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IN THE THIRD COURT OF APPEALS
AUSTIN, TEXAS

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, *Appellant*

and

VULCAN CONSTRUCTION MATERIALS, LLC, *Appellant*

v.

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

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

REPLY BRIEF OF APPELLANT VULCAN CONSTRUCTION MATERIALS, LLC

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GLOSSARY OF TECHNICAL TERMS AND DEFINED TERMS

- "2016 subsurface investigation" means the unrelated subsurface investigation Vulcan conducted in 2016 whose sole purpose was to help Vulcan decide whether to buy the property at which its Plant will be located.
- "ALJs" means the administrative law judges at the contested case hearing.
- "Appellees" means Friends and Reeh, collectively.
- "A.R." means the Administrative Record.
- "BACT" means Best Available Control Technology.
- "Cores" means core samples Vulcan obtained during its unrelated 2016 subsurface investigation
- "EPA" means the U.S. Environmental Protection Agency
- "ESL" means TCEQ's effects screening levels
- "Friends" means Friends of Dry Comal Creek and Stop 3009 Vulcan Quarry, collectively.
- "Full NAAQS Analyses for PM_{10} and $PM_{2.5}$" means the Minor NAAQS Analyses for the 24-hour PM_{10}, 24-hour $PM_{2.5}$, or Annual $PM_{2.5}$ NAAQS.
- "GLC_{max}" means a pollutant's maximum off-site ground level concentration calculated by air dispersion modeling.
- "MERA guidance" means TCEQ's Modeling and Effects Review Applicability guidance document
- "Modeling" means air dispersion modeling.
- "NAAQS" means National Ambient Air Quality Standard.
- "Permit" means Permit No. 147392L001, which authorizes construction and operation of the Plant.
- "Plant" means Vulcan's rock crushing plant whose construction and operation are authorized by the Permit.

- "$PM_{2.5}$" is particulate matter with a diameter less than or equal to 2.5 microns.
- "PM_{10}" is particulate matter with a diameter less than or equal to 10 microns.
- "Public health and welfare" means human health, including sensitive subgroups, and physical property, wildlife, vegetation, flora, and fauna.
- "Quarry and road emissions" means emissions from Vulcan's proposed on-site quarry and roads and/or from existing offsite quarries or roads.
- "Reeh" means Reeh Appellees, which collectively are Jeffrey Reeh, Terry Olson, Mike Olson, and Comal ISD.
- "Sensitive subgroups" includes, among others, children (including those at schools), elderly, and people with preexisting health conditions.
- "TCAA" means Texas Clean Air Act, which is in Chapter 382 of the Texas Health and Safety Code.
- "TCEQ" means Texas Commission on Environmental Quality.
- "TCEQ's Order" means TCEQ's November 21, 2019 Order that issued the Permit.
- "Trade secret information" means the geologic information Vulcan obtained from its unrelated 2016 subsurface investigation and maintains as confidential trade secret information.
- "Vulcan" means Vulcan Construction Materials, LLC.
- "Vulcan's aggregate material" means the aggregate material Vulcan will process in the Plant.

I. ARGUMENT

None of the arguments in the Brief of Friends of Dry Comal Creek and Stop 3009 Vulcan Quarry ("***Friends***") or Jeffrey Reeh, Terry Olson, Mike Olson, and Comal ISD ("***Reeh***") (collectively, "***Appellees***") overcomes the support in Vulcan Construction Materials, LLC's ("***Vulcan***") Initial Brief ("***Vulcan's Brief***"), in this Reply Brief, and in TCEQ's Initial Brief and Reply Brief (which Vulcan adopts) for the answers to the Issues Presented in Vulcan's Brief being as suggested therein. Therefore, this Court should (i) reverse the district court's rulings that caused its Final Judgment to not completely affirm the Order of the Texas Commission on Environmental Quality ("***TCEQ***") that issued Permit No. 147392L001 ("***Permit***") to Vulcan ("***TCEQ's Order***"),[1] and (ii) affirm TCEQ's Order.

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

Friends incorrectly assert TCEQ's determination the crystalline silica emissions from Vulcan's proposed rock crushing plant ("***Plant***") "will not violate 30 TEX. ADMIN. CODE §116.111(a)(2)(A), as embodied in Conclusion of Law No. 12 in TCEQ's Order," i.e., will be protective of public health and physical property,

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[1] 1 Administrative Record ("***A.R.***") 173.

is based on three so-called "general policies" that are allegedly "invalid rules".[2] Critically, each of those so-called "general policies" is actually long-standing TCEQ written guidance, and none of them is an invalid rule, as TCEQ discusses in its Reply Brief.

TCEQ's determination is based partly on the first so-called "general policy", i.e., TCEQ's "MERA guidance,"[3] which states TCEQ previously determined that emissions, including crystalline silica emissions, from rock crushers, such as the Plant, are not expected to negatively affect human health or welfare (which includes physical property).[4] However, two of the three findings in TCEQ's Order that support that determination, Finding Nos. 44 and 46, are based on Vulcan's voluntary crystalline silica modeling.[5] The third finding, Finding No. 45, is based on that modeling and TCEQ's "MERA guidance."[6]

Further, TCEQ's determination was not based on the so-called "general policy" that Friends wrongly claim provides that no "health effects analysis" is required for crystalline silica emissions if the maximum off-site ground level concentration ("***GLC_{max}***") from air dispersion modeling ("***modeling***") of such

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2 Friends' Brief at 20.
3 Modeling and Effects Review Applicability ("***MERA***") (APDG 5874), which is 2-B2 A.R. 223.
4 Vulcan's Brief at 29-30.
5 *Id*. at 29-31; 1 A.R. 173.
6 *Id*.

