Cause No. 03-21-00204-CV

IN THE COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS AT AUSTIN

Texas Commission on Environmental Quality and Vulcan Construction Materials L.L.C.,
Appellants,

v.

Friends of Dry Comal Creek, Stop 3009 Quarry, Jeffrey Reeh, Terry Olson, Mike Olson, and Comal Independent School District,
Appellees.

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

APPELLANT TCEQ'S REPLY BRIEF

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Glossary

APD	Air Permits Division
APDG 6232	*Air Quality Modeling Guidelines, TCEQ Guidance*
AQA	Air Quality Analysis
BACT	Best Available Control Technology
EPA	United States Environmental Protection Agency
ESL	Effect Screening Levels
GAQM	EPA's *Revisions to the Guideline on Air Quality Models* codified in 40 C.F.R. Pt. 51, App. W
MERA	TCEQ's *Modeling and Effects Review Applicability* guidance
NAAQS	National Ambient Air Quality Standards
NSR	New Source Review
PM	Particulate Matter
PSD	Prevention Significant Deterioration
SIL	Significant Impact Levels

To the Honorable Court of Appeals:

Introduction and Summary

The district court erred in reversing, in part, TCEQ's order. The district court wrongly reweighed the evidence, substituting its judgment for that of the Commission. TCEQ's order is supported by ample record evidence and is reasonable.

Vulcan's proposed rock-crushing plant will generate insignificant levels of particulate matter (PM) and crystalline silica. Its air quality analysis (AQA) demonstrated compliance with the Texas Clean Air Act and TCEQ's rules at the first levels of screening TCEQ uses to evaluate New Source Review (NSR) permits. The Appellees' arguments fail to demonstrate reversible error at these first screening levels or at the further steps of analysis Vulcan conducted voluntarily.

Regarding Vulcan's demonstration of compliance with the National Ambient Air Quality Standards (NAAQS), the Friends Appellees' "invalid rule" argument has not been preserved and is wrong on the merits. TCEQ's process for conducting a NAAQS demonstration was also reasonable and consistent with the Texas Clean Air Act and TCEQ rules. TCEQ properly limited the inventory of emissions included in the air-

dispersion modeling to facilities associated with the proposed plant. TCEQ also properly relied on preliminary impact determinations, a method approved by the U.S. Environmental Protection Agency (EPA), to find no cause or contribution to an exceedance of NAAQS from PM emissions. In addition, Vulcan's voluntary full NAAQS analysis was reasonably conducted and supported by substantial evidence. This additional analysis confirmed that PM emissions will not cause or contribute to an exceedance of the NAAQS.

Regarding Vulcan's health-effects demonstration for crystalline silica, the Appellees raise several "invalid rule" arguments. The only one of these that has been preserved for review is whether TCEQ's guidance exempting rock crushers from a health effects analysis is an invalid rule. TCEQ reasonably relied on its experience with previous NSR permit applications for rock crushers to determine that a health effects analysis for crystalline silica was not necessary. This finding contained in TCEQ's official guidance is not a rule. However, Vulcan's voluntary health effects analysis also confirmed that crystalline silica emissions from the proposed plant will be protective of human health, welfare, and property. Vulcan demonstrated that the maximum off-site concentrations (GLC_{max})

of crystalline silica barely register against both TCEQ's short- and long-term Effect Screening Levels (ESLs), which are set at levels below any measured health or welfare effects.

Thus, Vulcan demonstrated that the PM and crystalline silica emissions from its proposed plant will not negatively impact human health, welfare, or property consistent with the Texas Clean Air Act. In addition to the arguments presented in this reply, TCEQ adopts Vulcan's arguments in its reply. TCEQ requests the Court to reverse the district court's judgment and enter the judgment the district court should have, affirming TCEQ's order in full.

Argument

I. Appellees Failed to Show Error in TCEQ's Findings on Vulcan's NAAQS Demonstration for $PM_{2.5}$ and PM_{10}.

Vulcan's analysis for annual $PM_{2.5}$, 24-hour $PM_{2.5}$ ($PM_{2.5}$), and 24-hour PM_{10} (PM_{10}), showed compliance with the NAAQS under the preliminary impact determination.[1] Vulcan also conducted a full NAAQS analysis for these pollutants, which also demonstrated compliance with the NAAQS.[2] The Friends and Reeh Appellees have shown no error under

[1] TCEQ Br., pp. 37-38.
[2] TCEQ Br., pp. 45-58.

either the preliminary impact determination or Vulcan's voluntary full NAAQS analysis.

a. The Friends' invalid rule argument was not preserved for review and is wrong on the merits.

The Friends argue that the preliminary impact determination described in TCEQs guidance, *Air Quality Modeling Guidelines* (APDG 6232), constitutes an invalid rule.[3] This argument fails because it was not preserved for review. The Friends also overlook the contents of this guidance and how it is used by the agency, both of which show it is not applied as a rule.

i. The Friends did not preserve the argument that the preliminary impact determination is an invalid rule.

For the first time, the Friends argue that TCEQ's preliminary impact determination set out in APDG 6232 is an invalid rule. This argument has not been preserved. A motion for rehearing is a statutory prerequisite to filing a suit for judicial review of an administrative decision in a contested case. *Fisher v. Pub. Util. Comm'n of Tex.*, 549 S.W.3d 178, 180 (Tex. App.—Austin 2018, no pet.); Tex. Gov't Code

[3] Friends Br., p. 31.

§ 2001.145(a). To preserve error in a suit for judicial review, the motion must be sufficiently definite to notify the agency of the error claimed so that the agency can either correct or prepare to defend the error. *Scally v. Tex. State Bd. of Med. Examiners*, 351 S.W.3d 434, 444–45 (Tex. App.—Austin 2011, pet. denied). For each contention of error, the motion must set forth (1) the fact finding, legal conclusion, or ruling complained of and (2) the legal basis of that complaint. *Id.* at 445. It is not sufficient to set forth these two elements in generalities. *Id.*

Furthermore, to present error to the district court, a party seeking judicial review must brief the issue. *See* Travis (Tex.) Civ. Dist. Ct. Loc. R. 10.3 ("Failure to brief an issue for the merits hearing waives the issue."). Travis County Local Rules also incorporate Texas Rule of Appellate Procedure 38.1 on Requisites for Briefs. *Id.* 10.5. Under Rule 38.1, failure to brief an issue waives the point. *Osage Envtl., Inc. v. R.R. Comm'n of Tex.*, 03-08-00005-CV, 2008 WL 2852295, at *7 (Tex. App.—Austin July 24, 2008, no pet.). The Friends' argument that the preliminary impact determination is an invalid rule was raised neither

in the motions for rehearing[4] nor the briefing at the district court.[5] This issue was not preserved for review.

ii. APDG 6232 provides only regulatory guidance, not binding requirements that affect personal rights.

