CASE NO. 03-21-00204-CV

IN THE THIRD COURT OF APPEALS
AUSTIN, TEXAS

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

v.

FRIENDS OF DRY COMAL CREEK 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 APPELLEES JEFFREY REEH, TERRY OLSON, MIKE OLSON, AND COMAL INDEPENDENT SCHOOL DISTRICT

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ORAL ARGUMENT REQUESTED

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GLOSSARY OF TERMS

ALJ	Administrative Law Judge
CAA	Texas Clean Air Act
ED	TCEQ Executive Director
NAAQS	National Ambient Air Quality Standards
OPIC	Office of Public Interest Counsel
PFD	Proposal for Decision
PM	Particulate Matter
SOAH	State Office of Administrative Hearings
TCEQ	Texas Commission on Environmental Quality
Vulcan	Applicant Vulcan Construction Materials, LLC
Reeh Appellees	Appellees Jeffrey Reeh, Terry Olson, Mike Olson and Comal Independent School District
Friends Appellees	Appellees Friends of Dry Comal Creek and Stop 3009 Vulcan Quarry

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STATEMENT OF THE CASE

Reeh Appellees agree with the Statement of the Case as presented by Appellant TCEQ. Reeh Appellees disagrees with the Statement of the Case presented by Appellant Vulcan to the extent that it improperly addresses facts and argument that are not germane to the Statement of the Case. *See* Tex. R. App. P. 38.1(d). Reeh Appellees specifically disagree with the inclusion of footnote 2 in Appellant Vulcan's Statement of the Case and urge that it should be disregarded. The nature of the Vulcan facility and its proposed emissions are disputed facts that are wholly improper in a Statement of the Case. *See id*.

STATEMENT ON ORAL ARGUMENT

Reeh Appellees respectfully request oral argument. This appeal involves a complex regulatory scheme involving a number of different parties. Oral argument would give the Court a more complete understanding of the facts presented in this appeal and would aid the Court in deciding this case.

ISSUES PRESENTED

1. **Reply to Appellants' Issue 1 regarding the District Court's reversal of Conclusion of Law No. 12 in TCEQ's Order (which concluded that there is no indication that emissions from the Vulcan facility will contravene the intent of the Texas Clean Air Act, including the protection of the public's health and physical property) because:**

    a. **TCEQ's determination that the Vulcan facility's crystalline silica emissions will not negatively affect human health, welfare or property is not supported by substantial evidence;**

    b. **TCEQ's determination that the Vulcan facility's crystalline silica emissions calculations were based on representative site conditions is not supported by substantial evidence; and**

    c. **TCEQ's rejection of Reeh Appellees' assertions regarding ways the Permit was not sufficiently protective of public health or property is arbitrary and capricious and not supported by substantial evidence.**

2. **Reply to Appellants' Issue 2 regarding the District Court's reversal of Conclusion of Law No. 14 in TCEQ's Order (which concluded that Vulcan made all demonstrations required under applicable statutes and regulations, including 30 Tex. Admin. Code § 116.111 regarding air permit applications, to be issued an air quality permit with conditions as set forth in the Draft Permit) because:**

    a. **TCEQ's determination that Vulcan's air dispersion modeling/air quality analyses adequately accounts for or addresses cumulative impacts is not supported by substantial evidence and is arbitrary and capricious;**

    b. **TCEQ's determination that quarry and road emissions were adequately considered is not supported by substantial evidence and is arbitrary and capricious; and**

    c. **TCEQ's determination that Vulcan's choice of the relevant background concentrations used in its voluntary Full Minor**

NAAQS Analyses were appropriate is arbitrary and capricious and not supported by substantial evidence.

3. **Reply to Appellants' Issue 3, regarding the District Court's determination that the ALJ's ruling that Vulcan could maintain information from its 2016 subsurface investigation at the property where the facility will be located as confidential under the trade secret privilege is an abuse of discretion.**

4. **Reply to Appellants' Issue 4, regarding the District Court's determination that the Appellees were denied due process such that their substantial rights were prejudiced because:**

    a. **The ALJ improperly ruled that Vulcan could maintain information from its 2016 subsurface investigation at the property where the facility will be located as confidential under the trade secret privilege;**

    b. **The ALJ improperly denied Appellees' discovery and cross-examination of the "privileged" information; and**

    c. **TCEQ failed to require 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 $PM_{2.5}$.**

STATEMENT OF FACTS[1]

A. The Application and Draft Permit.

On June 26, 2017, Vulcan submitted its Application for an Air Quality Permit for its proposed rock crushing facility to be located along Highway 46 and FM 3009 in Comal County, Texas. (1 A.R. 1, APP000001 – APP000043).[2] By Vulcan's own admission, the facility is expected to be operational for decades, estimating up to eighty years to reach completion in a growing residential area. (*See* https://vulcancomalquarry.com). On January 19, 2018, the Executive Director completed technical review of the Application and recommended issuance of the Draft Permit. (1 A.R. 39). On December 12, 2018, the Commission referred the Application to a contested case hearing at the State Office of Administrative Hearings ("SOAH") and referred nineteen (19) specific issues for consideration by the ALJs. (1 A.R. 99).

B. The Silica Samples

As part of its application and modeling, Vulcan represents that the expected crystalline silica concentration will not exceed 0.2%. (1 A.R. 26, APP000246). This data is based on purportedly representative samples of the Vulcan Facility property,

[1] Throughout this proceeding, Reeh Appellees have been closely aligned with Friends Appellees. In an effort to avoid duplicative briefing, Reeh Appellees have not directly set forth the details of the regulatory scheme and permit but agree with and incorporate by reference herein the Statement of Facts in Friends Appellees' Initial Brief.

[2] All citations to the Administrative Record will be "(Section No.) A.R. (Document No.)" followed by specific pinpoint citations if applicable.

although the true composition and data concerning the samples from the site have not been disclosed. No one, including TCEQ, was able to test or evaluate the representative nature of the sample selected by Vulcan. Vulcan alone made that choice.

On March 12, 2019, Appellees propounded discovery on Vulcan seeking, among other things, data regarding the subsurface investigations conducted by Vulcan and data concerning the core samples used to determine the geological content of the rock to be quarried so that a complete scientific evaluation could be made. (1 A.R. 111). Vulcan objected to the requests, alleged trade secret privileges concerning the requested information and refused to produce any information or data regarding the subsurface investigations. (1 A.R. 111).

On April 9, 2019, Appellees filed a Motion to Compel and Motion for Continuance asking the ALJs to order production of the requested information and data and to continue the hearing on the merits to allow sufficient time for Protestants to obtain the data, review it, and file supplemental testimony and evidence concerning the data. (1 A.R. 111). On May 10, 2019, the ALJs denied Appellees' Motion to Compel and Motion for Continuance on the basis that the information was a trade secret and thus should be unavailable to Appellees or their experts. (1 A.R. 132). These rulings precluded all parties, including the Appellees from evaluating the subsurface materials and the resulting emissions. (1 A.R. 132). This resulted in

a constitutional violation of Appellees' right and ability to challenge the draft permit that was premised entirely upon Vulcan's selection of the geologic material.

