue Max Midstream's Permit. 40 C.F.R. § 52.2270(c).[9] The SIP also includes a right to appeal TCEQ decisions to state district court under a historical version of the Texas Clean Air Act. *Id*. § 52.2270(e) (incorporating Vernon's Ann. Tex. Civ. Stat. Art. 4477-5 § 6.01, as amended June 13, 1979).[10] By contrast, the Texas SIP does not include any of TCEQ's regulations concerning contested case hearings. *Id.* (omitting 30 Tex. Admin. Code §§ 39.402(b), 39.411(b), (c), (d), (e)(4), (e)(11)(A), Chapter 55, Subchapters F and G, and Chapter 80 regulations). Accordingly, there is no requirement to participate in a contested case hearing to appeal a TCEQ decision under the Texas SIP.

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[8] Texas's NSR requirements regulate preconstruction permitting for small (minor) and large (major) industrial sources of air pollution. Regulations that apply to both major and minor sources are found at 30 Tex. Admin. Code Chapter 116, Subchapter B, Divisions 1 through 4. Regulations concerning the kind of major project at issue here (PSD permitting requirements) are found at Subchapter B, Division 6.

[9] 40 C.F.R. § 52.2270(c) incorporates various regulations from 30 Texas Admin. Code Chapter 39 – Public Notice, Chapter 55 – Public Comment, and Chapter 116 – New Source Review.

[10] Save for swapping the word "board" for "Commission,", the judicial review provisions of the current TCAA and the older TCAA incorporated into the Texas SIP are identical. *Compare* Vernon's Ann. Tex. Civ. Stat. Art. 4477-5 § 6.01, *with* Tex. Health & Safety Code § 382.032(a).

Texas has affirmed that the right to judicial review of permitting decisions under its SIP is available to persons and organizations that satisfy baseline standing requirements under Article III. TCEQ, 35 Tex. Reg. 5198, 5201 (June 18, 2010) ("[A]ny provisions of State law that limit access to judicial review to not exceed the corresponding limits on judicial review imposed by the standing requirements of Article III[.]"); TCEQ, 40 Tex. Reg. 9651, 9655 (Dec. 25, 2015) ("[T]he Texas Attorney General statement regarding equivalence of judicial review based on THSC, §382.032 in accordance with Article III of the United States Constitution, is also applicable for every action of the commission subject to the Texas Clean Air Act") (citing Texas Attorney General, *Supplement to 1993, 1996, and 1998 Statements of Legal Authority for Texas's Federal Clean Air Act Title V Operating Permit Program*, at 34 (Section XIX)).

B. TCEQ's state-law contested case hearing process

While participation in a contested case hearing does not condition a person's right to directly appeal a federally-enforceable permitting decision to state court under the Texas SIP, members of the public have a state-law right to participate in a contested case hearing so long as they satisfy criteria established by TCEQ regulations. In particular, only members of the public who are "affected persons" may participate in a contested case hearing. Tex. Water Code § 5.556(c). An affected person is one:

> who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the administrative hearing. An interest common to members of the general public does not qualify as a personal justiciable interest.

Id. § 5.115.

TCEQ has adopted factors it *must* consider when making an "affected person" determination:

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

30 Tex. Admin. Code § 55.203(c) (1999).

As with the right to appeal permitting decisions directly to state court, TCEQ interprets affected person requirements for contested case hearings to be consistent with Article III. *See* Texas Attorney General, Statement of Legal Authority to Regulate Oil and Gas Discharged Under the Texas Pollutant Discharge Elimination

System Program at 12 (Sept. 2020)[11] (stating that TCEQ's affected person regulations "comport with the standing requirements of Article III for judicial review under the state statutes applicable to federal permit programs being implemented by the TCEQ… There is no material difference between the TCEQ's standards and the standards federal courts apply when deciding judicial standing.").

In assessing a hearing requestor's affected persons status, TCEQ *may* consider the merits of the permit application, the administrative record, the analysis and opinions of the executive director, and any data, reports, affidavits, or opinions submitted by a hearing requester, applicant, or the executive director. Tex. Water Code § 5.115(a-1)(1); 30 Tex. Admin. Code § 55.203(d) (1999). As explained below, consideration of merits issues as part of the affected person determination process may conflict with Article III. *See infra*, Arg. Section II.C.2. To the extent that such a conflict exists, Texas maintains that Article III should control. Texas Attorney General, Statement of Legal Authority to Regulate Oil and Gas Discharged Under the Texas Pollutant Discharge Elimination System Program at 22 (Sept. 2020) ("TCEQ does not consider discretionary factors in 30 Tex. Admin.

[11] Available at EPA, *Public Notice of State of Texas' Submittal to EPA of Request for Partial National Pollutant Discharge Elimination System (NPDES) Program Authorization for Oil and Gas Discharges*, "Attachment C – Statement of Legal Authority," Docket EPA-R06-OW-2020-0608, available at https://www.regulations.gov/document/EPA-R06-OW-2020-0608-0004.

Code § 55.203(d) that may not be consistent with the determination of Article III standing, *such as the merits of the underlying permit application*, in evaluating whether a hearing requester is an affected person.") (emphasis added).

Under Texas law, a "justiciable interest" is an "actual or imminent threat of injury peculiar to one's circumstances and not suffered by the public generally." *Benker v. Tex. Dept. of Ins.*, 996 S.W.2d 328, 330 (Tex. App.—Austin 1990, no pet.). The injury "may be economic, recreational, or environmental." *Id*. (citing *City of Bells v. Greater Texoma Util. Auth.,* 790 S.W.2d 6, 11 (Tex. App.—Dallas 1990, writ denied.) Injuries to legally protected interests created under environmental statutes may expand the scope of an individual's personal justiciable interest. *See Save Our Springs Alliance, Inc. v. City of Dripping Springs*, 304 S.W.3d 871, 880-81 (Tex. App.—Austin 2010, pet. denied) (discussing how the creation of legally protected interests in environmental statutes coupled with the creation of a private right of action results in expanded standing rights for environmental litigants). The Texas Clean Air Act expands protected interests to include "esthetic enjoyment" of Texas's air resources, preserving "adequate visibility," and the normal use and enjoyment of animal life, vegetation, or property. Tex. Health & Safety Code §§ 382.002(a), 382.003(3).

A group or association seeking a contested case hearing on the basis of representational standing for its members must identify a member of the group or

association who would be an affected person in the person's own right. Tex. Water Code § 5.115(a-1)(2). In addition, the group or association must meet the final two prongs of the standard for associational standing laid out in *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977): (b) the interests it seeks to protect are germane to the organization's purpose, and (c) neither the claim asserted, nor the relief requested requires the participation of individual members in the lawsuit. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 447 (Tex. 1993); 30 Tex. Admin. Code § 55.205(b) (1999).

C. Article III standing requirements

Article III standing requires an "injury in fact" that is "concrete and particularized" and "actual or imminent," a causal connection between the injury and the complained of conduct, and a likelihood that the injury will be redressed by a favorable court decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

1. Article III standing includes recreational and aesthetic harms that are not tied to a property interest

An individual demonstrates harm to a particularized recreational or aesthetic interest sufficient for Article III standing when they "use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Friends of the Earth, Inc. v. Laidlaw Env'l. Servs.* (TOC), Inc., 528 U.S. 167, 183 (2000) (*quoting Sierra Club v. Morton*, 405

U.S. 727, 735 (1972)). Plaintiffs show harm to their recreational and aesthetic interests when potential future exposure to pollutants will cause a plaintiff to forego their regular recreational activities on public land. *See, e.g., Sierra Club v. Franklin Cnty. Power of Ill., LLC*, 546 F.3d 918, 926 (7th Cir. 2008). Similarly, when the enjoyment of an individual's recreational activities is dependent on environmental quality – and the proposed action would cause degradation of the environment – the harm constitutes injury for standing. *See Sierra Club, Lone Star Chapter v. Cedar Point Oil Co. Inc.*, 73 F.3d 546, 556 (5th Cir. 1996) (finding that affiants whose enjoyment of recreational activities depended on good water quality had a "direct stake" sufficient to establish injury-in-fact).

