

NO. 03-21-00204-CV

**IN THE THIRD COURT OF APPEALS
AUSTIN, TEXAS**

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**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY and
VULCAN CONSTRUCTION MATERIALS, LLC,**
Appellants

v.

**FRIENDS OF DRY COMAL CREEK, STOP 3009 VULCAN QUARRY, JEFFREY REEH,
TERRY OLSON, MIKE OLSON, AND COMAL INDEPENDENT SCHOOL DISTRICT,**
Appellees

ON APPEAL FROM CAUSE No. D-1-GN-20-000941
353RD JUDICIAL DISTRICT COURT, TRAVIS COUNTY, TEXAS
HON. JUDGE MAYA GUERRA GAMBLE

**BRIEF OF *AMICUS CURIAE*
TEXAS AGGREGATES & CONCRETE ASSOCIATION**

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ORAL ARGUMENT REQUESTED

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GLOSSARY OF TECHNICAL TERMS AND DEFINED TERMS

- “Friends Appellees” means Friends of Dry Comal Creek and Stop 3009 Vulcan Quarry, collectively.
- “Application” means Vulcan’s application for the Permit.
- “AQA” means the Air Quality Analysis Vulcan conducted in conjunction with its Application.
- “AQAs for PM₁₀ and PM_{2.5}” means AQAs for 24-hour PM₁₀, 24-hour PM_{2.5}, and Annual PM_{2.5}.
- “Draft Permit” means the draft Permit that was prepared by the TCEQ Executive Director and that, along with the Application, was the subject of the contested case hearing.
- “ED” means the TCEQ Executive Director.
- “GLC_{max}” means a pollutant’s maximum off-site ground level concentration calculated by air dispersion modeling.
- “Issues” means the Issues Presented in this Initial Brief, which are closely based on the rulings in the Final Judgment that led the district court to not affirm TCEQ’s Order completely, but instead to reverse and remand parts of TCEQ’s Order.
- “Minor NAAQS Analyses for PM₁₀ and PM_{2.5}” means the Minor NAAQS Analyses for the 24-hour PM₁₀, 24-hour PM_{2.5}, or Annual PM_{2.5} NAAQS.
- “Modeling” means air dispersion modeling.
- “NAAQS” means National Ambient Air Quality Standard.
- “NSR” means new source review.
- “Order” means TCEQ’s November 21, 2019, Order that issued the Permit.

- “Permit” means Permit No. 147392L001, which authorizes construction and operation of the Plant.
- “PFD” means the Proposal for Decision.
- “Appellees” means Friends Appellees and Reeh Appellees, collectively.
- “Plant” means Vulcan’s rock crushing plant are authorized by the Permit.
- “PM” means particulate matter.
- “PM_{2.5}” is particulate matter with a diameter less than or equal to 2.5 microns.
- “PM₁₀” is particulate matter with a diameter less than or equal to 10 microns.
- “PM₁₀ and PM_{2.5} AQA modeling” means modeling associated with the AQAs for PM₁₀ and PM_{2.5}.
- “Quarry and road emissions” means emissions from Vulcan’s proposed on-site quarry and roads and/or from existing offsite quarries or roads.
- “Reeh Appellees” means Jeffrey Reeh, Terry Olson, Mike Olson, and Comal Independent School District, collectively. “Rock crushers” means rock crushing plants.
- “Sensitive subgroups” includes, among others, children (including those at schools), elderly, and people with preexisting health conditions.
- “SOAH” means State Office of Administrative Hearings.
- “TCAA” means Texas Clean Air Act.
- “TACA” means Texas Aggregates & Concrete Association.
- “TCEQ” means Texas Commission on Environmental Quality.
- “Vulcan” means Vulcan Construction Materials, LLC.

- “Vulcan’s aggregate material” means the aggregate material Vulcan will process in the Plant.

STATEMENT OF THE CASE

This case concerns an air quality permit application for a new rock crusher in Comal County, Texas. This case is before the Court because the Final Judgment misinterprets Texas law.

The case before this Court arose from a Texas Commission on Environmental Quality (“*TCEQ*”) November 21, 2019, Order (“*TCEQ Order*”)¹ that issued Vulcan Construction Materials, LLC (“*Vulcan*”) minor new source review² (“*NSR*”) Permit No. 147392L001 (“*Permit*”). The Permit authorized the construction and operation of a rock crushing plant in Comal County (the “*Plant*”).³ The TCEQ issued their Order based on a Proposal for Decision (“*PFD*”) from SOAH recommending Vulcan receive its Draft Permit (“*Draft Permit*”).⁴ Appellees each appealed the TCEQ’s Order. After briefing and a December 8, 2020, hearing, on April 1, 2021, the 353rd District Court in Travis County issued a Final Judgment (“*Final Judgment*”). *See* App’x A, C.R. 540-546. On April 30, 2021, Vulcan and TCEQ each filed a Notice of Appeal to appeal the rulings in the Final Judgment that led the district court to reverse and remand the TCEQ Order. C.R. 552-554; 548-551. TACA

¹ 1 A.R. 174

² It is a minor new source review permit because the Plant’s emissions of each pollutant are less than the 250 tons/year. *See* 30 TEX. ADMIN. CODE § 116.12(19) and 40 C.F.R. § 51.166(b)(1)(i)(b).

³ 1 A.R. 173.

⁴ 1 A.R. 161.

submits this amicus brief to support Vulcan and the TCEQ in their appeal of the Final Judgment.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

TACA is the leading concrete and aggregates state trade association in the United States. TACA member companies manufacture, mine, produce, recycle, and sell construction material products such as cement, sand, crushed limestone, and ready-mixed concrete. TACA's producer member companies employ more than 140,000 Texans. It is an \$8.0 billion per year industry. Texas relies on concrete and aggregates for building construction and infrastructure projects to sustain its rapidly growing population. In fact, to construct a single, average-sized residential home requires over 100 cubic yards of concrete and over 15,000 cubic yards of concrete are required to construct a new six-lane highway. The concrete industry generates significant tax revenue for state and local governments.

