CASE NO. 03-21-00204-CV

IN THE THIRD COURT OF APPEALS
AUSTIN, TEXAS

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

v.

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

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

REEH APPELLEES' MOTION FOR EN BANC RECONSIDERATION

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GLOSSARY OF TERMS

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

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INTRODUCTION

This appeal concerns whether Vulcan should receive an air quality permit from TCEQ for a proposed rock crushing facility to be located in Comal County, Texas. TCEQ determined that the permit should be issued. On appeal, the Travis County District Court reversed and remanded the decision to TCEQ on various grounds, including lack of substantial evidence, violations of due process, and abuse of discretion. The Third Court of Appeals panel reversed the Travis County district court's decision and rendered that the permit should be issued.

While much of the Court's opinion focuses on whether the TCEQ's decision was supported by substantial evidence, the issues of this appeal are broader, encompassing significant questions of due process and abuse of discretion. Reeh Appellees now respectfully request *en banc* reconsideration of the Court's opinion in this case given the extraordinary issues and high stakes involved in this proceeding concerning the Texas air permitting scheme and health and welfare of Texans statewide.[1]

ISSUE PRESENTED

The Court Should Reconsider its Opinion Because TCEQ's Order is in Violation of Constitutional or Statutory Provisions and is Arbitrary, Capricious or Characterized by an Abuse of Discretion.

[1] Reeh Appellees also join in the arguments made by Friends Appellees' Motion and incorporate those arguments herein by reference. Reeh Appellees further reurge and restate all arguments, issues, and points from its Appellees' Brief on the Merits filed in this appeal, which is incorporated by reference herein for all purposes.

ARGUMENT

The Court Should Reconsider its Opinion Because TCEQ's Order is in Violation of Constitutional or Statutory Provisions and is Arbitrary, Capricious or Characterized by an Abuse of Discretion.

Appellees respectfully request that this Court reconsider its decision through *en banc* reconsideration under Tex. R. App. P. 49.7. For the reasons set forth herein, Appellees believe further consideration is merited and appropriate to ensure consistent, clear and uniform decisions in this Court and to avoid a denial of due process to Appellees in this case. *See* Tex. R. App. P. 41.2(b). Under the APA, a court is required to reverse or remand a case for further proceedings if substantial rights of the party appealing the agency's action have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

> (A) in violation of a constitutional or statutory provision;
> (B) in excess of the agency's statutory authority;
> (C) made through unlawful procedure;
> (D) affected by other error of law;
> (E) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or
> (F) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Tex. Gov't Code Ann. § 2001.174(2). Each of these grounds is a distinct basis for reversing the decision of an administrative agency. *Arch W. Helton v. Railroad Comm'n of Tex. et al*., 126 S.W.3d 111, 115 (Tex. App.—Austin 2003, pet. denied). In other words, even if an agency action is supported by substantial evidence, it must

nonetheless be overturned if it is found to be, for example, arbitrary and capricious. *Tex. Health Facilities Comm'n et al. v. Charter Medical-Dallas, Inc*., 665 S.W.2d 446, 454 (Tex. 1984).

An agency's order may be arbitrary and capricious if a denial of due process has prejudiced the litigant's rights. *Tex. Dep't of Ins. v. State Farm Lloyds*, 260 S.W.3d 233, 245 (Tex.App.—Austin 2008). The proceedings of an agency "must meet the requirements of due process of law and the rudiments of fair play" in order to be upheld. *Grace v. Structural Pest Control Bd.*, 620 S.W.2d 157, 160 (Tex. App.—Waco 1981, writ ref'd n.r.e.). These standards require that the hearing must not be arbitrary or inherently unfair. *Id*.

While TCEQ is granted broad discretion in administering the Texas Clean Air Act, this discretion is not absolute. The agency's review must be thorough, transparent, and fair. The level of deference to be given to TCEQ concerning the Act is similarly not without question or limitation. Texas law generally contemplates deference to an administrative agency's interpretation of a statute or regulation where there is a vagueness, ambiguity, or room for a policy determination. *TGS-NOPEC Geophysical Co. v. Combs,* 340 S.W.3d 432, 438 (Tex. 2011). This deference, however, is not conclusive or absolute. *Id*. The Texas Supreme Court has explained: "[w]e defer only to the extent that the agency's interpretation is

reasonable, and no deference is due where an agency's interpretation fails to follow the clear, unambiguous language of its own regulations." *Id*.