Immediately thereafter, Reeh Appellees retained a firm at their own expense to study the substance of the soil and rock near Vulcan's site. (2-B3 A.R. 255). At the same time, Reeh Appellees asked Applicant for permission to access Vulcan's property to inspect and take a core sample on the Applicant's site. This request was denied, leaving Reeh Appellees no choice but to obtain their own sample on property as close to the location of Vulcan's sample as feasible.

On May 20, 2019, a core sample was taken from the Olson property near the location of one of Vulcan's samples. On June 5, 2019, the results of this sample were provided to Reeh Appellees, who promptly disclosed the information to all parties. (*See* 1 A.R. 149). The Reeh Appellees' core sample results showed that the crystalline silica content of the sample was actually far greater than represented by Vulcan. (2-B3 A.R. 255, Friends Ex. 304). As Appellees' expert, Thomas Dydek, explained:

> Vulcan had assumed a crystalline silica content of 0.2% in the feed material for purposes of Vulcan's analysis. The recent investigation on nearby property indicated a silica (silicon dioxide) content at 14, 60, and 94 feet of depth of 2.35%, 0.69%, and 3.03% respectively. In each of these three samples the quartz (crystalline silica) content was 1.0%.

(2-B3 A.R. 250, Friends Ex. 203, 1:7-10). There is a substantial difference between 0.2% and 1.0% of crystalline silica. This discrepancy calls into question Vulcan's

entire data underlying the Draft Permit. (1 A.R. 149, Friends Ex. 303, 3:11-4:3). Vulcan has not adequately explained or refuted this discrepancy nor can it without providing the withheld information.

Significantly, the purported representative sample relied upon by Vulcan and its experts for the silica concentration is remarkably low. Although Vulcan took a total of forty-one core samples for purposes of due diligence and economic feasibility, it took only three core samples for purposes of the permitting application at TCEQ. (3 A.R. 271, Hearing Transcript, Vol. 1, 156:1-4, 155:19-25). Vulcan selected the samples it preferred. None of the data regarding the other thirty-eight core samples was provided to TCEQ or Appellees in the permitting proceeding. (1 A.R. 132). The record demonstrates clear discrepancies on the silica calculations. (*See e.g.*, 2-B3 A.R. 250, Friends Ex. 203, 1:7-10). These discrepancies were never clearly or adequately refuted, nor can they be without disclosure of Vulcan's underlying data and calculations. TCEQ acted on less than all available information, and Appellees were denied this data.

C. The NAAQS Analysis and Air Dispersion Modeling

Vulcan's NAAQS analysis and air dispersion modeling are no less problematic. Vulcan's modeling did not consider emissions from quarries or roads. (3 A.R. 271, Transcript, Vol. 1, 96:11 – 98:4). The ALJs concluded that because quarries and roads are not regulated facilities, they cannot even be considered in the

air dispersion modeling as potential sources of emissions. (1 A.R. 161, pp. 18-19). Whether or not the quarry or roads are regulated, they will be significant sources of emissions that should have been accounted for in Vulcan's analysis. (2-B3 A.R. 240, Friends Exhibit 100, 6:19 – 7:6). They were not.

D. Hearing on the Merits, PFD, and Order

On June 10-12, 2019, an evidentiary hearing was held before SOAH. (3 A.R. 271-272). The ALJs recommended issuance of Vulcan's permit in a PFD. (1 A.R. 161). Following the Hearing on the Merits and the PFD, in its November 21, 2019 Order, the TCEQ determined that Vulcan's application for its rock crushing plant met the requirements of TCEQ's Air Quality Permit, pursuant to authority granted to TCEQ by the Texas Legislature in Tex. Health & Safety Code § 382.051 and granted it a portable permit for the Vulcan rock crushing facility. (1 A.R. 173). Reeh Appellees timely filed a Motion for Rehearing to TCEQ's Order on December 16, 2019, which was overruled by operation of law on January 15, 2020. (1 A.R. 177). This administrative appeal followed on February 14, 2020.

SUMMARY OF THE ARGUMENT

Comal County, Texas is home to some of the most scenic land in Texas. It is also home to 40,000 acres of aggregate operations, including numerous quarries. This appeal arises from Vulcan's plan to operate a 1,500-acre rock crushing facility and quarry in the heart of Comal County (the "Vulcan Facility"). At least 14

aggregates operations and quarries are located within a 20-kilometer radius around the proposed Vulcan Facility, each of which are additional sources of limestone dust emissions. (2-B3 A.R. 242, Friends Ex. 102). Operations at the Vulcan Facility—both rock crushing and the stockpiling of rocks—would contribute additional emissions of air contaminants, such as silica-laden dust that will be injurious to the health of nearby residents, including Appellees.

TCEQ's Order granting Vulcan's permit was properly reversed and remanded by the District Court. TCEQ wholly failed to adequately address air contaminant emissions at the Vulcan Facility. This failure occurred in at least two significant ways: 1) Vulcan's NAAQS analysis and air modeling were incomplete and inadequate; and 2) the supporting documentation concerning the silica concentrations was incomplete and the accuracy and representative nature of the calculations cannot be determined. As such, TCEQ is unable to establish, either generally or specifically, as applied to the Vulcan Facility that the emissions from the Vulcan Facility will not contravene the intent of the CAA—namely by allowing emissions that will pollute the air in this state.

Vulcan withheld its subsurface data and investigations with respect to the geological content of the limestone rock that will be mined or processed and the ultimate source of these emissions. As a result, Appellees were improperly deprived of a substantive right to review and analyze the rock samples held by Vulcan. TCEQ

acted upon the Vulcan hand-selected samples and never made any attempt to obtain the additional, necessary data.

Further, although the quarry operations and related road emissions from transporting the rock and product around the site will create additional, significant emissions, these emissions were not appropriately considered in Vulcan's air modeling or calculations with respect to the regulated emissions for the facility. Vulcan also failed to ensure background concentrations used in its modeling were representative of the proposed Vulcan Facility by selecting two monitors upwind of most of the quarries and aggregates operations in the vicinity of the Vulcan Facility. None of the emissions from the other quarries, rock crushers, cement plants or other similar facilities were captured in the background concentrations used by Vulcan.

TCEQ's Order granting Vulcan's permit is not supported by substantial evidence. Issuance of the permit violates the CAA and TCEQ Rules. Appellees were deprived of due process in the contested case proceeding because they were wholly denied any access to the subsurface rock samples and data concerning the crystalline silica content of the proposed emissions at the Vulcan Facility, including denial of discovery and cross examination as to that data, and by Vulcan's failure to include all relevant emissions data in its modeling and analysis.