Vulcan is a TACA member. Vulcan correctly completed the TCEQ air quality permitting application process. Vulcan can operate its Plant consistent with the limitations in its Permit, and there is no evidence in the Administrative Record that Vulcan will not do so. The reason TACA submits this amicus brief is because the district court incorrectly interpreted the TEXAS CLEAN AIR ACT. To be clear, TACA takes exception with ordering provision nos. 1 and 2 in the Final Judgment because

the conclusions and findings of the TCEQ Order to which those ordering provisions relate are supported by substantial evidence and are not arbitrary and capricious, and the district court's conclusion to the contrary is based on incorrect interpretations of the Texas Clean Air Act ("**TCAA**") and TCEQ rules. TACA takes no formal position on ordering provision nos. 4 and 5 in the Final Judgment. However, TACA supports the positions that Vulcan and TCEQ have taken concerning ordering provision nos. 4 and 5.

STATEMENT REGARDING ORAL ARGUMENT

Because of the legally incorrect rulings in the Final Judgment, oral argument to this Court from the actual parties to this case should be permitted. Oral argument will help this Court reach the correct legal resolution of this matter.

RECORD

There is a one volume Clerk's Record. Citations to the Clerk's Record will be C.R. [page]. There is also a one volume Reporter's Record. The Reporter's Record reflects that the administrative record supporting TCEQ's Order ("*Administrative Record*"), and it was admitted as Joint Exhibit 1 at the district court hearing. Reporter's Record at 38:4-17. The Administrative Record is located on pages 63-82 of the Clerk's Record. Cites in this Brief to the Administrative Record are in the form of "[Section of Administrative Record] A.R. [Item No. in Administrative Record] at [page number(s) of that Item (where applicable)]."

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to TEX. GOV'T CODE § 22.220(a) over this appeal of the district court's rulings in its Final Judgment.

ISSUES PRESENTED

The Final Judgment reversed and remanded parts of TCEQ's Order. TACA supports the positions of Vulcan and the TCEQ in their Initial Briefs challenging the ordering provisions of the Final Judgment. TACA files this Amicus Brief on the following issues:

1. Is the answer to each of the following issues yes such that this Court should affirm Conclusion of Law No. 12 in the TCEQ's Order:

- a. Is TCEQ's determination that the Plant's crystalline silica emissions will not negatively affect human health or welfare supported by substantial evidence?
- b. Is TCEQ's determination that the Plant's crystalline silica emissions calculations are representative of those to be expected from the Plant supported by substantial evidence?
- c. Are TCEQ's rejections of Reeh Appellees' assertions regarding ways the Permit allegedly is not sufficiently protective of public health or property supported by substantial evidence and not arbitrary and capricious?

2. Is the answer to each of the following issues yes, such that this Court should affirm Conclusion of Law No. 14 in TCEQ's Order:

- a. Is TCEQ's determination that Vulcan's air quality analyses ("**AQAs**") adequately accounted for and addressed cumulative impacts supported by substantial evidence and not arbitrary and capricious?
- b. Is TCEQ's determinations that quarry and road emissions were adequately considered supported by substantial evidence and not arbitrary and capricious?
- c. Is TCEQ's determination that Vulcan's choices of the relevant background concentrations used in its voluntary Minor National Ambient Air Quality Standard ("**NAAQS**") Analyses were appropriate supported by substantial evidence and not arbitrary and capricious?

STATEMENT OF THE FACTS

Vulcan completed its Application on November 17, 2017.⁵ The TCEQ Executive Director (“*ED*”) reviewed the Application, determined that it met all applicable legal requirements, and issued the Draft Permit.⁶ Like other permit applicants for new rock crushing equipment, Vulcan conducted AQAs for each of the pollutants that will be emitted from the Plant to demonstrate that its emissions will be protective of public health, welfare, and property.⁷ Vulcan’s AQAs satisfied all applicable requirements.⁸ Vulcan voluntarily conducted AQA modeling of the Plant’s crystalline silica emissions,⁹ and it demonstrated the Plant’s crystalline silica emissions will not negatively impact public health, or welfare.¹⁰

Vulcan’s AQAs also included Minor NAAQS Analyses for 24-hour PM₁₀, 24-hour PM_{2.5}, and Annual PM_{2.5} (“*PM₁₀ and PM_{2.5}*”). Those analyses show the Plant’s PM₁₀ and PM_{2.5} emissions will not negatively affect public health, including of sensitive subgroups, or welfare, including wildlife, vegetation, flora, and fauna.¹¹

⁵ 1 A.R. 27.

⁶ 2-B2 A.R. 211 at 4:12-17; 1 A.R. 39; 1 A.R. 40; 2-B2 A.R. 219; 2-B2 A.R. 229.

⁷ 1 A.R. 26 at 1, 3.

⁸ 2-B1 A.R. 185 at 12:10-13:1; 2-B2 A.R. 230, Response 14 at 35-36; 1 A.R. 10; 1 A.R. 22; 1 A.R. 26 at 1, 4, and 8.

⁹ 2-B1 A.R. 185 at 23:7-9; 2-B1 A.R. 187 at 23:17-24:4; 1 A.R. 26 at 10; 2-B2 A.R. 232 at 12:24-27.

¹⁰ 2-B1 A.R. 187 at 14:10-14; 26:6-27:18, 36:21-22, 37:19-38:2; 2-B2 A.R. 230, Response 6 at 23; 1 A.R. 154 at 36-38.

¹¹ 2-B1 A.R. 187 at 36:5-22, 37:10-18; 2-B2 A.R. 232 at 23:34-24:11; 2-B2 A.R. 230, Response 4 at 11, 13; 2-B2 A.R. 222.