The fact that these harms may be "shared by many" does not diminish their relevance in Article III standing considerations; a plaintiff need only show that they themselves are "among the injured." *Morton*, 405 U.S. at 733-4. Harm to a plaintiff's recreational and aesthetic interests is particularized when the plaintiff "repeatedly visit[s] a specific site [and] has imminent plans to do so again." *S. Utah Wilderness All. v. Palma*, 707 F.3d 1143, 1156 (10th Cir. 2013); *see also, e.g., Sierra Club v. EPA*, 939 F.3d 649, 664-65 (5th Cir. 2019) (holding that a plaintiff who regularly visited national parks and had plans to visit in the future had a particularized interest for standing).

2. Article III standing does not allow for resolution of disputed facts at the standing stage

The purpose of Article III standing requirements is to "identify those disputes which are appropriately resolved through the judicial process." *Lujan*, 504 U.S. at 560 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). Though it is ultimately the plaintiff's burden to establish each element of standing, it is well accepted that the required showing shifts as a case progresses. *See, e.g.*, *id*. at 561. At the pleading stage, alleged facts are taken as true. *Id*. If a plaintiff's standing is challenged through an indirect attack on the merits, *i.e.* the merits of a plaintiff's claim are intertwined with its standing, then disputed facts must be decided in the plaintiff's favor and the case should progress to its merits stage. *Id*. (finding that in a response to a motion for summary judgment regarding a plaintiff's standing, evidence produced by plaintiff will be taken as true.); *see also Williamson v. Tucker*, 645 F.2d 404, 415-16 (5th Cir. 1981) (stating that indirect attacks on the merits of a plaintiff's claim as a jurisdictional question forces a defendant to proceed under the standards of a motion for summary judgment, i.e. the motion can be granted only if the court determines "there are no issues of material fact.")

III. First Cause of Action: TCEQ's denial of Plaintiffs' contested case hearing requests was invalid, arbitrary, or unreasonable

TCEQ's denial of Plaintiffs' request for a contested case hearing is invalid, arbitrary, and unreasonable and has prejudiced Plaintiffs' substantial rights. Therefore, TCEQ's order should be overturned and remanded for a contested case hearing on the merits of the permit.

Plaintiffs met all the requirements necessary to show they are affected persons consistent with Texas law and Article III standing principles. Plaintiffs provided timely comments to TCEQ demonstrating they are affected persons who have personal justiciable interests not common to the general public that will be affected by Max Midstream's Terminal. Tex. Water Code §§ 5.556(c), 5.115(a).

A. Plaintiffs are affected persons

1. Plaintiffs demonstrated likely health impacts

Plaintiffs demonstrated "likely impacts" to their health and safety by providing "concrete evidence" to TCEQ through two expert declarations about "specific health risks their members expect to suffer" and the "extent to which those risks would be increased for those members by the expected emissions" from the Terminal. 30 Tex. Admin. Code § 55.203(c) (1999); *see Shrimpers & Fishermen of RGV v. Tex. Comm'n on Envtl. Quality*, 968 F.3d 419, 425 (5th Cir. 2020). First, public health expert Dr. Hopkins explained the health risks from

nitrogen dioxide ("NO_2"), a pollutant that would be emitted from the Terminal, which "can cause respiratory symptoms including coughing, wheezing, and difficulty breathing" and can aggravate existing respiratory diseases, like asthma. AR61 at 70 (Hopkins Decl. ¶13). Based on Max Midstream's own air modeling, Dr. Hopkins concluded that the Terminal could cause "an increase of nearly 50% above the existing background levels" which, based in her professional opinion, is "not a trivial increase." *Id.* (Hopkins Decl. ¶14). She also explained that "there are measurable health benefits from reducing concentrations of NO_2 to levels well below the National Ambient Air Quality Standards." *Id.* (Hopkins Decl. ¶15). Finally, Dr. Hopkins concludes that NO_2 increases "that **will likely occur within two miles** of the Terminal are harmful to those who live, work, or recreate in this area," and therefore, that "emissions from the Seahawk Terminal **will likely negatively impact**" Plaintiffs' members. *Id.* at 71 (Hopkins Decl. ¶¶16, 17) (emphasis added).

Second, Plaintiffs submitted a declaration by engineering expert Dr. Sahu who opined that "quantifiable air quality impacts" would likely extend farther, "**as far away as five miles from the Seahawk Terminal**," because Max Midstream's application understates the true quantity of emissions. *Id.* at 41-42 (Sahu Decl. ¶¶18, 20) (emphasis added). For example, he explains that it is "probable" that Max Midstream's volatile organic compound ("VOC") emissions from controlled

and uncontrolled marine loading "could be 30 percent higher" than the company represented, and that the application entirely fails to account for "potentially significant" air emissions of criteria air pollutants such as NO_x, CO, sulfur dioxide ("SO_2"), VOCs, particulate matter ("PM") and toxic air pollutants like benzene from dockside vessels. *Id.* at 42 (Sahu Decl. ¶¶21, 22); *see also infra*, Arg. Section IV.C. Therefore, Dr. Sahu concludes that "**actual impacts from pollution** emitted by Max Midstream's expanded Seahawk Terminal **will be significantly greater than the impacts predicted and demonstrated by the Applicant**." *Id.* at 43 (Sahu Decl. ¶26) (emphasis added).

The record also includes evidence about health impacts from Max Midstream's application and an expert declaration submitted by Max Midstream that create disputed issues of fact about 1) the distance at which health impacts are likely to occur and 2) the total amount of air pollution that could be emitted by the Seahawk Terminal. *Compare* AR55 11-12, 58-66 (Frasier Affidavit), *with* AR61 at 38-43 (Sahu Decl.), 68-71 (Hopkins Decl.). To comply with Article III standing review at this stage in the proceedings, these disputed issues of fact must be resolved in the hearing requester's favor. *Lujan*, 504 U.S. at 560-61; *see supra*, Arg. Section II.C.2.

Based on the expert testimony of Dr. Hopkins and Dr. Sahu and the information in Plaintiffs' comments and hearing requests, Plaintiffs demonstrated

that each of the following hearing requestors (discussed individually below) is an affected person based on likely harms to their health and safety.

2. Individual and Group Hearing Requestors

a. Diane Wilson is an affected person

Diane Wilson is a retired fourth-generation fisherwoman who has spent her life working and recreating in the bays near the Terminal and has dedicated herself to protecting Lavaca bays from pollution. AR70 at 440-41. Ms. Wilson has a deep personal connection with the bays that are endangered by pollution from industrial sources, like Max Midstream. *Id.* Ms. Wilson has personal justiciable interests based on her (1) health and safety and (2) aesthetic and recreational interests, which are not common to the general public. *Id.* at 408-09, 440-41.

First, Ms. Wilson will be exposed to increased amounts of air pollution sufficient to increase the risk of injury to her personal health and safety as a result of the Terminal expansion during her frequent visits to areas near the Terminal for her water pollution monitoring work with Waterkeeper. AR61 at 71 (Hopkins Decl. ¶17); AR70 at 408-09. Ms. Wilson is a party to a Federal Clean Water Act Consent Decree that requires a nearby large industrial facility, Formosa Plastics, to cease its discharge of plastics from its Point Comfort facility into the nearby Cox Creek and Lavaca Bays. AR70 at 408-09. To monitor and enforce this Consent Decree, Ms. Wilson has access to areas that are not accessible to the general public

and regularly visits monitoring sites on Lavaca Bay and nearby shorelines less than 1 mile, 1.85 miles, 2 miles, 2.5 miles, and 3 miles away from the Terminal. *Id.* at 408-09, 425-33 (maps showing distances of monitoring locations relative to the Terminal). Ms. Wilson visits these areas 1-3 times per week by boat or on foot for 4-6 hours per visit and will continue to visit these areas for her monitoring work. *Id.* at 408-09.

Ms. Wilson's health and safety interests are distinct from the general public because she has a court decree allowing her to enter private property along the bay in close proximity to the Terminal and because she visits areas less than 2 and 5 miles from the Terminal every week for her ongoing water quality monitoring work. *See S. Utah Wilderness All.* 707 F.3d at 1156.

