NO. 03-21-00204-CV

IN THE THIRD COURT OF APPEALS
AUSTIN, TEXAS

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, *Appellant*

and

VULCAN CONSTRUCTION MATERIALS, LLC, *Appellant*

v.

FRIENDS OF DRY COMAL CREEK and STOP 3009 VULCAN QUARRY, et.al.
Appellees

On Appeal from the 353rd Judicial District Court,
Travis County, Texas, Cause No. D-1-GN-20-000941

INITIAL BRIEF OF APPELLANT VULCAN CONSTRUCTION MATERIALS, LLC

McGINNIS LOCHRIDGE LLP
Keith A. Courtney (SBN 04892700)
kcourtney@mcginnislaw.com
600 Congress Ave., Ste. 2100
Austin, TX 78701
(512) 495-6000 / (512) 495-6093 FAX

ATTORNEY FOR APPELLANT
VULCAN CONSTRUCTION MATERIALS, LLC

ORAL ARGUMENT REQUESTED
July 23, 2021

IDENTITIES OF PARTIES AND COUNSEL

The appellants and their counsel are:

Texas Commission on Environmental Quality, which was Defendant at the district court and is represented by:

Mark A. Steinbach
Erin Snody
Assistant Attorneys General
Environmental Protection Division
Office of the Attorney General
P.O. Box 12548, MC 066 Austin,
Texas 78711-2548
Mark.Steinbach@oag.texas.gov
Erin.Snody@oag.texas.gov

Vulcan Construction Materials, LLC, which was Defendant-Intervenor at the district court and is represented by:

Keith A. Courtney
Derek Seal
McGinnis Lochridge
600 Congress Ave, Ste. 2100
Austin, TX 78701
kcourtney@mcginnislaw.com
dseal@mcginnislaw.com

The appellees and their counsel are:

Friends of Dry Comal Creek and Stop 3009 Vulcan Quarry (collectively, "***Friends Appellees***"), which Vulcan referred to as "Friends Plaintiffs" in the district court appeal and as "Aligned Protestants" in the contested case hearing, are represented by:

David Frederick
Eric Allmon
Frederick, Perales, Allmon, & Rockwell, PC
707 Rio Grande, Suite 200
Austin, Texas 78701
dof@lf-lawfirm.com
eallmon@lf-lawfirm.com

Jeffrey Reeh, Terry Olson, Mike Olson, and Comal Independent School District (collectively, "***Reeh Appellees***"), which were referred to as "Reeh Plaintiffs" in the district court appeal and which Vulcan referred to as "Harrison Protestants" in the contested case hearing (because Doug Harrison was also involved at the hearing), are represented by:

James D. Bradbury
Courtney Cox Smith
James D. Bradbury, PLLC
9111 Old Jollyville Road
Suite 220
Austin, Texas 78759
jim@bradburycounsel.com
ccox@bradburycounsel.com

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

GLOSSARY OF TECHNICAL TERMS AND DEFINED TERMS

- "2016 subsurface investigation" means the subsurface investigation Vulcan conducted in 2016 the sole purpose of which was to help Vulcan decide whether to buy the property at which its Plant will be located.
- "ALJs" means the administrative law judges at the contested case hearing.
- "Appellees" means Friends Appellees and Reeh Appellees, collectively.
- "Application" means Vulcan's application for the Permit.
- "AQA" means the Air Quality Analysis Vulcan conducted in conjunction with its Application.
- "AQAs for PM_{10} and $PM_{2.5}$" means AQAs for 24-hour PM_{10}, 24-hour $PM_{2.5}$, and Annual PM2.5.
- "A.R." means the Administrative Record.
- "BACT" means Best Available Control Technology.
- "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.
- "Friends Appellees" means Friends of Dry Comal Creek and Stop 3009 Vulcan Quarry, collectively.
- "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 PM_{10} and $PM_{2.5}$" means the Minor NAAQS Analyses for the 24-hour PM_{10}, 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 ALJs' Proposal for Decision.
- "Plant" means Vulcan's rock crushing plant that is the subject of the Application and whose construction and operation 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.
- "PM_{10}" is particulate matter with a diameter less than or equal to 10 microns.
- "PM_{10} and $PM_{2.5}$ AQA modeling" means modeling associated with the AQAs for PM_{10} 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.
- "TAC" means the Texas Administrative Code.

- “TCAA” means Texas Clean Air Act, which is in Chapter 382 of the Texas Health and Safety Code.
- “TCEQ” means Texas Commission on Environmental Quality.
- “Trade secret information” means the geologic information Vulcan obtained from its 2016 subsurface investigation and maintains as confidential trade secret information.
- “Vulcan” means Vulcan Construction Materials, LLC.
- “Vulcan’s aggregate material” means the aggregate material Vulcan will process in the Plant.

I. STATEMENT OF THE CASE

This case involves consolidated administrative appeals by "Friends Appellees" and "Reeh Appellees" (sometimes collectively referred to as "***Appellees***") of the Texas Commission on Environmental Quality's ("***TCEQ's***") November 21, 2019 Order ("***TCEQ's Order***")[1] that issued to Vulcan Construction Materials, LLC ("***Vulcan***") minor new source review ("***NSR***")[2] Permit No. 147392L001 ("***Permit***") to authorize construction and operation of a rock crushing plant in Comal County (the "***Plant***").[3] The TCEQ issued that Order based on a Proposal for Decision ("***PFD***") issued by the State Office of Administrative Hearings ("***SOAH***") administrative law judges ("***ALJs***") that recommended the TCEQ commissioners issue to Vulcan the draft Permit ("***Draft Permit***") with no changes.[4] Following their review of the PFD, the exceptions to the PFD, the replies to the exceptions to the PFD, Vulcan's application for the Permit ("***Application***"), and the Draft Permit, the TCEQ commissioners issued TCEQ's Order, which issued

---

1 1 Administrative Record ("***A.R.***") 174.

2 It is a minor NSR permit because the Plant's very small maximum allowable emissions of each pollutant are much less than the 250 tons/year threshold that would make it a major NSR permit. (See 30 TEX. ADMIN. CODE ("***TAC***") §116.12(19) For example, the Plant's maximum allowable emissions of $PM_{2.5}$ are only 1.07 tons/year (0.42 lbs/hour) and of PM_{10} are only 4.07 tons/year (2.33 lbs/hour). (1 A.R. 27 at 29) Since those emissions rates are only 0.4% and 1.6%, respectively, of the 250 tons/year threshold, for the Application to have been subject to major NSR for $PM_{2.5}$ or PM_{10}, the Plant's maximum allowable annual emissions of $PM_{2.5}$ or PM_{10} would have had to have been over 233 times greater or over 61 times greater, respectively.

3 1 A.R. 173.

4 1 A.R. 161.

the Permit to Vulcan. Appellees each timely filed a motion for rehearing, and each was overruled by operation of law.[5]

Appellees each appealed TCEQ's Order. After briefing and a December 8, 2020 hearing, on April 1, 2021, the 353rd District Court in Travis County (Judge Maya Guerra Gamble) issued a Final Judgment that the TCEQ Order is affirmed in part and reversed in part and remanded ("***Final Judgment***").[6] The Final Judgment identifies the court's rulings that led it to not affirm TCEQ's Order completely, and instead to reverse and remand parts of it. On April 30, 2021, Vulcan and TCEQ each filed a Notice of Appeal to appeal those rulings.[7]

---

5 1 A.R. 177 and 178.

6 Clerks' Record ("***C.R.***") at 540-546.

7 C.R. at 552-554 and 548-551.

II. STATEMENT REGARDING ORAL ARGUMENT

Vulcan requests oral argument because this appeal involves a number of complex Issues Presented in that are based on a complex regulatory scheme.

III. RECORD

There is a one volume Clerk's Record. There is also a one volume Reporter's Record.

The Reporter's Record reflects that the administrative record supporting TCEQ's Order, which issued the Permit to Vulcan ("***Administrative Record***"), was admitted as Joint Exhibit 1 at the district court.[8] The Administrative Record is located on pages 63-82 of the Clerk's Record. Cites in this Initial 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)]".

[8] Reporter's Record at 38:4-17.

IV. 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 that led it to not affirm TCEQ's Order completely, and instead to reverse and remand parts of it.

V. ISSUES PRESENTED

The Final Judgment specifies the district court's rulings that led it to not affirm TCEQ's Order completely, but instead to reverse and remand parts of its Order. Since Vulcan is appealing those rulings, the Issues Presented ("***Issues***") are closely based on them.

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

    a. Is TCEQ's determination the Plant's crystalline silica emissions will not negatively affect human health or welfare supported by substantial evidence?

    b. Is TCEQ's determination 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***")[9] adequately account for and address cumulative impacts supported by substantial evidence and not arbitrary and capricious?

[9] This issue refers to "air quality analyses," rather than "air dispersion modeling" (which is the term that is used in the district court's ruling upon which this issue is based), because the TCEQ finding upon which this issue is based - Finding of Fact 26 of TCEQ's Order - was that Vulcan's "air quality analyses," rather than its "air dispersion modeling," properly considered any cumulative impacts.

b. Are 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 chose appropriate relevant background concentrations for its voluntary Minor National Ambient Air Quality Standard ("***NAAQS***") Analyses supported by substantial evidence and not arbitrary and capricious?

3. Were the ALJs'[10] rulings Vulcan could maintain information from its unrelated 2016 subsurface investigation at the property where the Plant will be located as confidential under the trade secret privilege an abuse of discretion?

4. Were Appellees denied due process such that their substantial rights were prejudiced by either of the following:

   a. The Administrative Law Judge's rulings Vulcan could maintain information from its unrelated 2016 subsurface investigation at the property where the Plant will be located as confidential under the trade secret privilege?[11]

   b. TCEQ's decision to not require that Vulcan input emissions from quarries and roads into its air dispersion modeling ("***modeling***") for the AQAs for 24-hour PM_{10}, 24-hour $PM_{2.5}$, and Annual $PM_{2.5}$?

---

[10] "ALJs" is used in some places herein, and "ALJ" is used in other places. That is because the ALJ rulings that were made prior to the hearing on the merits were made by a single ALJ, and the ALJ rulings that were made at the hearing on the merits were jointly made by the two ALJs who presided at the hearing.

[11] This issue covers the district court's rulings under Section Nos. 5(1) and 5(2) of the Final Judgment because those rulings are effectively the same since the ALJ rulings 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 is the reason the ALJ denied Appellees' discovery and cross-examination requests regarding such trade secret information.

VI. STATEMENT OF THE FACTS

Vulcan submitted to TCEQ its Application on June 26, 2017,[12] its AQA Report on November 7, 2017,[13] and revised pages of its Application on November 17, 2017.[14] Vulcan's Application and AQA Report were prepared, and its AQAs for different pollutants were conducted, by air permitting specialists who have significant, relevant expertise regarding conducting those tasks for rock crushing plants (hereafter referred to as "***rock crushers***").[15] Based on its technical review of the Application, the TCEQ Executive Director ("***ED***") determined the Application demonstrated the Plant will meet all applicable requirements, and issued the Draft Permit.[16] The Permit requires the Plant be located at least 0.4 miles (specifically, 2,119 feet) from the nearest property line, i.e., which is the closest to the Plant any member of the public can get.

Vulcan conducted its AQAs to demonstrate the Plant's maximum allowable emissions of the different pollutants will be protective of public health, welfare, and property.[17] Vulcan's AQAs met, and in some ways exceeded, all applicable

12 1 A.R. 1.
13 1 A.R. 26.
14 1 A.R. 27.
15 2-B1 A.R. 183 at 4:18-20; 2-B1 A.R. 185 at 2:21-22.
16 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
17 1 A.R. 26 at 1, 3.

requirements.[18] For example, even though TCEQ guidance provides that no AQA modeling is required for crystalline silica emissions from rock crushers,[19] Vulcan voluntarily conducted AQA modeling of the Plant's crystalline silica emissions.[20] Vulcan voluntarily calculated such emissions based on its determination the aggregate material it will process in the Plant ("***Vulcan's aggregate material***") will contain 0.2% crystalline silica,[21] which Vulcan determined based on analysis of a representative sample of such material.[22] Such modeling demonstrated the Plant's crystalline silica emissions will not negatively impact public health, including of sensitive subgroups such as children (including those at schools), elderly, or people with preexisting health conditions ("***sensitive subgroups***"), or welfare.[23] In spite of significant evidence that Vulcan's aggregate material will contain 0.2% crystalline silica, Vulcan's experts testified that based on the modeling results, the Plant's crystalline silica emissions would not negatively impact public health, including of

---

18 2-B1 A.R. 185 at 12:10-13:1; 2-B2 A.R. 230 at 35-36; 1 A.R. 10; 1 A.R. 22; 1 A.R. 26 at 1, 4, and 8.

19 2-B1 A.R. 185 at 14:25-15:6; 2-B2 A.R. 223, Appendix B.

20 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.

21 2-B1 A.R. 185 at 34:10-11; 1 A.R. 26 at 10; 2-B1 A.R. 187 at 23:29-24:4.

22 2-B1 A.R. 198 at 7:6-11.

23 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

sensitive subgroups, or welfare even if that percentage was more than 27%,[24] and that it will not be anywhere near 27%.[25]

Based on Friends Appellees' belief that geologic information from Vulcan's subsurface investigation in 2016 (the year *before* Vulcan submitted the Application) that Vulcan has always claimed as confidential under the trade secret privilege ("***trade secret information***") might support a claim regarding the 0.2% crystalline silica's accuracy, Friends Appellees presented multiple motions requesting the ALJs require Vulcan to produce the trade secret information in discovery and be subject to cross-examination regarding such information.[26] The sole purpose of Vulcan's 2016 subsurface investigation was to determine the quantity and quality of the aggregate material at different depths and locations to help Vulcan decide whether to buy the property at which the Plant will now be located.[27] Vulcan did not use any of the trade secret information to develop the representative sample whose analysis showed 0.2% crystalline silica,[28] or include any of such information in its Application.[29] The ALJs denied all Friends Appellees' motions based on their determinations such information is a privileged trade secret, and Friends Appellees

---

24 2-B1 A.R. 185 at 35:16-37:20; 2-B1 A.R. 187 at 25:13-18, 26:6-8.
25 3 A.R. at 318:24-319:22.
26 1 A.R. 111, 129, 149, 150; 3 A.R. 271 at 182:8-13.
27 2-B1 A.R. 198 at 6:6-15.
28 3 A.R. 271 at 202:8-14, 203:18-204:4; 3 A.R. 271 at 166:3-11; 177:19-178:17; 3 A.R. 271 at 213:9-214:8.
29 1 A.R. 1, 26, 27.

did not demonstrate they would face injustice if Vulcan was not required to produce the trade secret information in discovery and be subject to cross-examination regarding such information because they were able to present pre-filed testimony questioning the 0.2% crystalline silica's accuracy.[30]

Even though Vulcan was not required to conduct Minor NAAQS Analyses for 24-hour PM_{10}, 24-hour $PM_{2.5}$, or Annual $PM_{2.5}$ ("***PM_{10} or $PM_{2.5}$***") under applicable TCEQ guidance,[31] Vulcan voluntarily conducted such analyses[32] (as the district court correctly confirmed in Final Judgment Ruling No. 2.iii)). Those analyses involved two additional steps[33] that significantly increased the total maximum PM_{10} and $PM_{2.5}$ off-site ground level concentrations ("***GLCs***") that were compared to the applicable NAAQS, which made those analyses very conservative.[34] Those comparisons show those total maximum GLCs are far below those NAAQS.[35] Thus, the Plant's PM_{10} and $PM_{2.5}$ emissions will not negatively affect public health, including of sensitive subgroups, or welfare[36] (which includes physical property

30 1 A.R. 132 at 4; 1 A.R. 161 at 2-3; 3 A.R. 271 at 4:24-5:3-4.
31 2-B1 A.R. 185 at 19:10-14; 2-B2 A.R. 222 at 1-2; 2-B2 A.R. 234 at 17.
32 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.
33 2-B1 A.R. 185 at 10:6-12, 27:9-13; 2-B2 A.R. 232 at 16:11-28, 18:1-6; 1 A.R. 26 at 9, 20; 2-B2 A.R. 234 at 17-18.
34 2-B1 A.R. 185 at 13:25-14:10, 19:19-24; 1 A.R. 26 at 1, 8; 2-B2 A.R. 230, Responses 4, 6, 7, and 14 at 12, 18, 23, 26-27, 36.
35 2-B1 A.R. 185 at 10:25-12:3; 2-B2 A.R. 232 at 21:2-8.
36 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 at 11-13; 2-B2 A.R. 222.

(covered by Issue A in the contested case hearing) and wildlife, vegetation, flora, and fauna (covered by Issue E in the contested case hearing))[37].

[37] 2-B1 A.R. 187 at 14:16-29, 18:9-29; 2-B2 A.R. 232 at 15:16-20; 2-B2 A.R. 230 at 11-12.

VII. SUMMARY OF THE ARGUMENT

Issue No. 1.a. – TCEQ's determination the Plant's crystalline silica emissions will not negatively affect human health or welfare is supported by substantial evidence.