The ED has historically determined that rock crushers will not emit significant amounts of crystalline silica. The ED approved Vulcan's AQAs, including its Minor NAAQS analyses for PM₁₀ and PM_{2.5}, which were proper even though they did not include the input of PM₁₀ and PM_{2.5} emissions from on- and off-site roads and quarries into the associated modeling because (i) roads and quarries are not subject to TCEQ air permitting jurisdiction, and (ii) the emissions of off-site roads and quarries were accounted for by Vulcan's addition of representative background concentrations from ambient air quality monitors.

SUMMARY OF THE ARGUMENT

Issue No. 1.a. – The Plant's crystalline silica emissions are not harmful.

After reviewing the Permit Application, including all the information from the contested case hearing, the Commission determined the Plant's crystalline silica emissions will not negatively affect human health or welfare. The TCEQ's determination is supported by substantial evidence.

The ED has experience permitting rock crushers. The ED has determined that crystalline silica emissions from rock crushers are not expected to harm human health or welfare. For this reason, the TCEQ's Air Permits Division did not initially require that Vulcan conduct AQA modeling of the Plant's crystalline silica emissions. Regardless, Vulcan voluntarily modeled these emissions.

It is TACA's position that Vulcan presented uncontroverted testimony from two toxicology experts that the Plant's crystalline silica emissions will not negatively impact human health, including of sensitive subgroups, or welfare. TACA agrees with the TCEQ's and Vulcan's briefing that Vulcan's modeling evidence and testimony that explained this evidence to the ALJ and the TCEQ provides substantial evidence to support TCEQ's determinations that maximum off-site concentrations of crystalline silica emissions will be less than TCEQ's crystalline silica effects screening levels ("ESLs") and thus will not be harmful to human health or welfare. TACA also agrees with the Vulcan's briefing that the crystalline silica percentage in Vulcan's aggregate material could be a little more than 135 times than the 0.2% crystalline silica content value it determined from its representative sample, and still be protective of human health and welfare.

Issue No. 1.b. - The calculated crystalline silica emissions are representative for the Plant and of similar limestone (i.e., aggregate materials) crushers.

TCEQ determined the calculated crystalline silica emissions are representative for the Plant. TCEQ's determination is supported by substantial evidence. First, evidence was presented that Vulcan's aggregate material sample was a representative sample. Vulcan's experts witness showed the sample contained a crystalline silica content consistent with other limestone deposits near the Plant. Vulcan used that percentage to calculate a worst-case emissions profile from its

Plant. Second, the Administrative Record contains testimony from two geologist experts stating the aggregate sample was a representative sample for limestone (i.e., aggregate materials) deposits near the Plant. Third, there is uncontroverted evidence the analysis of Vulcan’s representative sample showed 0.2% crystalline silica.

Issue No. 1.c. – The Permit is written to protect public health and property.

The TCEQ issues air quality permits that are legally required to protect public health and property. It is TACA’s position the TCEQ correctly rejected the Reeh Appellees’ assertions arguing that the Permit is not sufficiently protective of public health or property. The TCEQ’s determination to reject Reeh Appellees’ assertions are supported by substantial evidence. The TCEQ’s determination is not arbitrary or capricious. It is TACA’s position that the Texas Clean Air Act (“TCAA”), TCEQ rules, and TCEQ guidance do not require that the Permit include a fence line monitoring protocol for new rock crushers.

Issue No. 2.a. – TCEQ appropriately determined Vulcan’s AQA accounts for cumulative impacts.

The TCEQ determined Vulcan’s AQAs adequately accounted for cumulative impacts. Their determination is supported by substantial evidence. Their determination is not arbitrary or capricious.

Vulcan’s Minor NAAQS Analyses demonstrated the Plant’s PM₁₀ and PM_{2.5} emissions will not negatively affect public health or welfare. Vulcan completed its

Minor NAAQS Analyses for PM₁₀ and PM_{2.5}, and addressed the issue of cumulative impacts of PM₁₀ and PM_{2.5} emissions. Vulcan correctly modeled emissions from other nearby facilities to determine the worst-case potential off-site impacts due to the emissions from its proposed rock crusher. Not surprisingly, the total maximum off-site GLCs from the Minor NAAQS Analyses were less than the applicable NAAQS. To lead this Court to a more appropriate legal conclusion on this issue, TACA notes that the EPA conservatively establishes NAAQS at concentrations that will protect public health and welfare. Therefore, when Vulcan showed that its total maximum off-site GLCs were *less than* the NAAQS, it proved its Plant's emissions are protective of public health and welfare.

Issue No. 2.b. - TCEQ appropriately determined Vulcan's AQA adequately considered emissions from on-site and off-site roads and quarries.

As a threshold legal issue, TACA reminds this Court that the TCEQ does not have the legal authority to require Vulcan, or any permit applicant for a new rock crusher, to input quarry and road emissions into its AQA modeling because a quarry or road are excluded from the legal meaning of "facility."¹² The TCAA limits TCEQ's air permitting jurisdiction to emissions sources that are facilities. Therefore, the TCEQ's rules require emissions from proposed "facilities" ---not

¹² See TEX. HEALTH AND SAFETY CODE § 382.003(6). See also, 30 TEX. ADMIN. CODE § 116.10(4).

emissions from rock quarries or roads---to be input into AQA modeling, such as preliminary impact determination modeling and Minor NAAQS Analyses modeling. Since the definition of “facility” in the TCAA, and in the TCEQ rules specifically excludes quarries and roads, TCEQ does not have the legal authority to require Vulcan input emissions from on-site or off-site quarries or roads into any such modeling.