When culling through the record in this case, one theme emerges—a theme of exemption and exclusion. So much data was not even considered in this case.

Emissions sources were excluded. Supporting data concerning the rock underlying the proposed quarry and rock crushing facility was withheld. Health effects screenings were determined to be unnecessary. Peeling back the layers of exemptions, exceptions, and exclusions, reveals a hollow process. The Texas CAA demands more of TCEQ and the facilities it regulates.

The Vulcan Facility is large. These facilities are embedded in communities—close to homes, schools, farms, and businesses. Their impacts to these communities will span decades. It is paramount that the permits under which they operate are fully protective of air quality and the citizens of Texas. This did not happen in this case. The District Court's Final Judgment reversing and remanding TCEQ's Final Order should be affirmed.

STANDARD OF REVIEW

Review of a TCEQ order is governed by the Administrative Procedure Act (the "APA"). Tex. Gov't Code § 2001.001 et seq. An administrative appeal presents questions of law which are considered *de novo*. *Jenkins v. Crosby Ind. Sch. Dist.*, 537 S.W.3d 142, 149 (Tex. App. – Austin, 2017). Under the APA, this Court must reverse or remand a case for further proceedings if substantial rights of the party appealing the agency's action 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.

Id. § 2001.174(2). Each of these grounds is a distinct basis for reversing the decision of an administrative agency. *Arch W. Helton v. Railroad Comm'n of Tex. et al*., 126 S.W.3d 111, 115 (Tex. App.—Austin 2003, pet. denied). Thus, for example, an agency action that is arbitrary and capricious must be reversed even if it is supported by substantial evidence. *Tex. Health Facilities Comm'n et al. v. Charter Medical-Dallas, Inc*., 665 S.W.2d 446, 454 (Tex. 1984).

An agency acts arbitrarily if it makes a decision without regard for the facts, if it relies on fact findings that are not supported by any evidence, or if there does not appear to be a rational connection between the facts and decision—in other words, if the agency fails to take a "hard look at the salient problems." *See 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.). Furthermore, an agency's failure to follow the clear and unambiguous language of its own rules is arbitrary and capricious. *Rodriguez v. Service Lloyds Ins. Co*., 997 S.W.2d 248, 254-55 (Tex. 1999).

When construing administrative rules, the goal is to give effect to the intent of the issuing agency, with a primary focus on the plain meaning of the words

chosen. *Gomez v. Tex. Educ. Agency, Educator Certification & Standards Div*., 354 S.W.3d 905, 912 (Tex.App.—Austin 2011, pet. denied). Courts consider statutes and rules as a whole rather than their isolated provisions. *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 438 (Tex. 2011). Courts will defer to an agency's interpretation of its own rules when there is vagueness or ambiguity; however, deference to an agency's interpretations of its own rules is not conclusive or unlimited, as courts will only defer to an agency's interpretation to the extent that its interpretation is reasonable. *Id*. Further, the Texas Supreme Court has noted that it cannot "defer to an administrative interpretation that is plainly erroneous or inconsistent with the regulation." *Rodriguez*, 997 S.W.2d at 255. When an agency fails to follow the clear, unambiguous language of its own rule, the action is inherently arbitrary and capricious. *Combined Specialty Ins. Co. v. Deese*, 266 S.W.3d 653, 660 (Tex.App.—Dallas 2008). An agency interpretation of a rule that defeats the purpose of the rule is generally unreasonable. *Id.* at 661.

An agency's order may be arbitrary and capricious if a denial of due process has prejudiced the litigant's rights. *Tex. Dep't of Ins. v. State Farm Lloyds*, 260 S.W.3d 233, 245 (Tex.App.—Austin 2008). The proceedings of an agency "must meet the requirements of due process of law and the rudiments of fair play" in order to be upheld. *Grace v. Structural Pest Control Bd.*, 620 S.W.2d 157, 160 (Tex.

App.—Waco 1981, writ ref'd n.r.e.). These standards require that the hearing must not be arbitrary or inherently unfair. *Id*.

ARGUMENT

I. TCEQ's Order and Conclusion of Law No. 12 Supporting Issuance of the Permit is unlawful, arbitrary and capricious and not supported by substantial evidence.

The purpose and policy of the Texas CAA is to safeguard Texas air from pollution and to ensure the protection of public health, general welfare, and physical property. Tex. Health & Safety Code § 382.002(a). The TCEQ is charged with an important role as gatekeeper and protector of the natural resources of this State. Before issuing a permit under the Texas CAA, TCEQ must determine that there is no indication the emissions from the Vulcan facility will contravene the intent of the Texas CAA, including the protection of the public's health and physical property. *Id*. § 382.0518(b)(2). TCEQ's Order fails to meet this required finding in three significant respects: 1) the supporting documentation concerning the silica concentrations was incomplete rendering the accuracy of the calculations indeterminable such that no finding could be made regarding negative impacts to human health and physical property; 2) the Vulcan facility's crystalline silica emissions were not based on representative site conditions; and 3) TCEQ erroneously disregarded Reeh Appellees' substantial evidence regarding ways the Permit was not sufficiently protective of public health or property.

TCEQ staff only looked at the selected subset of data that Vulcan chose to include in its Application. Vulcan objected to providing additional information regarding the subsurface data surrounding the "selected" silica samples. When the Appellees sought the information through the proceedings, the ALJs incorrectly precluded Appellees and their experts from making any inquiry, denying a fair hearing and thorough review. Because of the deficiencies in Vulcan's silica core samples and the disregard of evidence presented by the Reeh Appellees regarding negative impacts to health and property, the Commission's Order that the permit meets all state and federal legal and technical requirements and that it would be protective of human health and safety, the environment, and physical property is not supported by substantial evidence.

A. TCEQ's determination that the Vulcan facility's crystalline silica emissions will not negatively affect human health, welfare or property is not supported by substantial evidence because Vulcan's silica emissions are not representative of the site, are unverified, and are not supported by substantial evidence.

A key concern with this Application is whether Vulcan provided reliable and accurate data regarding the constituents in the subsurface materials, which are necessary to determine the emissions expected from the facility and the potential impacts from the facility. Vulcan withheld its subsurface data and investigations with respect to the geological content of the limestone rock that will be mined or processed and the ultimate source of these emissions. (3 A.R. 271, Transcript, Vol.

1, 155:6 – 157:7; 1 A.R. 119). As part of its Application and modeling, Vulcan represented that the expected crystalline silica concentration will not exceed 0.2%. (1 A.R. 26, APP000246). This data is based on purportedly representative samples of Vulcan's property, although the true composition and data concerning the samples from the site have not been disclosed. (3 A.R. 271, Transcript, Vol. 1, 155:6 – 157:7; 1 A.R. 119). No one, including TCEQ has been able to test or evaluate the representative nature of the sample selected by Vulcan. (*See* 3 A.R. 271, Transcript, Vol. 1, 155:6 – 157:7; 1 A.R. 119). Vulcan alone made that choice.