Even if the invalid rule argument had been preserved, the argument is unconvincing. APDG 6232 is not a rule. A "rule"

> (A) means a state agency statement of general applicability that:
>
> i. implements, interprets, or prescribes law or policy; or
>
> ii. describes the procedure or practice requirements of a state agency;
>
> (B) includes the amendment or repeal of a prior rule; and
>
> (C) does not include a statement regarding only the internal management or organization of a state agency and not affecting private rights or procedures.

Tex. Gov't Code § 2001.003(6). However, "not every statement by an administrative agency is a rule." *Tex. Mut. Ins. Co. v. Vista Cmty. Med. Ctr., L.L.P.*, 275 S.W.3d 538, 555 (Tex. App.—Austin 2008, pet. denied). Administrative agencies routinely issue letters, guidance, and reports

[4] 1 A.R. 177; 1 A.R. 178.
[5] C.R. 88 and 242.

that may contain statements that implement, interpret, or prescribe agency policy and practice but are not rules that must be formally promulgated. *Brinkley v. Tex. Lottery Comm'n*, 986 S.W.2d 764, 769 (Tex. App.—Austin 1999, no pet.).

To constitute a rule, "an agency statement interpreting law must bind the agency *or otherwise represent its authoritative position in matters that impact personal rights*." *Tex. State Bd. of Pharmacy v. Witcher*, 447 S.W.3d 520, 528 (Tex. App.—Austin 2014, pet. granted), order withdrawn (Apr. 1, 2016) (quoting *Texas Dep't of Transp. v. Sunset Transp., Inc.*, 357 S.W.3d 691, 703 (Tex. App.—Austin 2011, no pet.)). To determine whether an agency statement is a binding rule, courts "consider the intent of the agency, the prescriptive nature of the policy, and the context in which the agency statement was made." *Witcher*, 447 S.W.3d at 533. In applying this analysis, courts recognize a distinction "between nonbinding evaluative guidelines that take into consideration case-specific circumstances—which have been held not to be a rule—and policies that dictate specified results without regard to individual circumstances, which have been held to be a rule." *Id.* at 529.

APDG 6232 is a guidance document used by TCEQ staff to process NSR permit applications. The introduction describes the purpose of this guidance:

> This document provides permit reviewers and air dispersion modeling staff with a process to evaluate and determine air quality impacts analysis requirements for case-by-case permit reviews for new and/or modified facilities. While the focus of the document is on the technical review process, it is available to the regulated community and the public to provide an understanding of air quality impacts analysis requirements and processes that affect air permit applications.[6]

The document establishes a consistent agency practice for processing NSR permit applications, but it does not create binding requirements:

> While this document provides a general process and defines minimum criteria for agency staff's consideration of air quality impacts analysis requirements, this document is not regulatory and **does not limit the permit reviewer's ability to require the applicant to provide additional information**. This additional information could be related to comments received during the public notice or meeting process, coordination with Environmental Protection Agency (EPA) or TCEQ staff on known areas of interest, or issues related to off-property impacts (protection of public health). Permit reviewers and air dispersion modeling staff **may deviate from this guidance** with approval from their supervisors or from the Air Permits Division (APD) director.[7]

[6] 2-B2 A.R. 234, p. 10.
[7] 2-B2 A.R. 234, p. 10 (emphasis added).

APDG 6232 also underscores that applications are considered on a case-by-case basis in which agency staff determine the appropriate analysis necessary to demonstrate compliance with the NAAQS:

> The AQA process may involve a number of agency staff, depending on the complexity of the application and the potential impact of the proposed facilities or sources on air quality. **The permit reviewer determines the scope of the AQA to be performed** by the applicant and involvement of other agency staff.[8]

TCEQ's witness, Rachel Melton, further explained how the development of an acceptable AQA is an iterative process in which agency staff may identify items that require "clarification" or "further justification" from the applicant.[9] TCEQ's permit reviewer, not the guidance, ultimately determines the scope and content of an AQA.

The Friends rely on *Witcher* to argue that APDG 6232 treats the preliminary impact determination as a rule, but the facts of that case are easily distinguished. In *Witcher*, a divided court found that statements made by the Texas State Board of Pharmacy regarding a reciprocal sanctions policy in a final agency order constituted a rule. The majority relied on language in the order indicating that "the Board is *duty-bound*

[8] 2-B2 A.R. 234, p. 13 (emphasis added).
[9] 2-B2 A.R. 232, p. 7:1-6.

to impose reciprocal disciplinary action without regard to any other factor that might be considered in individual circumstances." *Id.* at 529-30 (emphasis in original).

In contrast, there is nothing in APDG 6232 that imposes an obligation to find a NAAQS demonstration complete based on a preliminary impact determination in every case. The document sets out a general process for permit reviewers to determine compliance with the NAAQS, but it expressly states that the Air Permits Division may deviate from it in an appropriate case.[10] The guidance specifically mentions "known areas of interest" and potential "off-property impacts" affecting public health as bases for deviating from the guidance.[11] Thus, the guidance lacks the type of outcome-determinative language required for a rule.

In this respect, APDG 6232 is similar to the penalty policy at issue in *Slay v. TCEQ*, 351 S.W.3d 532 (Tex. App.—Austin 2011, pet. denied). In *Slay*, the Court found that TCEQ's penalty policy was not a rule because the document was intended for TCEQ staff to make

[10] 2-B2 A.R. 234, p. 10.
[11] 2-B2 A.R. 234, p. 10.

recommendations for penalties to be assessed by the Commission in agency enforcement proceedings, but the commissioners were not bound to follow the policy. *Id.* at 548. Like APDG 6232, the penalty policy was created to promote internal consistency in agency practice. *Id.* at 547. This type of nonbinding guidance does not constitute a rule.