Regardless, Vulcan’s experts and TCEQ witnesses testified that quarry and road emissions were adequately considered in Vulcan’s Minor NAAQS Analyses for PM₁₀ and PM_{2.5}. Their collective testimony showed that these off-site emission sources were accounted for through the selection of representative background concentrations of PM₁₀ and PM_{2.5} from nearby ambient air quality monitors. The total maximum GLCs from those Minor NAAQS Analyses that included those representative background concentrations were less than the NAAQS and TCEQ effects screening levels (“*ESLs*”) for PM₁₀ and PM_{2.5}, and crystalline silica, respectively. It is TACA’s position this means the Plant’s emissions of PM₁₀ and PM_{2.5} will not negatively impact public health or welfare. TACA reminds this Court that Vulcan’s experts showed that quarry and road emissions were adequately considered in Vulcan’s voluntary crystalline silica AQA. Therefore, it is TACA’s

position that TCEQ's determination that quarry and road emissions were adequately considered is supported by substantial evidence.

Issue No. 2.c. – TCEQ appropriately determined that Vulcan's selection of background concentrations of ambient air quality data from air monitors is appropriate.

The TCEQ determined that Vulcan's selected background concentrations for Vulcan's Minor NAAQS Analyses for PM₁₀ and PM_{2.5} and other pollutants were appropriate. The TCEQ's determination is supported by substantial evidence. The TCEQ's determination is not arbitrary or capricious.

The Administrative Record shows Vulcan adhered to TCEQ guidance for selecting the correct air quality monitors to provide the representative background concentrations for is AQA. These data included the PM₁₀ and PM_{2.5} background concentrations that accounted for quarry and road emissions. It is TACA's position that overwhelming evidence supports TCEQ's determination that such emissions from these background sources along with the proposed emissions profile of Vulcan's new crusher did not cause or contribute to an exceedance of any NAAQS.

STANDARD OF REVIEW

This Court should conduct a *de novo* review of each Issue pursuant to the standard set forth in TEX. GOV'T CODE § 2001.174, which states in part that the 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 § 382.003.¹³ TACA concurs with the positions regarding standard of review and deference to TCEQ in Vulcan's and TCEQ's initial briefs.

ARGUMENT

Based on this Court's de novo review of the Issues, it should determine the answers are “yes” to Issue Presented Nos. 1.a-c. and 2.a.-c. It is TACA's position that this Court should rule that the Final Judgment rulings upon which those issues are based are incorrect. Accordingly, this Court should affirm TCEQ's Order.

¹³ See, e.g., *Cnty. of Reeves v. Tex. Comm'n on Env'tl. Quality*, 266 S.W.3d 516, 528 (Tex. App.—Austin 2008); *Tex. Dep't of Pub. Safety v. Stanley*, 982 S.W.2d 36, 37 (Tex. App.—Houston [1st Dist.] 1998).

Issue Presented Nos. 1.a-c. and 2.a.-c. relate to the district court's rulings in its Final Judgment that TCEQ's determinations that the Plant's PM₁₀ and PM_{2.5} emissions and the Plant's crystalline silica emissions, respectively, will not negatively impact health, including of sensitive subgroups, or welfare are allegedly not supported by substantial evidence, and are allegedly arbitrary or capricious. To reject those TCEQ determinations and reverse the well-substantiated parts of the TCEQ's Order, the district court had to ignore, or improperly interpret and apply, the TCAA, TCEQ rules, and agency guidance. It is TACA's position the Administrative Record and the briefing before the district court contains no support for it to have done so.

The district court's Final Judgment negatively impacts Texas, the construction aggregates industry and the integrity of the TCEQ's air quality permitting program. The Final Judgment incorrectly interprets state law and TCEQ's rules. It creates confusion for permit applicants attempting to follow state law and TCEQ's rules when they apply to the TCEQ for an air quality permit. The Final Judgment ignored the TCEQ's well-reasoned Order, which was based on thorough review of Vulcan's Application and AQA data, and TCEQ's technical guidance for issuing air quality permits, including to new rock crushers. TACA asks this Court to properly interpret and apply the relevant language in the TCAA, TCEQ rules and TCEQ guidance to

this matter. If this Court does so, TACA is confident it will determine the answers are “yes” to Issue Nos. 1.a-c. and 2.a.-c. (as well as the other issues on this appeal), and that this Court will affirm the TCEQ Order.

I. Issue Nos. 1.a. – 1.c.

This Court should reverse the Final Judgment rulings upon which Issue Nos. 1.a - 1.c. are based. This Court should affirm Conclusion of Law No. 12 in the TCEQ’s Order. The rulings upon which Issue Nos. 1.a and 1.b. are based concern the district court’s unsupported finding that TCEQ incorrectly determined that Vulcan properly modeled its Plant’s crystalline silica emissions. It is TACA’s position that the district court ignored TCEQ’s prior determination in its written guidance document that crystalline silica emissions from rock crushers are not expected to negatively affect public health or welfare. It is TACA’s position the district court failed to understand or appreciate the fact that TCEQ does not require rock crushers be modeled for crystalline silica emissions to demonstrate such emissions will not negatively affect public health or welfare because it is well-known that rock crushers do not emit significant amounts of crystalline silica.¹⁴ It is TACA’s position the district court would not have made either of those rulings had it followed the TCAA

¹⁴ See e.g., Air Permit Reviewer Reference Guide, TEX. COMM’N ON ENVTL. QUALITY, March 2018, <https://www.tceq.texas.gov/assets/public/permitting/air/Guidance/NewSourceReview/mera.pdf>, Appendix B; 2-B1 A.R. 185 at 14:25-15:13; 2-B2 A.R. 211 at 33:31-34:8; 1 A.R. 154 at 35.

and TCEQ rules, paid closer attention to TCEQ guidance, and given the TCEQ the deference it legally deserves.

A. Issue 1.a. – The Plant’s crystalline silica emissions are not harmful.

The TCEQ determined the Plant’s crystalline silica emissions will not “negatively impact human health or welfare.”¹⁵ The TCEQ must make its determination pursuant to TEX. HEALTH AND SAFETY CODE § 382.0518(b)(2) and 30 TEX. ADMIN. CODE § 116.111(a)(2)(A)(i). This means the Plant’s crystalline silica emissions are not harmful to human health or welfare.