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

Agency deference is not meant to excuse an otherwise invalid process. TCEQ's failure and refusal to consider the underlying data in the silica emissions or to require modeling of surrounding sources and quarry and road emissions is not reasonable. It excluded a significant amount of critical data that directly impacts the way the Vulcan Facility will be authorized to operate. These failures undermine the Texas CAA's clear and unambiguous purpose and intent to safeguard Texas air from pollution and ensure the protection of public health, general welfare, and physical property. *See* Tex. Health & Safety Code § 382.002(a).

The Court of Appeals' opinion in this case focuses at length on whether the TCEQ's Order and the underlying actions by the SOAH ALJs were supported by substantial evidence. In every instance, the Court found that the substantial evidence standard was met. A finding of substantial evidence, however, does not end the inquiry. In this case, Appellees have lodged considerable arguments concerning the violation of constitutional protections of due process, and that the decisions rendered in this proceeding were arbitrary, capricious, and an abuse of discretion. Reeh Appellees urge the Court to revisit these arguments, reconsider their decision on these issues, and find that the TCEQ's Order granting the proposed permit must be overturned and the District Court's decision be affirmed.

TCEQ's Order Violated Constitutional Protections of Due Process

TCEQ's Order violated the constitutional protections of due process of the Appellees in multiple respects. First, Appellees were denied due process by the ALJ's denial of their Motion to Compel the production of the entirety of the core sample data concerning the crystalline silica content on the Vulcan site. Second, the Appellees were denied due process by the exclusion of significant, relevant data and emissions sources in the modeling and calculations considered by TCEQ in this permit, including the exclusion of quarry and road emissions. Third, the wholesale and unquestioned deference to TCEQ and exercise of unfettered and unlimited discretion by TCEQ in the air permitting scheme is a denial of due process. Finally,

the substantial evidence standard as applied in this case is itself a denial of due process. These due process violations are real and substantial and merit further consideration by this Court. Further, the violations of due process also render the TCEQ's Order arbitrary, capricious, and an abuse of discretion. The substantial rights of Appellees were prejudiced by these actions.

TCEQ's Air Permitting Process Must Meet the Requirements of Due Process

The proceedings of an agency "must meet the requirements of due process of law and the rudiments of fair play" in order to be upheld. *Grace*, 620 S.W.2d at 160. These standards require that the hearing must not be arbitrary or inherently unfair. *Id*. The actions of TCEQ, Vulcan, and SOAH in this case do not meet the requirements of due process of law, do not meet the rudiments of fair play, and were inherently unfair. Specificity, transparency, and a thorough agency process are essential elements to every permit, all of which were lacking in this case. Because of the deficiencies in Vulcan's modeling and silica core samples, there is not sufficient evidence that the Vulcan Facility or its permit meet all state and federal legal and technical requirements or that it would be protective of human health and safety, the environment, and physical property. Appellees have been prejudiced by these actions, and the District Court's decision overturning the Commission's Order should be affirmed.

Denial of Due Process and Abuse of Discretion Through the ALJ's Decision to Deny Appellees Access to Vulcan's 2016 Subsurface Investigation and Core Samples and Denial of Cross-Examination

The Court of Appeals opinion reviewed the issue of whether the ALJ abused her discretion by denying Appellees access to Vulcan's 2016 Subsurface Investigation and Core Samples. After affirming the ALJ's finding that Vulcan's data constituted a trade secret, the Court turned to the issue of whether the Appellees showed a "reasonable necessity" for the requested materials. In upholding the ALJ's decision on this issue, the Court of Appeals reasoned that: 1) the MERA guidance itself provides substantial evidence that "there is no indication that emissions from the Plant will contravene the intent of the CAA, including the protection of the public's health and physical property;" 2) the possibility that the requested trade-secret documents might show crystalline silica emissions from the plant to be higher than the ESL for that contaminant is speculative and remote; and 3) Appellees were able to cast doubt on Vulcan's calculations even without the requested trade-secret information. *Tex. Comm'n on Envtl. Quality et al v. Friends of Dry Comal Creek et al*, --- S.W.3d ---, 2022 WL 4540955 *19 (Tex. App.—Austin Sept. 29, 2022, no pet. h.). The Court concluded that Appellees failed to establish the requested information was "necessary or essential to the fair adjudication of the case" or how the lack of information will impair the presentation of the case to the point that an unjust result is a real threat. *Id.* Further, the Court concluded that for these reasons

Appellees' due process rights were not violated and the rudiments of fair play were observed in the SOAH proceeding.