In addition, APDG 6232 does not impact personal rights. To qualify as a rule, an agency statement interpreting law must bind the agency or otherwise represent its authoritative position in matters that impact personal rights. *Witcher*, 447 S.W.3d at 528. APDG 6232 directs the process for conducting a NAAQS analysis, but it does not establish any personal rights or affect any existing rights. Certainly, both the applicant and protestants are entitled to due process protections in an air-quality permit proceeding. *Office of Pub. Util. Counsel v. Pub. Util. Comm'n*, 185 S.W.3d 555, 574 (Tex. App.—Austin 2006, pet. denied). But the parties do not have a right to a particular method or analysis to demonstrate compliance with the NAAQS. APDG 6232 provides a transparent, consistent, and fair process in air-quality permitting, but it does not impact personal rights.

b. TCEQ reasonably relied on Vulcan's preliminary impact determination.

The Friends wrongly argue that the only way Vulcan could demonstrate compliance with the NAAQS for $PM_{2.5}$ and PM_{10} was by conducting a full NAAQS analysis.[12] The Friends also mischaracterize Vulcan's preliminary impact determination as an "exception" to the requirement that a proposed facility demonstrate compliance with the NAAQS.[13]

TCEQ's preliminary impact determination is not an exception to the requirement to demonstrate that Vulcan's proposed plant would not cause or contribute to a violation of the NAAQS. Neither is it "controversial" as the Friends contend.[14] Rather, it is an EPA-approved method of demonstrating compliance with the NAAQS that is appropriate when the GLC_{max} of a criteria pollutant is so low that, absent unusual circumstances, a permitting authority may find no cause or contribution to a NAAQS exceedance.[15] This demonstration compares the GLC_{max} of a proposed facility to EPA's Significant Impact Levels (SILs),[16]

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[12] Friends Br., p. 25.
[13] Friends Br., p. 29.
[14] Friends Br., p. 28.
[15] 2-B2 A.R. 235, PDF p. 45, Section 9.2.3(b).
[16] 2-B2 A.R. 234, p. 17.

which are based on EPA's analysis of the level of impact on ambient air quality that is not statistically significant or meaningful.[17]

To appreciate the rationale for using EPA's SILs as a measure of compliance with the NAAQS, PM emissions from Vulcan's proposed plant must be put into context. As explained in TCEQ's opening brief, Vulcan's rock-crushing plant will be a minor source of emissions under the federal Clean Air Act.[18] TCEQ's expert witness, Joel Stanford, testified that "rock crushers are not significant sources of emissions—even when large numbers are located in small areas."[19] Mr. Standford further explained that Vulcan's modeled GLC_{max} of $PM_{2.5}$ and PM_{10} below EPA's SIL values "would indicate that emissions from the proposed plant would not be

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[17] EPA, Guidance on Significant Impact Levels for Ozone and Fine Particles in the Prevention of Significant Deterioration Permitting Program,, pp. 10-11, available at https://www.epa.gov/sites/default/files/2018-04/documents/sils_policy_guidance_document_final_signed_4-17-18.pdf (last accessed October 27, 2021). The rationale for relying on SILs to establish compliance with the NAAQS was explained in EPA's 2007 rulemaking establishing the SIL for $PM_{2.5}$. "[S]ignificant impact levels are intended to identify a level of ambient impact on air quality concentrations that EPA regards as *de minimis*. The EPA considers a source whose individual impact falls below a SIL to have a *de minimis* impact on air quality concentrations. … In light of insignificance of the ambient impact from the source alone, EPA considers the conduct of a cumulative air quality analysis and modeling by such a source to yield information of trivial or no value with respect to the impact of the proposed source or modification." Prevention of Significant Deterioration (PSD) for Particulate Matter Less Than 2.5 Micrometers ($PM_{2.5}$)—Increments, Significant Impact Levels (SILs) and Significant Monitoring Concentration (SMC), 72 Fed. Reg. 54112-01 (September 21, 2007).

[18] TCEQ Br., p. 2.

[19] 2-B2 A.R. 211, p. 27:27-29.

distinguishable from ambient PM."[20] Vulcan demonstrated the proposed plant's compliance with the NAAQS for $PM_{2.5}$ and PM_{10} under the preliminary impact determinations.[21] The SIL thresholds used to satisfy the preliminary impact determination are set quite low. In this case, none of the GLC_{max} calculations from Vulcan's plant for $PM_{2.5}$ and PM_{10} exceed 2.7 percent of the applicable NAAQS.[22] The GLC_{max} of annual $PM_{2.5}$ was, in particular, modeled at less than one percent of the NAAQS.[23]

The Friends attempt to cast doubt on the use of EPA's SILs as a compliance measure citing *Sierra Club v. EPA*, 705 F.3d 458 (D.C. Cir. 2013).[24] But, as the Friends concede, *Sierra Club* did not invalidate the use of SILs for NSR permitting. The court vacated and remanded to EPA a rule that made reliance on the SILs an automatic exemption from a full NAAQS analysis such that the permitting authority could not consider factors that may warrant a full NAAQS analysis in exceptional cases. *Id*. at 464. But the court did not invalidate the use of EPA's SILs. The use of SIL thresholds has been held to be a valid method for making

[20] 2-B2 A.R. 211, p. 27:30-33.
[21] 2-B2 A.R. 232, p. 16:24-27.
[22] 1 A.R. 26, p. 34.
[23] 1 A.R. 26, p. 34.
[24] Friends Br. p. 33.

a NAAQS demonstration. *Sur Contra La Contaminacion v. EPA*, 202 F.3d 443, 448 (1st Cir. 2000) (holding that EPA acted within its discretion in issuing a Prevention of Significant Deterioration (PSD) permit based on demonstrated compliance with the SIL for sulfur dioxide). Furthermore, under EPA's *Revisions to the Guideline on Air Quality Models* (GAQM) codified in 40 C.F.R. Pt. 51, App. W, EPA continues to approve the use of SILs for NAAQS demonstrations under the PSD program.[25]

Based on EPA guidance, TCEQ could reasonably determine that the GLC_{max}s of $PM_{2.5}$ and PM_{10} under the *de minimis* SILs would demonstrate no cause or contribution to an exceedance of the NAAQS from Vulcan's proposed plant, thereby satisfying the Texas Clean Air Act's requirement that emissions from a proposed facility will not adversely impact public health, welfare, or property.

c. Vulcan's AQA properly excluded Vulcan's roads and quarry operations from the inventory of project emissions.