Even though Vulcan was not required to model its Plant’s crystalline silica emissions, Vulcan voluntarily calculated the Plant’s crystalline silica emissions based on the 0.2% crystalline silica content from an analysis of a representative sample of its aggregate material. Vulcan also voluntarily provided a modeling demonstration of these emissions to the TCEQ.¹⁶ The crystalline silica maximum off-site ground level concentrations (“GLC_{maxS}”) from the modeling are less than 1% of the applicable ESLs.¹⁷

By showing the GLC_{maxS} from modeling of its crystalline silica emissions were less than 1% of applicable screening levels, Vulcan demonstrated that its

¹⁵ Issue O in the contested case hearing.

¹⁶ 2-B1 A.R. 185 at 23:7-9, 35:10-11; 2-B1 A.R. 187 at 23:17-24:4; 2-B1 A.R. 198 at 7:7-8; 2-B2 A.R. 232 at 12:24-27.

¹⁷ 2-B1 A.R. 185 at 35:2-4; 2-B2 A.R. 232 at 23:5-8.

crystalline silica emissions will not be harmful. It is TACA's position that expert testimony and other evidence in the Administrative Record show that Vulcan's calculated crystalline silica GLC_{maxS} are less than the applicable ESLs. It is TACA's position that this means the Plant's crystalline silica emissions will not be harmful and will not negatively affect public health, including of sensitive subgroups, or welfare.¹⁸

B. Issue No. 1.b. - The Plant's crystalline silica emissions are representative of similar limestone crushing operations.

The TCEQ's determination that the calculated crystalline silica emissions are representative of those expected from the Plant is supported by substantial evidence. There is substantial evidence that Vulcan's sample showed a 0.2% crystalline silica content. Vulcan used this value to calculate the Plant's crystalline silica emissions. This value was based on analysis of a representative aggregate sample collected from Vulcan's property. It is TACA's position the Administrative Record contains testimony of two geology experts demonstrating that Vulcan's sample was a representative sample of aggregate material at Vulcan's property.¹⁹ This is substantial evidence in the Record that Vulcan's aggregate material contains 0.2% crystalline silica. It is TACA's position that this percentage value is consistent with

¹⁸ 2-B1 A.R. 187 at 14:24-29, 26:2-28:21, 33:16-36:22, 37:1-38:2; 1 A.R. 154 at 36-38.

¹⁹ 2-B1 A.R. 198 at 5:18-7:4; 2-B1 A.R. 204 at 8:17-9:15, 16:16-20; 3 A.R. 272 at 308:1-5; 3 A.R. 271 at 205:23-208:11.

the range of the crystalline silica percentages of limestone (i.e., aggregate material) formations near the Plant.²⁰ To conclude, this Plant's crystalline silica emissions are consistent with other rock crushers, and the TCEQ correctly determined this Plant's crystalline silica emissions will not negatively impact human health or welfare when it issued the Permit.

C. Issue No. 1.c - The Permit protects public health and property.

The Permit includes a variety of emission control requirements, including the requirement that Vulcan use dust suppression technologies.²¹ The Permit also requires on-site monitoring,²² and requires Vulcan to maintain records to prove that it is meeting the Permit's operational limitations.²³ However, the Permit appropriately does not require that Vulcan conduct fenceline monitoring; and the Permit not restrict the Plant's operating hours.

TCEQ's determination that the Permit should not require fenceline monitoring is supported by substantial evidence and is not arbitrary or capricious. The district

²⁰ 2-B1 A.R. 204 at 9:17-23, 10:8-21; 2-B2 A.R. 211 at 35:10-36:2; 1 A.R. 154 at 36-37.

²¹ See Permit, Special Condition No. 9, which requires that permanently mounted spray bars be installed on crushing equipment and Vulcan use water trucks to control emissions from work areas and stockpiles.

²² See Permit, Special Condition No. 16, which requires visible emission monitoring of Plant Operations on a quarterly basis consistent with EPA Test Method 22.

²³ See Permit Special Condition No. 17, which requires record generation and maintenance on daily, monthly and annual bases for verification that Vulcan is following the general and special conditions of the Permit.

court's ruling to the contrary ignored (i) the uncontroverted evidence that the TCAA, TCEQ air permitting rules, and written TCEQ technical guidance, do not require such fence-line monitoring for rock crushing plants,²⁴ and (ii) the testimony of the ED's and Vulcan's air quality permitting experts that they are not aware of any air permit for any other rock crusher in Texas that requires fence-line monitoring.

The TCEQ's determination that the Permit should not restrict the Plant's operating hours is also supported by substantial evidence and is not arbitrary or capricious. Vulcan's AQAs demonstrated that the Plant could operate continuously,²⁵ 24-hours per day, 7-days per week and 52-weeks per year, while at the same time showing that its emissions profile will not cause or contribute to exceedance of the applicable NAAQS. It is TACA's position Vulcan demonstrated its Plant will not adversely affect public health, welfare, and the environment, without the Permit restricting the Plant's operating hours.²⁶

II. Issue Nos. 2.a. – 2.c.

TACA believes this Court should reverse the Final Judgment rulings upon which Issue Nos. 2.a – 2.c. are based. The three rulings in the Final Judgment

²⁴ 2-B1 A.R. 183 at 40:17-41:4; 2-B1 A.R. 185 at 24:1-13; 2-B2 A.R. 211 at 27:11-34. 2-B2 A.R. 211 at 11:31-12:3; 2-B2 A.R. 230, Response 26 at 50.

²⁵ 2-B1 A.R. 185 at 24:5-13; 2-B2 A.R. 211 at 11:27-30; 2-B2 A.R. 232 at 10:31-36.