emissions does not exceed the crystalline silica effects screening level ("***ESL***").[7] First, such modeling and comparison of the resulting GLC_{max} to the ESL *is* a "health effects analysis" since TCEQ established ESLs at conservative concentrations so that GLC_{max}s below them will not cause negative effects to human health, including children, elderly, and people with preexisting health conditions ("***sensitive subgroups***"), or welfare.[8] Accordingly, by referencing "health effects analysis," Friends must mean the case-by-case health effects review the MERA guidance states the TCEQ Toxicology Division will conduct *if* a GLC_{max} exceeds the ESL.[9] Such a review was appropriately not conducted for the Plant because no crystalline silica GLC_{max} from Vulcan's voluntary modeling exceeded the applicable ESL (each GLC_{max} actually was below 1% of the ESL[10]), and that alone demonstrates the Plant's crystalline silica emissions will not negatively impact public health, including of sensitive subgroups, or welfare.[11]

The other so-called "general policy" is that Vulcan need not input "emissions for non-criteria pollutants from non-facility sources," i.e., crystalline silica emissions from its proposed quarry and roads or from off-site quarries and roads ("***quarry and road emissions***"), into its crystalline silica modeling to determine

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7 Friends' Brief at 22-24.
8 Vulcan's Brief at 30.
9 MERA, Appendix D; 2-B2 A.R. 211 at 35:4-7.
10 Vulcan's Brief at 30-31.
11 *Id*. at 30-31.

whether the modeled GLC_{max} is such that a TCEQ Toxicology Division case-by-case health effects review was required.[12] First, TCEQ's determinations that Vulcan was not required to input such quarry and road emissions into its modeling and they were adequately considered anyway are based on TCEQ's long-standing interpretation of the language in the Texas Clean Air Act ("***TCAA***")[13] and its rules, and its development of ESLs, not on a "general policy."[14] Regardless, TCEQ's determinations are supported by substantial evidence and not arbitrary or capricious.[15]

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

Reeh incorrectly allege Vulcan's sample of the aggregate material it will process in the Plant ("***Vulcan's aggregate material***") that was analyzed to show 0.2% crystalline silica was not a representative sample of such material because it was developed using three of the 41 core samples ("***cores***") Vulcan obtained during its unrelated 2016 subsurface investigation whose purpose was to help Vulcan decide whether to buy the property at which its Plant will be located ("***2016***

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12 Friends' Brief at 23.

13 TEX. HEALTH AND SAFETY CODE §§382.003(6) and 382.0518(a)-(b).

14 Vulcan's Brief at 47-50, 52-53.

15 *Id*. at 46-55.

subsurface investigation").[16] Vulcan explains on pages 32-34 of its Brief why that allegation is wrong. However, Reeh's statements on page 16 of their Brief need to be corrected. First, if their statement the 41 cores were "thoroughly analyzed" means they were analyzed for crystalline silica, that statement is false as none of the trade secret information from Vulcan's 2016 subsurface investigation ("***trade secret information***"), including cores' analytical results, specifies crystalline silica percentage.[17] Second, Reeh allege that Dr. Lori Eversull, one of Vulcan's geology experts, testified she was fully "apprised of the content" of the trade secret information, and that her testimony is not clear whether she used such information in developing Vulcan's representative sample. In fact, she testified that while she was apprised of the content of such information because she was involved as a Vulcan in-house geologist in Vulcan's 2016 subsurface investigation that resulted in such information, she did not use, or even review, such information in developing Vulcan's representative sample.[18]

Appellees incorrectly claim it is not clear without such trade secret information whether Dr. Eversull chose the three samples with the lowest crystalline silica content in developing Vulcan's representative sample, or what information,

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16 Reeh's Brief at 13, 16.

17 *See, e.g.,* 3 A.R. 271 at 154:10-20.

18 Vulcan's Brief at 66.

other than her observations during Vulcan's 2016 subsurface investigation, she used in developing that sample and as the basis of her testimony it was a representative sample.[19] In truth, Dr. Eversull clearly testified the basis for her expert testimony that Vulcan's sample was a representative sample was that in developing that sample, she and her subordinate in-house Vulcan geologist followed "widely accepted processes for collecting a representative sample of aggregate material," and in doing so, chose the three cores based on her expert opinion they would capture any possible variability in crystalline silica percentage.[20] Further, Vulcan's other geology expert, Mr. Thomas Mathews, testified that Vulcan's sample was developed in a manner that caused it to be a representative sample.[21] Moreover, although Dr. Eversull testified that in developing Vulcan's sample, she used her knowledge of the small variability in Vulcan's aggregate material that she obtained from her observations during Vulcan's 2016 subsurface investigation, which occurred *three years before*,[22] she clearly testified that she did not review, much less rely on, any of the trade secret information from that investigation in developing Vulcan's sample, or as the basis for her testimony.[23] Therefore, Friends' assertion that Appellees

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19 Reeh's Brief at 16; Friends' Brief at 60.
20 2-B1 A.R. 198 at 5:25-7:1; 3 A.R. 271 at 202-203.
21 Vulcan's Brief at 32
22 3 A.R. 271 at 212:24-214:8.
23 Vulcan's Brief at 66.

needed the trade secret information to test the reliability of Dr. Eversull's testimony[24] is unsupportable.

Reeh incorrectly assert the alleged average crystalline silica percentage of 1.0% from analyses of their three grab samples from adjacent property was "far greater" than Vulcan's 0.2% crystalline silica.[25] Vulcan explains on page 35 of its Brief why that alleged percentage does not overcome the substantial evidence that 0.2% crystalline silica is representative of Vulcan's aggregate material. As an aside, Reeh allege they had to collect those samples because Vulcan rejected their request for access to its property to collect samples. But, Vulcan's reasonably rejected that request because Reeh made it long after the deadline specified in TEX. R. CIV. P. 196.7(a).[26]

Reeh erroneously allege the record "shows" nine items relating to crystalline silica identified on pages 14-15 of their Brief. Vulcan addresses Item 5 in the prior paragraph, Item 8 in the paragraph just before that paragraph, and Item 7 in the last paragraph of Section I.A. The allegation regarding each remaining item is also without merit, as discussed below.

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24 Friends' Brief at 60.
25 Reeh's Brief at 13-14.
26 Reporter's Record at 118:25-119:8.