Both the Friends and Reeh Appellees argue that TCEQ erred by not requiring Vulcan to include emissions from its on-site roads and quarry

[25] 2-B2 A.R. 235, PDF p. 45, Section 9.2.3(b).

in its air-dispersion model.[26] But they fail to consider the plain language of the rule governing the scope of an AQA. For TCEQ to grant an air-quality permit, the applicant must demonstrate that "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 . . ., including protection of the health and property of the public." 30 Tex. Admin. Code § 116.111(a)(2)(A)(1). To support this finding, "[t]he executive director may require "[c]omputerized air dispersion modeling … to determine air quality impacts from a proposed new facility or source modification." *Id.* § 116.111(a)(2)(J). The definition of a "facility" excludes roads and quarries. Tex. Health & Safety Code § 382.003(6); 30 Tex. Admin. Code § 116.10(4).

The plain language of TCEQ's rules and the Act indicate that modeling used to support an application must demonstrate air quality impacts from the proposed facility, not roads and quarries that may be located near the proposed facility. This does not mean road and quarry emissions are ignored. As explained in TCEQ's opening brief, cumulative PM impacts from road and quarries are accounted for in a full NAAQS

[26] Reeh Br., pp. 22-23; Friends Br., p. 38.

analysis by adding the background concentrations to the modeling results.[27]

The Friends attempt to exploit imprecise language in Appendix E of APDG 6232, which provides that "[t]he full NAAQS analysis considers all emissions at the site under review, as well as emissions from nearby sources and the background concentrations."[28] Unlike "facility," the term "site" is not defined in the Texas Clean Air Act. This language cannot be used to expand upon Section 116.111. Appendix E clarifies that project-related emissions to be included in an AQA are those from the new or modified "facility."

> The purpose of the National Ambient Air Quality Standards (NAAQS) analysis is to demonstrate that proposed emissions of criteria pollutants from a new facility or from a modification of an existing facility will not cause or contribute to an exceedance of the NAAQS.[29]

Furthermore, the Commission's order in *EOG Resources* determined that air-dispersion modeling from roads and quarries should not be included as project-related emissions in an NSR permit application.[30] If

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[27] *In the Matter of EOG Resources*, TCEQ Docket No. 2012-0971-AIR, SOAH Docket No. 582-12-6347; TCEQ Br., p. 49.
[28] 2-B2 A.R. 234, Appendix E, p. 52.
[29] 2-B2 A.R. 234, Appendix E, p. 50.
[30] *See* TCEQ Br. pp. 42-43.

Section 116.111 is ambiguous on this point, the Court should defer to TCEQ's reasonable interpretation. *DuPont Photomasks, Inc. v. Strayhorn*, 219 S.W.3d 414, 420 (Tex. App.—Austin 2006, pet. denied). The Reeh Appellees counter that TCEQ's interpretation is a *de facto* new regulation.[31] But this additional "invalid rule" argument has been waived because it was not raised at the Commission in the motions for rehearing[32] or in the district court briefs.[33] Even if it had been preserved, TCEQ's interpretation is not a rule because it does not impact personal rights for the same reasons described *supra* p. 11.

The Friends rely on Howard Gebhart's testimony that fugitive dust emissions from roads and quarries, "would likely dwarf the emissions from the rock crusher and other processing equipment … ."[34] But he had no evidence or analysis to support this characterization.[35] The Commission had evidence before it that both roads and quarries are accounted for by representative background monitors that capture non-facility sources of PM.[36]

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[31] Reeh Br., p. 37.
[32] 1 A.R. 177; 1 A.R. 178.
[33] C.R. 88 and 242.
[34] 2-B3 A.R. 240, p. 5:5-15.
[35] 2-B3 A.R. 240, p. 5:13-15.
[36] 2-B2 A.R. 232, p 18:4-6.

The Friends emphasize the difference between modeled annual $PM_{2.5}$ emissions from the proposed plant alone and with annual $PM_{2.5}$ emissions from some in-plant roads, which Vulcan voluntarily added to its model.[37] However, this difference is insignificant when compared to the NAAQS for annual $PM_{2.5}$. Vulcan's modeled GLC_{max} for annual $PM_{2.5}$ including some in-plant roads is under five percent of the NAAQS.[38] Without these in-plant roads, it is less than one percent of the NAAQS.[39] The background concentrations of $PM_{2.5}$ and PM_{10} are by far the biggest contributors in Vulcan's NAAQS analysis.[40]

Furthermore, even though Vulcan's roads are not facilities that must be included in an air-dispersion model, Vulcan's permit includes conditions to prevent nuisance conditions from road dust. Vulcan must use certain Best Management Practices to minimize fugitive dust emissions from the site, including the use of water sprays or dust suppressant on all unpaved and paved roads.[41] This requirement is

[37] Friends Br., p. 10.
[38] TCEQ Br., p. 44.
[39] TCEQ Br., p. 44.
[40] 1 A.R. 26, p. 34.
[41] 1 A.R. 174, Permit p. 2, Special Condition 10.

expected to reduce PM from these surfaces by at least 70 percent.[42] This reduction was not controverted by the Appellees.

d. Section 101.2 is inapplicable to Vulcan's permit application.

The Reeh Appellees argue that 30 Texas Administrative Code Section 101.2(a) allows inclusion of Vulcan's on-site roads and quarry in the air-dispersion model.[43] However, this rule does not apply to air-dispersion modeling. Rather, it authorizes the Commission to require emissions reductions from already-permitted facilities when the additive effect from the accumulation of air contaminants from two or more sources on a single property or on two or more properties exceeds the NAAQS even though each source's emissions do not cause or contribute to an exceedance. This rule does not apply to Vulcan's application. Nevertheless, there is no evidence in the record that emissions from any combination of Vulcan's proposed plant or other facilities or sources will cause or contribute to an exceedance of the NAAQS.

[42] 2-B2 A.R. 211, p. 25:5-8.
[43] Reeh Br., p. 27.

e. Vulcan's full NAAQS analysis properly considered off-site sources of $PM_{2.5}$ and PM_{10}.