Second, Ms. Wilson's aesthetic and recreational interests constitute personal justiciable interests that will be harmed by the Terminal. She regularly engages in recreational activities such as swimming, kayaking, and boating in Lavaca and Matagorda Bays. AR70 at 441. Ms. Wilson's aesthetic and recreational interests are particularized and distinct from the general public because of her long-term enjoyment of and connection to the Bays and her repeated visits to areas around the facility to monitor for plastic pollution and for recreational activities such as swimming and kayaking. *See Laidlaw*, 528 U.S. at 183; *S. Utah Wilderness All.*, 707 F.3d at 1156. Ms. Wilson will suffer concrete harm if she cannot continue to

fully enjoy her regular activities. For example, Ms. Wilson's enjoyment of these recreational activities and the aesthetic beauty of the area would be diminished by her increased exposure to harmful air pollution, the degradation of these areas from visible air pollution, and new industrial infrastructure such as flares and vessels at Max Midstream's Terminal. *See* AR70 at 441; *Sierra Club v. Tenn. Valley Auth*., 430 F.3d 1337, 1345 (11th Cir. 2005) (holding that reduced enjoyment of lake for recreational activities due to air emissions was a sufficient injury-in-fact); *see also, e.g*., *Sierra Club*, 939 F.3d at 664-65 (finding that reduced visibility during regular visits to a national park established injury-in-fact).

The impacts to Ms. Wilson's 1) health and safety and 2) recreational and aesthetic interests satisfy TCEQ's required factors under its affected person status regulations consistent with Article III:

(1) Ms. Wilson's interests are "protected by the law under which the application will be considered," Tex. Health & Safety Code § 382.002(a); *Laidlaw*, 528 U.S. at 183;

(2) there are no distance restrictions imposed by law for this type of permit;[12]

[12] By contrast, TCEQ has established distance restrictions for determining affected person status for other types of permits, such as a requirement that a person live within 440 yards of a concrete batch plant to be an affected person. *See, e.g.*, Tex. Health & Safety Code § 382.058(c).

(3) a reasonable relationship exists between Ms. Wilson's interests and the regulated activity – an air permit authorizing additional air pollution and new infrastructure for an oil export terminal;

(4) air pollution from the Terminal will likely cause "quantifiable air quality impacts" and "will likely negatively impact" Ms. Wilson's health and safety where she regularly visits for work and recreation within 2-5 miles of the Terminal, AR61 at 41-42 (Sahu Decl. ¶¶18, 20), 71 (Hopkins Decl. ¶¶16, 17);

(5) air pollution and visible infrastructure from the Terminal will likely harm Ms. Wilson's use and enjoyment of the natural resource –the "ambient air" she breathes[13] and her viewshed– where she regularly recreates and visits; *Id.*; AR70 at 441; and

(6) Ms. Wilson submitted timely submitted comments on Max Midstream's application that were not withdrawn. AR70 at 406-24, 435-42.

30 Tex. Admin. Code § 55.203(c)(1)-(6) (1999).[14]

Ms. Wilson met all the requirements for an affected person based on both her 1) health and safety and 2) recreational and aesthetic interests. She is "one who has a personal justiciable interest related to a legal right, duty, privilege, power, or

[13] In its Response to Hearing Requests, the ED explained that the "natural resource that is the subject of this permit is the ambient air an individual breathes." *See, e.g.* AR56 at 13.
[14] The seventh factor in 30 Tex. Admin. Code § 55.203(c) (1999) is only applicable to governmental entities and thus is not applicable to any of the Plaintiffs in this case, so we will not address it.

economic interest affected by the application." *Id.* at § 55.203(a); Tex. Health & Safety Code § 382.002(a). Therefore, TCEQ's decision to deny Ms. Wilson's hearing request was arbitrary and capricious or an abuse of discretion because it (1) failed to consider a required factor, (2) considered an irrelevant factor, or (3) weighed relevant factors but reached a completely unreasonable result. Tex. Gov't Code § 2001.174; *see City of El Paso*, 883 S.W.2d at 184. It is additionally arbitrary and capricious or an abuse of discretion because it "does not follow the clear, unambiguous language of its own regulation in making a decision." Tex. Gov't Code § 2001.174; *Harris County Appraisal Dist.,* 519 S.W.3d at 119 (citing *Tex. Indus. Energy Consumers v. CenterPoint Energy Hous. Elec.*, LLC, 324 S.W.3d 95, 104 (Tex. 2010)).

b. Waterkeeper and TCE are affected persons based on their identified members, who have standing in their own right

Waterkeeper and TCE both identified at least one member that qualifies as affected persons in their own right and provided information about the groups' purposes to meet the other two prongs of the associational standing test. AR70 at 362-64, 368-402, 406-33, 435-42, 1907-08; *see Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 447 (Tex. 1993); 30 Tex. Admin. Code § 55.205(b) (1999). The only issue contested by TCEQ was whether identified members of Waterkeeper and TCE – including Ms. Wilson, Mr. and Ms. Maresh, Mr. Miller,

and Mr. Blanco – had standing in their own right to challenge the permit as affected persons. AR56 at 12-16; *see* AR58 at 4-8.

i. Diane Wilson, member of Waterkeeper

For the reasons explained above, Ms. Wilson is an affected person in her own right. *See supra*, Arg. Section III.A.2.a. Therefore, as an identified member of Waterkeeper, she also supports standing for the group. *See* AR70 at 406-09, 439-41.

ii. John and Janet Maresh, members of Waterkeeper

Siblings John and Janet Maresh are Waterkeeper members who were born and raised in the region and continue to live in their family home in Point Comfort approximately 1.79 miles from the Seahawk Terminal. AR70 at 408. They raised concerns about deleterious health impacts from the Terminal's air pollution and impacts to their use and enjoyment of their property from the additional visible pollution that could worsen the "thick acrid smog" they already experience over Point Comfort.[15] *Id.* Given the proximity of the Mareshes' home to the Seahawk Terminal, Dr. Hopkins concluded that the Seahawk Terminal's authorized air pollution "will likely negatively impact" the Mareshes' health. AR61 at 71 (Hopkins Decl. ¶¶16, 17).

[15] The Terminal is authorized to emit at least two pollutants that contribute to ozone formation, or smog: NOx and VOC. *See, e.g.,* 30 Tex. Admin. Code § 116.12(19) (1993) (indicating that a source that is a major emitter of either of these two ozone precursors is also major for ozone).

The impacts to the Mareshes' health and safety and use of their property satisfy all of the relevant factors TCEQ must consider under its affected person status regulations:

(1) The Mareshes' health and safety and use of property are "interests protected by the law under which the application will be considered," Tex. Health & Safety Code § 382.002(a);

(2) There are no distance restrictions imposed by law for this type of permit;

(3) A reasonable relationship exists between the Mareshes' health and property interests and the regulated activity – an air permit authorizing additional air pollution for an oil export terminal;

(4) Air pollution from the Terminal "will likely negatively impact" the Mareshes' healthy and safety and their use of property at their home; AR61 at 71 (Hopkins Decl. ¶¶16, 17);

(5) air pollution from the Terminal "will likely negatively impact" the Mareshes' use and enjoyment of the natural resource—the ambient air they breathe and their viewshed— where they live, *id.*; and

(6) Waterkeeper submitted timely submitted comments on Max Midstream's application that were not withdrawn. AR70 at 362-64, 368-402, 406-33, 435-42. 30 Tex. Admin. Code § 55.203(c)(1)-(6) (1999).