Because TCEQ previously determined that crystalline silica emissions from rock crushers are not expected to negatively affect human health or welfare, TCEQ appropriately did not require that Vulcan conduct AQA modeling of the Plant's crystalline silica emissions to demonstrate they will not negatively affect human health or welfare. Nevertheless, Vulcan voluntarily conducted AQA modeling of such emissions, which calculated crystalline silica maximum off-site ground level concentrations ("***GLC$_{max}$s***"). Since each of those GLC$_{max}$s is below 1% of the applicable TCEQ effects screening level ("***ESL***"), and based on uncontroverted expert testimony that TCEQ conservatively established each ESL to ensure no negative affect to human health or welfare, the Plant's crystalline silica emissions will not negatively impact human health, including of sensitive subgroups, or welfare.

Issue No. 1.b. – TCEQ's determination that Vulcan's voluntarily-calculated crystalline silica emissions are representative of those expected from the Plant is supported by substantial evidence.

Substantial evidence exists that the 0.2% crystalline silica Vulcan used to calculate the Plant's crystalline silica emissions was based on analysis of a "representative sample" of Vulcan's aggregate material, and 0.2% crystalline silica is representative for such material. Two geologist experts testified that Vulcan's sample was a representative sample, and 0.2% is consistent with the range of known crystalline silica percentages of aggregate material near the Plant. One of those experts' testimony overcame Appellees' arguments and evidence to the contrary.

Nevertheless, there would be substantial evidence for TCEQ's determination the Plant's crystalline silica emissions will not negatively impact public health or welfare – the only determination TCEQ was required to make regarding the Plant's crystalline silica emissions to issue its Order – even assuming *arguendo* that TCEQ's determination the Plant's crystalline silica emissions are representative of those expected from the Plant was not supported by substantial evidence. Such substantial evidence includes TCEQ's previous determination that crystalline silica emissions from rock crushers are not expected to negatively affect human health or welfare, and uncontroverted expert testimony that the Plant's crystalline silica emissions would not negatively impact public health or welfare even if the crystalline silica

percentage was actually a little more than 27%, and that it will not be anywhere near 27%.

Issue No. 1.c. – TCEQ's rejections of Reeh Appellees' assertions regarding ways the Permit allegedly is not sufficiently protective of public health or property are supported by substantial evidence and are not arbitrary or capricious.

Reeh Appellees' assertions that are relevant to this appeal and not addressed elsewhere herein are that the Permit should require fenceline monitoring and limit the Plant's operating hours. Nothing in the Texas Clean Air Act ("***TCAA***"), TCEQ rules, or TCEQ guidance supports either assertion. Further, two permitting experts testified that they are not aware of any rock crusher permit that requires fenceline monitoring, and there would be concerns about the Permit requiring fenceline monitoring. Moreover, those experts testified that limiting the Plant's operating hours is not needed to ensure the Plant's emissions will not adversely impact public health or welfare.

Issue No. 2.a. – TCEQ's determination Vulcan's AQAs adequately account for and address cumulative impacts is supported by substantial evidence and is not arbitrary or capricious.

Cumulative impacts are accounted for and addressed through Vulcan's Minor NAAQS Analyses for PM_{10} and $PM_{2.5}$ (the only pollutants potentially subject to Minor NAAQS Analyses that Appellees identified on appeal), even though that was

not required because Vulcan was not required to conduct those analyses since the GLC_{max}s from the PM_{10} and $PM_{2.5}$ "preliminary impact determinations" associated with those analyses were below the PM_{10} and $PM_{2.5}$ "de minimis" levels.

Each such voluntary Minor NAAQS Analysis involved Vulcan: (i) inputting into the modeling the PM_{10} or $PM_{2.5}$ emissions from TCEQ-identified nearby facilities, plus from the Plant, to calculate the PM_{10} or $PM_{2.5}$ GLC_{max}, and (ii) adding to such GLC_{max} a representative background concentration, which addresses the PM_{10} or $PM_{2.5}$ emissions from off-site emissions sources, including quarries and roads. The result of each such analysis was the PM_{10} or $PM_{2.5}$ total maximum off-site GLC. TCEQ identified the PM_{10} or $PM_{2.5}$ emissions that should be input into the modeling, rather than be addressed by addition of a representative background concentration, in accordance with TCEQ and EPA guidance.

The total maximum off-site GLC from each Minor NAAQS Analysis is far below the applicable NAAQS, which EPA conservatively established at a concentration that will protect public health, including of sensitive subgroups, and welfare. In light of that, the Plant's emissions of PM_{10} and $PM_{2.5}$ and other pollutants will not negatively impact public health, including of sensitive subgroups, or welfare.

Issue No. 2.b. – TCEQ's determinations that quarry and road emissions were adequately considered without Vulcan inputting them into its AQA modeling for PM_{10} and $PM_{2.5}$, or for crystalline silica, are supported by substantial evidence and are not arbitrary or capricious.

TCEQ is not legally mandated to require Vulcan to input quarry and road emissions into its AQA modeling for PM_{10} and $PM_{2.5}$, or for crystalline silica. Because the TCAA limits TCEQ's air permitting jurisdiction to emissions sources that are defined as "facilities," TCEQ rules and long-standing TCEQ guidance require that only emissions from proposed "facilities" be input into AQA preliminary impact determination modeling or modeling for pollutants like crystalline silica, assuming such modeling is required at all. Since the definition of "facility" in the TCAA and TCEQ rules expressly excludes quarries and roads, TCEQ does not have the legal authority to require that Vulcan input quarry and road emissions into such modeling.

Further, it was unnecessary for TCEQ to require that Vulcan input quarry and road emissions into its AQA modeling for PM_{10} and $PM_{2.5}$, or for crystalline silica, to demonstrate the Plant's emissions of them will cause no negative affect on public health or welfare. Experts testified that quarry and road emissions were adequately considered in the Vulcan's voluntary Minor NAAQS Analyses for PM_{10} and $PM_{2.5}$ through the addition of representative background concentrations, and that Vulcan

inputting quarry and road emissions into such modeling would not have changed the modeling results. Experts also testified that quarry and road emissions were adequately considered in Vulcan's voluntary crystalline silica AQAs, even though such emissions were not input into that modeling, because the ESLs used in the AQAs account for crystalline silica emissions from other emissions sources like quarries and roads, and the crystalline silica GLC_{max}s from the AQAs are less than 1% of the ESLs. Finally, the Permit contains conditions that will adequately control Vulcan's quarry and road emissions.

Issue No. 2.c. – TCEQ's determination that Vulcan chose appropriate background concentrations for PM_{10} and $PM_{2.5}$ is supported by substantial evidence and is not arbitrary or capricious.

That is true even though Vulcan was not legally required to choose representative background concentrations for PM_{10} and $PM_{2.5}$ since Vulcan was not legally required to conduct the Minor NAAQS Analyses in which Vulcan made those choices. Further, there is expert testimony that Vulcan's choices of those representative background concentrations also account for PM_{10} and $PM_{2.5}$ quarry and road emissions.

Issue No. 3 – No ALJ ruling that Vulcan could maintain the trade secret information as confidential under the trade secret privilege was an abuse of discretion; indeed, an ALJ ruling that Vulcan could not do so would have been an abuse of discretion.

Friends Appellees presented five motions requesting that Vulcan be required to produce the trade secret information in discovery and be subject to cross-examination regarding such information because they incorrectly believed it would support a challenge to the accuracy of the 0.2% crystalline silica, although its accuracy was not relevant to TCEQ's issuance of its Order. Vulcan's geologist expert testified she did not use such information to develop Vulcan's representative sample whose analysis showed 0.2% crystalline silica, or review or rely on such information for any of her testimony.

The ALJs appropriately denied all motions based on their determinations that the trade secret information is a privileged trade secret, and Friends Appellees did not demonstrate they would face injustice if Vulcan was not required to produce the trade secret information in discovery and be subject to cross-examination regarding such information; but, the ALJs also prohibited Vulcan from using such information in the contested case hearing. Their determination such information is a privileged trade secret was based on their consideration of it in light of applicable law and the arguments and information presented by Friends Appellees and Vulcan. They

determined Friends Appellees did not demonstrate they would face injustice if Vulcan was not required to produce the trade secret information in discovery and be subject to cross-examination regarding such information because neither was necessary for a fair adjudication of their claim regarding the 0.2% crystalline silica's accuracy since they were nevertheless able to present pre-filed testimony allegedly supporting their claim.

Issue No. 4 – Appellees were not denied due process such that their substantial rights were prejudiced either by (i) the ALJ rulings that Vulcan could maintain the trade secret information as confidential under the trade secret privilege, or (ii) TCEQ's decision to not require that Vulcan input quarry and road emissions into its AQA modeling for PM_{10} or $PM_{2.5}$.

Appellees were not denied due process by any ALJ ruling or by TCEQ's decision because they were accorded a full and fair hearing on each. Appellees had multiple opportunities to present evidence and arguments supporting their positions that (i) Vulcan's trade secret information is not a privileged trade secret, and it was an injustice for the ALJs to allow Vulcan to maintain such information as confidential under the trade secret privilege (i.e., not produce it to Friends Appellees in discovery or be subject to cross-examination regarding it), and (ii) TCEQ should require Vulcan to input quarry and road emissions into its AQA modeling for PM_{10} and $PM_{2.5}$. The ALJs' rulings and TCEQ's decision were based on consideration of

Appellees' evidence and arguments, and the evidence and arguments presented by Vulcan and the ED, in light of applicable law.

But, assuming *arguendo* Appellees were denied due process by any ALJ ruling or by TCEQ's decision, such denial did not prejudice Appellees' substantial rights. Reversal and remand due to such denial would amount to merely "a postponement of the inevitable," i.e., it would not affect TCEQ's determination regarding whether to re-issue the Permit on remand, because neither of the following would be "controlling on a material issue, [and] not merely cumulative:" (i) Vulcan being required to produce the trade secret information, or (ii) Vulcan being required to input quarry and road emissions into its AQA modeling for PM_{10} and $PM_{2.5}$.

The trade secret information is not controlling on the only material issue regarding the Plant's crystalline silica emissions, which is whether such emissions will negatively affect human health or welfare. Although such information does not relate to the 0.2% crystalline silica's accuracy, even if it did, such information would not be controlling, but would be merely cumulative, on that material issue because, regardless of the accuracy of the 0.2% crystalline silica, overwhelming evidence supports TCEQ's determination the Plant's crystalline silica emissions will not negatively affect human health or welfare. That includes uncontroverted evidence the Plant's crystalline silica emissions would not negatively affect public health or welfare even if the 0.2% crystalline silica was more than 27%. Further, such

information would not be controlling, and would be merely cumulative, on the issue of the 0.2% crystalline silica's accuracy (even though it is not a material issue) because Appellees had multiple opportunities to introduce evidence on that issue, and in spite of that, substantial evidence exists the 0.2% crystalline silica is accurate.

Inputting quarry and road emissions into Vulcan's AQA modeling for PM_{10} and $PM_{2.5}$ is not controlling on the only material issue, which is whether the Plant's PM_{10} and $PM_{2.5}$ emissions will negatively impact public health or welfare. Even without inputting quarry and road emissions into the AQA modeling for PM_{10} and $PM_{2.5}$, overwhelming evidence supports TCEQ's determination that the Plant's PM_{10} and $PM_{2.5}$ emissions will not negatively impact public health or welfare.

VIII. STANDARD OF REVIEW

1. Standard of Review

This Court owes no deference to any of the Final Judgment rulings that led the district court to not affirm TCEQ's Order completely; instead, this Court should conduct a de novo review of each Issue Presented based on each such ruling under the substantial evidence standard of review under TEX. GOV'T CODE §2001.174.[38] Under such review, this Court should not reverse and remand to TCEQ based on any Issue *unless* it decides that both (i) the TCEQ determination or ALJ ruling covered by the Issue is not supported by substantial evidence, is arbitrary or capricious, is an abuse of discretion, or constitutes denial of due process (as applicable), *and* (ii) such error prejudiced Appellees' substantial rights.[39]

In making such a decision on each Issue, this Court may only consider the Administrative Record, may not substitute its judgment for TCEQ or the ALJs on their determination, must presume such determination is supported by substantial evidence, and must require Appellees to demonstrate such determination is *not* supported by substantial evidence.[40] This Court is not to evaluate whether TCEQ or

---

38 *See, e.g., County of Reeves v. Tex. Comm'n on Envtl. 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).

39 TEX. GOV'T CODE §2001.174.

40 *See, e.g., Citizens Against Landfill Location v. TCEQ*, 169 S.W.3d 258, 264 (Tex. App.—Austin 2005, pet. denied).

the ALJs reached the correct determination, *but instead* whether there is some reasonable basis in the Administrative Record upon which reasonable minds could have made that determination.[41] The evidence may actually preponderate against the TCEQ or ALJ determination and still constitute substantial evidence.[42] It was appropriate for TCEQ and the ALJs to decide the meaning, weight, and credibility to assign to any conflicting evidence in making their determination, and this Court should not reverse and remand any determination because evidence was conflicting or did not compel that determination.[43]

For this Court to determine any of TCEQ determination is arbitrary or capricious, this Court may not substitute its judgment for TCEQ on the determination, and it must decide TCEQ made that determination without considering all relevant factors and without there being a rational connection between that determination and the facts.[44]

For this Court to determine any of the ALJs' rulings is an abuse of discretion, this Court would also have to determine the ALJs made that ruling arbitrarily and without reference to any guiding rules or principles.[45] Such ruling would not

---

41 *Id*.

42 *Id*.

43 *County of Reeves*, 266 S.W.3d at 528.

44 *See e.g., Starr County v. Starr Indus. Services, Inc.*, 584 S.W.2d 352, 355-56 (Tex. Civ. App. —Austin 1979, writ ref'd n.r.e.).

45 *See, e.g., Curry v. Tex. Dep't of Pub. Safety*, 472 S.W.3d 346, 354 (Tex. App.—Houston [1st Dist.] 2015).

constitute an abuse of discretion if this Court was to merely determine that it would have made a different ruling.[46]

For this Court to determine Appellees were denied due process, Appellees must demonstrate they were not accorded a full and fair hearing, and the "rudiments of fair play" were not observed.[47]

2. Deference to TCEQ

Even though Vulcan believes the relevant provisions in the TCAA and TCEQ rules are unambiguous and TCEQ's interpretations of them are consistent with their unambiguous meanings, to the extent this Court determines there is any ambiguity in the meaning of any of those provisions, this Court should defer to the TCEQ's interpretation of each of them because each such interpretation is reasonable and not plainly erroneous.[48] That is particularly true since Appellees have not shown that TCEQ has ever had different interpretations of any those statutory provisions or rules.[49]

---

46 *See Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985).

47 *See Office of Pub. Util. Counsel v. Pub. Util. Comm'n*, 185 S.W.3d 555, 576 (Tex. App.—Austin 2006, pet. denied); *Grace v. Structural Pest Control Bd.*, 620 S.W.2d 157, 160 (Tex. App.—Waco 1981, writ ref'd n.r.e.).

48 *Tex. Dep't of Ins. v. Am. Nat'l Ins. Co.,* 410 S.W.3d 843, 853 (Tex. 2011) ; *El Paso County Hosp. Dist. v. Tex. HHS Comm'n,* 400 S.W.3d 72, 81 (Tex. 2013).

49 *Tex. Dep't of Ins.,* 410 S.W.3d at 843.

IX. ARGUMENT

Based on de novo review of the Issues, which are based on the rulings in the Final Judgment that caused the district court to not affirm TCEQ's Order completely, this Court should determine the answers are "yes" to Issue Nos. 1.a-c. and 2.a.-c., and "no" to Issue Nos. 3 and 4.a.-b. Since those answers mean the related Final Judgment rulings are incorrect, this Court should affirm TCEQ's Order.

Initially, Vulcan emphasizes that each of the Issues, except for Issue No. 1.c., relates to an aspect of one of Vulcan's demonstrations that the Plant's emissions will not negatively impact public health, including of sensitive subgroups, or welfare that Vulcan was not required to conduct, but conducted voluntarily to provide even more support for such demonstration. As a result, TCEQ's determination the Plant's emissions will not negatively impact health, including of sensitive subgroups, or welfare is supported by substantial evidence and is not arbitrary or capricious notwithstanding the district court's rulings related to those Issues. Therefore, even if this Court does not determine one or more of those rulings was wrong, this Court should still determine TCEQ's Order is supported by substantial evidence and is not arbitrary or capricious, and, thus, affirm it.

Moreover, there is substantial evidence the parts of the TCEQ's Order the Final Judgment reversed are supported by the language of applicable provisions of the TCAA, TCEQ air permitting rules, and related TCEQ written guidance, and

TCEQ's consistent interpretation and application of that language over the years. To reverse those parts of the TCEQ's Order, the district court had to either improperly ignore the language of those provisions, or interpret and apply such language differently than TCEQ has over the years, even though the Administrative Record and the briefing at the district court provided no support for the district court to do so. For example, although the uncontroverted evidence shows that TCEQ has consistently interpreted and applied the TCAA and its rules, which have been in place for almost fifty years, to not require that emissions from quarries or roads be input into the modeling required for a proposed facility,[50] two of the court's rulings are that TCEQ should have required that Vulcan input emissions from quarries and roads into its modeling for its proposed Plant.