Significantly, the purported representative sample relied upon by Vulcan and its experts for the silica concentration is remarkably low. Although Vulcan took forty-one cores for purposes of due diligence and economic feasibility, Vulcan chose to use only three cores for the sample used in the Application. (3 A.R. 271, Transcript, Vol. 1, 156:1-4, 155:19-25). None of the data regarding the other thirty-eight core samples was provided to the Agency or the Appellees or was ever revealed.

In response, Reeh Appellees retained a firm at their own expense to study the substance of the soil and rock near the Vulcan's site. (2-B3 A.R. 255, Friends Ex. 304). At the same time, Reeh Appellees asked Vulcan for permission to access the property to inspect and take a core sample on Vulcan's site. This request was denied, leaving Appellees no choice but to obtain their own sample on property as close to

the location of Vulcan's sample as feasible. A core sample was taken from the Olson property a mere eighteen (18) feet from the western boundary of the Vulcan property. (*See* 1 A.R. 149).

The Reeh Appellees' core sample results showed that the crystalline silica content of the sample was actually far greater (at 1.0%) than represented by Applicant (0.2%). (2-B3 A.R. 255, Friends Ex. 304). The record demonstrates clear discrepancies on the silica calculations. Significantly, the evidence in the record shows the following:

1) Crystalline silica is a known carcinogen (2-B3 A.R. 247, Friends Ex. 200, 8:13);

2) Appellees live in close proximity to the proposed facility (2-B4 A.R. 264-268, Harrison Exs. 1-5);

3) Multiple schools are or will be located within five miles of the proposed facility (2-B4 A.R. 265, Harrison Ex. 2, 4:17 – 5:1);

4) Some Appellees are known to have serious respiratory conditions that would be highly sensitive to emissions from the proposed facility (2-B4 A.R. 264, Harrison Ex. 1, 7:13 – 8:2; 2-B4 A.R. 267, Harrison Ex. 4, 6:3 – 6:8, 6:24 – 7:15);

5) Crystalline silica content in core sample taken sixty feet from the location of Vulcan's sample shows significantly higher silica content than Vulcan's reported data (2-B3 A.R. 255, Friends Ex. 304);

6) Impacts to air quality and human health are directly dependent upon an accurate representation of the silica percentage (2-B3 A.R. 247, Friends Ex. 200, 10:3-6);

7) Unusual number of other silica sources in the area of the proposed facility were unaccounted for in the Vulcan's data (2-B3 A.R. 247, Friends Ex. 200, 11:7-22);

8) It is not clear what information or data was used to determine Vulcan's chosen sample for the silica emissions (2-B3 A.R. 251, Friends Ex. 300, 12:1-3); and

9) It is not clear what subsurface investigations were conducted by Vulcan in preparing its emissions calculations and modeling (2-B3 A.R. 251, Friends Ex. 300, 12:1-3).

There is no way to know or confirm the accuracy of Vulcan's calculations without the withheld data. The conclusions underlying the Commission's Order are an educated guess at best. But Texas law demands more. *See* Tex. Gov't Code § 2001.174(2); *see also Starr County*, 584 S.W.2d at 355-56 (reasoning that an agency acts arbitrarily if it appears there is no rational connection between the facts and the agency's decision and that the agency has not actually taken a "hard look at the salient problems").

Both TCEQ and Vulcan argue that the silica emissions calculations, and the crystalline silica data, are supported by substantial evidence. TCEQ contends that any discrepancies in the silica calculations are irrelevant because no health effects analysis was required. (TCEQ Brief, 22). Both TCEQ and Vulcan argue that Vulcan's subsurface data and investigations concerning the geological content of the limestone rock is irrelevant and does not constitute reversible error because it does not address a material issue in the case. (TCEQ Brief, 61; Vulcan Brief, 71). TCEQ and Vulcan's arguments fall short.

The reality is that no one but Vulcan knows the actual geological content of the rock beneath their property. The evidence shows they took forty-one core samples of their property. (3 A.R. 271, Hearing Transcript, Vol. 1, 156:1-4, 155:19-25). These samples were thoroughly analyzed and considered and three of those samples were hand-selected by Vulcan to use for determining the silica calculations. (3 A.R. 271, Hearing Transcript, Vol. 1, 156:1-4, 155:19-25). Although Vulcan argues that the underlying, withheld data was not used by Vulcan in forming its representative sample, the testimony from the hearing is anything but clear on this point. In fact, in several places, Vulcan's expert, Dr. Eversull, makes clear that she was fully apprised of the content of that data. (3 A.R. 271, 159:3-20).

The underlying data matters because without it, Vulcan, and Vulcan alone, knows the actual stratification, content, location, and formulation of the rock underlying its site and those forty-one samples. Without that underlying data, there is no way to know that Vulcan did not intentionally choose the three samples with the lowest silica content on the property. Vulcan's expert testimony concerning the character of limestone in the Edwards formation similarly does not overcome the significant gaps in actual data and evidence for the Vulcan site. What an expert expects to exist and what actually exists can vary widely. It is equally possible that the Vulcan site could sit on top of a portion of the Edwards Group that has an

abnormally high crystalline silica content. No one but Vulcan knows. Not TCEQ, not the ALJs, not Appellees.

TCEQ and Vulcan contend that the denial of the underlying data is irrelevant and not reversible error because it is not controlling on a material issue. TCEQ and Vulcan argue that the Commission did not refer an issue on whether Vulcan's sample was representative or whether the crystalline silica emissions were properly determined but only whether the silica emissions will negatively impact human health and the environment. (TCEQ Brief, 61; Vulcan Brief, 71). This argument fails because before a determination can be made as to the silica emissions' impacts to human health, welfare, or property, those emissions must be known, accurate, and representative. Appellees directly controverted and called into question the accuracy and representativeness of these calculations. (2-B3 A.R. 255, Friends Ex. 304).

The bottom line is that the subsurface data substantiating the emissions was never revealed to TCEQ or any other parties in this case. There is no way to confirm the accuracy of Vulcan's emissions calculations or their impacts to human health or property without the withheld data. The conclusions underlying the Commission's Order that the crystalline silica emissions will not negatively affect human health, welfare or property are based solely on unverified information supplied by Vulcan and called into question by Appellees. TCEQ and Vulcan's briefs confirm that TCEQ failed to take the requisite "hard look" at the salient issues in this case. This

is the very definition of arbitrary and capricious action and cannot support the Commissioners' Order or the permit. *See Starr County*, 584 S.W.2d at 355-56 (reasoning that an agency acts arbitrarily if it appears there is no rational connection between the facts and the agency's decision and that the agency has not actually taken a "hard look at the salient problems").