Mr. and Ms. Maresh are members of Waterkeeper who met all the requirements for affected persons in their own right based on their likely health and safety interests and impacts to their use and enjoyment of their property. *See Texans United for a Safe Econ. Educ. Fund v. Crown Cent. Petroleum Corp*., 207 F.3d 789, 792-94 (5th Cir. 2000) (holding that plaintiffs had standing because they frequently experienced smoke and odors from a nearby oil refinery while at home). Therefore, TCEQ's decision to deny Waterkeeper's hearing request was arbitrary and capricious or an abuse of discretion because it (1) failed to consider a required factor, (2) considered an irrelevant factor, or (3) weighed relevant factors but reached a completely unreasonable result. Tex. Gov't Code § 2001.174; *see City of El Paso*, 883 S.W.2d at 184. It is additionally arbitrary and capricious because it "does not follow the clear, unambiguous language of its own regulation in making a decision." Tex. Gov't Code § 2001.174; *Harris County Appraisal Dist.,* 519 D.W.3d at 119 (citing *Tex. Indus. Energy Consumers v. CenterPoint Energy Hous. Elec.*, LLC, 324 S.W.3d 95, 104 (Tex. 2010)).

iii. Curtis Miller, member of Waterkeeper and TCE

Curtis Miller is a member of Waterkeeper and TCE. AR70 at 362. He owns and operates Miller Seafood Company in Port Lavaca, a family business that sells shrimp and oysters harvested from the surrounding Bays. *Id.* Mr. Miller has

personal justiciable interests based on his (1) health and safety and (2) recreational and aesthetic interests, which are not common to the general public. *Id.* at 362-63.

First, Mr. Miller suffers from asthma and is under the care of a pulmonologist for serious respiratory health issues that make him particularly susceptible to harm from pollutants, like NO_2, that will be emitted from the expanded Seahawk Terminal. *Id.* at 363. As Dr. Hopkins explains, "[e]xposure to [NO_2] can ... aggravate respiratory diseases, particularly asthma, leading to increased risk of hospitalization for those who, like Curtis Miller, suffer from such conditions." AR61 at 70 (Hopkins Decl. ¶ 13).

Mr. Miller recreationally fishes on the Bay about two miles from the Terminal at least twice per month and also works from 50 to 60 hours a week at his family's commercial seafood shop located approximately four miles from the facility. AR70 at 362-63. Dr. Sahu testified that there will likely be quantifiable air quality impacts at this distance from the facility. AR61 at 41-42 (Sahu Decl. ¶¶18, 20). Due to Mr. Miller's health conditions, these impacts will be particularly harmful. *Id.* at 70 (Hopkins Decl. ¶ 13). Mr. Miller's interest in the protection of his health is not an interest shared by the general public because he will be directly exposed to harmful pollution increases resulting from the Terminal expansion project and because he is at a higher risk of harm from those impacts. *See United Copper Indus., Inc.v. Grissom*, 17 S.W.3d 797, 803-04 (Tex. App.—Austin, 2000,

pet. dism'd) (hearing requestor's unique health concern from asthma coupled with his proximity to the facility meant he was an affected person because he was more likely than other members of the general public to be harmed by the facility's air emissions).

Second, Mr. Miller would also suffer a particularized injury to his recreational and aesthetic interests. Mr. Miller fishes about two miles away from the facility twice per month, and thus has shown that he repeatedly uses the area, making his interests particularized. AR70 at 363; *see S. Utah Wilderness All.,* 707 F.3d at 1156.

Mr. Miller will suffer harm to these recreational and aesthetic interests because his recreational fishing activities depend on the bay's environmental conditions, showing that he has a "direct stake" in the outcome. *Cedar Point Oil Co. Inc*., 73 F.3d at 556. Additionally, he suffers from asthma and other respiratory illnesses aggravated by deteriorating air quality, and thus he has a heightened concern for his health while participating in recreational activities. *See Utah Physicians for a Healthy Env't v. Diesel Power Gear, LLC*, 21 F.4th 1229, 1241-47 (10th Cir. 2021) (holding that reduced participation in recreational activities due to health concerns from air pollution conferred standing). This combined with other harmful aesthetic impacts of a new industrial terminal, would constitute a reduction in Mr. Miller's recreational and aesthetic enjoyment in the bay.

The impacts to Mr. Miller's 1) health and safety and 2) recreational and aesthetic interests satisfy Article III standing and TCEQ's required factors under its affected person status regulations:

(1) Mr. Miller's interests are "protected by the law under which the application will be considered," Tex. Health & Safety Code § 382.002(a); *Laidlaw*, 528 U.S. at 183;

(2) there are no distance restrictions imposed by law for this type of permit;

(3) a reasonable relationship exists between Mr. Miller's interests and the regulated activity – an air permit authorizing additional air pollution and new infrastructure for an oil export terminal;

(4) air pollution from the Terminal will likely cause "quantifiable air quality impacts" and "will likely negatively impact" Mr. Miller's health and safety and use of property where he regularly works at his business within 5 miles and where he fishes within 2 miles of the Terminal, especially because of his pre-existing respiratory illness; AR61 at 41-42 (Sahu Decl. ¶¶18, 20), 71 (Hopkins Decl. ¶¶16, 17);

(5) air pollution from the Terminal will likely harm Mr. Miller's use and enjoyment of the natural resource—the ambient air he breathes and his viewshed —where he regularly recreates and works; *id.* and;

(6) Waterkeeper and TCE submitted timely submitted comments on Max Midstream's application that were not withdrawn. AR70 at 362-64, 368-402, 406-33, 435-42, 1907-08.

30 Tex. Admin. Code § 55.203(c)(1)-(6) (1999).

Mr. Miller met all the requirements for an affected person based on both his 1) health and safety and 2) recreational and aesthetic interests. Therefore, TCEQ's decision to deny Mr. Miller's hearing request was arbitrary and capricious or an abuse of discretion because it (1) failed to consider a required factor, (2) considered an irrelevant factor, or (3) weighed relevant factors but reached a completely unreasonable result. Tex. Gov't Code § 2001.174; *see City of El Paso*, 883 S.W.2d at 184. It is additionally arbitrary and capricious because it "does not follow the clear, unambiguous language of its own regulation in making a decision, the agency's action is arbitrary and capricious and will be reversed." Tex. Gov't Code § 2001.174; *Harris County Appraisal Dist.,* 519 D.W.3d at 119 (citing *Tex. Indus. Energy Consumers v. CenterPoint Energy Hous. Elec.*, LLC, 324 S.W.3d 95, 104 (Tex. 2010)).

iv. Mauricio Blanco, member of Waterkeeper and TCE

Mauricio Blanco is a member of Waterkeeper and TCE. AR70 at 364. He has been a commercial oysterman and shrimper for 34 years and holds several fishing licenses issued by the State of Texas that allow him to shrimp and oyster in

Matagorda and Lavaca Bay. AR61 at 89. His licenses confer upon him "a right or power which does not exist" without it. *See Payne v. Massey*, 196 S.W.2d 493, 495 (Tex. 1946). This is a right unique to him. He captains one of the ten fishing boats that he owns six days a week, including in bays very close to the Terminal. AR61 at 89. Mr. Blanco spends up to 4.5 months per year shrimping and oystering between 1.38 and 2.32 miles from the Terminal. *Id.* at 89-92.

Mr. Blanco raised concerns about breathing in harmful air pollution from the Terminal "while oystering and shrimping Cox Bay" and "in other locations in the Lavaca and Matagorda bay complexes which are the bays closest to the Seahawk terminal." AR61 at 92. Mr. Blanco's health interests will be negatively affected by the proposed Seahawk Terminal expansion, because, as Dr. Sahu and Dr. Hopkins testify, he will likely be harmed by air pollution, such as NO_2, in the locations where he frequently works on fishing boats within 1-3 miles of the Terminal. AR61 at 41, 43 (Sahu Decl. ¶¶ 18, 27), 71 (Hopkins Decl. ¶ 16).

Mr. Blanco will suffer concrete and particularized harm to his health and safety interests while he is out on the bays near the Terminal on his fishing boat. Mr. Blanco provided specific evidence of his use of the bays that establishes a particularized interest that is not common to the general public. *S. Utah Wilderness All.,* 707 F.3d at 1156. Additionally, because of the dependence of his activities on the conditions in the bay, Mr. Blanco has a "direct stake" in the expansion, raising

his concerns above the level of a "mere bystander." *Cedar Point Oil Co. Inc*., 73 F.3d at 556.