It is a significant problem for Vulcan, other members of the regulated community, and TCEQ that the district court improperly ignored the language of the applicable provisions of the TCAA, TCEQ air permitting rules, and related TCEQ written guidance, or interpreted and applied such language differently than TCEQ has over the years. Unless those district court's actions are corrected by this Court, they will prevent the TCEQ air permitting program from being properly and consistently-implemented, which is critical to provide the certainty the regulated

[50] *See, e.g.,* 1 A.R. 154 at 7.

community and TCEQ need in the TCEQ air permitting process. For example, if this Court does not reverse the two above-discussed rulings that TCEQ should have required that Vulcan input emissions from quarries and roads into its modeling for its proposed Plant, such rulings will significantly impact the TCEQ air permitting program. Specifically, contrary to express TCAA and TCEQ rule provisions, such rulings will force TCEQ to start requiring that each permit application for which there is or will be one or more quarries and/or roads on the same site as the proposed facilities covered by the application, or for which there is one or more nearby existing offsite quarries and/or roads, include calculations of emissions for such quarries and/or roads and include modeling into which such emissions are input. Accordingly, it is critical this Court not improperly ignore, and instead appropriately interpret and apply, the language of the applicable provisions of the TCAA, TCEQ air permitting rules, and related TCEQ written guidance.

1. Issue Nos. 1.a. – 1.c.

Issue Nos. 1.a – 1.c., which are addressed in the three subsections below, are closely based on the three rulings in Section 1 of the Final Judgment. The discussion in each subsection demonstrates the answer to the associated Issue is "yes," and, thus, the associated Final Judgment ruling was incorrect. Accordingly, this Court should reverse those rulings and affirm Conclusion of Law No. 12 in the TCEQ Order, to which Section 1 of the Final Judgment states those rulings relate (and

affirm any other part of TCEQ's Order to which this Court might determine those rulings relate).

a. Issue No. 1.a. – TCEQ's determination the Plant's crystalline silica emissions will not negatively affect human health or welfare is supported by substantial evidence

The only determination TCEQ was required to make regarding the Plant's crystalline silica emissions to issue its Order was that such emissions will not "negatively impact human health or welfare,"[51] which is based on the requirements in TEX. HEALTH AND SAFETY CODE §382.0518(b)(2) and 30 TAC §116.111(a)(2)(A)(i). According to TCEQ guidance, TCEQ had previously determined that emissions, including crystalline silica emissions, from rock crushers, such as the Plant, are not expected to negatively affect human health or welfare.[52] That guidance demonstrates TCEQ has determined TEX. HEALTH AND SAFETY CODE §382.0518(b)(2) and 30 TAC §116.111(a)(2)(A)(i) are met for crystalline silica emissions from rock crushers. Based on that guidance, and since neither of those provisions nor any other statutory or regulatory provision requires AQA modeling for crystalline silica emissions from a rock crusher,[53] TCEQ

---

51 Issue O in the contested case hearing.

52 *See, e.g.,* https://www.tceq.texas.gov/assets/public/permitting/air/Guidance/NewSourceReview/mera.pdf, Appendix B; 2-B2 A.R. 211 at 33:31-34:19.

53 *See, e.g.,* 30 TAC §116.111(a)(2)(J).

appropriately did not require that Vulcan calculate the Plant's crystalline silica emissions or conduct AQA modeling to demonstrate such emissions will not negatively affect human health or welfare.[54]

Nevertheless, Vulcan voluntarily made that demonstration by calculating the Plant's crystalline silica emissions based on the 0.2% crystalline silica of its aggregate material it determined based on analysis of a representative sample of such material, and conducting modeling of such emissions.[55] The Plant's crystalline silica emissions are very low -- only 0.0044 lb/hr.[56] The modeling conservatively calculated the hourly and annual GLC_{max}s of crystalline silica, and Vulcan compared them to the crystalline silica ESLs.[57] TCEQ previously established those ESLs at conservative concentrations so that GLC_{max}s below them will not cause negative effects to human health, including of sensitive subgroups, or welfare.[58] The modeled crystalline silica GLC_{max}s are less than 1% of the applicable ESLs.[59] Appellees offered no controverting crystalline silica modeling evidence.

Based on her comparison of the crystalline silica GLC_{max}s to the applicable ESLs, Vulcan's toxicology expert, Dr. Lucy Fraiser, testified the Plant's crystalline

---

54 2-B1 A.R. 185 at 14:25-15:13; 2-B2 A.R. 211 at 33:27-30; 1 A.R. 154 at 35.

55 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.

56 1 A.R. 26, Appendix A, Table 4.

57 2-B1 A.R. 185 at 10:27-28, 34:23-35:2; 1 A.R. 26 at 2; 2-B2 A.R. 230 at 18.

58 2-B1 A.R. 187 at 26:14-27:18, 37:22-38:2; 2-B2 A.R. 237 at 6:19-29, 7:6-9:13.

59 2-B1 A.R. 185 at 35:2-4; 2-B2 A.R. 232 at 23:5-8.

silica emissions will not negatively impact public health, including of sensitive subgroups, or welfare.[60] The ED concurred.[61]

Therefore, TCEQ's determination the Plant's crystalline silica emissions will not negatively affect public health, including of sensitive subgroups, or welfare is supported by substantial evidence.

b. Issue No. 1.b. – TCEQ's determination the Plant's crystalline silica emissions calculations are representative of those expected from the Plant is supported by substantial evidence

First, Vulcan reiterates that its calculation of the Plant's crystalline silica emissions was voluntary and unnecessary to support TCEQ's determination the Plant's crystalline silica emissions will not negatively affect human health or welfare due to TCEQ's above-discussed prior determination that crystalline silica emissions from rock crushers, such as the Plant, are not expected to negatively affect human health or welfare. Nevertheless, TCEQ's determination the calculated Plant crystalline silica emissions are representative of those expected from the Plant is supported by substantial evidence.

Appellees' unsupported assertion to the contrary is based on their incorrect assertion the 0.2% crystalline silica Vulcan used to calculate such emissions was

60 2-B1 A.R. 187 at 14:24-29, 26:2-28:21, 33:16-36:22, 37:1-38:2.
61 1 A.R. 154 at 36-38.

determined from analysis of a sample that was not a "representative sample" of Vulcan's aggregate material. The Administrative Record contains substantial evidence Vulcan's sample was a representative sample, and 0.2% crystalline silica is representative of Vulcan's aggregate material.

One of Vulcan's geologist experts, Dr. Lori Eversull, who has a Ph.D. in Geology and was responsible for the development of Vulcan's sample, testified that based on her knowledge and experience, the sample was a representative sample because it was developed "in accordance with the widely accepted processes for obtaining a representative sample of aggregate material."[62] Vulcan's other geologist expert, Mr. Thomas Mathews, testified that based on his knowledge and experience regarding how to develop a representative sample of aggregate material, for a sample to be a representative sample, it must be a composite of multiple samples collected from different parts of aggregate material, and based on his review of Dr. Eversull's testimony, Vulcan's sample was such a composite sample of Vulcan's aggregate material and was a representative sample.[63]

None of the arguments Appellees made to the contrary are supportable, including their assertion Vulcan's sample was not a representative sample because it was developed based on three of the 41 original core samples ("***cores***") Vulcan

---

62 2-B1 A.R. 198 at 5:18-7:4.

63 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.

had previously collected for an unrelated purpose during its 2016 subsurface investigation. That purpose was not to allow determination of the crystalline silica percentage of the aggregate material underlying the property to allow calculation of the Plant's crystalline silica emissions,[64] but instead, was to allow determination of the quantity and quality of such aggregate material at different depths and locations underlying the property to determine if such aggregate material meets the required specifications for construction aggregate such that Vulcan should buy the property.[65]

The Administrative Record contains substantial evidence Vulcan's sample was a representative sample even though it was based on three of the 41 original cores. Vulcan's geological expert, Dr. Eversull, provided uncontroverted testimony that the use of the three cores was appropriate to produce a representative sample[66] because (i) many of the 41 original cores no longer existed when Vulcan developed the representative sample because they had been consumed for other purposes during Vulcan's unrelated 2016 subsurface investigation,[67] (ii) the three cores were chosen from the north, central, and southern parts of the property to capture any lateral and vertical variability in the crystalline silica percentage of Vulcan's aggregate material,[68] and (iii) she had knowledge and experience there was little such

64 3 A.R. 271 at 162:22-23.
65 2-B1 A.R. 198 at 6:6-15.
66 3 A.R. 271 at 156:19-157:7.
67 3 A.R. 271 at 174:24-25, 202:20-21.
68 3 A.R. 271 at 202:21-203:3; 2-B1 A.R. 198 at 6:22-23.

variability in limestone formations, i.e., aggregate materials, in the area.[69] Dr. Eversull also testified Vulcan's only crystalline silica analysis was conducted using the three cores.[70]

The uncontroverted evidence demonstrates that the analysis of Vulcan's representative sample showed 0.2% crystalline silica.[71] There is much evidence that 0.2% is consistent with the range of the crystalline silica percentages of the aggregate materials in limestone formations[72] near the Plant. Mr. Mathews, Vulcan's other geological expert, testified he has no reason to doubt that Vulcan's aggregate material contains 0.2% crystalline silica,[73] based, in part, on that percentage being consistent with the results from a past Bureau of Economic Geology investigation of limestone formations in the area.[74] Further, the ED expert, Joel Stanford, testified that 0.2% crystalline silica is consistent with known percentages in limestone formations in the area.[75] Therefore, there is substantial evidence 0.2% crystalline silica is representative of Vulcan's aggregate material, and, thus, the Plant's crystalline silica emissions are representative for the Plant.

---

69 3 A.R. 271 at 166:3-11, 213:9-214:8.
70 3 A.R. 271 at 212:17-23.
71 2-B1 A.R. 198 at 7:7-8.
72 2-B1 A.R. 204 at 10:20-21.
73 2-B1 A.R. 204 at 9:17-23.
74 2-B1 A.R. 204 at 10:8-15.
75 1 A.R. 154 at 36-37; 2-B2 A.R. 211 at 35:10-36:2.

None of Appellees' evidence to the contrary is supportable. First, the alleged average 1.0% crystalline silica of the three grab samples Reeh Appellees collected of off-site aggregate material does not overcome the substantial evidence 0.2% crystalline silica is representative of Vulcan's aggregate material. None of those samples was a representative sample of Vulcan's aggregate material.[76] Further, Vulcan's geologist expert, Mr. Mathews, testified those samples' average crystalline silica percentage was really less than 0.9% and does not cause him to question that 0.2% crystalline silica is representative of Vulcan's aggregate material.[77] But, most importantly, 0.9% is far below the 27% crystalline silica that, as discussed below, would be required for the Plant's crystalline silica emissions to potentially negatively impact human health, including of sensitive subgroups, or welfare.

Moreover, the alleged 2% to 49% crystalline silica in three grab samples Appellees' witness, Dr. Joe Collins, obtained from off-site quarries do not overcome the substantial evidence 0.2% crystalline silica is representative of Vulcan's aggregate material.[78] First, he provided no evidence that any of those samples was a representative sample of Vulcan's aggregate material.[79] Further, the uncontroverted evidence shows the alleged 2% to 49% crystalline silica percentages are not accurate

---

76 3 A.R. 272 at 305:8-307:17.
77 3 A.R. 272 at 308:9-310:14, 311:10-313:6.
78 2-B1 A.R. 204 at 21:27-22:14, 23:20-28.
79 2-B1 A.R. 204 at 17:25-18:5.

for several reasons. The main reason is that the *crystalline silica* percentages for two of them are higher than their *total silica* percentages, and that is impossible since *crystalline silica* is a subset of *total silica*.[80] One sample allegedly contained 49% crystalline silica, but only 8.47% total silica.[81]

But, assuming *arguendo* there was not substantial evidence 0.2% crystalline silica is representative of Vulcan's aggregate material such that the Plant's crystalline silica emissions were not representative for the Plant, there nevertheless would be substantial evidence the Plant's crystalline silica emissions will not negatively impact public health, including of sensitive subgroups, or welfare, which is the only relevant issue for such emissions. The Administrative Record contains uncontroverted expert testimony that (i) the crystalline silica percentage would need to be more than 27%, i.e., 135 times higher than 0.2%, for such emissions to cause a predicted exceedance of an ESL and, thus, possibly negatively impact public health, including of sensitive subgroups, or welfare,[82] and (ii) assuming *arguendo* the crystalline silica percentage was higher than 0.2%, it will not be anywhere near 27%.[83]

---

80 2-B1 A.R. 204 at 22:19-23:18.
81 2-B1 A.R. 204 at 23:13-15.
82 2-B1 A.R. 185 at 35:16-37:20; 2-B1 A.R. 187 at 25:13-18, 26:6-8.
83 3 A.R. 272 at 318:24-319:2.

c. Issue No. 1.c. – TCEQ's rejections of Reeh Plaintiffs' assertions regarding ways the Permit allegedly is not sufficiently protective of public health or property are supported by substantial evidence and are not arbitrary and capricious

Comparison of the language of this Issue, which is based on the language of the ruling in Section 1.iii) of the Final Judgment, to the language of Issue No. 3 in Reeh Plaintiffs' Initial Brief at the district court, which was discussed in Section C of that brief, shows this issue covers the assertions raised in that section.[84] The only assertions therein that are addressed below are that the Permit allegedly should (i) require fenceline monitoring, and (ii) limit the Plant's operating hours. TCEQ's rejection of those assertions is supported by substantial evidence; therefore, there is a rational connection between the facts and TCEQ's rejection, which means it is not arbitrary or capricious.

Neither of the other assertions discussed in Section C of Reeh Plaintiffs' Initial Brief is addressed below. Because Section 3 of the Final Judgment affirmed TCEQ's Best Available Control Technology ("***BACT***") determinations, there is no need to address Reeh Plaintiffs' assertion that the emissions controls required by the Permit do not meet BACT because TCEQ's BACT reviews for Vulcan's Application were

[84] C.R. 242-279.

not properly conducted. Reeh Plaintiffs' other assertion, which is that Vulcan allegedly did not demonstrate the Plant's emissions will not negatively affect public health or welfare, is shown to be unsupported in Sections IX.1.a-1.b. and IX.2.a.-2.c of this Initial Brief.

i. The Permit not requiring fenceline monitoring is supported by substantial evidence and is not arbitrary or capricious

Substantial evidence exists for TCEQ's rejection of Reeh Plaintiffs' assertion the Permit should require fenceline monitoring for PM_{10} and $PM_{2.5}$; therefore, there is a rational connection between the facts and TCEQ's rejection, which means it is not arbitrary or capricious.

Neither the TCAA, TCEQ rules, nor TCEQ guidance requires fenceline monitoring.[85] In addition, the ED's and Vulcan's permitting experts, Mr. Stanford and Gary Nicholls, each testified he is not aware of an air permit for any other rock crusher that requires fenceline monitoring.[86] Mr. Stanford also testified he would have several concerns about the Permit requiring fenceline monitoring, e.g., it would be impossible to distinguish between monitored PM_{10} and $PM_{2.5}$ that was due to the Plant's emissions and emissions from natural sources since the fenceline monitors

---

85 2-B1 A.R. 183 at 40:17-27.

86 2-B1 A.R. 183 at 40:27-41:4; 2-B2 A.R. 211 at 27:11-12.

would indiscriminately collect PM_{10} and $PM_{2.5}$ from all emissions sources.[87] Further, such fenceline monitoring is not necessary because the Permit requires the Plant be located at least 2,119 feet (about 0.4 miles) from the nearest property line, which will lower the potential the Plant's PM_{10} and $PM_{2.5}$ emissions might get off-site, including during high winds.[88]

ii. The Permit not restricting the Plant's operating hours is supported by substantial evidence and is not arbitrary or capricious

Substantial evidence exists for TCEQ's rejection of Reeh Plaintiffs' assertion the Permit should restrict the Plant's operating hours to ensure no adverse impacts to public health, welfare, and the environment; therefore, there is a rational connection between the facts and TCEQ's rejection, which means it is not arbitrary or capricious.

The Administrative Record shows the Plant would not adversely impact public health, welfare, and the environment, even if it was to operate continuously, as the Permit allows.[89] Vulcan's AQAs were based on the assumption the Plant will operate continuously.[90] That is an overly conservative assumption because, in

87 2-B2 A.R. 211 at 27:13-34.
88 2-B1 A.R. 183 at 41:6-20.
89 2-B1 A.R. 185 at 24:1-13; 2-B2 A.R. 211 at 11:31-12:3; 2-B2 A.R. 230 at 50.
90 2-B1 A.R. 185 at 24:9-11; 2-B2 A.R. 211 at 11:27-30; 2-B2 A.R. 232 at 10:31-36.

reality, the Plant will not operate continuously due to variable production demands, planned maintenance, and inclement weather.[91]

2. Issue Nos. 2.a. – 2.c.

Issue Nos. 2.a – 2.c., which are addressed in the three subsections below, are closely based on the three rulings in Section 2 of the Final Judgment. The discussion in each of those subsections demonstrates the answer to the associated Issue is "yes," and, thus, the associated ruling was incorrect. Accordingly, this Court should reverse those rulings and affirm Conclusion of Law No. 14 in the TCEQ Order, to which the Section 2 of the Final Judgment states those rulings relate (and affirm any other part of TCEQ's Order to which this Court might determine those rulings relate).

a. Issue No. 2.a. – TCEQ's determination Vulcan's AQAs adequately account for and address cumulative impacts is supported by substantial evidence and is not arbitrary or capricious

Critically, no TCAA provision, TCEQ rule, or TCEQ guidance required that Vulcan's AQAs account for and address "cumulative impacts." Nevertheless, based on Finding of Fact 25 of TCEQ's Order, which states that Vulcan's Minor NAAQS Analyses "analyzed any cumulative impacts," and based on Appellees' definition of

[91] 2-B1 A.R. 185 at 24:15-19.