The Friends Appellees argue that Vulcan's voluntary full NAAQS analysis for PM_{10} and $PM_{2.5}$ was flawed because it did not add emissions from the Martin Marrietta quarry or roads to the air dispersion model.[44] The Reeh Appellees argue that TCEQ failed to consider other sources in the area, including other quarries, rock crushing facilities, and concrete plants.[45] They also assert that off-site road emissions were not properly accounted for.[46] However, the Appellees ignore EPA's guidance, which TCEQ reasonably follows in its minor NSR permitting program.[47]

As explained in TCEQ's opening brief,[48] under EPA guidance, an applicant is not required to model emissions from every off-site source in a full NAAQS analysis, but only those that, in the permitting authority's professional judgment, cause a "significant concentration gradient" in the vicinity of the proposed facility.[49] For pollutants like $PM_{2.5}$ and PM_{10}, there are a host of insignificant sources, including natural sources, that

[44] Friends Br., p. 38.
[45] Reeh Br., p. 18.
[46] Reeh Br., p. 22.
[47] 2-B2 A.R. 232, p. 6:9-11.
[48] TCEQ Br., pp. 49-51.
[49] 2-B2 A.R. 235, PDF p. 40, Section 8.3.3(b).

contribute to the ambient background levels and are properly considered by use of a representative background monitor.[50] EPA's GAQM guidance provides that emissions from nearby sources to be added to an air-dispersion model will generally be located within 10 to 20 km of the proposed facility and will be few in most cases.[51]

Based on a survey of permitted facilities within a 10 km radial distance from Vulcan's proposed plant, TCEQ found that Vulcan's proposed plant is an isolated source with the Martin Marietta rock-crushing plant as the only possible off-site source that could cause a significant concentration gradient in the vicinity.[52] And Vulcan's modeling showed that emissions from the Martin Marietta rock crusher will have no cumulative or additive impact with the PM_{10} and $PM_{2.5}$ emissions from the proposed plant.[53] Furthermore, Vulcan's representative background monitors for $PM_{2.5}$ and PM_{10} capture both road sources and other off-site sources of PM.[54] The representative monitors also provide concentrations that are conservatively higher than

[50] 2-B2 A.R. 232, p. 18:3-6.
[51] 2-B2 A.R. 235, PDF p. 40, Section 8.3.3(b)(iii).
[52] 2-B2 A.R. 232, p. 17:14-18.
[53] 2-B1 A.R. 185, p. 21:23-26.
[54] 2-B2 A.R. 232, p. 18:1-6.

the actual background concentrations.[55] They record concentrations in Bexar County, a county with a higher population, major highways, and large industrial sources of PM that are not present in the vicinity of the Vulcan project.[56] TCEQ's process for determining cumulative impacts from off-site sources was reasonable and supported by substantial evidence.

f. Vulcan's use of representative background monitors was reasonable and supported by substantial evidence.

The Reeh Appellees object to Vulcan's choice of representative background monitors to establish the background concentrations of $PM_{2.5}$ and PM_{10}. They argue that Vulcan should have relied upon monitors downwind of the area they call "Quarry Row."[57] This objection, which TCEQ addressed in its opening brief,[58] seeks to reweigh the evidence before the Commission and is unreasonable. There is no monitor that measures $PM_{2.5}$ or PM_{10} emissions in the vicinity of "Quarry Row" or

[55] Vulcan's expert explained how he chose monitors in counties that had higher levels of the relevant pollutant and higher populations than Comal County. In addition, he chose the monitor that recorded the highest monitored concentration. 2-B1 A.R. 185, p. 29:12-23.
[56] 2-B1 A.R. 185, pp. 31:28-32:1-26.
[57] Reeh Br., p. 28.
[58] TCEQ Br., p. 54.

anywhere in Comal County.[59] Likewise, there is no basis to require a representative background monitor that captures emissions from quarries and rock crushers, specifically. This would require a monitoring network far in excess of what exists.

Vulcan's use of representative background monitors in Bexar County to establish the ambient concentrations of $PM_{2.5}$ and PM_{10} is supported by substantial evidence and reasonable. Vulcan provided a county-wide emissions comparison, a county-wide population comparison, a land use comparison, and a quantitative assessment of emissions surrounding the location of the monitors compared to the project site, as well as consideration of roads near the representative monitors.[60]

g. The district court found no error in the application of BACT.

The Reeh Appellees appear to raise issues concerning TCEQ's application of the Best Available Control Technology (BACT) standard for Vulcan's permit.[61] They suggest other controls, such as the enclosure of crushing and screening equipment, enclosure of stockpiles, and the use

[59] 2-B1 A.R. 185, p. 28:21-22.
[60] 1 A.R. 26, pp. 12-19; 2-B2 A.R. 232 p. 19:1-7.
[61] *See* TCEQ Br., p. 3.

of a fabric filter baghouse.[62] But the district court found no error in TCEQ's application of BACT, and the Reeh Appellees did not appeal this finding.[63] They cannot raise complaints about TCEQ's application of BACT in this appeal.

h. The Reeh Appellees' other objections fail to show error.

The Reeh Appellees raise other objections to Vulcan's NAAQS demonstration for $PM_{2.5}$ and PM_{10}, but these objections seek to reweigh the evidence before the Commission. None show that TCEQ's decision was unsupported by substantial evidence or unreasonable.

- They argue that TCEQ should have considered the use of fence-line monitoring.[64] But TCEQ's expert witness Joel Stanford testified that fence-line PM monitors are ineffective at determining the actual off-site concentrations of PM emissions from rock crushers. These monitors record background PM emissions not associated with the rock crusher.[65]

[62] Reeh Br., pp. 18-19.
[63] C.R. 541.
[64] Reeh Br., pp. 18-19.
[65] 2-B2 A.R. 211, p. 27:13-34.