B. TCEQ's rejection of Reeh Appellees' assertions regarding ways the Permit was not sufficiently protective of public health or property is arbitrary and capricious and not supported by substantial evidence.

The Texas "one size fits all" approach to air permitting that was used in this case does not address site-specific concerns that may necessitate additional permit conditions, such as the Vulcan facility's close proximity to homes and residences. (2-B3 A.R. 240, Friends Ex. 100, 19:1 – 20:9). It did not consider the proposed facility's close proximity to other substantial sources in the area, namely multiple other quarries, rock crushing facilities, concrete plants and similar operations. (2-B3 A.R. 240, Friends Ex. 100, 19:1 – 20:9).

The record further shows that additional permit controls would address these concerns and make the Permit more protective of air quality, human health and property. (2-B3 A.R. 240, Friends Ex. 100, 20:10-22). These controls include enclosure of crushing and screening equipment, use of a fabric filter baghouse, and enclosures for stockpiles. (2-B3 A.R. 240, Friends Ex. 100, 20-21). Fence-line air

emissions monitoring along the Vulcan's property line would also provide additional important protections.

Vulcan's failure to adequately address these concerns and the absence of these additional controls from the Permit provide further justification for overturning the Permit. Vulcan proposes to operate the facility for a minimum of twelve hours daily, six days per week, but it will have authorization to operate up to twenty-four hours per day, seven days per week. (*See* 1 A.R. 174, Special Conditions, p. 2). The operating hours provide a substantial amount of time that the Vulcan's facility will be impacting surrounding landowners, schools, livestock, and businesses. Vulcan has not demonstrated that its proposed operating hours will not adversely impact human health, welfare, or the environment.

In contrast, Reeh Appellees' provided evidence of many potential adverse impacts from the facility:

1) to their property (2-B4 A.R. 264, Harrison Ex. 1, 6:7-13; 2-B4 A.R. 266, Harrison Ex. 3, 5:17-25; 2-B4 A.R. 267, Harrison Ex. 4, 6:3-8; 2-B4 A.R. 268, Harrison Ex. 5, 4:5-24);

2) to their health (2-B4 A.R. 264, Harrison Ex. 1, 7:13 – 8:2; 2-B4 A.R. 267, Harrison Ex. 4, 6:24 – 7:15);

3) to their livestock and/or wildlife (2-B4 A.R. 264, Harrison Ex. 1, 8:11-18; 2-B4 A.R. 268, Harrison Ex. 5, 8:19-26)

4) to their businesses (2-B4 A.R. 266, Harrison Ex. 3, 5:17-25; 2-B4 A.R. 268, Harrison Ex. 5, 6:16-21); and

5) to their use and enjoyment of their property (2-B4 A.R. 264, Harrison Ex. 1, 7:5-8, 9:11-12; 2-B4 A.R. 266, Harrison Ex. 3, 5:17-

25; 2-B4 A.R. 267, Harrison Ex. 4, 6:3-6:8; 2-B4 A.R. 268, Harrison Ex. 5, 4:5-24).

Further, Comal Independent School District ("Comal ISD") provided testimony and exhibits demonstrating that multiple existing and planned schools are located within five miles of the proposed facility. (2-B4 A.R. 265, Harrison Ex. 2, 4:17 – 5:1). These schools account for nearly 3,500 current students with total potential capacities of 4,850 elementary, middle school, and high school students. (2-B4 A.R. 265, Harrison Ex. 2, 5:7-11). Each of these schools have outdoor facilities and host a wide array of outdoor activities for students. (2-B4 A.R. 265, Harrison Ex. 2, 5:12 – 6:9). The school district has received complaints regarding air quality at one of its schools located near another local quarry. (2-B4 A.R. 265, Harrison Ex. 2, 6:14-17). There is no reason to believe the impacts will be any less at the schools located close to the Vulcan Facility. The impacts to students are understandably of significant concern to Comal ISD and an important justification for requiring additional, site-specific permit conditions for the proposed facility.

Vulcan has repeatedly responded that the Application and the Draft Permit are in compliance with TCEQ Rules and that anything more stringent is not required or has never been done before. This is no basis for giving Vulcan a free pass to the rigors of a thorough and complete permitting process. Vulcan failed to meet its burden to demonstrate that the proposed facility will not negatively affect human health, including sensitive subgroups, and physical property. Further, Vulcan failed

to demonstrate that the proposed facility will not adversely affect wildlife, vegetation, flora and fauna. When looking at the record in this case, Vulcan omitted or withheld vital information, emissions, and data from its Application, modeling, and the TCEQ. The record contains numerous testimonies from laypersons and local residents to highly-qualified experts that directly refute Vulcan's data and calculations. Vulcan's only response is that the Vulcan Facility, Application, and permit comply with TCEQ Rules and the Texas CAA. But there is no way to substantiate Vulcan's claims because they have omitted, excluded, or withheld so much information. The Commission's Order is not supported by substantial evidence and is arbitrary and capricious, and the Reeh Appellees ask this Court to affirm the district court's judgment reversing the Commission's Order issuing Vulcan's permit. *See* Tex. Gov't Code § 2001.174(2); *see also Starr County*, 584 S.W.2d at 355-56 (reasoning that an agency acts arbitrarily if it appears there is no rational connection between the facts and the agency's decision and that the agency has not actually taken a "hard look at the salient problems").

II. TCEQ's Order and Conclusion of Law No. 14 Supporting Issuance of the Permit is unlawful, arbitrary and capricious and not supported by substantial evidence.

A. Vulcan's modeling and NAAQS analyses failed to adequately account for or address cumulative impacts and background concentrations, and quarry and road emissions were not adequately considered.

In addition to the discrepancies with the silica concentrations, Vulcan's modeling and NAAQS analyses are deficient in numerous other respects. Vulcan's modeling failed to account for many other sources in the area. The modeling was not based on site-specific data but rather data some distance from the proposed facility, the New Braunfels Airport Data. (2-B3 A.R. 240, Friends Ex. 100, 7:8-18). Vulcan also failed to adequately account for quarry and road emissions in its calculations. (3 A.R. 271, Transcript, Vol. 1, 89:13-21). As Protestants' expert Thomas Dydek explained "air dispersion modeling predicts theoretical *maximum* off-property air concentrations." (2-B3 A.R. 247, Friends 200, 8:4-9)(emphasis added). Because of its failure to use site-specific data and other non-facility sources in the area, Applicant's modeling woefully underestimates background concentrations for specific constituents, including $PM_{2.5}$ and PM_{10}. (2-B3 A.R. 240, Friends Ex. 100, 8:1 – 10:14).