- Items 1-4 relate to Reeh's unsubstantiated concerns the Plant's crystalline silica emissions will negatively impact their health and welfare and that of Comal ISD school attendees. TCEQ's determination the Plant's crystalline silica emissions will not negatively impact the health or welfare of *any* member of the public, including Reeh's members or Comal ISD school attendees, is supported by substantial evidence.[27]

- In Item 6, Reeh assert TCEQ's determination the Plant's crystalline silica emissions will cause no adverse impact to air quality and human health is "directly dependent" on Vulcan's sample containing 0.2% crystalline silica, and on page 17, they similarly assert that determination is "based solely" on the allegedly "unverified" 0.2%. Finding of Fact 46 of TCEQ's Order demonstrates those assertions are unsupportable. It states the Plant's crystalline silica emissions would not negatively affect human health or welfare, including of Reeh's members or Comal ISD school attendees, even if the 0.2% was really 135 times higher, i.e., was 27%.[28] There is no probative evidence Vulcan's aggregate material could contain anywhere near 27% crystalline silica; instead, the probative evidence shows 0.2% is consistent with the range of crystalline silica

27 Section I.A above; Vulcan's Brief at 29-36.

28 *See also* Vulcan's Brief at 36.

percentages of aggregate materials in limestone formations near the Plant.[29]

- Item 9 asserts it is unclear what subsurface investigations Vulcan conducted for the purpose of determining the Plant's crystalline silica "emissions calculations" for Vulcan's modeling, i.e., the crystalline silica percentage of Vulcan's aggregate materials. The uncontroverted evidence shows the only subsurface investigation Vulcan conducted was not conducted for that purpose.[30]

Reeh make additional crystalline silica-related assertions regarding Issue No. 3 on pages 12, 15-17 of their Brief and regarding Issue No. 4 on pages 17-18 of their Brief. Vulcan addresses those assertions in Sections I.G and I.H.1, respectively.

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

Reeh assert that additional Permit conditions may be needed (i) due to site-specific issues, such as the Plant's alleged close proximity to homes and schools and

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[29] Vulcan's Brief at 31-36.

[30] 2-B1 A.R. 198 at 6:6-19; 3 A.R. 271 at 154:10-156:4.

other alleged “substantial sources in the area,” including quarries, rock crushers, and concrete plants,[31] and (ii) because Vulcan allegedly failed to demonstrate the Plant’s emissions will not negatively impact “human health, including sensitive subgroups and physical property” or “wildlife, vegetation, flora, and fauna”[32] (collectively, “***public health and welfare***”[33]), in light of Reeh’s alleged “evidence” regarding five listed health and welfare aspects.[34] Reeh’s second assertion is shown to be unsupportable in Sections IX.1.a, IX.1.b, and IX.2.a. - IX.2.c of Vulcan’s Brief, Sections I.A - I.B and I.D - I.F herein, and TCEQ’s Initial and Reply Briefs.

The additional Permit conditions Reeh suggest would (i) require that Vulcan conduct fenceline monitoring for PM_{10} and $PM_{2.5}$, (ii) limit the Plant’s operating hours, and (iii) require different emissions controls that Reeh assert constitute Best Available Control Technology (“***BACT***”).[35] With respect to Reeh’s suggestion that TCEQ be required to amend the Permit to require that Vulcan conduct PM_{10} and $PM_{2.5}$ fenceline monitoring and to limit the Plant’s operating hours, TCEQ’s rejection of each of those suggestions is supported by substantial evidence and is not arbitrary or capricious.[36] Further, because Section 3 of the Final Judgment affirmed

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31 Reeh’s Brief at 18-20.
32 *Id*. at 20-21.
33 Vulcan’s Brief at 11-12.
34 Reeh’s Brief at 19-20.
35 *Id*. at 18-19.
36 Vulcan Brief at 38-40.

TCEQ's determinations the Plant's emissions controls will meet or exceed BACT, and since Reeh did not appeal that ruling, Vulcan need not address Reeh's BACT-related assertion.[37]

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

The full National Ambient Air Quality Standards ("***NAAQS***") Analyses Vulcan conducted for the 24-hour PM_{10}, 24-hour $PM_{2.5}$, and Annual $PM_{2.5}$ NAAQS ("***full NAAQS Analyses for PM_{10} and $PM_{2.5}$***"[38]) demonstrated there will be no cumulative impacts. These analyses, which Vulcan conducted in accordance with long-standing written TCEQ and U.S. EPA guidance, demonstrate the Plant's PM_{10} and $PM_{2.5}$ emissions will not negatively affect public health or welfare.[39] Vulcan conducted those analyses voluntarily as the TCAA, TCEQ rules, and such guidance did not require that Vulcan conduct them since each PM_{10} and $PM_{2.5}$ GLC_{max} from Vulcan's preliminary impact determination modeling was below the applicable "de minimis" level (also, "significant impact level").[40]

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37 TEX. R. APP. P. 25(c).

38 Vulcan's Brief referred to these as "Minor NAAQS Analyses for PM_{10} and $PM_{2.5}$."

39 Vulcan's Brief at 40-46.

40 *Id*.

Strangely, Friend Appellees inexplicably make the clearly incorrect assertion that Vulcan did not conduct those analyses.[41] But, they later admit the opposite.[42]

Further, Friends erroneously assert that Vulcan's modeling failed to demonstrate the Plant's crystalline silica emissions will not contribute to adverse health effects if "combined with ambient air conditions,"[43] i.e., when also accounting for cumulative impacts from off-site sources of crystalline silica, such as quarries and roads. Similarly, Reeh assert there are off-site crystalline silica sources for which Vulcan's modeling did not account.[44] There is uncontroverted expert testimony that Vulcan's modeling <u>did</u> also account for such cumulative impacts, even though emissions from off-site sources were not input into such modeling. Vulcan's and TCEQ's toxicology experts testified that TCEQ established the crystalline silica ESLs to also account for such cumulative impacts such that a GLC_{max} from modeling the proposed facilities' emissions not exceeding the ESL ensures that <u>any</u> cumulative impacts from crystalline silica emissions from off-site sources, such as quarries and roads, and from the proposed facilities will not negatively impact public health or

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41 Friends' Brief at 29.
42 *Id*. at 36-37.
43 *Id*. at 24.
44 Reeh's Brief at 14.