- They argue that Vulcan failed to show that its operating hours will not adversely affect human health, welfare, or the environment.[66] But Vulcan's modeling showed that the plant would not adversely impact human health, welfare, and the environment even if operated 24 hours a day and 365 days a year.[67]
- They argue that TCEQ should have considered the plant's proximity to homes and residences.[68] They also claim potential adverse impacts from the plant on property, health, livestock, businesses, wildlife, and vegetation.[69] But Vulcan's AQA demonstrated that the GLC_{max} of pollutants will not cause or contribute to an exceedance of any of the primary or secondary NAAQS.[70] EPA established each primary NAAQS at a concentration level that will protect public health, including the health of sensitive members of the public, with a margin of safety. EPA established each secondary NAAQS at a concentration level

[66] Reeh Br., p. 19.
[67] 2-B1 A.R. 185, p. 24:1-13; 2-B2 A.R. 211, p. 11:27-30.
[68] Reeh Br., p. 18.
[69] Reeh Br., p.19.
[70] *See* TCEQ Br., p. 38.

that will protect public welfare, which includes, physical property, animals, crops, and vegetation.[71]

- They cite complaints regarding air quality at a school in Comal Independent School District located near another quarry.[72] These complaints have no bearing on the Vulcan plant.
- They repeat the conclusory statement that Vulcan has not demonstrated that the proposed plant will not negatively impact human health and property.[73] But they do not point to any specific flaws in the process of developing Vulcan's AQA, which TCEQ detailed in its opening brief.[74]
- They repeat the assertion that Vulcan has omitted, excluded, or withheld information.[75] But they do not identify any specific information that was allegedly withheld.
- Finally, they object to the meteorological data used in Vulcan's air dispersion modeling.[76] TCEQ had evidence that the year of

[71] TCEQ Br., pp. 38-39.
[72] Reeh Br., p. 20.
[73] Reeh Br., p. 20.
[74] TCEQ Br., pp. 35-40.
[75] Reeh Br., p. 21.
[76] Reeh Br., p. 22.

meteorological data from the New Braunfels Airport was appropriate for NSR permitting.[77]

II. Appellees Failed to Show Error in TCEQ's Findings on Crystalline Silica Emissions.

TCEQ's finding that Vulcan's emissions of crystalline silica will not negatively impact human health and welfare or contravene the intent of the Texas Clean Air Act[78] is supported by TCEQ's *Modeling and Effects Review Applicability* (MERA) guidance. However, based on Vulcan's voluntary health effects analysis, TCEQ additionally found that the GLC_{max}s of crystalline silica from Vulcan's proposed plant are well below the applicable ESLs and that Vulcan's percentage used to calculate crystalline silica emissions could be 135 times greater and still have no negative impact on human health or welfare.[79] Appellees have shown no error in relying on the MERA guidance or in Vulcan's voluntary health effects analysis.

[77] 2-B2 A.R. 232, pp. 8:27-10:1.
[78] 1 A.R. 173, Finding of Fact 45.
[79] 1 A.R. 173, Findings of Fact 44 and 46.

a. The MERA's rock crusher exclusion is non-binding guidance.

The Friends argue that the exclusion of rock crushers from a health effects analysis under Appendix B of the MERA guidance is an invalid rule.[80] The Friends are wrong. The MERA guidance is not a rule.

The MERA is a guidance document designed to provide TCEQ's air permitting staff with guidelines for reviewing and processing permit applications. It provides agency staff a process for determining whether a health effects analysis is required for a permitting project, and if required, the scope of the analysis.[81] Under the MERA, a health effects analysis for emissions of particulate matter, including crystalline silica, from rock crushers is generally not required.[82] But the MERA guidance does not preclude TCEQ from requiring a health effects analysis for crystalline silica emissions from a proposed rock crusher—like APDG 6232, the MERA grants permit reviewers discretion to deviate from the outlined processes when necessary or appropriate:

> "[w]hile this document defines the minimum level of modeling and effects review required for a project it is not regulatory and **does not limit the permit reviewer's ability to require a sitewide modeling and effects review**. Permit

[80] Friends Br., p. 22.
[81] 2-B2 A.R. 223, p. 1.
[82] 2-B2 A.R. 223, p. 21, Appendix B.

> reviewers **may deviate from this guidance** with the approval of supervisors or the Air Permits Division (APD) director."[83]

Additionally, it provides that a permit reviewer may forego the MERA procedures entirely if warranted in a particular case:

> [A] permit reviewer may advise the applicant that the [MERA] **cannot be used for a particular project**, or request additional information related to the project and other authorized emissions at a site, based on available technical information outside of the permit application. This technical information could come from permit reviewers, toxicologists, regional investigators, agency management, or the public.[84]

As with APDG 6232, the permit reviewer retains control over the process. This was confirmed by Ms. Melton. When asked whether Vulcan was required to conduct a health effects analysis, she responded, "No, the permit reviewer only requested an impacts evaluation of all averaging times of the NAAQS . . . as well as a State Property Line Analysis . . . ."[85] Thus, the MERA does not prevent TCEQ from requiring a health effects analysis if an application indicates that crystalline silica emissions will be higher than expected from an excluded facility.

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[83] 2-B2 A.R. 223, p. 1 (emphasis added).
[84] 2B-2 A.R. 223, p. 1 (emphasis added).
[85] 2-B2 A.R. 232, p. 22:5-9.

As explained in TCEQ's opening brief, TCEQ has already determined, based on data and expertise accumulated over years of processing similar applications, that rock crushers emit insignificant amounts of crystalline silica and are not expected to cause adverse health effects.[86] This determination was made by the Toxicology Division "based on many past case-by-case reviews."[87] Notwithstanding the general exclusion, if TCEQ is presented with an application for a rock crusher with a substantially different design or emissions characteristics, the MERA does not prevent TCEQ from requesting a health effects analysis. The MERA provides guidance to TCEQ staff for permitting familiar industries, but it does not bind the agency. Such guidance falls within the scope of "nonbinding evaluative guidelines that take into consideration case-specific circumstances" *Witcher*, 447 S.W. 3d at 529.

In addition, like APDG 6232, the MERA guidance does not impact personal rights. The parties to an administrative proceeding for an air-quality permit do not have a right to a particular method for determining the possible adverse health impacts from a proposed facility. Thus,

[86] TCEQ Br., p. 21; 2-B2 A.R. 223, p. 6.
[87] 2-B2 A.R. 223, p. 6.

TCEQ's reliance on Appendix B of the MERA guidance is not an invalid rule.

b. Appellees' arguments that TCEQ's processes for conducting a health effects analysis are invalid rules were not preserved for review and are not persuasive.