The proposed facility is surrounded by significant larger sources of similar constituents of $PM_{2.5}$, PM_{10} and crystalline silica. (2-B3 A.R. 240, Friends Ex. 100, 7:7-23; 2-B3 A.R. 242, Friends Ex. 102). Additionally, the quarry and roads throughout Vulcan's property will contribute additional, substantial emissions. (2-B3 A.R. 240, Friends Ex. 100, 6:19 – 7:6). Each of these factors must be appropriately considered to ensure that the proposed facility is sufficiently protective

of air quality and public health and property. This simply was not done. (*See* 3 A.R. 271, Transcript, Vol. 1, 97:10-21).

TCEQ and Vulcan argue that the modeling and emissions calculations and NAAQS analyses are supported by substantial evidence and that there is no reversible error in the failure to include quarry and road emissions in the Vulcan Facility's modeling because quarries are not regulated facilities. (TCEQ Brief, 40; Vulcan Brief, 46). These arguments are insufficient to support the Commission's Order.

Modeling is not the same as regulating. TCEQ and Vulcan attempt to conflate two distinct issues concerning the modeling of quarry and road emissions. They argue that *modeling* these emissions is tantamount to *regulating* them. This simply is not true. Inclusion of quarry and road emissions into the air dispersion modeling for the Vulcan Facility does not regulate those emissions; rather, it informs the emissions regulations that should be in place for the Vulcan Facility. It is difficult to understand how the modeled emissions calculations can be considered accurate for the Vulcan Facility when it intentionally omits any consideration of significant on-site and surrounding emissions.

To understand the full impact of these exclusions, it is helpful to look at the big picture. There are at least fourteen aggregates operations and quarries located within a 20-kilometer radius around the proposed Vulcan Facility. (2-B3 A.R. 242,

Friends Ex. 102). Following TCEQ and Vulcan's reasoning, quarry and road emissions were neither modeled nor considered for *any* of those other facilities during their respective permitting proceedings with TCEQ. That is unquestionably a significant amount of emissions that are not included, considered, factored, or addressed by modeling or NAAQS analyses. There is no basis under the Texas CAA or TCEQ Rules for such exclusions. The exclusion of these emissions cannot support issuance of the permit.

The failure to include quarry and road emissions prevents TCEQ from making the requisite statutory findings for issuance of the permit. There is no way to determine whether a violation of NAAQS occurred because the necessary data was not included. TCEQ's failure to require accurate, complete, and comprehensive modeling of all sources in the area of the Vulcan Facility reveals a wholly deficient technical review. TCEQ and Vulcan's response is that these emissions are not regulated and not required. This is neither accurate nor sufficient to justify their exclusion in this proceeding, and the record cannot support issuance of the permit without them.

When Vulcan's emissions are considered in the context of the entire area in which the proposed facility will actually operate, the results would be markedly different. (*See* 2-B3 A.R. 240, Friends 100, 6:19 – 7:6). As Appellees' expert Howard Gebhart testified:

> At Vulcan, the road and quarry emissions are among the largest and most significant emission sources associated with the project. However, in the air quality modeling analysis, Vulcan and TCEQ pretend that such emissions do not exist. One cannot ignore the most significant air emissions associated with a project, yet otherwise claim that the permit review analysis has been full and complete. Notwithstanding the TCEQ regulatory definition of "facilities," the Vulcan and TCEQ analysis fails to demonstrate that adverse impacts to public health, general welfare, and physical property will not occur.

(2-B3 A.R. 240, Friends Ex. 100, 6:24 – 7:6). Whether or not the quarry is regulated, it will be a significant source of emissions. (2-B3 A.R. 240, Friends Ex. 100, 6:16 – 7:6). As such, these potential emissions must be accounted for in Vulcan's analysis. They were not.

Vulcan cannot look at the emissions from the proposed facility in a vacuum. Vulcan cannot cherry-pick the data and sources it wants to include in its modeling to get a compliant result. Rather, Vulcan must consider all potential impacts, sources, and background concentrations to ensure that its data is accurate and sufficiently protective of air quality in the area where the proposed facility will be located. Especially when the facility is expected to be operational for decades, the law demands more.

The failures and gaps in data and information in Vulcan's modeling and NAAQS analyses cannot meet with the requisite statutory findings because the data was not considered. There is no way to determine whether a violation of NAAQS occurred because the necessary data was not included. Virtually any facility could

feign compliance with regulatory standards when exempting and excluding sources. This shows little other than the ability of a facility to manipulate data to achieve a compliant result.

Similar to the silica data, TCEQ's failure to require accurate, complete, and comprehensive modeling of all sources in the area of the Vulcan Facility indicates a wholly deficient technical review. The record therefore does not support the Commission's Order, and it should be vacated. *See* Tex. Gov't Code § 2001.174(2); *see also Starr County*, 584 S.W.2d at 355-56 (reasoning that an agency acts arbitrarily if it appears there is no rational connection between the facts and the agency's decision and that the agency has not actually taken a "hard look at the salient problems").

B. TCEQ's Order granting Vulcan's permit violates regulatory and statutory requirements by failing to receive, consider, or evaluate data or information concerning emissions from surrounding sources in the area of the proposed Vulcan Facility.

Because of the deficiencies in Vulcan's modeling and emissions data, issuance of the permit violates regulatory and statutory requirements. If the cumulative impacts adversely impact air quality, the requirements on the proposed facility must be more restrictive to ensure compliance with air standards in that area. *See* 30 Tex. Admin. Code § 101.2(a). This is not the same as regulating the quarry itself. It is regulating the proposed facility to address cumulative impacts of

surrounding air quality and background concentrations. TCEQ Rules specifically contemplate this outcome when they state:

> In an area where an additive effect occurs from the accumulation of air contaminants from two or more sources on a single property or from two or more properties, such that the level of air contaminants exceeds the ambient air quality standards established by the commission, and each source or each property is emitting no more than the allowed limit for an air contaminant for a single source or from a single property, *further reduction of emissions from each source or property shall be made* as determined by the commission.

30 Tex. Admin. Code § 101.2(a) (emphasis added). The ALJs attempted to distinguish this provision as inapplicable to this permit reasoning that "the rule addresses when accumulation from various sources leads to a violation of the ambient air quality standards. It does not address modeling in applications; nor has there been a showing that the ambient air quality standards will be violated." (1 A.R. 161, PFD, pp. 18-19). This facility, however, is precisely the type of permit and application to which this rule applies. A determination cannot be made that the ambient air quality standards are being violated if a complete and accurate picture of emissions at a facility are not known or considered.

To the extent there has been no showing of a violation of ambient air quality standards, that is by Vulcan's design. Vulcan has specifically withheld significant data from the Commission and Appellees supporting its Application and failed to include significant surrounding emissions, both through the exclusion of quarry and road emissions as well as selecting monitors that are not representative of air quality

at the site and along Quarry Row for its modeling. (*See* 2-B3 A.R. 240, Friends Ex. 100, 6:24 – 7:6). This ensures the numbers and data show what they know the Commission wants to see and not necessarily what actually occurs. Had they chosen monitors downwind of Quarry Row and properly captured the emissions that will be in the vicinity of the proposed facility, the data would unquestionably be different, and Reeh Appellees believe would have demonstrated violations of the NAAQS. (*See* 2-B3 A.R. 240, Friends Exhibit 100, 6:19 – 7:6). Because Vulcan failed to include these additional sources and data, no one can know with any certainty, including the Commission.