²⁶ 2-B1 A.R. 185 at 24:1-13; 2-B2 A.R. 211 at 11:31-12:3; 2-B2 A.R. 230, Response 26 at 50.

concern the district court's position that TCEQ incorrectly determined that Vulcan properly conducted its Minor NAAQS Analyses for PM₁₀ and PM_{2.5}. To make those rulings, the court incorrectly applied the law, TCEQ's rules and guidance for how such Minor NAAQS Analyses must be conducted. It is TACA's position this Court should affirm Conclusion of Law No. 14 in the TCEQ Order.

The TCAA, TCEQ air permitting rules, and TCEQ technical guidance do not require Vulcan conduct Minor NAAQS Analyses for PM₁₀ or PM_{2.5} as part of its AQAs for PM₁₀ or PM_{2.5} to demonstrate the Plant's PM₁₀ or PM_{2.5} emissions will not negatively affect public health or welfare. It is TACA's position Vulcan properly conducted "preliminary impact determinations" for PM₁₀ and PM_{2.5}.²⁷ It is TACA's position that because GLC_{maxS} from the preliminary impact determinations for PM₁₀ and PM_{2.5} were below the "de minimis" levels, Vulcan was not required to conduct a Minor NAAQS Analysis for PM₁₀ or PM_{2.5} in order to demonstrate the Plant's PM₁₀ and PM_{2.5} emissions will not negatively affect public health or welfare.²⁸ Nevertheless, Vulcan voluntarily conducted such Minor NAAQS Analyses to

²⁷ 2-B1 A.R. 185 at 9:5-10:6; 13:3-20; 2-B1 A.R. 183 at 14:1-22; 2-B2 A.R. 211 at 27:37-28:4; 2-B2 A.R. 232 at 11:3-4; 2-B2 A.R. 234 at 14-15; 1 A.R. 154 at 5-6, 39.

²⁸ 2-B1 A.R. 185 at 13:3-25, 19:8-14; 2-B2 A.R. 222 at 1-2, Table 2; 2-B2 A.R. 234 at 15, 17; 2-B1 A.R. 232 at 16:24-27; 1 A.R. 154 at 6, 39.

provide even more documentation that its AQA demonstration accounted for cumulative impacts of PM₁₀ or PM_{2.5}.²⁹

Since the TCAA, TCEQ air permitting rules, or TCEQ technical guidance did not require Vulcan complete a Minor NAAQS Analyses to demonstrate its Plant's PM₁₀ or PM_{2.5} emissions would not negatively affect public health or welfare, it was inappropriate for the district court to substitute its judgment for the TCEQ's determination in making its three rulings upon which Issue Nos. 2.a – 2.c. are based. To make those rulings, the district court had to improperly interpret the law since the record and the briefing at the court provided substantial evidence for TCEQ's determination that Vulcan properly conducted the Minor NAAQS Analyses for PM₁₀ and PM_{2.5} in accordance with the law.

A. Issue No. 2.a - TCEQ's determination that Vulcan's AQAs adequately addressed cumulative impacts is supported by substantial evidence and it is not arbitrary or capricious.

First, Vulcan was not required to address cumulative impacts for PM₁₀ or PM_{2.5} because the Administrative Record contains evidence that the means for addressing their cumulative impacts is through Minor NAAQS Analyses.³⁰ Nevertheless, because Vulcan conducted Minor NAAQS Analyses for PM₁₀ or PM_{2.5}

²⁹ 2-B1 A.R. 185 at 20:16-27, 30:14-31:4; 2-B2 A.R. 232 at 12:20-24, 19:22-31; 1 A.R. 154 at 6, 39. 2-B1 A.R. 185 at 19:10-14, 20:16-27, 30:14-31:4; 2-B2 A.R. 232 at 12:20-24, 19:22-31.

³⁰ C.R. 106.

and all other pollutants in a manner that conformed to the TCEQ's requirements,³¹ and in a manner that demonstrated the Plant's emissions would be protective of human health and welfare, the TCEQ's determination that Vulcan's AQAs adequately addressed cumulative impacts is supported by substantial evidence and it is not arbitrary or capricious.

Vulcan's Minor NAAQS Analyses showed there will be no cumulative impacts by showing that the total maximum off-site GLC of each pollutant for which NAAQS exist, including PM₁₀ and PM_{2.5}, is less than the applicable NAAQS,³² which means the Plant's emissions of each such pollutant will not negatively impact public health, including of sensitive subgroups, or welfare.³³ Further, according to uncontroverted expert testimony, there will be no cumulative impact between the Plant's PM₁₀ and PM_{2.5} emissions and PM₁₀ and PM_{2.5} emissions from any off-site facilities or other emissions sources.³⁴

³¹ 2-B1 A.R. 185 at 19:10-14, 20:16-27, 30:14-31:4; 2-B2 A.R. 232 at 12:20-24, 19:22-31.

³² TCEQ Order, Finding of Fact 22; 2-B1 A.R. 185 at 11:4-12:3.

³³ 2-B1 A.R. 187 at 17:21-23, 36:5-22, 37:10-38:2; TCEQ Order, Findings of Fact 23 and 32; 2-B2 A.R. 232 at 23:34-24:11; 2-B2 A.R. 230, Response 4 at 11, 13; 2-B2 A.R. 222.

³⁴ See Section 2.b.i.(b) below.

B. Issue 2.b – The TCEQ’s determinations that quarry, and road emissions were adequately considered are supported by substantial evidence and are not arbitrary or capricious.