welfare.[45] Plus, Vulcan's modeling expert testified there will be no cumulative impacts from emissions from off-site sources and the Plant.[46]

Reeh erroneously assert that pursuant to 30 TEX. ADMIN. CODE §101.2(a), TCEQ should have required that Vulcan conduct cumulative impacts analyses for PM_{10} and $PM_{2.5}$.[47] As just discussed, Vulcan's full NAAQS Analyses for PM_{10} and $PM_{2.5}$ were cumulative impacts analyses. Nevertheless, Reeh provided no compelling support to counter the bases provided at the contested case hearing for the rejection of such assertion.[48]

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

Friend Appellees' incorrectly assert that TCEQ's determinations that quarry and road emissions were adequately considered was wrong because Vulcan did not input into its PM_{10} or $PM_{2.5}$ NAAQS Analysis modeling the emissions from its proposed onsite quarry and some of its proposed roads, or from existing off-site quarries and roads.[49]

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45 Vulcan's Brief at 54.
46 *Id*. at 51.
47 Reeh's Brief at 26-27.
48 1 A.R. 161 at 18-19.
49 Friends' Brief at 36-39.

As support for their assertion TCEQ should have required that Vulcan input emissions from its proposed quarry and roads, Friends use the following language from Appendix E of TCEQ's modeling guidance:[50] "The full NAAQS analysis considers all emissions at the site under review, as well as emissions from nearby sources and background concentrations."[51] That language does not support their assertion. The only part of that language that could possibly do so is "all emissions at the site under review" since "emissions from nearby sources" and "background concentrations" refer to emissions from *existing off-site* sources, and Vulcan's quarry and roads are *proposed on-site* sources. TCEQ properly determined that "all emissions at the site under review" does not cover Vulcan's proposed quarry and roads because other language in Appendix E demonstrates that quoted language relates to the full NAAQS analysis' preliminary impact determination, which includes emissions from the proposed *facilities* only. Specifically, the first paragraph under the Appendix E heading "Preliminary Impact Determination" states that a full NAAQS analysis begins with a preliminary impact determination that determines whether the "proposed emissions could make a significant impact on existing air quality."[52] And, the reference in the first paragraph of Appendix E to "proposed emissions of criteria pollutants from a new facility" shows the term "proposed

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50 2-B2 A.R. 234.
51 Friends' Brief at 38-39.
52 2-B2 A.R. 234 at 50.

emissions" refers to the emissions from the proposed *facilities* only, and *not also* from proposed emissions sources that are not facilities.[53] Since Vulcan's proposed quarries and roads are not proposed *facilities* because quarries and roads are specifically excluded from the definition of "facility" in the TCAA and TCEQ rules,[54] the quoted language from Appendix E shows TCEQ was correct to not require that Vulcan input into its modeling the emissions from its proposed quarry and roads.

Notwithstanding that, both Appellees erroneously assert the emissions from Vulcan's proposed quarry and roads could be "significant" or "substantial", and would "likely dwarf" the Plant's emissions.[55] For support, they cite to the testimony of one of their witnesses, and to a comparison of Annual $PM_{2.5}$ GLC_{max}s from Vulcan's modeling of $PM_{2.5}$ emissions from the Plant and some roads of 0.57 μ/m^3 and of $PM_{2.5}$ emissions from the Plant only of 0.04 μ/m^3.[56] Neither demonstrates Appellees' assertions are accurate. First, their witness's testimony should be ignored since he admitted the emissions from Vulcan's proposed quarry and other roads had not been quantified.[57] Second, there is no basis to appropriately characterize the Annual $PM_{2.5}$ GLC_{max} of 0.57 μ/m^3 as "significant" or "substantial," even though it

53 *Id*.
54 Vulcan's Brief at 47-49.
55 Friends' Brief at 6; Reeh's Brief at 22, 25.
56 *Id*. at 8, 10; *Id*. at 24-25.
57 2-B3 A.R. 240 at 5:13-15.

is almost "13 times more"[58] than the other Annual $PM_{2.5}$ GLC_{max} of 0.04 μ/m^3, since 0.57 μ/m^3 is less than 5% of the Annual $PM_{2.5}$ NAAQS of 12 μ/m^3 to which it is to be compared to demonstrate the Plant's annual $PM_{2.5}$ emissions will not negatively affect public health or welfare.[59]

With respect to Friends' assertion TCEQ should have required Vulcan to input into its modeling PM_{10} and $PM_{2.5}$ emissions from off-site quarries and roads, Vulcan first corrects their erroneous claim that "Vulcan determined" both that it needed to input into its modeling the PM_{10} or $PM_{2.5}$ emissions from all sources within 10 kilometers of the Plant, and that only Martin Marietta's rock crusher and quarry are within that radius.[60] In fact, it was the TCEQ modeling expert who determined that 10 kilometers is the appropriate radius for Vulcan to use under the applicable TCEQ and EPA guidance, and that, for the reasons she gave in her testimony, Vulcan only needed to input into its modeling the PM_{10} and $PM_{2.5}$ emissions from Martin Marietta's rock crusher.[61]

Further, Vulcan's discussion on pages 46-52 of its Brief why TCEQ's determination to not require Vulcan to input PM_{10} and $PM_{2.5}$ emissions from off-site quarries and roads is supported by substantial evidence and is not arbitrary or

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58 It is not 20 times more, as Friends asserted on page 6 of their Brief.
59 1 A.R. 26 at 34.
60 Friends' Brief at 38.
61 Vulcan's Brief at 44.

capricious, and demonstrates Friends' contrary assertion is unsupportable. In addition to Vulcan not being legally required to have input such emissions,[62] it was not necessary for Vulcan to have input them to demonstrate the Plant's PM_{10} and $PM_{2.5}$ emissions will not negatively affect public health or welfare.[63] First, such emissions were adequately considered through the PM_{10} and $PM_{2.5}$ representative background concentrations Vulcan voluntarily added to the modeled GLC_{max}s in the full NAAQS Analyses since those concentrations account for PM_{10} and $PM_{2.5}$ emissions from emissions sources, including quarries and roads,[64] such as those located within 20 kilometers of the Plant in an area called "quarry row."[65] Moreover, Vulcan's modeling expert provided uncontroverted testimony Vulcan's GLC_{max}s would not have changed even if Vulcan had input such emissions into its modeling, i.e., such emissions will have no cumulative impact with the Plant's emissions.[66]

Appellees incorrectly assert that because Vulcan did not input quarry and road emissions into its modeling or otherwise consider them in its PM_{10} or $PM_{2.5}$ NAAQS Analyses, TCEQ could not determine the Plant's PM_{10} and $PM_{2.5}$ emissions will not

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62 It is irrelevant if, as Friends claim, inputting quarry and road emissions would be consistent "with other jurisdictions' [i.e., other states'] practices" since the TCAA and TCEQ's rules, guidance, and practices, not other states' practices, apply to Vulcan's modeling.