"cumulative impact,"[92] "cumulative impacts" means the possible offsite impacts that were accounted for and addressed by Vulcan's voluntary Minor NAAQS Analyses.

Neither Vulcan's modeling, nor any other part of its AQAs, was required to account for or address cumulative impacts for PM_{10} or $PM_{2.5}$ (the only pollutants potentially subject to Minor NAAQS Analyses Appellees identified on appeal) because neither the TCAA, TCEQ rules, nor the long-standing TCEQ guidance[93] required Vulcan to conduct Minor NAAQS Analyses for PM_{10} or $PM_{2.5}$ to demonstrate the Plant's emissions of them will not negatively affect public health or welfare. Vulcan's AQAs made that demonstration even if the results of the Minor NAAQS Analyses for PM_{10} or $PM_{2.5}$ that Vulcan voluntarily conducted are not considered.

Specifically, as required by the TCEQ guidance, Vulcan conducted a "preliminary impact determination" for each of PM_{10} and $PM_{2.5}$ and each other pollutant potentially subject to Minor NAAQS Analyses. Each preliminary impact determination involved modeling of each pollutant's maximum emissions[94] from the "facilities"[95] comprising the Plant using an EPA-approved model,[96] which

---

92 C.R. at 106.

93 2-B2 A.R. 234 at 16-18.

94 2-B1 A.R. 185 at 9:25-10:4; 2-B1 A.R. 183 at 14:1-22; 2-B2 A.R. 211 at 27:37-28:4; 2-B2 A.R. 230 at 12-13; 2-B2 A.R. 232 at 11:3-4.

95 2-B2 A.R. 234 at 14-15.

96 2-B1 A.R. 185 at 9:17-23.

calculated the pollutant's GLC_{max}.[97] In accordance with the TCEQ guidance, Vulcan compared each GLC_{max} to the pollutant's "de minimis" level (also, "significant impact level").[98] Under such guidance, for any pollutant whose GLC_{max} exceeded its "de minimis" level, Vulcan was required to conduct a Minor NAAQS Analysis.[99] Because no GLC_{max} for PM_{10} or $PM_{2.5}$ exceeded its "de minimis" level, Vulcan was not required to conduct a Minor NAAQS Analysis for PM_{10} or $PM_{2.5}$, or, thus, account for and address cumulative impacts, to demonstrate the Plant's PM_{10} or $PM_{2.5}$ emissions will not cause or contribute to exceedance of the applicable NAAQS, and, thus, will not negatively affect public health or welfare.[100]

Nevertheless, Vulcan voluntarily conducted Minor NAAQS Analyses for PM_{10} and $PM_{2.5}$ (and every other pollutant whose GLC_{max} was below its "de minimis" level), and, thus, addressed those pollutants' cumulative impacts in a manner that exceeded the legal requirements.[101] Each Minor NAAQS Analysis involved Vulcan: (i) inputting into the modeling the pollutant's permitted emissions from TCEQ-identified nearby offsite facilities within 10 kilometers of the Plant,[102] plus from the Plant, to calculate its GLC_{max}, and (ii) adding to that GLC_{max} a

---

97 2-B1 A.R. 185 at 9:5-14, 10:6.

98 2-B2 A.R. 234 at 15, 17; 2-B1 A.R. 185 at 13:3-24.

99 *Id*.

100 2-B1 A.R. 185 at 13:17-20, 19:8-14; 1 A.R. 26 at 31-32; 2-B2 A.R. 222 at 1-2; 2-B1 A.R. 232 at 16:24-27; 2-B2 A.R. 234 at 17.

101 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.

102 2-B1 A.R. 185 at 17:23-18:27, 20:23-27; 2-B2 A.R. 232 at 17:11-28.

representative background concentration, which addresses the pollutant's emissions from existing off-site facilities and other emissions sources, including quarries and roads. The result of each such analysis was the pollutant's total maximum off-site GLC.[103]

TCEQ followed its written guidance[104] and EPA's Guideline on Air Quality Models in 40 C.F.R. Part 51, Appendix W ("***Appendix W***") in identifying each pollutant's emissions that should be input into the modeling to calculate its GLC_{max} rather than be addressed by adding a representative background concentration.[105] Appendix W, §8.3.1.a.i states that existing "sources that cause a significant concentration gradient in the vicinity of the [facilities covered by the permit application, in this case, the facilities that comprise the Plant] are not adequately represented" by representative background concentrations and are considered "nearby" sources whose emissions need to be input into the modeling to calculate the pollutant's GLC_{max}. Appendix W, §8.3.3.b.iii states that the identification of "nearby" sources is to be based on "the exercise of professional judgment by the appropriate reviewing authority," i.e., TCEQ. TCEQ guidance is consistent with Appendix W.[106]

---

103 2-B1 A.R. 185 at 27:5-33:11; 2-B2 A.R. 232 at 17:1-21:1; 3 A.R. 271 at 97:12-16.

104 2-B2 A.R. 234.

105 2-B1 A.R. 185 at 17:14-18:7; 2-B2 A.R. 232 at 5:10-6:15 ("Guideline on Air Quality Models published on January 17, 2017" is Appendix W).

106 2-B2 A.R. 234 at 17-18.

Vulcan's modeling expert, Mr. Knollhoff, complied with Appendix W, §8.3.3.b.iii and that TCEQ guidance by consulting with ED staff regarding the identification of nearby sources whose emissions Vulcan should input into its Minor NAAQS Analyses modeling.[107] ED staff identified such nearby sources as all facilities located within 10 kilometers (approximately 6.2 miles) from the Plant, all of which are associated with Martin Marietta Materials' rock crusher.[108] The ED's modeling expert, Rachel Melton, testified that requiring Vulcan to input emissions from Martin Marietta's facilities only into such modeling was appropriate because those facilities are the only emissions sources that cause a significant concentration gradient in the vicinity of the Plant, and Vulcan's preliminary impact determinations showed the Plant's emissions will cause only a small area of impact.[109] As an aside, the fact those are the only facilities within 10 kilometers of the Plant demonstrates it will be in a rural, non-industrialized area.

Each modeled total maximum off-site GLC is much higher than the modeled GLC_{max} would be absent Vulcan conducting a Minor NAAQS Analysis[110] because each representative background concentration added to the GLC_{max} in each Minor NAAQS Analysis is much higher than the GLC_{max}.[111] For example, for 24-hour

107 2-B1 A.R. 185 at 17:18-30.
108 *Id*.
109 2-B1 A.R. 232 at 17:14-25.
110 2-B1 A.R. 185 at 12:15-14:10.
111 2-B1 A.R. 185 at 14:2-10.

$PM_{2.5}$, the representative background concentration is 23.35 μg/m^3 while the GLC_{max} is only 0.68 μg/m^3, which means the representative background concentration is over 34 times the GLC_{max} and 97% of the total maximum off-site GLC.[112]

Nevertheless, each total maximum off-site GLC from each Minor NAAQS Analysis is far below the applicable NAAQS, which is the concentration to which such GLC is to be compared to determine whether the Plant's emissions will negatively impact public health, including of sensitive subgroups, or welfare.[113] EPA conservatively established each primary NAAQS at a concentration that will protect public health, including of sensitive subgroups, with a margin of safety,[114] and each secondary NAAQS at a concentration that will protect public welfare, which includes physical property, wildlife, vegetation, flora and fauna.[115]

Since each total maximum off-site GLC is far below the applicable NAAQS,[116] the Plant's emissions of each pollutant for which NAAQS exist, including PM_{10} and $PM_{2.5}$, will not negatively impact public health, including of sensitive subgroups, or welfare.[117] TCEQ concurred.[118]

---

112 1 A.R. 26 at 34.

113 2-B1 A.R. 185 at 10:25-27, 11:4-12:3; 2-B2 A.R. 232 at 21:2-5.

114 2-B1 A.R. 187 at 18:1-9, 18:24-29, 37:25-38:2; 2-B2 A.R. 232 at 15:12-16; 2-B2 A.R. 230 at 11-12.

115 2-B1 A.R. 187 at 14:24-29, 18:10-29; 2-B2 A.R. 232 at 15:16-20; 2-B2 A.R. 230 at 11-12.

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

117 2-B1 A.R. 187 at 17:21-23, 36:5-22, 37:10-38:2.

118 TCEQ Order, Findings of Fact 23 and 32; 2-B2 A.R. 232 at 23:34-24:11; 2-B2 A.R. 230 at 11-13; 2-B2 A.R. 222.

Further, there is uncontroverted testimony the Plant's PM_{10} and $PM_{2.5}$ emissions will cause no cumulative impact with PM_{10} and $PM_{2.5}$ emissions from any off-site facilities or other emissions sources.[119]

Therefore, TCEQ's determination that Vulcan's AQAs adequately account for and address cumulative impacts is supported by substantial evidence; therefore, there is a rational connection between the facts and TCEQ's determination, which means it is not arbitrary or capricious.

b. Issue No. 2.b. – TCEQ's determinations that quarry and road emissions were adequately considered are supported by substantial evidence and are not arbitrary or capricious

This issue is based on Appellees' unsupportable assertions TCEQ should have required that Vulcan input quarry and road emissions into its modeling for PM_{10} and $PM_{2.5,}$ and for crystalline silica. TCEQ appropriately did not require that Vulcan input such emissions because (i) TCEQ is not legally required to do so, and (ii) it was not necessary for TCEQ to do for Vulcan's AQAs to demonstrate the Plant's PM_{10}, $PM_{2.5}$, and crystalline silica emissions will not negatively affect public health, including of sensitive subgroups, or welfare, which were the only TCEQ demonstrations required for such emissions that Final Judgment reversed.

---

119 *See* Section IX.2.b.i.(b).

Accordingly, TCEQ's determinations that quarry and road emissions were adequately considered are supported by substantial evidence; therefore, there is a rational connection between the facts and TCEQ's determinations, which means they are not arbitrary or capricious.

i. PM_{10} and $PM_{2.5}$ quarry and road emissions

The only aspects of each Vulcan PM_{10} or $PM_{2.5}$ AQA that involved modeling in which quarry and road emissions could have been input were Vulcan's (i) required preliminary impact determinations modeling, and (ii) voluntary Minor NAAQS Analyses modeling that also involved inputting emissions from Martin Marietta's off-site facilities. TCEQ's determinations to not require Vulcan to input quarry and road emissions into such modeling are supported by substantial evidence and are not arbitrary or capricious.

(a). TCEQ was not legally mandated to require that Vulcan input such emissions

Under the TCAA, TCEQ rules, and long-standing TCEQ guidance, Vulcan was only required to input into its preliminary impact determinations modeling the emissions from the "facilities" comprising the Plant.[120] The TCAA and TCEQ rules

[120] TEX. HEALTH AND SAFETY CODE §382.0518(b); 30 TAC §§116.110(a) and 116.111(a)(2)(J); 2-B2 A.R. 234 at 14-15; 2-B1 A.R. 183 at 57:16-24; 1 A.R. 154 at 7; 2-B2 A.R. 232 11:32-33.

define "facility" to exclude quarries and roads;[121] thus, while quarries and roads are emissions sources, they are not facilities. Since neither Vulcan's proposed quarry and roads nor any off-site quarries and roads are facilities, and since none are part of the Plant, TCEQ does not have the legal authority to require Vulcan to input PM_{10} or $PM_{2.5}$ emissions from any of them into its preliminary impact determination modeling.[122] Therefore, it was appropriate for TCEQ to not require Vulcan to have done so.

Moreover, since Vulcan was not legally required to conduct Minor NAAQS Analysis modeling as part of its AQA for PM_{10} or $PM_{2.5}$,[123] there was no required modeling into which Vulcan could have input PM_{10} or $PM_{2.5}$ quarry and road emissions. But, even if Vulcan had been required to conduct such modeling, nothing in the TCAA, TCEQ rules, or TCEQ guidance required that Vulcan input into such modeling such emissions, either from its on-site quarry and roads or any offsite quarries and roads. The ED properly determined that Vulcan was only required to input into such modeling emissions from its proposed "facilities" and from certain

---

121 TEX. HEALTH & SAFETY CODE §382.003(6); 30 TAC §116.10(4); 2-B1 A.R. 183 at 56:8-16; 2-B2 A.R. 211 at 25:15-20; 2-B2 A.R. 232 at 11:30-31.

122 2-B2 A.R. 230 at 36; 2-B1 A.R. 183 at 55:11-58:7; 2-B2 A.R. 211 at 24:15-25:27; 2-B2 A.R. 232 at 11:28-34; 1 A.R. 154 at 6-7.

123 *See* Section IX.2.a.

off-site "facilities", and, thus, was not required to input quarry and road emissions since quarries and roads are not facilities.[124]

TCEQ has consistently interpreted and applied the TCAA and its rules such that quarry and road emissions do not have to be input into modeling.[125] For example, the proposal for decision supporting TCEQ's Order regarding EOG Resources Inc. ("***EOG***") concluded that it was appropriate that EOG did not input quarry and road emissions into its modeling.[126] In that Order, the TCEQ Commissioners concluded that EOG's modeling "was accurate and appropriate," even though quarry and road emissions were not input into it.[127]

Notwithstanding TCEQ's consistent interpretation of the TCAA and its rules that quarry and road emissions do not have to be input into modeling, if this Court was to believe a different interpretation is better, it should nevertheless defer to TCEQ's interpretation because it is reasonable and not plainly erroneous, particularly since there is no evidence TCEQ has ever had any different interpretation. Moreover, Vulcan's air permitting expert, Mr. Nicholls, testified that based on his work on over 100 rock crusher permit applications, he is unaware of

---

124 1 A.R. 154 at 7; 2-B2 A.R. 211 at 24:24-25:27.

125 2-B2 A.R. 230 at 36; 1 A.R. 154 at 7; 2-B2 A.R. 211 at 24:24-25:27; 2-B2 A.R. 232 at 11:28-34.

126 *In the Matter of EOG Resources,* TCEQ Docket No. 2012-0971-AIR, Proposal for Decision at 23, 25.

127 EOG Order, Conclusion of Law 30.

TCEQ ever requiring quarry emissions be input into modeling for rock crushers or similar operations.[128]

(b). It is unnecessary for TCEQ to require that Vulcan input such emissions

Not only does substantial evidence exist that TCEQ was not legally mandated to require that Vulcan input quarry and road emissions into its modeling for PM_{10} or $PM_{2.5}$, substantial evidence also exists it was unnecessary for Vulcan to have done so to demonstrate the Plant's PM_{10} and $PM_{2.5}$ emissions will not negatively affect public health, including of sensitive subgroups, or welfare.

Critically, although quarry and road emissions were not input into Vulcan's Minor NAAQS Analyses modeling for PM_{10} and $PM_{2.5}$, such emissions were adequately considered through the PM_{10} and $PM_{2.5}$ representative background concentrations Vulcan voluntarily added to the modeled GLC_{max}s in those analyses.[129] Those representative background concentrations, which were measured at TCEQ monitors, account for PM_{10} and $PM_{2.5}$ emissions from facilities and other emissions sources, including quarries and roads, whose emissions were not input into such modeling.[130]

---

128 2-B1 A.R. 183 at 4:18-19, 57:26-58:2.

129 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.

130 3 A.R. 271 at 97:12-16; 2-B2 A.R. 232 at 18:4-6; 1 A.R. 154 at 41.

Moreover, the uncontroverted testimony of Vulcan's modeling expert, Mr. Knollhoff, demonstrates that inputting quarry and road emissions into such modeling was also unnecessary because it would not have changed the modeling results. The PM_{10} and $PM_{2.5}$ GLC_{max}s from Vulcan's voluntary Minor NAAQS Analyses modeling that included Martin Marietta facilities' emissions were the same as the PM_{10} and $PM_{2.5}$ GLC_{max}s from Vulcan's preliminary impact determinations modeling that included the Plant's emissions only.[131] That demonstrates Martin Marietta's emissions, including those from its quarry and roads, will have no cumulative impact with the Plant's emissions because the area of impact of the Plant's emissions is so small that it does not overlap with the area of impact of Martin Marietta's emissions.[132] Accordingly, it is even more true that emissions from quarries and road located further from the Plant, such as the quarries Reeh Appellees claim are located "within a 20 km radius" of the Plant in an area Friends Appellees call "quarry row," will have no cumulative impact with the Plant's emissions. Mr. Knollhoff testified that is consistent with his experience from his prior modeling of facilities in the area.[133] Since inputting quarry and road emissions into Vulcan's Minor NAAQS Analyses modeling for PM_{10} and $PM_{2.5}$ would not have changed the modeled GLC_{max}s, it was unnecessary for Vulcan to input such emissions.

---

131 1 A.R. 26 at 30-31.
132 2-B1 A.R. 185 at 21:20-26; 1 A.R. 26 at 30-31.
133 2-B1 A.R. 185 at 21:26-22:23.