Here, the district court’s ruling is based on that court’s incorrect determination that TCEQ should have required Vulcan input quarry and road emissions into the modeling it conducted for the Plant’s PM₁₀ and PM_{2.5} emissions and crystalline silica emissions. To make its ruling, the district court had to ignore the TCAA, TCEQ rules,³⁵ and TCEQ guidance.³⁶ TCEQ’s legal authority is limited to requiring that emissions from the proposed “facilities” and potentially certain offsite “facilities” be input into the modeling associated with the proposed facilities’ permit application. Quarries and roads are specifically excluded from being facilities.³⁷ For many years the TCEQ has correctly interpreted and applied the TCAA and its rules to not require that quarry and road emissions be input into modeling analyses for proposed facilities like Vulcan’s Plant.³⁸

If this Court does not reverse the district court’s rulings, the Final Judgment could arbitrarily impact the TCEQ air permitting program. For example, under those

³⁵ See, e.g., 30 TEX. ADMIN. CODE § 116.111(a)(2)(J).

³⁶ See, e.g., 2-B2 A.R. 234 at 14-15 and 2-B2 A.R. 223.

³⁷ TEX. HEALTH AND SAFETY CODE § 382.0518(b); 30 TEX. ADMIN. CODE §§ 116.110(a) and 116.111(a)(2)(J); 2-B1 A.R. 183 at 56:8-16 and 57:13-58:7; 2-B2 A.R. 211 at 25:15-20; 2-B2 A.R. 232 at 11:30-31.

³⁸ 1 A.R. 154 at 7; 2-B1 A.R. 183 at 4:18-19, 57:26-58:2; *In the Matter of EOG Resources*, TCEQ Docket No. 2012-0971-AIR, SOAH Docket No. 582-12-6347 (Feb. 8, 2014), Proposal for Decision at 23, 25, and TCEQ Order, Conclusion of Law 30.

rulings, the TCEQ would apparently be required to require that permit applicants model emissions from “non-facilities,” like quarries and roads. Other industries could be impacted, too. Imagine the unnecessary time, effort, and expense it would take if TCEQ forced air permit applicants to model all conceivable potential emissions from “non-facilities” at places like interstate highways, shipyards, rail spurs, oil and gas exploration sites, windfarms or chemical plants. To avoid such an absurd result, this Court should defer to TCEQ’s interpretation of the TCAA and its own rules and guidance that quarry and road emissions should not input into modeling. The TCEQ’s initial determination on this issue is reasonable and not plainly erroneous. It is TACA’s position that the district court should have deferred to the TCEQ’s technical experience on this issue.

Since TCEQ does not have the legal authority to require that Vulcan input quarry and road emissions into any of its modeling, TCEQ’s determinations that quarry and road emissions were adequately considered are supported by substantial evidence and are not arbitrary or capricious. In addition, there was no need for TCEQ to have required Vulcan to input quarry and road emissions into its modeling to demonstrate the Plant’s emissions will not negatively affect public health. First, there is substantial evidence that PM₁₀ or PM_{2.5} quarry and road emissions were adequately considered by the addition of representative background concentrations

in Vulcan's voluntary Minor NAAQS Analyses for PM₁₀ or PM_{2.5}³⁹ since there is testimony of multiple experts that such concentrations accounted for PM₁₀ and PM_{2.5} emissions from quarries and roads.⁴⁰ Second, the Permit contains special conditions that will adequately control the PM₁₀ or PM_{2.5} and crystalline silica emissions from Vulcan's proposed quarry and roads.⁴¹ Third, the Administrative Record contains uncontroverted expert testimony that crystalline silica quarry and road emissions are addressed in Vulcan's voluntary crystalline silica AQA. Such emissions are addressed therein through the crystalline silica ESLs because TCEQ established them at low enough concentrations to address cumulative impacts of such emissions.⁴² Third, it is TACA's position that as long as the modeled crystalline silica GLC_{max} is less than the crystalline silica ESL, as is the case for Vulcan's crystalline silica modeling,⁴³ there will be no negative impact on public health, including of sensitive subgroups, or welfare due to crystalline silica emissions.⁴⁴

³⁹ 3 A.R. 271 at 96:25-97:16; 2-B2 A.R. 211 at 24:24-25:4; 2-B2 A.R. 232 at 11:35-12:2, 17:35-18:6.

⁴⁰ 3 A.R. 271 at 97:12-16; 2-B2 A.R. 232 at 18:4-6; 1 A.R. 154 at 41.

⁴¹ 2-B1 A.R. 183 at 59:18-60:13; 2-B2 A.R. 211 at 25:5-12. *See also*, Permit Special Conditions nos. 9 and 10, which require that stockpiles, work areas and unpaved roads be treated with water or dust suppressants.

⁴² 2-B2 A.R. 237 at 7:17-35; 2-B1 A.R. 187 at 27:20-28:21.

⁴³ 2-B1 A.R. 187 at 26:2-8, 26:14-27:18, 37:1-38:2.

⁴⁴ 2-B2 A.R. 237 at 7:32-35; 2-B1 A.R. 187 at 26:14-20.

C. Issue 2.c – The TCEQ’s determination that Vulcan’s choices of the relevant background concentrations used in its voluntary Minor NAAQS Analyses were appropriate are supported by substantial evidence.

The TCEQ’s determination that Vulcan’s selected background concentrations for its Minor NAAQS Analyses were appropriate is supported by substantial evidence and is not arbitrary or capricious. Even though Vulcan was not legally required to select and use a representative background concentration for PM₁₀ or PM_{2.5} or most of the other pollutants because, as discussed above, it was not legally required to conduct a Minor NAAQS Analysis for any of those pollutants, Vulcan did so anyway to provide evidence that its Plant’s emissions will be protective of human health and welfare.

It is TACA’s position that Vulcan followed TCEQ’s written guidance when it selected the ambient air quality monitors used for the representative background concentrations.⁴⁵ It is TACA’s position that Vulcan selected monitors so that the background concentrations for such pollutants would be conservatively representative of their ambient concentrations near the Plant.⁴⁶

⁴⁵ 2-B1 A.R. 185 at 28:10-17; 2-B2 A.R. 232 at 20:27-21:1; 2-B2 A.R. 234.