63 Vulcan's Brief at 47-52.

64 *Id*. at 50.

65 *Id*. at 51. The map in Appendix 3 to Friends' Brief shows those quarries and roads are not, as Friends allege, "just" south of the Plant, but are at least approximately 15 kilometers from the Plant.

66 *Id*.

cause or contribute to a violation of the applicable NAAQS.[67] First, the fact the PM_{10} and $PM_{2.5}$ GLC_{max}s from Vulcan's preliminary impact determinations are below their "de minimis" levels alone demonstrates the Plant's PM_{10} and $PM_{2.5}$ emissions will not cause or contribute to a violation of the NAAQS.[68] But, even if Vulcan had been required to conduct NAAQS Analyses PM_{10} and $PM_{2.5}$, it would not have been required to input into the associated modeling the emissions from quarries and roads in the area Appellees call "quarry row" since they admit those quarries and roads are located outside the 10 kilometers radius from the Plant.[69] Further, it was unnecessary for Vulcan to have input quarry and road emissions since the uncontroverted testimony of Vulcan's modeling expert was that doing so would not have changed the modeling results.[70] Notwithstanding, Vulcan did appropriately "consider" quarry and road emissions in its voluntary NAAQS Analyses by adding PM_{10} and $PM_{2.5}$ representative background concentrations to their modeled GLC_{max}s.[71]

Reeh erroneously assert that TCEQ and Vulcan argue that inputting quarry and road emissions into modeling is tantamount to regulating them.[72] Actually, Vulcan's position is that (i) TCEQ has consistently interpreted and applied the

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67 Friends' Brief at 36-39; Reeh's Brief at 23-26.
68 *See, e.g.,* 2-B2 A.R. 234 at 17; 2-B1 A.R. 185 at 13:17-20.
69 Vulcan's Brief at 42.
70 *Id*. at 50-52, 53-55.
71 *Id*. at 50.
72 Reeh's Brief at 23, 26-27.

TCAA and its rules to not require that quarry and road emissions be input into the modeling associated with the permit application for proposed facilities, like the Plant, and (ii) if this Court was to prefer a different interpretation, it should nevertheless defer to TCEQ's interpretation because it is reasonable and not plainly erroneous and there is no evidence TCEQ has ever had a different interpretation,[73] and because a different interpretation would significantly impact TCEQ's air permitting program.[74]

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

Reeh incorrectly assert the monitors Vulcan chose to provide the PM_{10} and $PM_{2.5}$ representative background concentrations for its voluntary NAAQS Analyses should have been located "downwind of quarry row" so as to provide "site-specific" concentrations.[75] Importantly, no such monitor exists because it would be in Comal County (see the map of "quarry row" in Appendix 3 of Friends' Brief), and, as Reeh admit,[76] there is no such monitor in Comal County.[77] As discussed on pages 56-58

73 Vulcan's Brief at 25.
74 *Id*. at 27-28.
75 Reeh's Brief at 22, 28.
76 *Id*. at 12.
77 *See also* Vulcan's Brief at 57.

of Vulcan's Brief, Vulcan followed, or exceeded, TCEQ's modeling guidance[78] in choosing the monitors, which resulted PM_{10} and $PM_{2.5}$ background concentrations that are conservatively higher than the concentrations that would be measured if there were "site-specific" monitors "downwind of quarry row."[79]

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

Friends erroneously assert the administrative law judge ("***ALJ***") abused her discretion by ruling the trade secret information is a privileged trade secret[80] because Vulcan allegedly abandoned its trade secret claim for such information by including in its Permit application the laboratory report showing 0.2% crystalline silica.[81] In fact, Vulcan has never claimed that report is, or contains, trade secret information. Moreover, Vulcan did not provide any of the trade secret information to TCEQ or anyone else.[82]

Appellees erroneously assert the ALJ should have required disclosure of the trade secret information under a protective order because such information was allegedly necessary for a fair adjudication of their claims regarding the 0.2%

78 2-B2 A.R. 234.
79 Vulcan's Brief at 57.
80 *See, e.g.,* 1 A.R. 132.
81 Friends' Brief at 47-48.
82 Vulcan's Brief at 60.

crystalline silica's accuracy, i.e., was allegedly necessary to prevent injustice.[83] As discussed on pages 62-64 of Vulcan's Brief, the ALJ correctly determined Appellees failed to meet their burden to demonstrate that the trade secret information being available to them in discovery[84] and cross-examination was necessary for a fair adjudication of their claims and to prevent injustice.

Friends' assertion they met that burden fails because it is based on misstatements about Dr. Eversull's testimony.

- They first misstate that her testimony is "based on a threshold assumption" that Vulcan's sample that was analyzed to show 0.2% crystalline silica was a representative sample.[85] In truth, she testified Vulcan's sample *was* a representative sample of Vulcan's aggregate material because it was developed "in accordance with the widely accepted processes for obtaining a representative sample."[86] She did *not* base her testimony on an assumption Vulcan's sample was a representative sample.

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83 Friends' Brief at 46; Reeh's Brief at 29-30.