Finally, it was unnecessary for Vulcan to input the emissions from its proposed quarry and roads into its PM_{10} and $PM_{2.5}$ Minor NAAQS Analyses modeling because the Permit contains special conditions that will adequately control such emissions, including preventing them from causing a nuisance.[134]

ii. Crystalline silica quarry and road emissions

TCEQ's determination to not require that Vulcan input crystalline silica quarry and road emissions into its AQA modeling for crystalline silica is supported by substantial evidence and is not arbitrary or capricious.

(a). TCEQ has no legal authority to require Vulcan to input such emissions

As discussed in Section IX.1.a., TCEQ appropriately did not require that Vulcan conduct AQA modeling of the Plant's crystalline silica emissions to demonstrate they will not negatively affect public health, including of sensitive subgroups, or welfare. Therefore, there was no required modeling into which Vulcan could have input crystalline silica quarry and road emissions.

But, even if Vulcan had been required to conduct such modeling, under the TCAA, TCEQ rules, and long-standing TCEQ guidance, TCEQ's legal authority is limited to requiring that Vulcan input into such modeling crystalline silica emissions

134 2-B1 A.R. 183 at 59:18-60:13; 2-B2 A.R. 211 at 25:5-12.

from the "facilities" comprising the Plant.[135] Since neither Vulcan's proposed quarry and roads nor any off-site quarries and roads are facilities,[136] and since none are part of the Plant, TCEQ does not have the legal authority to require that Vulcan input into such modeling crystalline silica emissions from any of those quarries or roads.[137]

Accordingly, and as discussed in Section IX.2.b.i.(a), TCEQ has consistently interpreted and applied the TCAA and its rules such that AQA modeling of emissions of crystalline silica does not involve inputting quarry and road emissions.

(b). It is unnecessary for TCEQ to require Vulcan to input such emissions

Not only does substantial evidence exist that TCEQ does not have the legal authority to require that Vulcan input quarry and road emissions into its AQA modeling for crystalline silica, substantial evidence also exists it was unnecessary for Vulcan to have done so to demonstrate the Plant's crystalline silica emissions will not negatively affect public health, including of sensitive subgroups, or welfare.

The Administrative Record demonstrates that crystalline silica quarry and road emissions are addressed in Vulcan's voluntary crystalline silica AQA even

---

135 TEX. HEALTH AND SAFETY CODE §382.0518(b); 30 TAC §§116.110(a) and 116.111(a)(2)(J); 2-B2 A.R. 223 at 1, 6-7; 2-B1 A.R. 183 at 57:6-24; 2-B2 A.R. 232 at 11:32-33.

136 *See* Section IX.2.b.i.(a).

137 2-B2 A.R. 230 at 36; 2-B1 A.R. 183 at 55:11-58:7; 2-B2 A.R. 211 at 24:15-25:27; 2-B2 A.R. 232 at 11:28-34; 1 A.R. 154 at 6-7.

though they were not input into that AQA's modeling. There is uncontroverted expert testimony such emissions are addressed by the conservatism included in the crystalline silica ESLs by TCEQ establishing them at low enough concentrations to account for cumulative impacts of crystalline silica emissions from emissions sources that are not the proposed facilities, such as quarries and roads.[138] Accordingly, if the crystalline silica GLC_{max} from modeling of crystalline silica emissions from proposed facilities, like the Plant, is below the crystalline silica ESL, such emissions will not negatively impact public health, including of sensitive subgroups, or welfare, *even if* offsite or other onsite crystalline silica emissions sources exist.[139] Therefore, since each of Vulcan's modeled crystalline silica GLC_{max}s is below the crystalline silica ESL, the Plant's crystalline silica emissions will not negatively impact public health, including of sensitive subgroups, or welfare, even though Vulcan did not input crystalline silica quarry and road emissions into its AQA modeling.[140] Indeed, that conclusion is even more certain since each crystalline silica GLC_{max} is less than 1% of the crystalline silica ESL.[141] Therefore, it was unnecessary for TCEQ to have required Vulcan to input crystalline silica emissions from quarries or roads in its voluntary AQA modeling.

---

138 2-B2 A.R. 237 at 7:17-35; 2-B1 A.R. 187 at 27:20-28:21.
139 2-B2 A.R. 237 at 7:32-35; 2-B1 A.R. 187 at 26:14-20.
140 2-B1 A.R. 187 at 26:2-8, 26:14-27:18, 37:1-38:2.
141 *See* Section IX.1.a.

Finally, it was also unnecessary for Vulcan to input crystalline silica emissions from its proposed quarry and road emissions into its AQA modeling for crystalline silica because the Permit contains special conditions that will adequately control such emissions, including preventing a nuisance.[142]

iii. Significant negative impact of affirming district court's ruling

Although TCEQ's determinations quarry and road emissions were adequately considered are supported by substantial evidence and are not arbitrary or capricious, if this Court was to consider ruling otherwise and affirming the district court's ruling reversing those TCEQ's determinations, Vulcan respectfully asks this Court to consider that such ruling would significantly impact the entire TCEQ air permitting program. Such ruling would force TCEQ to require *for the first time* (to Vulcan's knowledge) that an air permit application for a site with a quarry and/or roads, or with a nearby offsite quarry(ies) or roads, include calculations of such quarry and road emissions and conduct modeling into which such emissions would be input.

[142] 2-B1 A.R. 183 at 59:18-60:13; 2-B2 A.R. 211 at 25:5-12.

c. Issue No. 2.c. – TCEQ's determination that Vulcan chose appropriate background concentrations for its voluntary Minor NAAQS Analyses is supported by substantial evidence and is not arbitrary or capricious

First, Vulcan reiterates it was not legally required to conduct a Minor NAAQS Analysis for PM_{10} or $PM_{2.5}$ (the only such pollutants Appellees addressed on appeal) or any other pollutant whose GLC_{max} was less than its applicable "de minimis" level, and, thus, Vulcan was not legally required to add a representative background concentration for any of those pollutants to the applicable GLC_{max} in that voluntary analysis.[143] Nevertheless, substantial evidence exists for TCEQ's determination that Vulcan chose appropriate representative background concentrations for all pollutants because those concentrations are conservatively representative of those pollutants' concentrations in the area around the Plant. Therefore, there is a rational connection between the facts and TCEQ's determination, which means it is not arbitrary or capricious.

A pollutant's background concentration is measured at a TCEQ ambient air monitor (rather than calculated through modeling) and accounts for emissions of that pollutant from existing facilities and other emissions sources in the area, including

---

143 *See* Section IX.2.a; *see also*, 2-B1 A.R. 185 at 30:14-23; 2-B2 A.R. 232 at 19:16-29; 1 A.R. 154 at 30.

existing quarries and roads.[144] When Vulcan chose the monitors to use to provide the representative background concentrations, Vulcan followed, and even exceeded, the TCEQ guidance.[145] Since there are no monitors in Comal County (location of the Plant),[146] in accordance with applicable TCEQ guidance,[147] Vulcan's modeling expert, Mr. Knollhoff, evaluated monitors in other counties in Texas and chose monitors that provide background concentrations that are conservatively representative of the pollutants' concentrations in the area around the Plant,[148] i.e., they are conservatively higher than those pollutants' concentrations that would be if there were monitors to measure their concentrations.[149] Those background concentrations are conservatively representative because they came from monitors located in counties with higher total emissions of those pollutants from facilities and with larger populations (and, thus, higher emissions of those pollutants from sources that are not facilities, such as mobile sources and roads) than Comal County.[150] To be even more conservative, Mr. Knollhoff chose the monitor with the highest monitored concentration to provide each pollutant's background concentration,

144 3 A.R. 271 at 97:12-16; 2-B2 A.R. 232 at 18:4-6; 1 A.R. 154 at 41.
145 2-B1 A.R. 185 at 28:10-17; 2-B2 A.R. 232 at 20:27-21:1; 2-B2 A.R. 234.
146 2-B1 A.R. 185 at 28:21-22; 2-B2 A.R. 232 at 18:28-36.
147 2-B2 A.R. 234 at 44-48.
148 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 at 15.
149 2-B1 A.R. 185 at 14:11-16, 29:5-23, 31:6-9.
150 2-B1 A.R. 185 at 29:15-18; 2-B2 A.R. 232 at 19:1-15, 19:32-20:18, 20:27-31.

which is beyond what is required by TCEQ guidance.[151] Critically, the PM_{10} and $PM_{2.5}$ background concentrations Vulcan chose account for emissions of PM_{10} and $PM_{2.5}$ from existing quarries and roads (and other existing emissions sources in the area).[152]

Accordingly, TCEQ determined that each background concentration Vulcan used in its voluntary Minor NAAQS Analysis was appropriate because it was conservatively representative of the ambient concentration of the pollutant in the area around the Plant.[153] Therefore, that determination is supported by substantial evidence and is not arbitrary or capricious.

A crystalline silica representative background concentration is not discussed herein because this issue relates only to background concentrations of the pollutants subject to Vulcan's voluntary Minor NAAQS Analyses, and Vulcan conducted no such analysis for crystalline silica because one was not required, or even possible, since there is no NAAQS for crystalline silica.[154]

---

151 2-B1 A.R. 185 at 29:19-23, 33:1-7.
152 3 A.R. 271 at 97:12-16; 2-B2 A.R. 232 at 18:4-6; 1 A.R. 154 at 41.
153 TCEQ Order, Finding of Fact 41.
154 40 C.F.R. Part 50.

3. Issue No. 3 – No ALJ ruling that Vulcan could maintain the trade secret information as confidential under the trade secret privilege was an abuse of discretion

For this Court to conclude that any ALJ ruling that Vulcan could maintain the trade secret information as confidential under the trade secret privilege was an abuse of discretion, this Court would have to determine the ruling was arbitrary because it was without reference to the trade secret rule in Texas Rule of Evidence 507(a), and there was no rational connection between that ruling and the facts.[155] There is no basis for this Court to make that determination, or, thus, to conclude any ALJ ruling was an abuse of discretion.

Friends Appellees requested the trade secret information based on their unsupported belief it includes information that might support a claim regarding the accuracy of the 0.2% crystalline silica Vulcan used to calculate the Plant's crystalline silica emissions. Critically, such claim is not relevant to the only crystalline silica issue TCEQ had to determine to issue its Order, which was whether the Plant's crystalline silica emissions will negatively impact human health or welfare.[156] Substantial evidence exists to support TCEQ's determination such emissions will not negatively impact human health, including of sensitive subgroups,

---

155 *See* Section VIII.A.

156 *See* Section IX.1.a.

or welfare, *even if* the crystalline silica percentage was more than 0.2%, and even if it was a little more than 27%, for which there is no probative evidence to support.[157]

Although the 0.2% crystalline silica's accuracy was *not* an issue TCEQ had to determine to issue its Order, the Administrative Record shows Vulcan did not use any of the trade secret information (e.g., boring logs or photographs) to develop the representative sample whose analysis showed 0.2%,[158] or, thus, to determine the 0.2% Vulcan used to calculate the Plant's crystalline silica emissions. Moreover, Vulcan did not include any of the trade secret information in its Application or otherwise provide it to TCEQ or to anyone else,[159] which means Vulcan did not waive its trade secret claim for such information. When counsel for the ED was asked by an ALJ whether TCEQ received any of the trade secret information, he answered no.[160] Further, the ED's permitting expert, Mr. Stanford, testified the ED's review of Vulcan's Application "did not necessitate more information" regarding Vulcan's calculation or modeling of the Plant's crystalline silica emissions, i.e., it did not necessitate the trade secret information.[161]

---

157 *See* Section IX.1.b.
158 3 A.R. 271 at 202:8-14, 203:18-204:4, 213:9-214:8.
159 *See, e.g.,* 1 A.R. 1, 26, 27.
160 3 A.R. 271 at 184:14-16.
161 2-B2 A.R. 211 at 35:13-18

Nevertheless, Friends Appellees filed a Motion to Compel asking the ALJ to require Vulcan to produce *all* of the trade secret information in discovery.[162] They later filed a Motion for Continuance, alleging they needed all of such information to "effectively question Vulcan's experts" and to present pre-filed testimony.[163] However, they never requested to depose any of Vulcan's experts and they waited to file their Motion for Continuance until after submitting their pre-filed testimony.[164]

The ALJ appropriately denied both motions through Order No. 2 based on her rulings the trade secret information is a privileged trade secret, and Friends Appellees did not demonstrate that having such information was necessary to prevent injustice.[165] She ruled the trade secret information is a privileged trade secret based on her evaluation of the following in light of the trade secret privilege rule (Texas Rule of Evidence 507(a)) and related case law: the trade secret information, and the arguments and information presented by Friends Appellees and Vulcan, including additional evidence Vulcan provided to show the trade secret information is a privileged trade secret.[166] Appellees failed to support their position the ALJ's ruling was wrong under the relevant facts and law.

---

162 1 A.R. 111.
163 1 A.R. 129 at 3-4. Reeh Appellees made no motion for the trade secret information.
164 1 A.R. 131 at 3-4.
165 1 A.R. 132 at 1-4; 1 A.R. 161 at 2-3.
166 1 A.R. 111; 1 A.R. 119; 1 A.R. 122; 1 A.R. 129; 1 A.R. 131.

The ALJ correctly acknowledged that in spite of her ruling the trade secret information is a privileged trade secret, Vulcan would have been required to produce such information to Friends Appellees in discovery under a protective order and respond to their cross-examination about such information *if* they had met their burden to demonstrate those things were necessary to prevent injustice, i.e., were necessary for a fair adjudication of their claim regarding the 0.2% crystalline silica's accuracy[167] (even though that claim is irrelevant to whether TCEQ's Order should be affirmed[168]). To demonstrate such necessity, Friends Appellees were required to do more than merely claim the trade secret information would be useful,[169] or make general assertions that its non-production was unfair.[170] It would have been abuse of discretion for the ALJ to have required Vulcan to produce the trade secret information to Friends Appellees in discovery, even under a protective order, or respond to their cross-examination about it without them demonstrating those things

---

167 *Id*., at 3-4; *see, e.g.,* Tex. R. Evid. 507(a), and *In re Continental Gen. Tire, Inc.,* 979 S.W.2d 609, 612-613 (Tex. 1998) (a party is not required to produce information it has established as trade secret information, even under a protective order, unless the party seeking such information proves disclosure is necessary to prevent injustice, i.e., to allow a fair adjudication of that party's claims); *In re Prairiesmarts LLC*, 421 S.W.3d 296, 304-305 and 308-309 (Tex. App. —Fort Worth 2014, no pet.); *In re Refining-Texas, L.P.,* 415 S.W.3d 567, 570 (Tex. App.—Houston [1st Dist.] 2013, no pet.).

168 *See* Section IX.1.a.

169 *See, e.g., In re Prairiesmarts, 421 S.W.3d at 305, 309; In re Refining-Texas, L.P.,* 415 S.W.3d at 570.

170 *See, e.g., Id.*

were necessary for a fair adjudication of their claim regarding the 0.2% crystalline silica's accuracy.[171]

The ALJ properly evaluated whether Friends Appellees had made that demonstration, and determined they had not done so.[172] The ALJ determined it was not an injustice for Vulcan to not be required to produce the trade secret information in discovery or respond to cross-examination about such information because those things were not necessary for a fair adjudication of Friends Appellees' claim regarding the 0.2% crystalline silica's accuracy since they were able to present pre-filed testimony allegedly supporting their claim even without having such information.[173]

That determination was further supported by the ALJs allowing Friends Appellees to fully cross-examine Vulcan's expert Dr. Eversull (until the ALJs determined such cross-examination went out of bounds),[174] and allowing Friends Appellees to introduce supplemental expert testimony at the hearing on the merits (which was long after the expert testimony deadline) regarding the average crystalline silica percentage of the above-discussed three grab samples Reeh

---

171 *See, e.g., In re Prairiesmarts, 421 S.W.3d at 310*; *In re Cooper Tire & Rubber Co.,* 313 S.W.3d 910, 915 (Tex. App.—Houston [14th Dist.] 2010, orig. proceeding).

172 1 A.R. 132 at 3-4.

173 *Id*., at 4.

174 3 A.R. 271 at 152:23-197:22.

Appellees had collected and analyzed shortly before the hearing.[175] The ALJ's determination was also supported by the uncontroverted expert testimony the Plant's crystalline silica emissions will not negatively impact public health or welfare (the only issue regarding the Plant's crystalline silica emissions TCEQ had to decide to issue its Order), even if the crystalline silica percentage is much higher than 0.2%, and even a little more than 27%.[176]

Therefore, not only was it not an abuse of discretion for the ALJ to rule the trade secret information is a privileged trade secret and Vulcan was not required to produce it to Friends Appellees in discovery or be subject to their cross-examination regarding it, it would have been abuse of discretion for the ALJ to have required its production or cross-examination regarding it since Friends Appellees failed to meet their burden to show such production or cross-examination was necessary to prevent injustice, i.e., were necessary for a fair adjudication of their claim regarding the 0.2% crystalline silica's accuracy.

Also, while the ALJ did not require production of the trade secret information or allow cross-examination regarding it, she ruled that Vulcan could not use such information in the hearing, including for its pre-filed testimony.[177] Vulcan complied with that ruling.

---

175 2-B3 A.R. 254 and 255.
176 *See* Section IX.1.b.
177 1 A.R. 161 at 1, 4.