The impacts to Mr. Blanco's health and safety interests satisfy Article III standing and TCEQ's required factors under its affected person status regulations:

(1) Mr. Blanco's interests are "protected by the law under which the application will be considered," Tex. Health & Safety Code § 382.002(a);

(2) there are no distance restrictions imposed by law for this type of permit;

(3) a reasonable relationship exists between Mr. Blanco's interests and the regulated activity – an air permit authorizing additional air pollution and new infrastructure for an oil export terminal;

(4) air pollution from the Terminal will likely cause "quantifiable air quality impacts" and "will likely negatively impact" Mr. Blanco's health and safety where he regularly works on his fishing boats within 1-5 miles of the Terminal; AR61 at 41-42 (Sahu Decl. ¶¶18, 20), 71 (Hopkins Decl. ¶17);

(5) air pollution from the Terminal will likely harm Mr. Blanco's use and enjoyment of the natural resource—the ambient air he breathes—where he regularly works on the bays; *id.* and

(6) Waterkeeper and TCE submitted timely submitted comments on Max Midstream's application that were not withdrawn. AR70 at 362-64, 368-402, 406-33, 435-42, 1907-08.

30 Tex. Admin. Code § 55.203(c)(1)-(6) (1999).

Mr. Blanco met all the requirements for an affected person based on his health and safety interests as a commercial fisherman. Therefore, TCEQ's decision to deny Mr. Blanco's hearing request was arbitrary and capricious or an abuse of discretion because it (1) failed to consider a required factor, (2) considered an irrelevant factor, or (3) weighed relevant factors but reached a completely unreasonable result. Tex. Gov't Code § 2001.174; *see City of El Paso*, 883 S.W.2d at 184. It is additionally arbitrary and capricious because it "does not follow the clear, unambiguous language of its own regulation in making a decision, the agency's action is arbitrary and capricious and will be reversed." Tex. Gov't Code § 2001.174; *Harris County Appraisal Dist.,* 519 D.W.3d at 119 (citing *Tex. Indus. Energy Consumers v. CenterPoint Energy Hous. Elec.*, LLC, 324 S.W.3d 95, 104 (Tex. 2010)).

IV. Second Cause of Action: TCEQ's issuance of Max Midstream's minor source air permit was invalid, arbitrary, or unreasonable

The Terminal is a major stationary source subject to Texas SIP Prevention of Significant Deterioration ("PSD") preconstruction permitting requirements, because the Terminal has the potential to emit volatile organic compounds ("VOC") at rates exceeding the applicable major source threshold of 100 tons per year ("TPY"). TCEQ's order authorizing the proposed expansion project was invalid, arbitrary, and unreasonable and prejudiced Plaintiffs' substantial rights

because Max Midstream did not demonstrate compliance with applicable PSD requirements, including protection of National Ambient Air Quality Standards for ozone and compliance with the stringent federal Best Available Control Technology ("BACT") pollution reduction standard.

Plaintiffs challenge TCEQ's order under the Texas Clean Air Act, as approved in the Texas SIP. 40 C.F.R. § 52.2270(e) (incorporating Vernon's Ann. Tex. Civ. Stat. Art. 4477-5 § 6.01 as amended June 13, 1979—a previous version of Tex. Health & Safety Code § 382.032— into Texas' federal Clean Air Act State Implementation Plan); *see* Tex. Health & Safety Code § 382.032(a). Plaintiffs have standing to challenge TCEQ's issuance of the Permit. *See supra*, Arg. Sections II, III.

A. Legal Background: Clean Air Act permits for minor and major sources

Texas' SIP-approved regulations implementing the federal Clean Air Act establish different requirements for permits authorizing major and minor projects. Before TCEQ may issue a permit authorizing a minor project, the applicant must demonstrate compliance with applicable requirements listed at 30 Tex. Admin. Code § 116.111(a)(2)(A) through (G) and (J) through (L). Major projects in areas, such as Calhoun County, that are designated as in attainment for all National Ambient Air Quality Standards must also comply with PSD preconstruction permitting requirements listed at 30 Tex. Admin. Code § 116.160(c) (1993). This

provision directly incorporates federal requirements that EPA has established to implement the federal Clean Air Act's PSD program requirements, including protection of National Ambient Air Quality Standards, *id.* at § 116.160(c)(2)(A) (incorporating 40 C.F.R. § 52.21(k)) and federal BACT, *id*. at § 116.160(c)(1)(A), (a)(2)(A) (incorporating 40 C.F.R. § 52.21(b)(12) defining federal BACT and 52.21(j)(3) requiring federal BACT controls for major sources). While TCEQ often requires minor projects to demonstrate that their emissions are protective of NAAQS for various pollutants, the agency only requires ozone NAAQS demonstrations for major projects. AR51 at 8 (explaining no ozone impacts analysis was required for this project because the Terminal is a minor source).

1. Major source thresholds for named and unnamed sources

Texas' SIP-approved regulations define major stationary source to mean:

> Any stationary source that emits, or has the potential to emit, a threshold quantity of emissions or more of any contaminant (including volatile organic compounds (VOCs)) for which a national ambient air quality standard has been issued, or greenhouse gases. The major source thresholds … for prevention of significant deterioration pollutants are identified in 40 … [C.F.R.] § 51.166(b)(1).

30 Tex. Admin. Code § 116.12(19) (1993).

40 C.F.R. § 51.166(b)(1) establishes two different major source thresholds. If a source falls under one of the various source categories listed at § 51.166(b)(1)(i)(a), the applicable threshold is 100 tons per year ("TPY") of any

regulated NSR pollutant. These are known as "named sources." If a source does not fall under one of the named source categories, the applicable threshold is 250 TPY. 40 C.F.R. § 51.166(b)(1)(i)(b). These are known as "unnamed sources."

2. A source's potential to emit is based on its worst-case emissions

Potential to emit, referenced in the major source definition, means:

> The maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any *physical or enforceable operational limitation* on the capacity of the stationary source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, may be treated as part of its design only if the limitation or the effect it would have on emissions is federally enforceable.

30 Tex. Admin. Code § 116.12(29) (1993) (emphasis added). Potential to emit "is meant to be a worst case emissions calculation" rather than a calculation based upon the average performance of a source across a variety of operating scenarios. *In re Peabody W.Coal Co.* ("Peabody"), 12 E.A.D. 22, 2005 WL 428833, at *11 (February 18, 2005).[16]

[16] The Environmental Appeals Board is an impartial appellate tribunal established by regulation to hear administrative appeals under the major environmental statutes that EPA administers. *See* 40 C.F.R. § 124.19.

3. Synthetic minor air permits only constrain a source's potential to emit below major-source thresholds if they are practically enforceable

TCEQ and EPA have interpreted the definition of potential to emit to allow sources that would otherwise trigger PSD preconstruction permitting requirements to artificially constrain their potential to emit by agreeing to install add-on pollution control equipment or to include enforceable operating limitations sufficient to constrain emissions below the major source threshold. Such constraints include restrictions on hours of operation, on the type or amount of material combusted, stored, or processed. 30 Tex. Admin. Code § 116.12(29) (1993) (defining potential to emit). Minor source permits that establish such artificial constraints are called "synthetic minor permits."

However, artificial constraints on a source's potential to emit do not successfully shield a source from PSD preconstruction permitting requirements "unless there are legally and practicably enforceable mechanisms in place to make certain that the emissions remain below the relevant levels." *Weiler v. Chatham Forest Prods.*, 392 F.3d 532, 535 (2d Cir. 2004); *Sierra Club v. EPA*, 895 F.3d 1, 17 (D.C. Cir. 2018) ("However, if not for the enforceable controls they have implemented, synthetic minor sources would be major sources under … [the Clean Air Act].") (quotation marks omitted); *see also* Expert Report on Certain Aspects of Max Midstream Texas LLC Draft Air Quality Permit No. 162941 by Dr. Ranajit

Sahu, AR70 at 373-74 (explaining EPA's longstanding policy that synthetic minor emission limits only constrain a source's potential to emit if they are practically enforceable). In order to limit a source's potential to emit:

> a capacity restriction must meet certain minimum criteria. Specifically, it must be practically enforceable, which EPA guidance has interpreted to mean 'that the permit's provisions must specify: (1) a technically-accurate limitation and the portions of the source subject to the limitation; (2) the time period for the limitation (hourly, daily, monthly, and annual limits such as rolling annual limits); and (3) the method to determine compliance including appropriate monitoring, recordkeeping, and reporting.