The Commission's approval of the permit notwithstanding the omission of significant sources is not supported by substantial evidence and violates TCEQ Rules and the CAA. The district court should be affirmed. *See* Tex. Gov't Code § 2001.174(2); 30 Tex. Admin. Code § 101.2(a); *see also Starr County*, 584 S.W.2d at 355-56 (reasoning that an agency acts arbitrarily if it appears there is no rational connection between the facts and the agency's decision and that the agency has not actually taken a "hard look at the salient problems").

III. The ALJs' ruling that Vulcan could maintain information from its 2016 subsurface investigation at the property where the facility will be located as confidential under the trade secret privilege is an abuse of discretion.

The ALJs denied Appellees any access to Vulcan's 2016 subsurface investigation at the proposed site for the Vulcan facility. This ruling was an abuse of

discretion that substantially prejudiced Appellees' ability to evaluate Vulcan's crystalline silica data or verify the representative nature of the samples used. An abuse of discretion occurs when an ALJ acts arbitrarily or unreasonably, without reference to any guiding rules or principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985).

Vulcan claimed the 2016 subsurface investigation and data constituted proprietary trade secrets, exempting it from production. (1 A.R. 119). In Texas, however, any claim of trade secret in litigation does not prevent the other side from reviewing the evidence. Rather, the confidentiality of the information is addressed through a protective order to facilitate a thorough review of all relevant facts. See *In re Continental General Tire, Inc.*, 979 S.W.2d 609, 613 (Tex. 1998); Tex. R. Evid. 507.

Regardless of whether the subsurface information or data was a trade secret, the information was necessary to a fair adjudication of this case. *In re Bridgestone/Firestone, Inc.*, 106 S.W.3d 730, 732 (Tex. 2003). There were procedural mechanisms in place under Texas law that accommodate the protection of confidential information while allowing their use in legal proceedings. The ALJs ignored these options and instead opted for the most restrictive ruling—prohibiting any use of the material in the proceeding.

As a result of the ALJs' rulings in this case, the subsurface data was never revealed to the Commission or any other parties in the case. That circumstance undermines the role of the Agency as a fair and impartial decisionmaker on the science and impacts to area communities. The entirety of the available evidence should be open and subject to review. Without Vulcan's subsurface data, a true and accurate assessment of the Vulcan Facility's impacts to air quality could not and did not occur.

Because of the ALJs' erroneous ruling as to the trade secret privilege, Appellees were denied a full and fair opportunity to evaluate Vulcan's silica concentrations or the modeling of silica emissions from the facility, which were necessary to adequately evaluate and challenge Vulcan's expert opinions concerning the crystalline silica emissions or the representativeness of the samples. The ALJs erred by preventing all parties from accessing this data. This error could have been remedied by ordering Vulcan to produce its data subject to a protective order binding the parties to maintain the confidentiality of the information, but this was not done. The ALJs' rulings constitute an abuse of discretion that prejudiced Appellees' substantial rights in this contested case hearing.

IV. Appellees were denied due process such that their substantial rights were prejudiced in this case.

A. Appellees preserved error on violation of due process.

Appellees preserved error on their due process claims. Appellants contend that Reeh Appellees cannot argue due process in this case because it was not included in their Motion for Rehearing. Texas law does not support such a strict reading.

Reeh Appellees' arguments concerning the ALJs rulings on the subsurface data, the silica emissions, and the air dispersion modeling were all clearly argued and set forth in the Motion for Rehearing. (1 A.R. 177). Reeh Appellees' clearly questioned the fairness of the proceeding and denial of access to significant data and information. (1 A.R. 177, p. 1, 5, 6-7). Appellant Vulcan again tries to define a new standard to its own benefit. The fact that the exact phrase "due process" may not be in the Motion for Rehearing does not preclude Reeh Appellees from raising that argument in the administrative appeal. *See Morgan v. Employees' Retirement System of Texas*, 872 S.W.2d 819, 822 (Tex. 1994) (holding that the failure of a party to argue that an agency's findings lack "substantial evidence" did not render the Motion for Rehearing insufficient because it otherwise achieved the purpose of sufficiently informing the agency to which it is addressed of the errors alleged). The Reeh Appellees' Motion for Rehearing unquestionably raised the issue of whether sufficient process occurred in this case, saying "transparency, and a thorough Agency process are essential elements to every permit, all of which were lacking in this case," and "to approve and issue the Draft Permit to Applicant based on the record in this case undermines the entire process." (1 A.R. 177, p. 1, 5). Further, the

Motion for Rehearing argues: "the subsurface data was never revealed to the Commission, the ALJs or any other parties in this case. That circumstance undermines the role of the Agency as a fair and impartial decisionmaker on the science and impacts to area communities." (1 A.R. 177, p. 6). Each of these examples call into question the existence, adequacy, and fairness of the process. Moreover, the Friends Appellees' Motion for Rehearing also addressed the issue of due process by raising issues of "fair play" and violations of constitutional provisions. (1 A.R. 178). Texas law requires "fair notice" as to a Motion for Rehearing, and Appellants received more than fair notice through the Motions for Rehearing of both Reeh Appellees and Friends Appellees. *See Morgan*, 872 S.W.2d at 822. Appellees preserved error as to their due process claims.

B. Appellees were denied due process through the absence of significant data and emissions calculations as well as improper discovery decisions made by the ALJs.

A state agency must respect the due process rights of parties that appear before it in a contested case. *See Grace*, 620 S.W.2d at 160. Even if an agency's order is supported by substantial evidence, the order may be arbitrary and capricious if a denial of due process has prejudiced the litigant's rights. *State Farm Lloyds*, 260 S.W.3d at 245. The proceedings of an agency "must meet the requirements of due process of law and the rudiments of fair play" in order to be upheld. *Grace*, 620 S.W.2d at 160. These standards require that the hearing must not be arbitrary or

inherently unfair. *Id*. The actions of TCEQ, Vulcan, and SOAH in this case do not meet the requirements of due process of law, do not meet the rudiments of fair play, and were inherently unfair. Appellees have been prejudiced by these actions, and this Court should vacate the Commission's Order.

Specificity, transparency, and a thorough agency process are essential elements to every permit, all of which were lacking in this case. Because of the deficiencies in Vulcan's modeling and silica core samples, there is not sufficient evidence that the Vulcan Facility or its permit meet all state and federal legal and technical requirements or that it would be protective of human health and safety, the environment, and physical property. Vulcan wholly denied TCEQ, Appellees, and the public any access to the subsurface rock samples and data concerning the crystalline silica content of the proposed emissions. The ALJs upheld Vulcan's denial of critical information, refusing Appellees essential discovery on that information or the ability to cross-examine Vulcan's witnesses regarding the "privileged" information. Appellees had no opportunity to review or analyze the data, and when they attempted to conduct their own tests and evaluations, Vulcan refused to allow them access to the site.