Then, on the last business day before the hearing on the merits, Friends Appellees filed both a Motion for Reconsideration of Order No. 2 based on Reeh Appellees' analysis of the three above-discussed grab samples, and also a Motion for Leave to Supplement Prefiled Testimony regarding such sampling and analysis.[178] At the beginning of the hearing on the merits, the ALJs denied the Motion for Reconsideration based on their review of those motions and Vulcan's responses to them.[179] That denial was appropriate since the only new basis Friends Appellees presented in that motion as to why Order No. 2 was wrong regarded Reeh Appellees' analyses of the three above-discussed grab samples, and since the ALJ granted Friends Appellees' Motion for Leave to Supplement Prefiled Testimony regarding such analyses.[180]

Finally, during the hearing on the merits, Friends Appellees made an oral motion for continuance[181] based on their incorrect assertion Vulcan's geologist expert, Dr. Eversull, admitted that the development of Vulcan's representative sample relied on some of the trade secret information.[182] The ALJs appropriately denied that motion[183] because Friends Appellees' assertion underlying it is based on

178 1 A.R. 149-150.
179 3 A.R. 271 at 4:24-5:4.
180 *Id*.
181 Reeh Appellees did not participate in the hearing.
182 3 A.R. 271 at 182:8-13.
183 3 A.R. 271 at 215:20-22.

Dr. Eversull's testimony that is taken out of context and completely ignores her other testimony. In fact, she testified the development of Vulcan's representative sample was based in part on her knowledge and experience regarding the low level of variability of aggregate material in the Edwards Limestone Group/Formation around Vulcan's property, which she gained from her prior work with six other Vulcan quarries in the area, and her general sense from her work on Vulcan's 2016 subsurface investigation.[184] Dr. Eversull clearly testified that while she reviewed some of the boring logs and core photos of the trade secret information in connection with her work regarding Vulcan's 2016 subsurface investigation *three years prior*, she did not review, much less rely on, any of them in the development of the representative sample because doing so could have potentially biased such development,[185] and she did not need to do so due to her knowledge and experience regarding the aggregate material around Vulcan's property[186]. She also testified she did not review, much less rely on, any of the trade secret information for any of her testimony, including her pre-filed testimony.[187] Therefore, Vulcan's designation of Dr. Eversull as a testifying expert witness did not waive its trade secret privilege for

184 3 A.R. 271 at 166:3-11, 177:19-178:17, 213:9-214:8.
185 3 A.R. 271 at 202:1-17, 203:18-23.
186 3 A.R. 271 at 166:3-11, 177:19-178:17, 213:9-214:8.
187 3 A.R. 271 at 158:25-160:11, 203:4-7.

such information even though she had seen such information, during Vulcan's 2016 subsurface investigation through her work as a Vulcan employee.[188]

Based on the foregoing, the ALJs' rulings Vulcan could maintain the trade secret information as confidential under the trade secret privilege, i.e., was not required to produce such information to Friends Appellees in discovery or be subject to cross-examination regarding it, were based on consideration of the relevant rule and had a rational connection to the relevant facts. Thus, there is no basis for this Court to conclude any of those rulings was an abuse of discretion.

4. Issue Nos. 4.a-4.b – Appellees were not denied due process such that their substantial rights were prejudiced

Issue Nos. 4.a-4.b., which are addressed in the two subsections below, are closely based on the two rulings in Section 5 of the Final Judgment. Those issues are whether Appellees were denied due process such that their substantial rights were prejudiced by (i) the ALJs' rulings Vulcan could maintain the trade secret information as confidential under the trade secret privilege, and (ii) TCEQ's decision to not require that Vulcan input quarry and road emissions into its modeling for the AQAs for PM_{10} or $PM_{2.5}$. Under the substantial evidence standard in TEX. GOV'T CODE §2001.174(2) that applies to this appeal, for the answer to either issue to be

188 *See, e.g., Aetna Cas. & Surety Co. v. Blackmon*, 810 S.W.2d 438, 440 (Tex. App.—Corpus Christi 1991, orig. proceeding).

"yes" such that there was reversible error, this Court must determine that *both* of the following is true: (i) Appellees were denied due process, *and* (ii) that resulted in their substantial rights being prejudiced. Vulcan demonstrates below that neither of those is true for either issue such that the answer to each issue is "no." Accordingly, there was no reversible error, and the associated ruling in Section 5 of the Final Judgment upon which each issue is based is incorrect. Thus, this Court should reverse those rulings and affirm the parts of the TCEQ Order to which they relate.

For Appellees to have been denied due process by any ALJ ruling or by TCEQ's decision regarding quarry and road emissions, Appellees must demonstrate they were not accorded a full and fair hearing, and the "rudiments of fair play" were not observed.[189] Vulcan demonstrates below that Appellees were not denied due process on any ALJ ruling or such TCEQ decision because they were accorded a full and fair hearing on each, and the "rudiments of fair play" were observed for each.

But, assuming *arguendo* Appellees were denied due process on any ALJ ruling or such TCEQ decision, for such denial to have prejudiced Appellees' substantial rights, they must demonstrate that this Court's reversal and remand of the ALJ ruling or such TCEQ decision would amount to more than "a postponement of the inevitable," i.e., it would affect what TCEQ would decide regarding the Permit

189 *See Office of Pub. Util. Counsel v. Pub. Util. Comm'n*, 185 S.W.3d 555, 576 (Tex. App.—Austin 2006, pet. denied); *Grace v. Structural Pest Control Bd.*, 620 S.W.2d 157, 160 (Tex. App.—Waco 1981, writ ref'd n.r.e.).

on remand.[190] For that to be true, Appellees must show harm by demonstrating that each of the following would be "controlling on a material issue, [and] not merely cumulative:"[191] (i) Vulcan being required to produce the trade secret information in discovery and being subject to cross-examination regarding it, and (ii) Vulcan being required to input quarry and road emissions into its AQA modeling for PM_{10} or $PM_{2.5}$. Vulcan demonstrates below that Appellees have not demonstrated, and cannot demonstrate, that either of those would be controlling, and are not merely cumulative, on any material issue TCEQ was required to decide to issue its Order. Therefore, even assuming *arguendo* that Appellees could show they were denied due process by any ALJ ruling or such TCEQ decision, Appellees have not demonstrated, and cannot demonstrate, such denial prejudiced their substantial rights.

---

190 *See Nissan N. Am., Inc. v. Tex. Dep't of Motor Vehicles*, 592 S.W.3d 480, 487 (Tex. App.—Texarkana 2019, no pet.).

191 *See Office of Pub. Util. Counsel,* 185 S.W.3d at 576. "Harm" means prejudice of substantial rights per *City of Corpus Christi v. Public Util. Comm'n, 51 S.W.3d 231, 263 (Tex. 2001)*.

a. Appellees were not denied due process such that their substantial rights were prejudiced by any ALJ ruling Vulcan could maintain the trade secret information as confidential under the trade secret privilege

Appellees were not denied due process by any ALJ ruling Vulcan could maintain the trade secret information as confidential under the trade secret privilege. Appellees were accorded a full and fair hearing, and the "rudiments of fair play" were observed, regarding the issues of whether the trade secret information is a privileged trade secret, and whether it would be an injustice for Vulcan to maintain such information as confidential under the trade secret privilege, and not produce it to Friends Appellees in discovery or be subject to cross-examination regarding it. As discussed in detail in Section IX.3, Appellees were provided multiple opportunities during the contested case hearing to present to the ALJs those issues and supporting evidence and arguments, both in writing and orally. Indeed, Friends Appellees made and argued five motions to the ALJs requesting that Vulcan be required to produce the trade secret information and be subject to cross-examination regarding it. The Administrative Record, including Order No. 2, shows that the ALJs' rulings on those motions were based on review and thoughtful consideration of them and Friends Appellees' supporting evidence and arguments, as well as Vulcan's evidence and arguments, in light of the trade secret privilege rule and related case law.

But, assuming *arguendo* this Court determines Appellees were denied due process by any ALJ ruling, such denial did not prejudice Appellees' substantial rights because reversal and remand to require Vulcan to produce the trade secret information and be subject to cross-examination regarding it would not affect what TCEQ would decide regarding the Permit on remand because such information is not "controlling on a material issue," but instead "is merely cumulative."[192] That is true because the material issue is *not* the accuracy of the 0.2% crystalline silica Vulcan used to calculate the Plant's crystalline silica emissions, which, as discussed in Section IX.3, is what Friends Appellees incorrectly believe the trade secret information would help them challenge; instead, the only material issue regarding the Plant's crystalline silica emissions TCEQ had to decide to issue its Order is whether such emissions will negatively affect public health or welfare.[193] The trade secret information is not controlling, and is merely cumulative, on that issue because, even without such information, the Administrative Record contains overwhelming evidence supporting TCEQ's determination the Plant's crystalline silica emissions will not negatively affect public health, including of sensitive subgroups, or welfare.[194]

---

192 *See Nissan*, 592 S.W.3d at 487; *Office of Pub. Util. Counsel,* 185 S.W.3d at 576.
193 *See* Section IX.1.a.
194 *Id*.

Not only is the trade secret information not controlling and is merely cumulative on the only material issue, it is also not controlling and is merely cumulative on the issue of the 0.2% crystalline silica's accuracy. First, even without the trade secret information, Appellees had, and took, multiple opportunities to obtain or develop, and introduce into the Administrative Record, support for their challenge to the 0.2% crystalline silica's accuracy, and the Administrative Record shows such support was properly considered by TCEQ, before rejecting it.[195] For example, Appellees' witness Dr. Collins offered testimony regarding the alleged crystalline silica percentages of three grab samples of aggregate materials he obtained from three off-site quarries and of Reeh Appellees' three grab samples of aggregate material from an adjacent property.[196] However, the Administrative Record contains significant expert testimony that none of those percentages shows the 0.2% is inaccurate,[197] and significant other evidence that the 0.2% crystalline silica is accurate. Such evidence includes the testimony of Vulcan's geologist experts, Dr. Eversull and Mr. Mathews, and the ED's expert Mr. Stanford.[198] Such testimony was based, in part, on different types of publically available information, such as Bureau of Economic Geology and U.S. Geological Survey reports, that

195 *See* Section IX.1.b.
196 *Id.*
197 *Id*.
198 *Id*.

provide further probative evidence the 0.2% crystalline silica is accurate.[199] Even though the Administrative Record contains significant evidence supporting TCEQ's determination the 0.2% crystalline silica is accurate, the Administrative Record also contains overwhelming support for TCEQ's determination the Plant's crystalline silica emissions would not negatively affect public health or welfare (the only material issue) even if the 0.2% was a little more than 27%.[200]

Based on the foregoing, the trade secret information is not controlling, and is merely cumulative, not only on the only material issue, but also on the issue regarding the 0.2% crystalline silica's accuracy, which is the issue for which Appellees incorrectly believe the trade secret information would be needed. Thus, reversal and remand to require Vulcan to produce the trade secret information in discovery and be subject to cross-examination regarding it would merely be "a postponement of the inevitable," i.e., would not affect the TCEQ's decision on remand. Accordingly, the ALJs' rulings would not have prejudiced Appellees' substantial rights even assuming *arguendo* those rulings were a denial of Appellees' due process.

---

199 2-B1 A.R. 204 at 10:11-14:13; 2-B2 A.R. 211 at 35:10-36:2.

200 *See* Section IX.1.b.

b. Appellees were not denied due process such that their substantial rights were prejudiced by TCEQ's decision to not require that Vulcan input quarry and road emissions into its modeling for the AQA for PM_{10} or $PM_{2.5}$

Reeh Appellees were the only Appellees that asserted at district court they were denied due process such that their substantial rights were prejudiced by TCEQ's decision to not require that Vulcan input quarry and road emissions into its modeling for the AQA for PM_{10} or $PM_{2.5}$. First, the district court should not have considered, much less ruled in support of, that assertion because Reeh Appellees did not raise it in their Motion for Rehearing, and, thus, TCEQ did not have the opportunity to evaluate and respond to it.[201] Accordingly, this Court should reverse that ruling.

Nevertheless, this Court should also reverse that ruling because Reeh Appellees' assertion is wrong. First, neither they nor Friends Appellees were denied due process by TCEQ's decision to not require that Vulcan input quarry and road emissions into its modeling for the AQAs for PM_{10} or $PM_{2.5}$. Appellees were accorded a full and fair hearing, and the "rudiments of fair play" were observed, regarding the issue of whether TCEQ should have required that Vulcan input quarry

[201] *See Scally v. Tex. State Bd. of Med. Examiners*, 351 S.W.3d 434, 444–45 (Tex. App.—Austin 2011, pet. denied).

and road emissions into such modeling. Appellees had, and took advantage of, multiple opportunities during the contested case hearing to present to TCEQ evidence and arguments supporting their position on that issue, including in their witnesses' testimony, in their pleadings, and during the hearing on the merits. The Administrative Record, and the discussion above in Section IX.2.b, demonstrate TCEQ's decision to not require that Vulcan input quarry and road emissions into its modeling for the AQAs for PM_{10} or $PM_{2.5}$ was based on its review and thoughtful consideration of Appellees' evidence and arguments, as well as Vulcan's and the ED's evidence and arguments on that issue, in light of the applicable provisions of the TCAA and TCEQ rules. Appellees have not demonstrated otherwise, and the district court had no basis to rule otherwise. Therefore, TCEQ's decision was supported by substantial evidence and was not arbitrary or capricious.

But, assuming *arguendo* Appellees were denied due process by TCEQ's decision, that would not prejudice their substantial rights because reversal and remand to require that Vulcan input quarry and road emissions into its modeling for the AQAs for PM_{10} or $PM_{2.5}$ would not affect TCEQ's decision on remand because inputting such emissions would not be "controlling on a material issue," and instead would be "merely cumulative." That is true because the material issue under the TCAA and TCEQ rules is not whether TCEQ should have required Vulcan to input quarry and road emissions into its modeling for the AQAs for PM_{10} and $PM_{2.5}$;

instead, it is whether the Plant's PM_{10} and $PM_{2.5}$ emissions will negatively impact public health, including of sensitive subgroups, or welfare.[202] Not inputting quarry and road emissions into such modeling is not controlling, and is merely cumulative, on that issue because, even without such emissions being input, the Administrative Record contains overwhelming evidence supporting TCEQ's determination the Plant's PM_{10} and $PM_{2.5}$ emissions will not negatively impact human health, including of sensitive subgroups, or welfare.[203]

Since TCEQ's decision to not require that Vulcan input quarry and road emissions into its modeling for the AQAs for PM_{10} or $PM_{2.5}$ is not controlling, and merely cumulative, on the material issue, reversal and remand would merely be "a postponement of the inevitable," i.e., would not affect the TCEQ's decision on remand. Accordingly, TCEQ's decision would not have prejudiced Appellees' substantial rights, even assuming *arguendo* that decision was a denial of Appellees' due process.

202 *See* Section IX.2.
203 *Id*.

X. PRAYER

Vulcan respectfully prays that this Court reverse the rulings in the Final Judgment that led the district court to not affirm TCEQ's Order completely, and instead affirm TCEQ's Order completely. Vulcan further prays for any and all other relief to which it may be entitled.

Respectfully submitted,

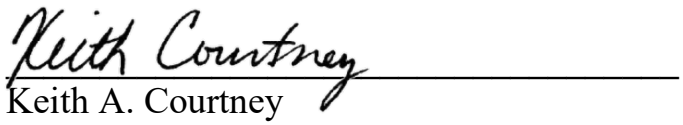
By: Keith Courtney

Keith A. Courtney
State Bar No. 04892700
Derek L. Seal
State Bar No. 00797404
MCGINNIS LOCHRIDGE LLP
600 Congress Avenue, Suite 2100
Austin, TX 78701
(512) 495-6100 (Tel)
(512) 495-6093 (Fax)
kcourtney@mcginnislaw.com
dseal@mcginnislaw.com

ATTORNEYS FOR DEFENDANT-INTERVENOR VULCAN CONSTRUCTION MATERIALS, LLC

CERTIFICATE OF COMPLIANCE

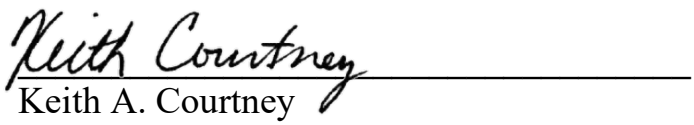
I hereby certify the body of this Initial Brief, excluding the contents listed in Texas Rule of Appellate Procedure 9.4(i)(1), contains 14,943 words, as counted by Microsoft Word.



Keith A. Courtney

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Initial Brief of Appellant Vulcan Construction Materials, LLC was served on each of the following counsel of record by electronic filing and electronic mail on July 23, 2021.