⁴⁶ 2-B1 A.R. 185 at 28:22-29:5; 2-B2 A.R. 232 at 18:37-19:15; 2-B2 A.R. 230, Response 4 at 15.

CONCLUSION AND PRAYER

For the foregoing reasons, the Texas Aggregates & Concrete Association respectfully prays that the Court reverse the Final Judgment that led the district court to not affirm TCEQ's Order in full and affirm TCEQ's Order in its totality. TACA further prays for any and all other relief to which it may be entitled.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the typeface requirements of Texas Rule of Appellate Procedure 9.4(e) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document also complies with the word-count limitations of Rule 9.4(i), if applicable, because it contains 4,667 words, excluding any parts exempted by TEX. R. APP. P. 9.4(i)(1).

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NO. 03-21-00204-CV

**IN THE THIRD COURT OF APPEALS
AUSTIN, TEXAS**

**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY and
VULCAN CONSTRUCTION MATERIALS, LLC,**
Appellants

v.

**FRIENDS OF DRY COMAL CREEK, STOP 3009 VULCAN QUARRY, JEFFREY REEH,
TERRY OLSON, MIKE OLSON, AND COMAL INDEPENDENT SCHOOL DISTRICT,**
Appellees

ON APPEAL FROM CAUSE No. D-1-GN-20-000941
353RD JUDICIAL DISTRICT COURT, TRAVIS COUNTY, TEXAS
HON. JUDGE MAYA GUERRA GAMBLE

APPENDIX TO BRIEF *AMICUS CURIAE*

Final Judgment (signed April 1, 2021).....Tab A

TAB A

Cause No. D-1-GN-20-000941

FRIENDS OF DRY COMAL CREEK
and STOP 3009 VULCAN QUARRY,
Plaintiffs,

v.

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY,
Defendant

and

VULCAN CONSTRUCTION
MATERIALS, LLC,
Defendant-Intervenor

§
§
§
§ IN THE DISTRICT COURT OF
§ TRAVIS COUNTY, TEXAS
§ 353RD JUDICIAL DISTRICT
§
§
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§
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§

FINAL JUDGMENT

On December 8, 2020, came on to be heard this matter. All parties appeared through counsel and announced ready, and the administrative record was admitted into evidence.

Based on the pleadings, the administrative record, the parties’ briefs and the parties’ arguments, it is the opinion of the Court that the Texas Commission on Environmental Quality’s November 21, 2019, “ORDER GRANTING THE APPLICATION BY VULCAN CONSTRUCTION MATERIALS, LLC FOR PERMIT NO. 147392L001; TCEQ DOCKET NO. 2018-1303-AIR; SOAH DOCKET NO. 582-19-1955” (“Final Order”) should be REVERSED in part and REMANDED.

The Court finds and rules as follows:

1. TCEQ’s Conclusion of Law No. 12 (concluding that there is no indication that emissions from the plant will contravene the intent of the Texas Clean Air Act, including the protection of the public’s health and physical property) is reversed because i) TCEQ’s determination that the Plant’s crystalline silica emissions will not negatively affect human health or welfare is not supported by substantial evidence; ii) Vulcan’s silica emissions

calculations are not based on representative site conditions, and TCEQ's determination that Vulcan's silica emissions calculations are representative of those to be expected from the site is not supported by substantial evidence; and iii) TCEQ's rejection of Reeh Plaintiffs' assertions regarding ways the Permit allegedly is not sufficiently protective of public health or property is arbitrary and capricious and not supported by substantial evidence.

2. TCEQ's Conclusion of Law No. 14 (concluding that Vulcan has made all demonstrations required under applicable statutes and regulations, including 30 Texas Administrative Code § 116.111 regarding air permit applications, to be issued an air quality permit with conditions as set forth in the Draft Permit) is reversed because i) TCEQ's determination that Vulcan's air dispersion modeling adequately accounts for or addresses cumulative impacts; ii) TCEQ's determination that quarry and road emissions were adequately considered; and iii) TCEQ's determination that Vulcan's choice of the relevant background concentrations used in its voluntary Full Minor National Ambient Air Quality Standard ("NAAQS") Analyses were appropriate, is arbitrary and capricious, and not supported by substantial evidence.


3. TCEQ's Best Available Control Technology ("BACT") reviews for Vulcan's Application met the standards of Texas Health and Safety Code § 382.0518 and 30 Texas Administrative Code § 116.111(a)(2)(C), were properly conducted, supported by substantial evidence, and not arbitrary, capricious, or unlawful. TCEQ's BACT determination is affirmed.

4. The Administrative Law Judge abused her discretion by ruling that Vulcan could maintain information from its 2016 subsurface investigation at the property where the Plant will be located as confidential under the trade secret privilege.

5. Plaintiffs were denied due process such that their substantial rights were prejudiced by: (1) the Administrative Law Judge's ruling that Vulcan could maintain information from its 2016 subsurface investigation at the property where the Plant will be located as confidential under the trade secret privilege; (2) the Administrative Law Judge's denial of Plaintiffs' discovery and cross-examination of the "privileged" information; and (3) TCEQ's not requiring Vulcan to input emissions from quarries and roads into its modeling for the AQAs for 24-hour PM₁₀, 24-hour PM_{2.5}, and Annual PM_{2.5}.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Final Order is AFFIRMED IN PART and REVERSED IN PART and REMANDED.

Signed this 1st day of April, 2021



JUDGE MAYA GUERRA GAMBLE
JUDGE, 459TH DISTRICT COURT

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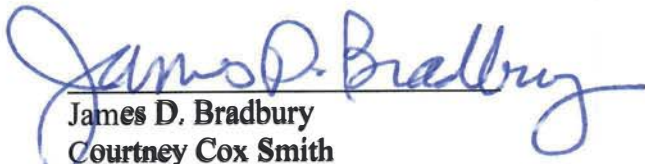
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