As described in TCEQ's opening brief, TCEQ uses a tiered approach to conducting a health effects analysis of non-criteria pollutants.[88] A Tier I health analysis is conducted to determine whether the modeled GLC_{max} of project-related emissions will exceed the relevant ESLs for that contaminant. If the modeled concentrations do not exceed the ESLs, TCEQ may conclude that the proposed facility will not negatively affect public health and welfare.[89] Accordingly, further review under Tiers II and III of the review process is not necessary.[90]

Vulcan's voluntary health effects analysis of crystalline silica confirmed the finding in Appendix B of the MERA—that crystalline silica emissions from its proposed plant will be insignificant, with modeling results showing that that GLC_{max} of crystalline silica at 0.7 percent of the

[88] TCEQ Br., pp. 7-8.
[89] 2-B2 A.R. 237, p. 6:18-24.
[90] 2-B2 A.R. 237, pp. 9:30-10:10.

short-term ESL and 0.04 percent of the annual ESLs.[91] Thus, Vulcan's health effects demonstration was complete at Tier I.

The Friends argue that TCEQ's process for Vulcan's health-effects analysis constitutes an invalid rule in two respects. First, they argue that TCEQ's policy of relying on ESLs as a measure of compliance under the first tier of a health effects analysis is an invalid rule.[92] Second, they argue that TCEQ applies an invalid rule dictating that emissions for non-criteria pollutants from non-facility sources are to be ignored in determining the need for a health effects analysis.[93] These arguments were not raised at the Commission or in the briefing below. They are also wrong on the merits.

i. The Friends did not preserve arguments that TCEQ's processes for conducting a health effects analysis are invalid rules.

The Friends' invalid rule arguments based on the health-effects analysis process were not raised at the Commission in the motions for

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[91] Vulcan's modeling showed that the GLC_{max} for one-hour crystalline silica emissions would be 0.09 micrograms per cubic meter (µg/m^3), or 0.7 percent of the ESL of 14 µg/m^3. Modeling further showed that the GLC_{max} for annual crystalline silica emissions including modeled emissions from roads was 0.0001 µg/m^3, which represents only 0.04 percent of the ESL of 0.27 µg/m^3. 1 A.R. 26, pp. 35-36; 1 A.R. 30, p. 4.

[92] Friends Br., p. 23.

[93] Friends Br., p. 23.

rehearing.[94] In their motion for rehearing, the Friends' only "invalid rule" argument asserted that the MERA's exclusion of rock crushers from the requirement to conduct a health effects analysis for PM emissions was an improperly promulgated rule.[95] They did not raise as a point of error that the tiered method used in evaluating Vulcan's health effects analysis was also an improperly promulgated rule or that TCEQ applies a rule excluding non-facility sources. By failing to raise these additional arguments before the Commission, they did not preserve the issues for review. *Fisher,* 549 S.W.3d at 180. In addition, the Friends did not raise these issues in the briefing to the district court below.[96] These arguments have been waived.

ii. TCEQ's process for conducting a health effects analysis is a non-binding recommendation for permit reviewers, not a rule.

The Friends' new invalid rule arguments are also unpersuasive. Friends wrongly assert that TCEQ has a "general policy of finding that no health effects analysis is needed for emissions that cause an increase in ambient concentrations beneath the applicable ESL."[97] First, this is an

[94] 1 A.R. 177; 1 A.R. 178.
[95] *See* 1 A.R. 178, pp. 1-3.
[96] C.R. 88 and 242.
[97] Friends Br., p. 24.

incorrect description of TCEQ's process. A Tier I health effects analysis is conducted to determine whether the modeled maximum off-site concentrations of a contaminant will exceed the ESLs for that contaminant. If the modeled concentrations do not exceed the ESLs, further review under Tiers II and III of the review process is not required.[98] Vulcan voluntarily provided a health effects analysis for crystalline silica that demonstrated compliance with the Texas Clean Air Act and TCEQ's NSR permitting rules under Tier I.[99]

TCEQ may reasonably find that emissions of non-criteria pollutants like crystalline silica will not adversely affect human health and welfare by determining that the GLC_{max} of the pollutant will be below TCEQ's ESL. The ESLs are health-based screening guidelines used by TCEQ's Toxicology Division to help determine if the predicted off-site concentrations would be expected to cause a health or welfare effect.[100] ESLs are set at levels lower than levels reported to produce adverse health effects, and as such are set to protect the general public, including sensitive subgroups such as children, the elderly, or people with existing

[98] 2-B2 A.R. 223, p. 28; 2-B2 A.R. 237, p. 6:19-29.
[99] 1 A.R. 26, pp. 35-36; 2-B2 A.R. 211, p. 35:1-7.
[100] 2-B2 A.R. 237, p. 6:19-21.

respiratory conditions.[101] As TCEQ's toxicologist explained, "the health-based ESLs are conservative and are based on either a one-hour or life-time exposure level and include a built-in margin of safety. If a modeled concentration is at or below the ESL, health and welfare effects would not be expected."[102] TCEQ's Toxicology Division has done extensive work to set ESLs for crystalline silica that are highly conservative and protective of human health and welfare.[103] The agency does not need to conduct a labor-intensive full toxicological evaluation of air emissions where Vulcan's modeling shows that the *maximum* off-site concentrations of crystalline silica will be one percent or less of the ESLs.[104]

However, TCEQ may conduct additional toxicological review of an application if there are circumstances that suggest additional analysis may be appropriate. While the MERA provides that further review is generally not required if the GLC_{max} from the proposed plant is below the ESL, a permit reviewer may determine that a particular application

[101] 1 A.R. 45, p. 11; 2-B2 A.R. 237, pp. 7:6-16 and 8:22-39.
[102] 2-B2 A.R. 237, p. 6:22-26.
[103] 2-B2 A.R. 237, pp. 7:17-35 and 8:22-9:1-13; 2-B2 A.R. 239.
[104] 1 A.R. 26, pp. 35-36; 1 A.R. 30, p. 4

warrants additional review by the Toxicology Division.[105] Because the agency is not bound by the guidance and it does not dictate a specific outcome, it is not a rule. *Witcher*, 447 S.W. 3d at 529. In addition, as shown above, the MERA guidance does not impact personal rights. The Friends cannot show a right to a particular method for conducting a health effects analysis that might be impacted by the MERA guidance.