Similarly, the refusal to include quarry and road emissions into the modeling and NAAQS analyses rendered the hearing in this case worked injustice in this case. Exempting so many emissions sources from consideration in this permitting process

is tantamount to no process at all. In fact, repeatedly throughout Appellants' briefs they state over and over how certain information was not reviewed, considered, or determined for the Vulcan facility but instead was exempted from consideration based on TCEQ policies or guidance. When one peels back the layers of the exemptions, exceptions, and exclusions in this permitting case, all that is left is a hollow process that does not account for actual emissions, impacts, or hazards to human health or physical property.

The significant gaps in information, refusal to disclose material and relevant information, and prohibitions on discovery and cross examination are a denial of due process in this case that prejudiced the Appellees in the ability to fully challenge Vulcan's Application. *See Grace*, 620 S.W.2d at 160. To approve and issue a permit to Vulcan based on the record in this case undermines the entire process. It encourages other applicants to withhold information or manipulate data to obtain permits. It also sends the message that as long as the numbers look good on paper, there will be no further review.

The Commissioners' Order and the Findings of Fact and Conclusions of Law are based on the incomplete modeling and unsubstantiated and controverted silica calculations. This record cannot support issuance of the permit. *See* Tex. Gov't Code § 2001.174(2); *see also Starr County*, 584 S.W.2d at 355-56 (reasoning that an agency acts arbitrarily if it appears there is no rational connection between the facts

and the agency's decision and that the agency has not actually taken a "hard look at the salient problems"). Appellees were denied due process in this case and ask this Court to vacate TCEQ's Order and authorization of the permit for the Vulcan Facility. *See Grace*, 620 S.W.2d at 160; *see also State Farm Lloyds*, 260 S.W.3d at 245 (reasoning an order may be arbitrary and capricious if a denial of due process has prejudiced a litigant's rights).

V. TCEQ is not entitled to deference on these disputed issues.

Both TCEQ and Vulcan argue in their Initial Briefs that TCEQ is entitled to significant deference concerning the interpretation of its rules and application of the Texas CAA. Appellees contend that deference to TCEQ, particularly concerning the failure to require modeling of quarry and road emissions in this case, is neither required nor appropriate.

Texas law generally contemplates deference to an administrative agency's interpretation of a statute or regulation where there is a vagueness, ambiguity, or room for a policy determination. *TGS-NOPEC Geophysical Co.,* 340 S.W.3d at 438. This deference, however, is not conclusive or without limitation. *Id*. The Texas Supreme Court has explained: "[w]e defer only to the extent that the agency's interpretation is reasonable, and no deference is due where an agency's interpretation fails to follow the clear, unambiguous language of its own regulations." *Id*.

Agency interpretations that have not been adopted through a formal rulemaking process or adjudication are entitled to less deference. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). Such interpretations, like opinion letters, policy statements, agency manuals, and enforcement guidelines, lack the force of law and do not warrant unquestioned deference. *Id*. While an agency's interpretation of its own regulation is entitled to some deference when a regulation is ambiguous, this deference does not extend to unambiguous rules and statutes. "To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Id*. at 588.

Deference to the agency is appropriate where the underlying process is fair, transparent, and thorough. Agency deference is not meant to excuse an otherwise invalid process. TCEQ's failure and refusal to consider the underlying data in the silica emissions or to require modeling of surrounding sources and quarry and road emissions is not reasonable. It excludes a significant amount of critical data that directly impacts the way the Vulcan Facility will be authorized to operate. These failures fly in the face of the Texas CAA's clear and unambiguous purpose and policy to safeguard Texas air from pollution and ensure the protection of public health, general welfare, and physical property. *See* Tex. Health & Safety Code § 382.002(a). TCEQ is entitled to no deference on these issues. *See TGS-NOPEC Geophysical Co*., 340 S.W.3d at 438.

Appellants rely heavily on TCEQ "guidance" throughout their briefs to support TCEQ's Order and the Permit. This guidance does not hold the force of law. *See Christensen*, 529 U.S. at 587. Further, Appellants' continued interpretation of Texas law that excludes consideration or modeling of quarry and road emissions is similarly entitled to no deference. Texas CAA and TCEQ rules are unambiguous. Modeling quarry and road emissions is not the same as regulating the sources. There is nothing in any statute or regulation that prohibits the modeling of quarry and road emissions. To give deference to TCEQ's erroneous interpretation, practice and policy of excluding these emissions from permitting processes is tantamount to allowing TCEQ to create *de facto* a new regulation. One that has not been subject to any public scrutiny, public comment, or adjudication. Likewise, the fact that modeling such emissions "has never been done" is no basis for deference. TCEQ is not entitled to deference on the issues in this case. *Id*. at 588.

CONCLUSION AND PRAYER

The purpose of the CAA is "to safeguard the state's air resources from pollution by controlling or abating air pollution and emissions of air contaminants, consistent with the protection of public health, general welfare, and physical property." Tex. Health & Safety Code § 382.002(a). Vulcan seeks authorization to operate a rock crushing facility. It is a large project that it anticipates operating for decades. The facility is located in close proximity to homes, businesses, schools, and

other large quarries, rock crushers, cement plants, and related operations. Vulcan cherry-picked the data it used for its Application, modeling, and analysis and said "take our word for it, the numbers are good." The Commission required no additional review, data, or analysis. Neither Appellees nor the Commission have any information as to the true extent of the emissions and impacts of the Vulcan Facility on the surrounding area and the air contaminants that will be contributed to the vicinity, impacting the schools and homes located nearby.

Vulcan presents a picture perfect facility and permit that it claims meets legal and technical requirements and is protective of air quality, human health and property, all the while failing to disclose the underlying data, investigation, and analysis used to determine the substance of its Application and the Permit and excluding significant emissions in the area around the Vulcan Facility. The law demands more. The people of Texas demand more. TCEQ is charged with protecting the air quality in Texas and to ensure that those facilities that it regulates are truly protective of human health, the environment, and property. They are the gatekeepers charged by the Texas Legislature to ensure protection of air quality in the State of Texas. That has not been done in this case. TCEQ's Order should not stand. Reeh Appellees respectfully pray that this Court affirm the District Court's Final Judgment reversing and remanding TCEQ's Final Order.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TRAP 9.4(i)

This is to certify that the foregoing Brief of Appellees consists of 9,747 words, in accordance with Texas Rule of Appellate Procedure 9.4(i)(2).

/s/ James D. Bradbury

James D. Bradbury

CERTIFICATE OF SERVICE

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