Keith A. Courtney

David Frederick
Eric Allmon
Frederick, Perales, Allmon, & Rockwell, PC
707 Rio Grande, Suite 200
Austin, Texas 78701
dof@lf-lawfirm.com
eallmon@lf-lawfirm.com
Fax: (512) 482-9346
dof@lf-lawfirm.com
eallmon@lf-lawfirm.com
Counsel for Friends Appellees

Mark Steinbach
Erin Snody
Assistant Attorneys General
Environmental Protection Division
P.O. Box 12548 (MC-066)
Austin, Texas 78711-2548
mark.steinbach@oag.texas.gov
erin.Snody@oag.texas.gov
Counsel for the Texas Commission on Environmental Quality

James D. Bradbury
Courtney Cox Smith
James D. Bradbury, PLLC
9111 Old Jollyville Road
Suite 220
Austin, Texas 78759
Fax: (817) 886-3495
jim@bradburycounsel.com
ccox@bradburycounsel.com
Counsel for Reeh Appellees

APPENDIX

Tab	Description
1	Final Judgment
2	30 TEX. ADMIN. CODE §116.12(19)
3	TEX. GOV'T CODE §22.220(a)
4	TEX. GOV'T CODE §2001.174
5	TEX. HEALTH AND SAFETY CODE §382.0518(b)
6	TEXAS ADMIN. CODE §116.111(a)(2)(A)(i)
7	https://www.tceq.texas.gov/assets/public/permitting/air/Guidance/NewSourceReview/mera.pdf, Appendix B
8	30 TEXAS ADMIN. CODE §116.111(a)(2)(J)
9	30 TEXAS ADMIN. CODE §§116.110(a)
10	TEX. HEALTH AND SAFETY CODE §382.003(6)
11	30 TEX. ADMIN. CODE §116.10(4)
12	Texas Rule of Evidence §507(a)

Appendix Tab 1

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

FRIENDS OF DRY COMAL CREEK and STOP 3009 VULCAN QUARRY, *Plaintiffs*,	§	
v.	§	IN THE DISTRICT COURT OF
	§	TRAVIS COUNTY, TEXAS
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, *Defendant*	§	353RD JUDICIAL DISTRICT
and	§	
VULCAN CONSTRUCTION MATERIALS, LLC, *Defendant-Intervenor*	§	

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 PM_{10}, 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

Approved as to form only:

Eric Allmon
David Frederick
Perales, Allmon & Ice, P.C.

Counsel for Friends of Dry Comal Creek and Stop 3009 Vulcan Quarry

Mark A. Steinbach, by DSF with consent

Mark A. Steinbach
Erin K. Snody
Office of The Attorney General

Counsel for Texas Commission on Environmental Quality

_____

Keith A. Courtney
Michael A. Shaunessy
Derek L. Seal
Mcginnis Lochridge LLP

Counsel for Vulcan Construction Materials, LLC

_____

James D. Bradbury
Courtney Cox Smith
James D. Bradbury, PLLC

Counsel for Jeffrey Reeh, Terry Olson, Mike Olson, and Comal Independent School District

_____
Mark A. Steinbach
Erin K. Snody
Office of The Attorney General

Counsel for Texas Commission on Environmental Quality

Keith A. Courtney
Michael A. Shaunessy
Derek L. Seal
Mcginnis Lochridge LLP

Counsel for Vulcan Construction Materials, LLC

_____
James D. Bradbury
Courtney Cox Smith
James D. Bradbury, PLLC

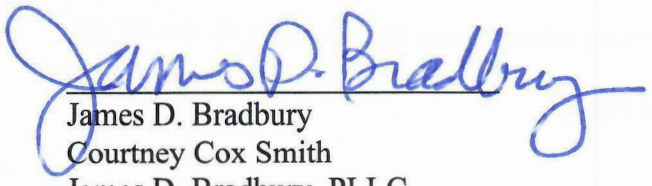
Counsel for Jeffrey Reeh, Terry Olson, Mike Olson, and Comal Independent School District

Mark A. Steinbach
Erin K. Snody
Office of The Attorney General

Counsel for Texas Commission on Environmental Quality

Keith A. Courtney
Michael A. Shaunessy
Derek L. Seal
Mcginnis Lochridge LLP

Counsel for Vulcan Construction Materials, LLC



James D. Bradbury
Courtney Cox Smith
James D. Bradbury, PLLC

Counsel for Jeffrey Reeh, Terry Olson, Mike Olson, and Comal Independent School District

Appendix Tab 2

30 TAC § 116.12

This document reflects all regulations in effect as of June 30, 2021

TX - Texas Administrative Code > TITLE 30. ENVIRONMENTAL QUALITY > PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY > CHAPTER 116. CONTROL OF AIR POLLUTION BY PERMITS FOR NEW CONSTRUCTION OR MODIFICATION > SUBCHAPTER A. DEFINITIONS

§ 116.12. Nonattainment and Prevention of Significant Deterioration Review Definitions

Unless specifically defined in the Texas Clean Air Act (TCAA) or in the rules of the commission, the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms that are defined by the TCAA, and in § 101.1 of this title (relating to Definitions), the following words and terms, when used in Subchapter B, Divisions 5 and 6 of this chapter (relating to Nonattainment Review Permits and Prevention of Significant Deterioration Review); and Subchapter C, Division 1 of this chapter (relating to Plant-Wide Applicability Limits), have the following meanings, unless the context clearly indicates otherwise.

(1) Actual emissions--Actual emissions as of a particular date are equal to the average rate, in tons per year, at which the unit actually emitted the pollutant during the 24-month period that precedes the particular date and that is representative of normal source operation, except that this definition shall not apply for calculating whether a significant emissions increase has occurred, or for establishing a plant-wide applicability limit. Instead, paragraph (3) of this section relating to baseline actual emissions shall apply for this purpose. The executive director shall allow the use of a different time period upon a determination that it is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period. The executive director may presume that the source-specific allowable emissions for the unit are equivalent to the actual emissions, e.g., when the allowable limit is reflective of actual emissions. For any emissions unit that has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

(2) Allowable emissions--The emissions rate of a stationary source, calculated using the maximum rated capacity of the source (unless the source is subject to

(B)except for greenhouse gases, any pollutant that is subject to any standard promulgated under Federal Clean Air Act (FCAA), § 111;

(C)any Class I or II substance subject to a standard promulgated under or established by FCAA, Title VI;

(D)any pollutant that otherwise is subject to regulation under the FCAA; except that any or all hazardous air pollutants either listed in FCAA, § 112 or added to the list under FCAA, § 112(b)(2), which have not been delisted under FCAA, § 112(b)(3), are not regulated new source review pollutants unless the listed hazardous air pollutant is also regulated as a constituent or precursor of a general pollutant listed under FCAA, § 108; or

(E)greenhouse gases that meet or exceed the thresholds established in § 116.164 of this title (relating to Prevention of Significant Deterioration Applicability for Greenhouse Gases Sources).

(16) Greenhouse gases (GHGs)--as defined in § 101.1 of this title (relating to Definitions).

(17) Lowest achievable emission rate--For any emitting facility, that rate of emissions of a contaminant that does not exceed the amount allowable under applicable new source performance standards promulgated by the United States Environmental Protection Agency under 42 United States Code, § 7411, and that reflects the following:

(A)the most stringent emission limitation that is contained in the rules and regulations of any approved state implementation plan for a specific class or category of facility, unless the owner or operator of the proposed facility demonstrates that such limitations are not achievable; or

(B)the most stringent emission limitation that is achieved in practice by a specific class or category of facilities, whichever is more stringent.

(18) Major facility--Any facility that emits or has the potential to emit 100 tons per year or more of the plant-wide applicability limit (PAL) pollutant in an attainment area; or any facility that emits or has the potential to emit the PAL pollutant in an amount that is equal to or greater than the major source threshold for the PAL pollutant in Table I of this section for nonattainment areas.

(19) Major stationary source--Any stationary source that emits, or has the potential to emit, a threshold quantity of emissions or more of any air contaminant (including volatile organic compounds (VOCs)) for which a national ambient air quality standard has been issued, or greenhouse gases. The major source thresholds are identified in Table I of this section for nonattainment pollutants and the major source thresholds for prevention of significant

deterioration pollutants are identified in 40 Code of Federal Regulations (CFR) § 51.166(b)(1). For greenhouse gases, the major source thresholds are specified in § 116.164 of this title (relating to Prevention of Significant Deterioration Applicability for Greenhouse Gases Sources). A source that emits, or has the potential to emit a federally regulated new source review pollutant at levels greater than those identified in 40 CFR § 51.166(b)(1) is considered major for all prevention of significant deterioration pollutants. A major stationary source that is major for VOCs or nitrogen oxides is considered to be major for ozone. The fugitive emissions of a stationary source shall not be included in determining for any of the purposes of this definition whether it is a major stationary source, unless the source belongs to one of the categories of stationary sources listed in 40 CFR § 51.165(a)(1)(iv)(C).

(20) Major modification--As follows.

(A) Any physical change in, or change in the method of operation of a major stationary source that causes a significant project emissions increase and a significant net emissions increase for any federally regulated new source review pollutant. At a stationary source that is not major prior to the increase, the increase by itself must equal or exceed that specified for a major source. At an existing major stationary source, the increase must equal or exceed that specified for a major modification to be significant. The major source and significant thresholds are provided in Table I of this section for nonattainment pollutants. The major source and significant thresholds for prevention of significant deterioration pollutants are identified in 40 Code of Federal Regulations § 51.166(b)(1) and (23), respectively and in § 116.164 of this title (relating to Prevention of Significant Deterioration Applicability for Greenhouse Gases Sources).

Display Image

(B) A physical change or change in the method of operation shall not include: (i) routine maintenance, repair, and replacement; (ii) use of an alternative fuel or raw material by reason of an order under the Energy Supply and Environmental Coordination Act of 1974, § 2(a) and (b) (or any superseding legislation) or by reason of a natural gas curtailment plan under the Federal Power Act; (iii) use of an alternative fuel by reason of an order or rule of 42 United States Code, § 7425; (iv) use of an alternative fuel at a steam generating unit to the extent that the fuel is generated from municipal solid waste; (v) use of an alternative fuel or raw material by a stationary source that the source was capable of accommodating before December 21, 1976 (unless such change would be prohibited under any federally enforceable permit condition established after December 21, 1976) or the source is approved to

Appendix Tab 3

Tex. Gov't Code § 22.220

This document is current through the 2021 Regular Session, 87th Legislature with the exception of HB 1154, HB 1525, HB 1540, HB 1560, HB 2237, HB 2315, HB 2352, HB 2462, HB 2658, HB 3257, HB 3607, HB 3774, HB 3853, HB 4030, HB 4294, HB 4368, HB 4580, HB 4590, HB 4626, HB 4627, HB 4645, HB 4646, HB 4652, HB 4658, HB 4659, SB 30, SB 41, SB 703, SB 1126, SB 1160, SB 1164, SB 1232, SB 1267, SB 1365, SB 1490, SB 1615, SB 1697, SB 1888 and SB 2050.

Sec. 22.220. Civil Jurisdiction.

(a) Each court of appeals has appellate jurisdiction of all civil cases within its district of which the district courts or county courts have jurisdiction when the amount in controversy or the judgment rendered exceeds $250, exclusive of interest and costs.

(b) If a court of appeals having jurisdiction in a case, matter, or controversy that requires immediate action is unable to take immediate action because the illness, absence, or unavailability of the justices causes fewer than three members of the court to be present, the nearest available court of appeals, under rules prescribed by the supreme court, may take the action required in the case, matter, or controversy.

(c) Each court of appeals may, on affidavit or otherwise, as the court may determine, ascertain the matters of fact that are necessary to the proper exercise of its jurisdiction.

History

Enacted by Acts 1985, 69th Leg., ch. 480 (S.B. 1228), § 1, effective September 1, 1985; am. Acts 2009, 81st Leg., ch. 1351 (S.B. 408), § 3, effective September 1, 2009.

Appendix Tab 4

Tex. Gov't Code § 2001.174

This document is current through the 2021 Regular Session, 87th Legislature with the exception of HB 1154, HB 1525, HB 1540, HB 1560, HB 2237, HB 2315, HB 2352, HB 2462, HB 2658, HB 3257, HB 3607, HB 3774, HB 3853, HB 4030, HB 4294, HB 4368, HB 4580, HB 4590, HB 4626, HB 4627, HB 4645, HB 4646, HB 4652, HB 4658, HB 4659, SB 30, SB 41, SB 703, SB 1126, SB 1160, SB 1164, SB 1232, SB 1267, SB 1365, SB 1490, SB 1615, SB 1697, SB 1888 and SB 2050.

Sec. 2001.174. Review Under Substantial Evidence Rule or Undefined Scope of Review.

If the law authorizes review of a decision in a contested case under the substantial evidence rule or if the law does not define the scope of judicial review, a court may not substitute its judgment for the judgment of the state agency on the weight of the evidence on questions committed to agency discretion but:

(1) may affirm the agency decision in whole or in part; and

(2) 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.

History

Enacted by Acts 1993, 73rd Leg., ch. 268 (S.B. 248), § 1, effective September 1, 1993.

Appendix Tab 5

Tex. Health & Safety Code § 382.0518

This document is current through the 2021 Regular Session, 87th Legislature with the exception of HB 1154, HB 1525, HB 1540, HB 1560, HB 2237, HB 2315, HB 2352, HB 2462, HB 2658, HB 3257, HB 3607, HB 3774, HB 3853, HB 4030, HB 4294, HB 4368, HB 4580, HB 4590, HB 4626, HB 4627, HB 4645, HB 4646, HB 4652, HB 4658, HB 4659, SB 30, SB 41, SB 703, SB 1126, SB 1160, SB 1164, SB 1232, SB 1267, SB 1365, SB 1490, SB 1615, SB 1697, SB 1888 and SB 2050.

Sec. 382.0518. Preconstruction Permit.

(a) Before work is begun on the construction of a new facility or a modification of an existing facility that may emit air contaminants, the person planning the construction or modification must obtain a permit or permit amendment from the commission.

(b) The commission shall grant within a reasonable time a permit or permit amendment to construct or modify a facility if, from the information available to the commission, including information presented at any hearing held under Section 382.056(k), the commission finds:

(1) the proposed facility for which a permit, permit amendment, or a special permit is sought will use at least the best available control technology, considering the technical practicability and economic reasonableness of reducing or eliminating the emissions resulting from the facility; and

(2) no indication that the emissions from the facility will contravene the intent of this chapter, including protection of the public's health and physical property.

(c) In considering the issuance, amendment, or renewal of a permit, the commission may consider the applicant's compliance history in accordance with the method for using compliance history developed by the commission under Section 5.754, Water Code. In considering an applicant's compliance history under this subsection, the commission shall consider as evidence of compliance information regarding the applicant's implementation of an environmental management system at the facility for which the permit, permit amendment, or permit renewal is sought. In this subsection, "environmental management system" has the meaning assigned by Section 5.127, Water Code.

Appendix Tab 6

30 TAC § 116.111

This document reflects all regulations in effect as of June 30, 2021

TX - Texas Administrative Code > TITLE 30. ENVIRONMENTAL QUALITY > PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY > CHAPTER 116. CONTROL OF AIR POLLUTION BY PERMITS FOR NEW CONSTRUCTION OR MODIFICATION > SUBCHAPTER B. NEW SOURCE REVIEW PERMITS > DIVISION 1. PERMIT APPLICATION

§ 116.111. General Application

(a) In order to be granted a permit, amendment, or special permit amendment, the application must include:

(1)a completed Form PI-1 General Application signed by an authorized representative of the applicant. All additional support information specified on the form must be provided before the application is complete;

(2)information which demonstrates that emissions from the facility, including any associated dockside vessel emissions, meet all of the following.

(A) Protection of public health and welfare. (i) The emissions from the proposed facility will comply with all rules and regulations of the commission and with the intent of the Texas Clean Air Act (TCAA), including protection of the health and property of the public. (ii) For issuance of a permit for construction or modification of any facility within 3,000 feet of an elementary, junior high/middle, or senior high school, the commission shall consider any possible adverse short-term or long-term side effects that an air contaminant or nuisance odor from the facility may have on the individuals attending the school(s).

(B) Measurement of emissions. The proposed facility will have provisions for measuring the emission of significant air contaminants as determined by the executive director. This may include the installation of sampling ports on exhaust stacks and construction of sampling platforms in accordance with guidelines in the "Texas Commission on Environmental Quality Sampling Procedures Manual."

(C) Best available control technology (BACT) must be evaluated for and applied to all facilities subject to the TCAA. Prior to evaluation of BACT under the TCAA, all facilities with pollutants subject to regulation under the Federal Clean Air Act (FCAA), Title I, Part C shall evaluate and apply BACT

Appendix Tab 7

Air Permit Reviewer Reference Guide

APDG 5874

Modeling and Effects Review Applicability (MERA)

Air Permits Division

Texas Commission on Environmental Quality

March 2018

Appendix B: Toxicology Emissions Screening List

Emissions from the following facilities have been reviewed for health effects and are not expected to cause adverse health effects. These do not require additional review through the MERA process.