Peabody, 2005 WL 428833, at *8 (*citing* Memorandum from John. S. Seitz, Director, EPA Office of Air Quality Planning and Standards, to EPA Regional Air Division Directors, *Options for Limiting the Potential to Emit (PTE) of a Stationary Source Under Section 112 and Title V of the Clean Air Act*, at 5-6 (Jan. 1995)).[17]

Moreover, as the definition of potential to emit provides, constraints to limit potential to emit should be "physical or enforceable operational limitation[s]." 30 Tex. Admin. Code § 116.12(29). Mere emission limits without such constraints are not, in most cases, sufficient to limit a source's potential to emit. *United States v. La.-Pac.Corp.*, 682 F.Supp.1122, 1132 (D. Colo. 1987) (factors properly included in the calculation of a source's potential to emit "do not include permit restrictions

[17] EPA PTE Memo available at https://www.epa.gov/sites/default/files/2015-07/documents/ptememo.pdf.

which limit specific types and amounts of actual emissions."); *In Re: Shell Offshore Inc.*, 15 E.A.D. 536, 2012 WL 1123876, at *14 (March 30, 2012) ("Petitioners correctly assert that the use of blanket emission limits alone, essentially statements that actual emissions of a pollutant will not exceed a particular quantity, is generally prohibited to restrict PTE because such limits are not enforceable as a practical matter.").

B. The Terminal is a major stationary source and TCEQ erred by applying the wrong major source threshold

As explained below, the Terminal expansion triggers PSD preconstruction permitting requirements because its potential to emit VOCs exceeds the applicable major source threshold of 100 TPY. *See infra*, Arg. Section IV.C. TCEQ's stated rationale for determining that the Terminal is only a minor source is that its potential to emit VOCs (or any other regulated pollutant) does not exceed 250 TPY. AR51 at 10 ("Because proposed emission rates for this project are below 250 tpy for each pollutant, the project is not subject to PSD permitting."); AR62 at 2 ("The facility is an unnamed sources and does not have the potential to emit greater than 250 tons per year of any pollutant; therefore, PSD review is not applicable."). But this is the wrong major source threshold. Accordingly, TCEQ's conclusion that the Terminal expansion does not trigger PSD preconstruction permitting requirements is based on an error of law.

The Terminal is a named source subject to the 100 tpy major source threshold. 40 C.F.R. § 51.166(b)(1)(i)(a). It is a petroleum storage and transfer unit:

> The Seahawk Crude Condensate Terminal … is a for-hire bulk *petroleum storage* terminal. *Petroleum* products are *stored* in various storage tanks and *transferred* in and out of terminal tankage by external customers via pipeline and marine vessel.

AR1 at 134 (emphasis added). Its storage capacity is 4,800,000 barrels. AR12 at 112-19 (listing tank nominal capacity for tanks TK-06-01 through TK-06-15). This far exceeds the 300,000 barrels necessary to trigger named source thresholds for petroleum storage and transfer units. 40 C.F.R. § 52.21(b)(1)(i)(a). The Applicant even recognizes that the Terminal is a named source and relied on the 100 tpy threshold in its application. AR1 at 47; AR12 at 105 (updated demonstration).

TCEQ erred when it applied the unnamed source major source thresholds when reviewing the application for the Terminal's NSR permit. As a result of this error of law, TCEQ authorized the Terminal without a demonstration that ozone impacts from the Terminal will not cause or contribute to violations of NAAQS, and without ensuring the permit establishes pollution limits consistent with stringent federal BACT requirements. This authorization prejudiced Plaintiffs' substantive rights by allowing construction of a major stationary source near where they live, work, and recreate without the requisite public health and safety demonstrations required by the Federal and Texas Clean Air Acts. Accordingly,

this Court should vacate the final Order and Permit and remand Max Midstream's application back to the TCEQ. Tex. Gov't Code § 2001.174.

C. Even if TCEQ had applied the correct major source threshold, its decision to authorize the Terminal with a minor permit would still be invalid, arbitrary or unreasonable

Max Midstream's contention that the Terminal's potential to emit VOC is less than 100 TPY is based on annual limits in its Permit totaling 85.40 TPY. *Compare* AR12 at 105 (annual potential to emit values used to determine PSD applicability) with AR65 at 27-38 (TPY permit limits are the same values used to determined PSD applicability).[18] To limit the Terminal's potential to emit, these permit limits must represent worst-case operating scenarios, reflect physical or operating constraints that are part of the Terminal's design, and be technically accurate and practically enforceable. *See supra*, Arg. Section IV.A. The permit's emissions limits for VOCs from three sources of emissions fail to satisfy these criteria: 1) storage tanks, AR65 at 28 (Storage Tank Emissions Cap), 2) controlled loading losses from Vapor Combustion Units ("VCUs"), *id*. at 35 (Marine Control Emissions Cap), and 3) uncontrolled loading losses, *id*. at 28 (Marine Dock

[18] Max Midstream's contention in its Application that the Terminal is a minor source of pollution applies the proper major source threshold, but fails to establish that the Terminal's potential to emit VOCs is less than 100 TPY. Because TCEQ relied on the incorrect major source threshold, rather than relying on Max Midstream's Application that the Terminal's potential to emit is less than 100 TPY, the Court should vacate the Permit and remand this matter to TCEQ without evaluating whether Max Midstream's Application or the issued Permit demonstrate the Terminal is a minor source. Plaintiffs address Max Midstream's arguments out of an abundance of caution.

Emissions Cap). The permit's failure to establish practically enforceable and technically accurate physical and operational limits for any one of these three emissions categories is sufficient to trigger major-source PSD preconstruction permitting requirements. For example, the appropriately calculated PTE for VOCs for the Terminal's storage tanks alone is 824.75 TPY. *See infra*, Arg. Section IV.C.1.a. Accordingly, issuance of a minor permit authorizing the Terminal based on these permit limits is arbitrary and capricious or an abuse of discretion. Moreover, the record in this matter does not contain substantial evidence that the Terminal's potential to emit VOC is less than 100 TPY.

1. The Permit fails to limit potential VOC emissions from the Terminal's storage tanks to less than 100 TPY

The permit's annual Storage Tank Emissions Cap authorizes Terminal storage tanks to emit 42 TPY of VOCs. AR65 at 28. This emission limit does not represent worst-case emissions from the tanks, it is not a technically accurate limit, and it is not practically enforceable. Accordingly, it does not limit the tanks' potential to emit and the TCEQ may not rely on it as evidence that the Terminal's potential to emit VOCs is less than 100 TPY.

a. The annual storage tank emissions cap does not represent worst-case, or "potential" emissions

The hourly limits in the permit for breathing losses from the Terminal's storage tanks are 13.40 pounds of VOC/hour for tanks TK-06-01 and TK-06-03

through TK-06-07, 9.51 pounds of VOC/hour for tanks TK-06-08 through TK-06-15, and 18.42 pounds of VOC/hour for TK-06-02. AR65 at 27-28. Max Midstream represents that these hourly emission limits are based upon worst-case conditions using "maximum temperature and vapor pressure." AR1 at 136. This worst-case emission rate determines the tanks' potential to emit VOCs unless the permit establishes practically enforceable physical or operating limits to artificially constrain potential to emit. *See supra*, Arg. Section IV.A.3.