Likewise, TCEQ does not have a rule dictating that emissions for non-criteria pollutants from non-facility sources are to be ignored in determining the need for a health effects analysis. Following its interpretation set out in *EOG Resources*, TCEQ did not require modeling from roads or quarries nearby the proposed rock crushing plant.[106] However, these sources are not categorically excluded from a health-effects analysis. First, background concentrations are considered in setting the ESLs. TCEQ's toxicologist explained TCEQ's process for setting the ESLs considers both cumulative and aggregate exposures.[107] Furthermore, he explained that if multiple facilities in an area emit the same non-criteria pollutants, it is very unlikely that the maximum

[105] 2-B2 A.R. 223, p. 1; 2-B2 A.R. 234, p. 10.
[106] 2-B2 A.R. 211, pp. 24:15-23, 25:13-16.
[107] 2-B2 A.R. 237, p. 7:19-20.

concentrations of emissions from other facilities emitting the same pollutant would occur at the same place.[108] As a result, adverse effects would not be expected in the general public, even when multiple facilities in an area emit the same pollutants.[109]

Moreover, background sources of non-criteria pollutants may also be considered in the refined level of review. In the MERA, this consideration is included under a Tier III, case-by-case review:

> Existing levels of the same constituent: Does sitewide modeling predict (or ambient monitoring indicate) the presence of significant concentrations of the constituent, due to existing sources? If so, additional emissions from the new project may result in a condition of air pollution.[110]

Thus, there is no rule excluding non-facility sources of crystalline silica from consideration in a health effects analysis. By rule, they are excluded from the inventory of facility emissions to be modeled in an AQA. 30 Tex. Admin. Code § 116.111(a)(2)(A)(i), (a)(2)(J). However, the Commission considers them appropriately under a case-by-case review.

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[108] 2-B2 A.R. 237, p. 7:29-32.
[109] 2-B2 A.R. 237, p. 7:33-35.
[110] 2-B2 A.R. 223, Appendix D, (III)(C)(4), p. 29.

c. TCEQ rules do not mandate a full toxicological review to support every NSR permit application.

The Friends further argue that "TCEQ has not adopted any rule that exempts a source's (or facility's) contributions to ambient concentration below ESL levels from the health effects demonstration required by 30 Tex. Admin. Code § 116.111(a)(2)(A)."[111] But their argument is not supported by the text. The rule requires only that an applicant for air permit include information demonstrating that the proposed facility "will comply with all rules and regulations of the commission and with the intent of the Texas Clean Air Act . . ., including protection of the health and property of the public." 30 Tex. Admin. Code § 116.111(a)(2)(A)(i). The Texas Clean Air Act provides that TCEQ may grant an air permit if it finds "no indication that the emissions from the facility will contravene the intent of [the Act], including protection of the public's health and physical property." Tex. Health & Safety Code § 382.0518(b)(2). The intent of the Act includes "safeguard[ing] the state's air resources from pollution by controlling or abating air pollution and emissions of air contaminants, consistent with the protection of public

[111] Friends Br., p. 24.

health, general welfare, and physical property . . . ." *Id.* § 382.002(a). Neither the statute nor the rule specifies *how* an application must demonstrate that emissions will be protective of human health and welfare, only that the showing must be made.

The MERA does not create an "exemption" from this requirement. Instead, it outlines the various ways in which an applicant can make the required showing. Demonstrating that GLC_{max}s are below the ESLs—levels that TCEQ's Toxicology Division have determined are conservatively protective of the most sensitive subgroups—is one way that an applicant can show that emissions from the facility will be protective of human health and welfare. This showing may also be satisfied by the agency's previous work in determining that certain types of industries emit insignificant levels of non-criteria pollutants. The MERA is clear that the list of exempt industries is based on the Toxicology Division's review of past health effects analyses supporting NSR permit applications.[112] And, as explained above, TCEQ is not bound by the MERA. If a permit reviewer is not satisfied that an application demonstrates that emissions will be protective of human health and

[112] 2-B2 A.R. 223, p. 6.

welfare based on the ESLs, the reviewer may require the application to undergo further review. Thus, TCEQ's MERA guidance does not create an "exemption" from the rule's requirement to demonstrate that emissions will be protective of human health and welfare. Rather, it provides non-binding guidance to determine what additional health effects analysis, if any, is necessary to demonstrate that the proposed facilities will be protective of human health and welfare.

The Friends wrongly assert that a showing of emissions that do not cause an exceedance of an ESL may nevertheless contribute to an adverse effect on human health when combined with ambient air conditions.[113] In a similar vein, the Reeh Appellees argue that TCEQ ignored "significant sources" of crystalline silica in the area, noting the presence of aggregate operations and quarries.[114] But, as noted above, TCEQ's process considers both cumulative and aggregate exposures.[115]

The Friends also point to Vulcan's health effects analysis for annual crystalline silica, claiming that with some plant roads voluntarily added, the analysis produced a GLC_{max} 20 times greater than the concentration

[113] Friends Br., p. 24.
[114] Reeh Br., p. 22.
[115] 2-B2 A.R. 223, Appendix D, (III)(C)(4), p. 29.

without roads.[116] But their focus on comparative values is misleading. Twenty times a very small number is still a very small number. Without modeled road emissions, the GLC_{max} of crystalline silica from Vulcan's proposed plant is 0.04 percent of the annual ESL.[117] With the on-site roads, the GLC_{max} was modeled at 0.8 percent of the annual ESL.[118] Neither amount is remotely close to a concentration that would warrant further study by a toxicologist for potential adverse health effects.

III. TCEQ Joins Vulcan's Arguments.

In addition to the above arguments, TCEQ adopts the arguments from Vulcan's reply.

Conclusion and Prayer

The district court erred in reversing in part TCEQ's order granting Vulcan's permit application. The Appellees have shown no reversible error. The Court should reverse and render judgment affirming TCEQ's order.

Respectfully submitted,

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[116] Friends Br., p. 6.
[117] 1 A.R. 26, p. 36.
[118] 1 A.R. 26, p. 36.

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Certificate of Service

I hereby certify that on this 29th day of October 2021, a true and correct copy of the foregoing TCEQ's Reply Brief has been served upon the parties listed below via electronic service or email.

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