84 In discovery, Friends did *not* request the cores themselves, but only documents regarding the cores. (Reporter's Record at 118:19-24, addressing 56:3-20)

85 Friends' Brief at 49, 52-53.

86 Vulcan's Brief at 32.

- Friends' second misstatement is that Dr. Eversull testified that her testimony is based in part on her review of the trade secret information.[87] In truth, she testified that while she reviewed some of that information, i.e., boring logs and cores photographs, in her work as Vulcan's in-house geologist during its 2016 subsurface investigation *that occurred three years prior*, she did <u>not</u> review, much less rely on, any of that information for any of her testimony.[88]

Reeh have no basis to claim that <u>before</u> the ALJ made her ruling, they met their burden to demonstrate the trade secret information was necessary for a fair adjudication of their claim regarding the 0.2% crystalline silica's accuracy.[89] Critically, they propounded no discovery on Vulcan, including regarding the trade secret information, and filed no Motion to Compel regarding such information.[90] Further, they failed to present to the ALJ any of their reasons for believing such information was necessary for a fair adjudication of their claim; they only presented such reasons to the district court and this Court. Thus, the ALJ had no opportunity to consider their reasons. Notwithstanding that, their reasons are overwhelmed by

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[87] Friends' Brief at 48-54.

[88] Vulcan's Brief at 66.

[89] Reeh's Brief at 29-30.

[90] While Reeh claim "Appellees propounded discovery" (Reeh's Brief at 2), they are referring to Friends since that claim is based on Friends' Motion to Compel, and Reeh propounded no discovery.

Vulcan's support on pages 59-67 of its Brief, in the discussion below, and in TCEQ's Initial and Reply Briefs.

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

1. Appellees were not denied due process by any ALJ rulings or TCEQ's decision

Friends incorrectly assert they were denied due process because the ALJs' rulings prevented them from cross examining Dr. Eversull further regarding the trade secret information.[91] According to the cases cited in their Brief, due process requires they had the opportunity to cross examine Dr. Eversull. But, even with the ALJs' rulings, they did have the opportunity to cross-examine her; in fact, for a long time[92] and very broadly, including asking her about trade secret information, e.g., the boring logs and cores photographs, and about the trade secret documents on

[91] Friends' Brief at 55-57.

[92] About 25% of the testimony on the only full day of the hearing involved cross-examination of Dr. Eversull (covering 55 pages of the about 230 pages of the transcript for that day (3 A.R. 271)).

Vulcan's privilege log.[93] The only restriction the ALJs placed on Friends' cross-examination was they were not allowed to ask her questions the answers to which would effectively disclose trade secret information. Such restriction was irrelevant based on her testimony she did not review, much less rely on, any of the trade secret information for her testimony, or in Vulcan's development of its representative sample.[94] None of the cases Friends cite indicate such a reasonable restriction denied them due process.

Further, contrary to their claim, the ALJs' rulings did not allow Vulcan to offer in an "unchallenged" manner Dr. Eversull's expert testimony regarding the crystalline silica percentage of Vulcan's aggregate materials, i.e., that Vulcan's sample was a representative sample.[95] Friends had, and took, multiple opportunities to challenge her testimony, including through their own witnesses' testimony and their cross-examination of her.[96] However, such challenges failed because the TCEQ Commissioners properly considered them and determined they were overcome by other evidence in the Administrative Record, including the testimony of Vulcan's

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[93] 3 A.R. 271 at 166-176.
[94] Vulcan's Brief at 66.
[95] Friends' Brief at 56-57.
[96] Vulcan's Brief at 70.

geology experts, Dr. Eversull and Mr. Mathews, and of the TCEQ's experts, Joel Stanford.[97]

Reeh incorrectly allege they were denied due process by the ALJs' rulings regarding the trade secret information and TCEQ's decision to not require that Vulcan input quarry and road emissions into its modeling[98] based on their assertion the ALJs and TCEQ allegedly did not observe the "rudiments of fair play", which they claim resulted in the contested case hearing not being fair.[99] First, contrary to Reeh's claim,[100] their Motion for Rehearing was not adequate to apprise TCEQ of their "due process" claim so TCEQ had the opportunity to consider that claim. Thus, this Court should reject Reeh's due process allegation.[101] Nevertheless, Reeh's supporting assertions fail to support that allegation.

Reeh's assertion they were denied due process by the ALJs' rulings regarding the trade secret information is unsupportable because "rudiments of fair play" were observed such that the contested case hearing was fair. If Reeh did not receive due process, it is only because they chose to not participate in the parts of the

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97 *Id*.

98 Issue No. 4, the issue to which this allegation relates, is limited to whether quarry and road emissions should be input into Vulcan's PM_{10} and $PM_{2.5}$ NAAQS Analyses modeling, rather than into its crystalline silica modeling.

99 Reeh's Brief at 32-35.

100 *Id*. at 30-32.

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

contested case hearing with which they now complain. Specifically, they propounded no discovery on Vulcan, including regarding the trade secret information, and they did not take advantage of their opportunity to cross-examine Dr. Eversull, as Friends' counsel did (or participate at all in the hearing on the merits). Therefore, Reeh were not denied due process by the ALJs' rulings; they just chose to not avail themselves of the due process that was available to them.

With respect to Reeh's assertion they were denied due process by TCEQ's decision to not require that Vulcan input quarry and road emissions into its modeling, Vulcan discusses on pages 74-75 of its Brief how Reeh were provided due process through a fair hearing in which the "rudiments of fair play" were observed regarding whether TCEQ should have made that decision.