Table 1: Hourly Limits in Permit for Breathing Losses for Storage Tanks

Permit Limit (VOC pounds/hour)	No. of Tanks	Annual Hours of Operation Authorized	Annual Worst-Case VOC (TPY)
18.42	1	8,760	80.68
13.40	6	8,760	410.84
9.51	8	8,760	333.23
		Total	824.75

But Max Midstream represents a much lower potential to emit based on the permit's Annual Storage Tank Emissions Cap VOC limit of 42.86 TPY. AR12 at 105; AR65 at 28. This much lower limit is not the product of any design or operating constraints imposed by the permit. Instead, the difference is simply the result of different, unenforceable predictions about ambient temperatures, and more importantly, crude characteristics such as the predicted vapor pressure of

stored materials that Max Midstream used to calculate short-term and long-term emissions:

Table 2: Values Used to Calculate Short and Long-Term Emissions for TK-06-01 Through TK-06-07[19]

Parameter	Value (Worst-Case)	Value (Annual)
Max Stored True Vapor Pressure	11.00 psia	9.87 psia
Vapor Pressure Function	0.33169	0.2407

Vapor pressure is a measure of a liquid's tendency to evaporate. Thus, as the vapor pressure of crude oil stored in Max Midstream's tanks increases, so does the amount of VOC emitted by the tanks. The different vapor pressure values (and the related vapor pressure function) Max Midstream used to calculate tank emissions limits reflect the characteristics of crude stored at the Terminal, which is properly considered as part of the Terminal's design. AR12 at 2 (explaining that the Terminal will handle a wide variety of crudes with differing vapor pressures). To limit potential to emit, the crude vapor pressure used to calculate annual VOC emissions must represent worst-case conditions authorized by the permit. But the annual value was not calculated using the worst-case true vapor pressure of 11 pounds per square inch absolute ("psia"). Instead, it was calculated using the lower vapor pressure of 9.87 psia, which does not represent worst-case conditions.

[19] AR12 at 112-13.

The only enforceable constraint on vapor pressure in the permit states that "[t]he true vapor pressure of any liquid stored at this facility in an atmospheric tank shall not exceed 11.0 psia." AR65 at 8. This condition does not require the vapor pressure of materials stored at the Terminal to comply with the annual average vapor pressure of 9.87 psia used to calculate the annual VOC limit in the permits annual Storage Tank Emissions Cap. Accordingly, this annual limit not only fails to represent worst-case, or "potential," tank emissions; it also fails the test of practical enforceability. Because this is so, TCEQ may not rely on the annual VOC emission limit in the permit's Storage Tank Emissions Cap to determine that the Terminal's potential to emit VOC is less than 100 TPY.

b. The annual storage tank emissions cap is not technically accurate or practically enforceable

Even if Max Midstream had properly used worst-case conditions to calculate potential VOC emissions from its storage tanks, the annual VOC emission limit in the Annual Storage Tank Emissions Cap would still fail the tests of technically accuracy and practical enforceability. The application calculated maximum hourly and annual emissions from Max Midstream's storage tanks using EPA's AP-42 emission factors. AR1 at 136. An emissions factor is "a representative value that attempts to relate the quantity of a pollutant released to the atmosphere with an activity associated with the release of that pollutant." AR70 at 377 (emphasis omitted) (Sahu Report) (quoting EPA, AP-42: Compilation of Air Emissions

Factors, *Introduction*, at 1 (Jan. 1995)[20]). AP-42 emission factors are "simply averages of all available data of acceptable quality, and are generally assumed to be representative of long-term averages for all facilities in the source category (i.e., a population average)." *Id.* (emphasis omitted). For that reason, EPA has explained that AP-42 emission factors "are not likely to be accurate predictors of emissions from any one specific source, except in very limited scenarios" and should not be used to establish permit limits. *Id*. at 377-78.

But even if AP-42 factors reliably predicted actual emissions, they are still not an appropriate basis for determining a source's potential to emit. As EPA's Environmental Appeals Board has explained:

> [T]here is a fundamental conceptual difference between PTE and actual emission performance that makes … reliance on emission factors inappropriate in this instance. While PTE is intended to identify the highest possible level of emissions that a facility is capable of releasing in light of its physical design and operational characteristics … emission factors are intended to provide a generalized estimate of the *average* emissions performance of a particular type of emission source.

Peabody, 2005 WL 428833, at *11.

Thus, the Terminal's AP-42-based Storage Tank Emissions Cap VOC limit is not a technically accurate constraint on potential to emit because it does not

[20] Available at https://www.epa.gov/sites/default/files/2020-09/documents/c00s00.pdf; *see* EPA, AP-42: Compilation of Air Emissions Factors, https://www.epa.gov/air-emissions-factors-and-quantification/ap-42-compilation-air-emissions-factors (last visited July 13, 2023).

accurately predict Terminal emissions and because it reflects annual averages rather than worst-case potential emissions.

The permit directs Max Midstream to use the same AP-42 emissions factors and calculation procedures used to establish Terminal permit limits to demonstrate compliance with storage tank emission limits. AR65 at 9 (Special Condition No. 9(G)). For the same reasons that AP-42 emissions factors are presumptively inappropriate for calculating emission limits, they are also a disfavored method for determining compliance with permit limits:

> Because emission factors essentially represent an average of a range of emission rates, approximately half of the subject sources will have emission rates greater than the emission factor and the other half will have emission rates less than the factor. As such, a permit limit using an AP-42 emission factor would result in half of the sources being in noncompliance.

AR70 at 378 (emphasis omitted) (Sahu Report) (quoting EPA, *Reminder About Inappropriate Use of AP-42 Emission Factors*, Publication No. EPA 325-N-20-001 (November, 2020)[21]). Accordingly, TCEQ may not rely on the Storage Tank Emissions Cap VOC limit to determine that the Terminal's potential to emit VOC is less than 100 TPY.

[21] Available at https://www.epa.gov/sites/default/files/2021-01/documents/ap42-enforcementalert.pdf.

2. The Permit fails to limit potential VOC emissions from the Terminal's Vapor Combustion Units to less than 100 TPY

The permit authorizes 20 vapor combustion units ("VCUs"). These VCUs combust VOC in vapors released during the marine loading process. Hourly VOC emissions from each VCU are based on a maximum collected loading loss rate of 5,140 pounds of VOC vapors/hour. AR12 at 124-25. At this worst-case scenario, the permit authorizes each VCU to emit 5.14 pounds/hour of VOC, based the input of 5,140 pounds of VOC/hour and a device control rate of 99.9%.[22] *Id*. If all these VCUs operated under worst case conditions year-round, Max Midstream's calculations indicate that they would emit 405 TPY of VOC.[23]

These worst-case emissions are significantly higher than the annual VOC limit of 17.33 TPY established by the permit's Marine Control Emissions Cap. AR65 at 35. Worst-case emission rates should be used to determine the tanks' potential to emit VOC unless the permit establishes practically enforceable physical or operating limits to artificially constrain potential to emit. *See supra*, Arg. Section IV.A.

[22] Hourly VOC input rate (5,140) * 99.9% Control Efficiency (0.001) = 5.14.
[23] Hourly rate (5.14 pounds) * Number of VCUs (20) * Hours in a year (8,760) / Pounds per ton (2,000) = 405.

a. The annual marine control emissions cap does not represent worst-case, or "potential," emissions

If each of the Terminal's 20 VCUs has the capacity to combust 5,140 pounds of VOC/hour, then the maximum annual capacity of all 20 VCUs is 900,528,000 pounds.[24] AR12 at 124-25. Based on the required VOC control efficiency of 99.9%, Terminal VCUs could only combust 34,660,000 pounds of VOC from marine loading activities and comply with the Marine Control Emissions Cap limit of 17.33 TPY. But the permit does not limit the amount of VOC directed to the VCUs or establish any other enforceable physical or operational limits that would prevent the Terminal from operating in a way that causes the VCUs to emit more than 17.33 TPY of VOC. Accordingly, the Marine Control Emissions Cap does not effectively limit the VCUs' potential to emit and TCEQ may not rely on it as evidence that the Terminal's potential to emit VOC is less than 100 TPY. 30 Tex. Admin. Code § 116.12(29).

b. The annual marine control emissions cap is not technically accurate or practically enforceable

The permit requires all VCUs to continuously achieve a 99.9% destruction efficiency, meaning they must destroy 99.9% of the VOCs fed to them. AR65 at 11 (Special Condition No. 17(A)). But Max Midstream has not demonstrated that its

[24] Maximum per unit hourly VOC (5,140) * Number of VCUs (20) * Hours in a year (8,760) = 900,528,000.