- Odor and particulate emissions from agricultural, food processing, or animal feeding or handling facilities.
- Emissions of particulates from abrasive blast cleaning provided they do not contain any of the following:
  - asbestos;
  - metals and metal compounds with an ESL of less than 50 µg/m3 that are in a concentration of greater than 2.0%; or
  - crystalline silica at greater than or equal to 1 percent (weight) of the total particulate weight.
- Emissions of particulate matter, except for metals, metal compounds, silica, from controlled surface coating operations. Controlled surface coating operations are those that capture and abate particulate matter with a water wash or dry filter system (at least 98% removal efficiency) and vent through an elevated stack with no obstruction to vertical flow.
- Emissions of particulate matter from rock crushers, concrete batch plants and soil stabilization plants.
- Emissions from boilers, engines, or other combustion units fueled only by pipeline-quality natural gas as well as emissions from the combustion of natural gas in control devices.
- Emissions from flares, heaters, thermal oxidizers, and other combustion devices burning gases only from onshore crude oil and natural gas processing plants, with the exception of emissions from glycol dehydrators and amine units.
- Emissions of volatile organic compounds from emergency diesel engines.
- Emissions of freons that have ESLs greater than 15,000 µg/m3 from any facility.
- Emissions of the following gases, which have been classified as simple asphyxiates, from any facility.
  - argon
  - carbon dioxide
  - ethane
  - helium
  - hydrogen
  - methane
  - neon
  - nitrogen
  - propane
  - propylene

Appendix Tab 8

30 TAC § 116.111

This document reflects all regulations in effect as of June 30, 2021

TX - Texas Administrative Code > TITLE 30. ENVIRONMENTAL QUALITY > PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY > CHAPTER 116. CONTROL OF AIR POLLUTION BY PERMITS FOR NEW CONSTRUCTION OR MODIFICATION > SUBCHAPTER B. NEW SOURCE REVIEW PERMITS > DIVISION 1. PERMIT APPLICATION

§ 116.111. General Application

(a) In order to be granted a permit, amendment, or special permit amendment, the application must include:

(1)a completed Form PI-1 General Application signed by an authorized representative of the applicant. All additional support information specified on the form must be provided before the application is complete;

(2)information which demonstrates that emissions from the facility, including any associated dockside vessel emissions, meet all of the following.

(A) Protection of public health and welfare. (i) The emissions from the proposed facility will comply with all rules and regulations of the commission and with the intent of the Texas Clean Air Act (TCAA), including protection of the health and property of the public. (ii) For issuance of a permit for construction or modification of any facility within 3,000 feet of an elementary, junior high/middle, or senior high school, the commission shall consider any possible adverse short-term or long-term side effects that an air contaminant or nuisance odor from the facility may have on the individuals attending the school(s).

(B) Measurement of emissions. The proposed facility will have provisions for measuring the emission of significant air contaminants as determined by the executive director. This may include the installation of sampling ports on exhaust stacks and construction of sampling platforms in accordance with guidelines in the "Texas Commission on Environmental Quality Sampling Procedures Manual."

(C) Best available control technology (BACT) must be evaluated for and applied to all facilities subject to the TCAA. Prior to evaluation of BACT under the TCAA, all facilities with pollutants subject to regulation under the Federal Clean Air Act (FCAA), Title I, Part C shall evaluate and apply BACT

as defined in § 116.160(c)(1)(A) of this title (relating to Prevention of Significant Deterioration Requirements).

(D) New Source Performance Standards (NSPS). The emissions from the proposed facility will meet the requirements of any applicable NSPS as listed under 40 Code of Federal Regulations (CFR) Part 60, promulgated by the United States Environmental Protection Agency (EPA) under FCAA, § 111, as amended.

(E) National Emission Standards for Hazardous Air Pollutants (NESHAP). The emissions from the proposed facility will meet the requirements of any applicable NESHAP, as listed under 40 CFR Part 61, promulgated by EPA under FCAA, § 112, as amended.

(F)NESHAP for source categories. The emissions from the proposed facility will meet the requirements of any applicable maximum achievable control technology standard as listed under 40 CFR Part 63, promulgated by the EPA under FCAA, § 112 or as listed under Chapter 113, Subchapter C of this title (relating to National Emissions Standards for Hazardous Air Pollutants for Source Categories (FCAA § 112, 40 CFR Part 63)).

(G) Performance demonstration. The proposed facility will achieve the performance specified in the permit application. The applicant may be required to submit additional engineering data after a permit has been issued in order to demonstrate further that the proposed facility will achieve the performance specified in the permit application. In addition, dispersion modeling, monitoring, or stack testing may be required.

(H) Nonattainment review. If the proposed facility is located in a nonattainment area, it shall comply with all applicable requirements in this chapter concerning nonattainment review.

(I) Prevention of Significant Deterioration (PSD) review. (i) If the proposed facility is located in an attainment area, it shall comply with all applicable requirements in this chapter concerning PSD review. (ii) If the proposed facility or modification meets or exceeds the applicable greenhouse gases thresholds defined in § 116.164 of this title (relating to Prevention of Significant Deterioration Applicability for Greenhouse Gases Sources) then it shall comply with all applicable requirements in this chapter concerning PSD review for sources of greenhouse gases.

(J) Air dispersion modeling. Computerized air dispersion modeling may be required by the executive director to determine air quality impacts from a proposed new facility or source modification. In determining whether to issue, or in conducting a review of, a permit application for a shipbuilding or ship

repair operation, the commission will not require and may not consider air dispersion modeling results predicting ambient concentrations of non-criteria air contaminants over coastal waters of the state. The commission shall determine compliance with non-criteria ambient air contaminant standards and guidelines at land-based off-property locations.

(K) Hazardous air pollutants. Affected sources (as defined in § 116.15(1) of this title (relating to Section 112(g) Definitions)) for hazardous air pollutants shall comply with all applicable requirements under Subchapter E of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, § 112(g), 40 CFR Part 63)).

(L) Mass cap and trade allowances. If subject to Chapter 101, Subchapter H, Division 3 of this title (relating to Mass Emissions Cap and Trade Program), the proposed facility, group of facilities, or account must obtain allowances to operate.

(b) In order to be granted a permit, amendment, or special permit amendment, the applicant must comply with the requirements of Chapter 39 of this title (relating to Public Notice) and Chapter 55 of this title (relating to Request for Reconsideration and Contested Case Hearings; Public Comment).

(c) Upon request by the owner or operator of a facility which previously has received a permit or special permit from the commission, the executive director or designated representative may exempt the relocation of such facility from the provisions in Chapter 39 of this title if there is no indication that the operation of the facility at the proposed new location will significantly affect ambient air quality and no indication that operation of the facility at the proposed new location will cause a condition of air pollution.

History

SOURCE:

The provisions of this § 116.111 adopted to be effective July 8, 1998, 23 TexReg 6973; amended to be effective September 23, 1999, 24 TexReg 8296; amended to be effective March 29, 2001, 26 TexReg 2398; amended to be effective September 12, 2002, 27 TexReg 8546; amended to be effective October 7, 2010, 35 TexReg 8944; amended to be effective April 17, 2014, 39 TexReg 2901; amended to be effective May 14, 2020, 45 TexReg 3093

Appendix Tab 9

30 TAC § 116.110

This document reflects all regulations in effect as of June 30, 2021

TX - Texas Administrative Code > TITLE 30. ENVIRONMENTAL QUALITY > PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY > CHAPTER 116. CONTROL OF AIR POLLUTION BY PERMITS FOR NEW CONSTRUCTION OR MODIFICATION > SUBCHAPTER B. NEW SOURCE REVIEW PERMITS > DIVISION 1. PERMIT APPLICATION

§ 116.110. Applicability

(a) Permit to construct. Except as provided in § 116.118 of this title (relating to Construction While Permit Amendment Application Pending), before any actual work is begun on the facility, any person who plans to construct any new facility or to engage in the modification of any existing facility which may emit air contaminants into the air of this state shall either:

(1)obtain a permit under § 116.111 of this title (relating to General Application);

(2)satisfy the conditions for a standard permit under the requirements in:

(A) Subchapter F of this chapter (relating to Standard Permits);

(B) Chapter 321, Subchapter B of this title (relating to Concentrated Animal Feeding Operations);

(C) Chapter 332 of this title (relating to Composting); or

(D) Chapter 330, Subchapter N of this title (relating to Landfill Mining);

(3)satisfy the conditions for a flexible permit under the requirements in Subchapter G of this chapter (relating to Flexible Permits);

(4)satisfy the conditions for facilities permitted by rule under Chapter 106 of this title (relating to Permits by Rule); or

(5)satisfy the criteria for a de minimis facility or source under § 116.119 of this title (relating to De Minimis Facilities or Sources).

(b) Modifications to existing permitted facilities. Modifications to existing permitted facilities may be handled through the amendment of an existing permit.

(c) Compliance history. For all authorizations listed in subsections (a) and (b) of this section or § 116.116 of this title (relating to Changes to Facilities), compliance history reviews may be required under Chapter 60 of this title (relating to Compliance History).

(d) Exclusion. Owners or operators of affected sources (as defined in § 116.15(1) of this title (relating to Section 112(g) Definitions)) subject to Subchapter E of this chapter

Appendix Tab 10

Tex. Health & Safety Code § 382.003

This document is current through the 2021 Regular Session, 87th Legislature with the exception of HB 1154, HB 1525, HB 1540, HB 1560, HB 2237, HB 2315, HB 2352, HB 2462, HB 2658, HB 3257, HB 3607, HB 3774, HB 3853, HB 4030, HB 4294, HB 4368, HB 4580, HB 4590, HB 4626, HB 4627, HB 4645, HB 4646, HB 4652, HB 4658, HB 4659, SB 30, SB 41, SB 703, SB 1126, SB 1160, SB 1164, SB 1232, SB 1267, SB 1365, SB 1490, SB 1615, SB 1697, SB 1888 and SB 2050.

Texas Statutes & Codes Annotated by LexisNexis® > Health and Safety Code > Title 5 Sanitation and Environmental Quality (Subts. A — G) > Subtitle C Air Quality (Chs. 381 — 400) > Chapter 382 Clean Air Act (Subchs. A — L) > Subchapter A General Provisions (§§ 382.001 — 382.010)

Sec. 382.003. Definitions.

In this chapter:

(1) "Administrator" means the Administrator of the United States Environmental Protection Agency.

(1-a) "Advanced clean energy project" means a project for which an application for a permit or for an authorization to use a standard permit under this chapter is received by the commission on or after January 1, 2008, and before January 1, 2020, and that:

(A) involves the use of coal, biomass, petroleum coke, solid waste, natural gas, or fuel cells using hydrogen derived from such fuels, in the generation of electricity, or the creation of liquid fuels outside of the existing fuel production infrastructure while co-generating electricity, whether the project is implemented in connection with the construction of a new facility or in connection with the modification of an existing facility and whether the project involves the entire emissions stream from the facility or only a portion of the emissions stream from the facility;

(B) with regard to the portion of the emissions stream from the facility that is associated with the project, is capable of achieving:

(i) on an annual basis:

(a) a 99 percent or greater reduction of sulfur dioxide emissions;

(b) if the project is designed for the use of feedstock, substantially all of which is subbituminous coal, an emission rate of 0.04 pounds or less of

sulfur dioxide per million British thermal units as determined by a 30-day average; or

(c) if the project is designed for the use of one or more combustion turbines that burn natural gas, a sulfur dioxide emission rate that meets best available control technology requirements as determined by the commission;

(ii) on an annual basis:

(a) a 95 percent or greater reduction of mercury emissions; or

(b) if the project is designed for the use of one or more combustion turbines that burn natural gas, a mercury emission rate that complies with applicable federal requirements;

(iii) an annual average emission rate for nitrogen oxides of:

(a) 0.05 pounds or less per million British thermal units;

(b) if the project uses gasification technology, 0.034 pounds or less per million British thermal units; or

(c) if the project is designed for the use of one or more combustion turbines that burn natural gas, two parts per million by volume; and

(iv) an annual average emission rate for filterable particulate matter of 0.015 pounds or less per million British thermal units; and

(C) captures not less than 50 percent of the carbon dioxide in the portion of the emissions stream from the facility that is associated with the project and sequesters that captured carbon dioxide by geologic storage or other means.

(2) "Air contaminant" means particulate matter, radioactive material, dust, fumes, gas, mist, smoke, vapor, or odor, including any combination of those items, produced by processes other than natural.

(3) "Air pollution" means the presence in the atmosphere of one or more air contaminants or combination of air contaminants in such concentration and of such duration that:

(A) are or may tend to be injurious to or to adversely affect human health or welfare, animal life, vegetation, or property; or

(B) interfere with the normal use or enjoyment of animal life, vegetation, or property.

(3-a) "Coal" has the meaning assigned by Section 134.004, Natural Resources Code.

(4)"Commission" means the Texas Commission on Environmental Quality.

(4-a)"Electric vehicle" means a motor vehicle that draws propulsion energy only from a rechargeable energy storage system.

(5)"Executive director" means the executive director of the commission.

(6)"Facility" means a discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a stationary source, including appurtenances other than emission control equipment. A mine, quarry, well test, or road is not considered to be a facility.

(7)"Federal source" means a facility, group of facilities, or other source that is subject to the permitting requirements of Title IV or V of the federal Clean Air Act Amendments of 1990 (Pub.L. No. 101-549) and includes:

(A)an affected source as defined by Section 402 of the federal Clean Air Act (42 U.S.C. Section 7651a) as added by Section 401 of the federal Clean Air Act Amendments of 1990 (Pub.L. No. 101-549);

(B)a major source as defined by Title III of the federal Clean Air Act Amendments of 1990 (Pub.L. No. 101-549);

(C)a major source as defined by Title V of the federal Clean Air Act Amendments of 1990 (Pub.L. No. 101-549);

(D)a source subject to the standards or regulations under Section 111 or 112 of the federal Clean Air Act (42 U.S.C. Sections 7411 and 7412);

(E)a source required to have a permit under Part C or D of Title I of the federal Clean Air Act (42 U.S.C. Sections 7470 et seq. and 7501 et seq.);

(F)a major stationary source or major emitting facility under Section 302 of the federal Clean Air Act (42 U.S.C. Section 7602); and

(G)any other stationary source in a category designated by the United States Environmental Protection Agency as subject to the permitting requirements of Title V of the federal Clean Air Act Amendments of 1990 (Pub.L. No. 101-549).

(7-a)"Federally qualified clean coal technology" means a technology or process, including a technology or process applied at the precombustion, combustion, or postcombustion stage, for use at a new or existing facility that will achieve on an annual basis a 97 percent or greater reduction of sulfur dioxide emissions, an emission rate for nitrogen oxides of 0.08 pounds or less per million British thermal units, and significant reductions in mercury emissions associated with the use of coal in the generation of electricity, process steam, or industrial products, including the creation of liquid fuels, hydrogen for fuel cells, and other

Appendix Tab 11

30 TAC § 116.10

This document reflects all regulations in effect as of June 30, 2021

TX - Texas Administrative Code > TITLE 30. ENVIRONMENTAL QUALITY > PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY > CHAPTER 116. CONTROL OF AIR POLLUTION BY PERMITS FOR NEW CONSTRUCTION OR MODIFICATION > SUBCHAPTER A. DEFINITIONS

§ 116.10. General Definitions

Unless specifically defined in the Texas Clean Air Act (TCAA) or in the rules of the commission, the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms which are defined by the TCAA, and in § 101.1 of this title (relating to Definitions), the following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Best available control technology (BACT)--An air pollution control method for a new or modified facility that through experience and research, has proven to be operational, obtainable, and capable of reducing or eliminating emissions from the facility, and is considered technically practical and economically reasonable for the facility. The emissions reduction can be achieved through technology such as the use of add-on control equipment or by enforceable changes in production processes, systems, methods, or work practice.

(2) Dockside vessel--Any water-based transportation, platforms, or similar structures which are connected or moored to the land.

(3) Dockside vessel emissions--Those emissions originating from a dockside vessel that are the result of functions performed by onshore facilities or using onshore equipment. These emissions include, but are not limited to:

(A)loading and unloading of liquid bulk materials;

(B)loading and unloading of liquified gaseous materials;

(C)loading and unloading of solid bulk materials;

(D)cleaning and degassing of liquid vessel compartments; and

(E)abrasive blasting and painting.

(4) Facility--A discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a stationary source, including appurtenances other than emission control equipment. A mine, quarry, well test, or road is not a facility.

Appendix Tab 12

Tex. Evid. R. 507

THIS DOCUMENT IS CURRENT THROUGH June 16, 2021

Rule 507 Trade Secrets Privilege

(a) ***General Rule.***--A person has a privilege to refuse to disclose and to prevent other persons from disclosing a trade secret owned by the person, unless the court finds that nondisclosure will tend to conceal fraud or otherwise work injustice.

(b) ***Who May Claim.***--The privilege may be claimed by the person who owns the trade secret or the person's agent or employee.

(c) ***Protective Measure.***--If a court orders a person to disclose a trade secret, it must take any protective measure required by the interests of the privilege holder and the parties and to further justice.

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Keith Courtney on behalf of Keith Courtney
Bar No. 4892700
kcourtney@mcginnislaw.com
Envelope ID: 55655315
Status as of 7/23/2021 2:58 PM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
David O'Brien Frederick	7412300	dof@lf-lawfirm.com	7/23/2021 2:51:52 PM	SENT
Eric Michael Allmon	24031819	eallmon@txenvirolaw.com	7/23/2021 2:51:52 PM	SENT
Derek Leon Seal	797404	dseal@mcginnislaw.com	7/23/2021 2:51:52 PM	SENT
Keith Alan Courtney	4892700	kcourtney@mcginnislaw.com	7/23/2021 2:51:52 PM	SENT
James D. Bradbury	2814500	jim@bradburycounsel.com	7/23/2021 2:51:52 PM	SENT
Courtney Smith	24045711	ccox@bradburycounsel.com	7/23/2021 2:51:52 PM	SENT
irene tong		irene.tong@oag.texas.gov	7/23/2021 2:51:52 PM	SENT
Mark A.Steinbach		mark.steinbach@oag.texas.gov	7/23/2021 2:51:52 PM	SENT
Erin Snody		erin.snody@oag.texas.gov	7/23/2021 2:51:52 PM	SENT