Reeh erroneously assert that Vulcan and TCEQ each states in its Initial Brief that certain information was allegedly "exempted" from consideration based on TCEQ "policies or guidance."[102] But, none of what Reeh allege to be "exemptions" is really an exemption. An exemption would result in the permit applicant and/or TCEQ not being required to conduct *any* analysis. However, each alleged "exemption" is a situation where TCEQ and/or EPA guidance provide that a permit applicant was not required to conduct *further* analysis to demonstrate its

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[102] Reeh's Brief at 33-34.

proposed facility's emissions will not negatively impact public health or welfare, because that demonstration was already made by the conservative analysis the permit applicant or TCEQ had already conducted. For example, under TCEQ and EPA guidance, a permit applicant is not required to conduct full PM_{10} and $PM_{2.5}$ NAAQS Analyses if their GLC_{max}s from the applicant's preliminary impact determinations are below their de minimis levels, which demonstrates their emissions from the proposed facility will not cause or contribute to an exceedance of the applicable NAAQS.[103] Also, under the TCEQ's MERA guidance, a permit applicant for a rock crusher is not required to conduct modeling to further demonstrate its crystalline silica emissions will not negatively impact public health or welfare.[104]

In addition to neither of those alleged "exemptions" being exemptions, Vulcan voluntarily did not rely solely on either of them to demonstrate the Plant's emissions will not negatively impact public health or welfare; instead, in each case, Vulcan voluntarily conducted *further* analysis to support that demonstration. More specifically, Vulcan voluntarily conducted full PM_{10} and $PM_{2.5}$ NAAQS Analyses, rather than depend solely on their preliminary impact determinations to

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103 Section I.D above; Vulcan's Brief at 41-42.

104 Section I.A above; Vulcan's Brief at 29-30.

support that demonstration,[105] and crystalline silica modeling, rather than depend solely on TCEQ's "MERA guidance" to support that demonstration.[106] Therefore, TCEQ's determinations the Plant's PM_{10} and $PM_{2.5}$ emissions and crystalline silica emissions will not negatively impact public health or welfare was not based solely on those alleged "exemptions."

Reeh fail to support their assertion that TCEQ not requiring that Vulcan input quarry and road emissions into its PM_{10} and $PM_{2.5}$ full NAAQS Analyses modeling or its crystalline silica modeling was due to an "exemption" based on TCEQ "policies or guidance." First, TCEQ not requiring inputting of quarry and road emissions is not an "exemption" based on TCEQ "policies or guidance" since it is based on TCEQ's long-standing interpretation of language in the TCAA and its rules.[107] Further, the only reason Reeh can make their assertion is because Vulcan voluntarily conducted full PM_{10} and $PM_{2.5}$ NAAQS Analyses modeling and crystalline silica modeling, since that is the modeling into which Reeh assert Vulcan should have input quarry and road emissions. Finally, although Vulcan did not input quarry and road emissions into either of such modeling, such emissions

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105 Vulcan's Brief at 40-58.

106 *Id*. at 28-36.

107 *Id*. at 46-55.

nevertheless were appropriately considered in Vulcan's PM_{10} and $PM_{2.5}$ NAAQS Analyses and crystalline silica modeling.[108]

Based on the foregoing, what Reeh incorrectly allege to be "exemptions" fail to support their assertion they were denied due process.

2. Assuming *arguendo* Appellees were denied due process by the ALJs' rulings or TCEQ's decision, their substantial rights were not prejudiced

Not only have Appellees failed to meet their burden to demonstrate they were denied due process by any ALJ ruling regarding the trade secret information and/or by TCEQ's decision to not require that Vulcan input quarry and road emissions into its modeling, they have failed to demonstrate that even if they had met each burden, such denial of due process prejudiced their substantial rights.

Friends assert their substantial rights were prejudiced by TCEQ's decision to issue the Permit because it was allegedly based on Dr. Eversull's testimony that Vulcan's sample was a representative sample, which they claim was based on the trade secret information.[109] Assuming *arguendo* they had demonstrated the ALJs' rulings denied them due process, for them to demonstrate their substantial rights

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108 *Id*. at 50-55.

109 Friends' Brief at 55, 57.

were prejudiced, they had to demonstrate that having the trade secret information and/or being allowed to cross-examine Dr. Eversull regarding it would have affected TCEQ's decision to issue the Permit because such information is "controlling on a material issue," rather than being "merely cumulative," regarding that decision.[110] Friends did not make that demonstration.[111]

The only material issue regarding the Plant's crystalline silica emissions TCEQ had to decide before it could grant the Permit is whether such emissions will negatively affect human health and welfare (Issue O in the contested case hearing).[112] Therefore, the issue of whether Vulcan's sample was a representative sample, or, thus, the accuracy of the 0.2% crystalline silica Vulcan used to calculate the Plant's crystalline silica emissions, was not a material issue. The trade secret information is not controlling and is merely cumulative on the only material issue because, even without Dr. Eversull's testimony that Vulcan's sample was representative sample, there is more than substantial evidence supporting TCEQ's determination that the Plant's crystalline silica emissions will not negatively affect public health or welfare.[113] That evidence includes the statement in TCEQ's "MERA guidance" based on its determination that the

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110 Vulcan's Brief at 68-71.
111 *Id*.
112 *Id*. at 14, 21, 29; 1 A.R. 173 at 2-3.
113 *Id*. at 29-31.

emissions, including of crystalline silica, from rock crushers, such as the Plant, are not expected to negatively affect human health or welfare.[114] That evidence also includes uncontroverted expert testimony that (i) even if Vulcan's sample was not a representative sample and its actual crystalline silica percentage was more than 0.2%, the Plant's crystalline emissions would not negatively impact human health or welfare even if that percentage was 27%, i.e., 135 times higher than 0.2%, and (ii) the crystalline silica percentage will be nowhere near 27%[115] (indeed, Reeh's sampling and analysis showed crystalline silica percentage of a little less than 0.9%[116]).

Friends incorrectly assert that in spite of that uncontroverted expert testimony about 27% crystalline silica, the ALJs' rulings prejudiced their substantial rights because the crystalline silica emissions from Vulcan's proposed quarry and roads allegedly were inadequately considered because they were not input into Vulcan's modeling upon which that expert testimony is based.[117] That assertion fails because TCEQ's determination that such quarry and road emissions

114 *Id*. at 29.
115 *Id*. at 36.
116 *Id*. at 35.
117 Friends' Brief at 57-58.

were adequately considered without Vulcan inputting them into its modeling is supported by more than substantial evidence and is not arbitrary or capricious.[118]

Reeh erroneously assert the trade secret information is "controlling on a material issue" and not "merely cumulative" because the issue of whether the Plant's crystalline silica emissions are "accurate and representative" is a material issue since TCEQ allegedly could not determine such emissions will not negatively affect human health or welfare unless such emissions are "accurate and representative."[119] In other words, Reeh are asserting the issue of whether Vulcan's sample is a representative sample such that the 0.2% crystalline silica is "accurate and representative" is also a material issue, and that the trade secret information is "controlling" and not "merely cumulative" on that issue. In truth, that issue is not a material issue because there is more than substantial evidence the Plant's crystalline silica emissions will not negatively affect human health or welfare even if the 0.2% crystalline silica of Vulcan's aggregate materials was not exactly "accurate and representative." As just discussed, that evidence includes the TCEQ's "MERA Guidance," and the uncontroverted expert testimony the Plant's

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118 Section I.E above; Vulcan's Brief at 46-47 and 52-55.