VCUs will achieve this level of performance, as required by 30 Tex. Admin. Code § 116.111(a)(2)(G) (1998). Initially, Max Midstream represented it had obtained a vendor guarantee for this level of performance. AR1 at 137; AR12 at 124-25. However, when TCEQ asked for the vendor data, Max Midstream admitted there was no such guarantee. AR12 at 2 ("The vendor selection process is currently underway and a final decision on vendors has yet to be made."). And the permit record does not identify any similar source that has continuously achieved this level of performance.

The only record information concerning achievable VCU performance comes in the form of two generic vendor pamphlets that were not included in the application materials made available to the public during the notice and comment period. AR16 at 4-7. Only one of these pamphlets includes information about the operating temperature needed to achieve 99.9% VCU control and it contradicts the permit terms. The pamphlet for Aereon's CEB 4500 VCU states that the unit's operating temperature is between 900 and 1,200°C (or between 1,652 and 2,192°F). *Id.* at 7. The permit, however, directs Max Midstream to presume that its VCUs are achieving 99.9% control so long as the combustion chamber temperature is above 1,400°F. AR65 at 11 (Special Condition No. 17(A)). Max Midstream's February 2021 application update casts further doubt upon the sufficiency of the permit term, indicating that a temperature of 1,600°F is necessary to comply with Marine

Control Emissions Cap. AR26A at 1 (table identifying temperature of 1,600°F to comply with annual marine VCU cap (MVCUCAP)). The permit requirement is also inconsistent with Max Midstream's representation that "its emergency flare will maintain a temperature of 1,832 F to achieve a much lower …. [destruction and removal efficiency] between 98 and 99%." AR70 at 380 (Sahu Report).

In addition to the temperature requirement for VCUs, the permit requires Max Midstream to conduct a single test to demonstrate compliance with the 99.9% VOC control requirement. AR65 at 11-13 (Special Condition No. 18). This stack test fails the test of practical enforceability:

> [T]his method … of determining compliance … is unacceptable, because the performance of Max Midstream's VCUs during a single stack test is not a reliable measure of the controls' performance across all operating scenarios authorized by the … Permit. There are various factors that affect a VCU's performance, including changes in the volumetric flow rate and composition of the materials being combusted. Thus, Max Midstream contends that it would not be practical to establish throughput limits for the various materials it will handle at the Terminal, "due to the varying nature of crude oils and crude condensates and customer markets at the terminal." [AR1 at 136.] Given this variability, the very high level of control represented and the utter lack of margin between Max Midstream's represented …[potential to emit] and the corresponding PSD significance threshold, the … Permit must require more robust monitoring to make its synthetic minor emission caps practically enforceable.

AR70 at 375-76 (Sahu Report).

TCEQ responded that the test requirement assures practical enforceability because it "will require stack testing under worst case conditions to verify the

provided preliminary vendor data," AR51 at 15, but this simply is not true. The permit only provides that testing shall occur at the "maximum *expected* hourly loading rate," and provides that all the other test parameters shall be nailed down at a pretest meeting. AR65 at 12. If the test parameters are yet to be determined, the permit does not actually require that the test will reflect worst-case conditions. Moreover, a "single stack test is not a reliable measure of the controls' performance across all operating scenarios authorized by the … Permit" *for the entire lifetime* of each unit. AR70 at 375 (Sahu Report).

Making matters worse, the permit allows TCEQ to modify or waive this stack test requirement entirely upon Max Midstream's request. AR65 at 11-12 ("Requests to waive testing for any pollutant specified in this condition shall be submitted to the TCEQ Office of Air, Air Permits Division.").[25] EPA has objected to similar language in other Texas permits, because TCEQ "failed to demonstrate how waiving stack testing requirements is consistent with the requirement that there is adequate monitoring for the specified units." *In the Matter of Premcor Refining Group Inc., Valero Port Arthur Refinery*, Order on Petition No. VI-2018-

[25] Special Condition No. 18's provision requiring EPA approval for waivers for 40 C.F.R. Part 60 testing requirements does not apply here, because the relevant VOC, NOx, and CO requirements were not established pursuant to Part 60.

4, at 23 (November 30, 2021).[26] The record in this matter is also silent on this question. Accordingly, the test waiver provision undermines the practical enforceability of the 99.9% VCU control requirement used to establish the annual VOC limit in the Marine Control Emissions Cap.

3. The Permit fails to limit potential VOC emissions from the Terminal's uncontrolled marine loading losses

Not all VOC vapors released during the marine loading process are routed to Terminal VCUs. The permit also authorizes 11.80 TPY of VOCs from uncollected loading losses. AR65 at 28 (Marine Dock Emissions Cap). This emissions limit was calculated using Equation 1 from EPA's AP-42 Emissions Factors for Petroleum Loading, Section 5.2. AR1 at 137. As explained above, AP-42 is generally disfavored as a basis for establishing source-specific permit limits. But the AP-42 equation Max Midstream used to calculate uncontrolled loading losses is particularly unreliable, because it "has a built-in margin of error of plus or minus 30%." AR70 at 375 (Sahu Report) (*citing* EPA, AP-42: Compilation of Air Emissions Factors, *Section 5.2 – Transportation and Marketing of Petroleum Liquids*, at 4 (June 2008) [27]).

[26] This EPA objection considers the sufficiency of monitoring in a PSD permit that has been incorporated into a federal operating permit. Federal operating permits compile and establish monitoring requirements to assure compliance with all Clean Air Act requirements—including preconstruction permitting requirements—for major sources of pollution. *See* 42 U.S.C. § 7661c(a).

[27] Available at https://www3.epa.gov/ttn/chief/ap42/ch05/final/c05s02.pdf.

The annual VOC permit limit in the Marine Dock Emission Cap is not technically accurate because it is based on calculations that build in a probable 30% rate of error. It is also unenforceable because the permit does not establish any monitoring, testing, or recordkeeping requirements that explains how Max Midstream is to determine compliance with it. Because the Marine Dock Emissions Cap VOC limit is not the product of any enforceable physical or operational limits, and because it is not a technically accurate or enforceable limit, it does not limit the Terminal's potential to emit. 30 Tex. Admin. Code § 116.12(29). Accordingly, TCEQ may not rely on it as evidence that the Terminal's potential to emit VOC is less than 100 TPY.

CONCLUSION AND PRAYER

For the reasons stated above, TCEQ's April 8, 2022 order denying all contested case hearing requests and issuing Max Midstream's air permit must be reversed and remanded because it was invalid, arbitrary, or unreasonable. Plaintiffs raise two causes of action in this case, challenging TCEQ's 1) denial of Plaintiffs' hearing requests and 2) issuance of the minor source air permit, either one of which is sufficient to require reversal and remand of the Permit to TCEQ.

Specifically, Plaintiffs respectfully request that the Court:

1. Find TCEQ's April 8, 2022 order is invalid, arbitrary, or unreasonable, and reverse and remand the order back to TCEQ for

further proceedings with instructions to proceed in accordance with this Court's findings and orders; and

2. Grant any and all such further relief, general or special, at law or in equity, to which Plaintiffs may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of TRAVIS COUNTY (TEX.) DIST. CT. LOC. R. 10.5 and TEX. R. APP. 38.1 because:

    - this brief contains 14,874 words, excluding the parts of the brief exempted by TEX. R. APP. P. 9.4(i)(1).

2. This brief also complies with the typeface requirements because:

    - this brief has been prepared in a proportionally spaced typeface using Microsoft Word 365 with a 14-point font and the footnotes were typed with a 12-point font named Times New Roman.

Dated: July 17, 2023

/s/ Erin Gaines
Erin Gaines

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of July 2023, a true and correct copy of this **OPENING BRIEF OF SAN ANTONIO BAY ESTUARINE WATERKEEPER, TEXAS CAMPAIGN FOR THE ENVIRONMENT, and S. DIANE WILSON,** electronically served upon the following counsel of record via the Court's electronic filing manager:

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