119 Reeh's Brief at 17.

crystalline silica emissions would not negatively affect public health or welfare even if the 0.2% crystalline silica was 27%, which will not be the case.

Nevertheless, assuming *arguendo* that issue was a material issue, the trade secret information would not be "controlling," and instead would be "merely cumulative," on that issue.[120] Vulcan's support that 0.2% is accurate for its aggregate materials, and, thus, Vulcan's sample was a representative sample, includes the expert testimony of Mr. Mathews and Mr. Stanford.[121] Since Appellees do not claim the testimony of either of them was based on the trade secret information, such information would not be "controlling" on that issue. Mr. Mathews' and Mr. Stanford's testimony was based, in part, on different types of publically available information, such as the Bureau of Economic Geology ("BEG") and U.S. Geological Survey reports to which Friends refer.[122] Further, Mr. Mathews' testimony was also based on his expert opinion that none of the alleged crystalline silica percentages of Appellees' grab samples of aggregate materials – the three that Appellees' witness Dr. Collins obtained from off-site

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120 Vulcan's Brief at 72-73.

121 Vulcan's Brief at 32-35, 72-73.

122 *Id.* at 34, 72-73. Friends claim on page 59 of their Brief that the fact Vulcan's 0.2% crystalline silica is consistent with the crystalline silica percentage in the BEG report "says nothing about whether there is a connection between the data Dr. Eversull relied on" and her expert testimony that Vulcan's sample is a representative sample. That claim is covered by Issue No. 3, which Vulcan addresses in Section I.G above.

quarries, or the three that Reeh had collected from an adjacent property – supports a different conclusion on that issue.[123]

Friends challenge some of that testimony support based on their assertion that it did not "inform the basis of" Dr. Eversull's testimony that Vulcan's sample was a representative sample such that Vulcan's aggregate materials contain 0.2% crystalline silica.[124] That challenge is not covered by Issue No. 4; instead, it is covered by Issue No. 3, which Vulcan addresses in Section I.G above.

I. TCEQ is entitled to deference

Reeh wrongly assert TCEQ is not entitled to deference regarding its interpretations that supported it (i) affirming the ALJs' rulings regarding the trade secret information as confidential under the trade secret privilege, and (ii) not requiring that Vulcan input quarry and road emissions into its modeling.[125] Their supporting allegations fail to support their assertion.

Reeh incorrectly allege the contested case hearing was unfair and unreasonable because TCEQ did not consider the allegedly "critical" trade secret

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123 *See Id*. at 35-36.

124 Friends' Brief at 58. Contrary to Friends' assertion, Vulcan did not raise "TCEQ's MERA guidance" as support that 0.2% is accurate; but instead for its position the trade secret information is not "controlling" and instead is "merely cumulative" on the only material issue, i.e., whether the Plant's crystalline silica emissions will negatively affect public health or welfare.

125 Reeh's Brief at 36.

information or require that Vulcan input quarry and road emissions into its modeling.[126] Vulcan has addressed each aspect of their allegation: (i) the hearing was fair and reasonable, even though Reeh chose to not propound discovery or participate in the hearing on the merits,[127] (ii) the trade secret information is not "critical" to TCEQ's determination regarding the Plant's crystalline silica emissions,[128] and (iii) TCEQ appropriately considered quarry and road emissions although Vulcan did not input them into its modeling.[129]

Reeh also erroneously allege the TCAA and TCEQ's rules "unambiguously" provide that TCEQ should have required that Vulcan input quarry and road emissions into its modeling.[130] In fact, the language in the TCAA and TCEQ rules support TCEQ's long-standing interpretation that quarry and road emissions should not be input into modeling for an application.[131] But, even if this Court believes the TCAA and TCEQ's rules do not "unambiguously" support TCEQ's interpretation, this Court should defer to TCEQ's interpretation because it is reasonable and not plainly erroneous based on the language in the TCAA and TCEQ's rules and there

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126 *Id*.
127 Section I.G above; Vulcan's Brief at 70-73.
128 Section I.G above; Vulcan's Brief at 59-60.
129 Section I.E above; Vulcan's Brief at 50-55.
130 Reeh's Brief at 37.
131 Vulcan's Brief at 47-50, 52-53.

is no evidence TCEQ has ever had a different interpretation,[132] and a different interpretation would significantly impact TCEQ's air permitting program.[133]

Reeh incorrectly allege nothing in the TCAA or TCEQ's rules "prohibits" TCEQ from requiring that Vulcan input quarry and road emissions into its modeling.[134] The lack of a prohibition in the TCAA or TCEQ's rules against TCEQ requiring that Vulcan input such emissions does not mean TCEQ was mandated to require that Vulcan do so. A contrary determination would remove the required certainty regarding the TCEQ's air permitting program because it would mean TCEQ might not issue a permit for an application that demonstrates compliance with all applicable TCAA and TCEQ rule requirements and/or a permit issued for an application that demonstrates compliance with those requirements might nevertheless not be able to withstand appeal in court.

II. PRAYER

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

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132 *Id*. at 25, 49.
133 *Id*. at 27-28.
134 Reeh's Brief at 37.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify the body of this Reply Brief of Appellant Vulcan Construction Materials, LLC, excluding the contents listed in Texas Rule of Appellate Procedure 9.4(i)(1), contains 7,495 words, as counted by Microsoft Word.

Keith A. Courtney

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Reply Brief of Appellant Vulcan Construction Materials, LLC was served on each of the following counsel of record by electronic filing and electronic mail on October 29, 2021.

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