Appellees maintain that the ALJ's findings were an abuse of discretion and resulted in a denial of due process in this case. Although Appellees attempted to present the best challenge possible without the requested subsurface data and information, the fact that Appellees supplied some evidence to support their case is not justification for denying Appellees access to the requested information. That is precisely the point. The separate samples taken by Appellees demonstrated that samples taken on behalf of Appellees near the property line of the Vulcan property showed a crystalline silica content five times higher that that supplied by Vulcan. (2-B3 A.R. 250, Friends Ex. 203, 1:7-10). This alone casts substantial doubt on the Vulcan calculations and should rise beyond mere speculation and demonstrate a necessity for the information. Simply put, Vulcan, TCEQ, and the ALJ denied Appellees access to this data and the Court's opinion simply brushes it aside with agency deference as the broom.

Moreover, almost all discovery requests can be classified as "speculative" until the parties learn the full extent of the issues, facts, and arguments of the case. Appellees have not wavered on the significance of the core samples data and information to determining the veracity and accuracy of the data and calculations used by Vulcan in this proceeding—data that no one, not TCEQ and not Appellees,

have ever seen. The fact that MERA Guidance finds there is no indication that emissions from the Plant will contravene the intent of the CAA, including the protection of the public's health and physical property is similarly not a basis for upholding the ALJ's decision. Merely because a guidance document estimates that a particular constituent is likely to be below the requisite standard does not render consideration of actual site-specific evidence superfluous because such site-specific evidence could reveal that the estimates are incorrect. *See Sierra Club v. E.P.A.*, 705 F.3d 458, 469 (D.C. Cir. 2013) (reasoning that "the estimation that an area is below the SMC does not render monitoring superfluous because monitoring could reveal that the estimate was incorrect").

On balance, the risk to Vulcan was slight compared to the due process violations against Appellees. If the core samples data and information were in fact trade secrets, this information could have been maintained confidential and protected through the use of appropriate protective orders, document sealing, and related restrictions. These options were not considered or allowed.

Finally, the ALJ's denial of cross examination regarding the core samples further constituted a violation of due process. This is especially true given the fact that Vulcan's expert witness Lori Eversull testified that she was fully apprised of the content of the data. (3 A.R. 271, 159:3-20). It is impossible to know or understand whether or how Dr. Eversull presented her knowledge concerning that data from

informing her opinions in the case. In fact, without seeing the data, it is impossible to adequately cross examine Dr. Eversull about her knowledge and opinions. Appellees were not only denied access to the critical underlying core samples and data, but Vulcan was allowed to present an expert witness who was fully apprised of the data and information to provide testimony while Appellees had no opportunity to cross examine her about that information or data and whether or how it informed her testimony and opinions in this case. The proceedings resulted in a "trust us we saw the data and you cannot." That is the pinnacle of a denial of due process and an abuse of discretion.

Denial of Due Process Through the Exclusion of Quarry and Road Emissions from Consideration

The Court of Appeals' opinion found that potential emissions from quarry and road emissions were rendered irrelevant in this proceeding and their exclusion from Vulcan's air dispersion modeling did not constitute a denial of due process. The Court found that only "facilities" were required to be permitted, and the CAA and TCEQ rules expressly exclude roads and quarries from the definition of "facility." Accordingly, there was no basis for including emissions from quarries and roads in the Vulcan analysis. The Court further concluded that any potential effects were considered through the TCEQ stationary monitors, which indirectly included road and quarry emissions. Appellees maintain that quarry and road emissions were not

adequately considered and that their exclusion from this process is a violation of due process.

It is true that the CAA and TCEQ Rules exclude roads and quarries from the definition of "facility," and only "facilities" are permitted under the CAA and TCEQ. This fact, however, does not prohibit the consideration of emissions from roads and quarries in the analysis of a "facility." A plain reading of the statute and the TCEQ rules reveals solely that roads and quarries are not required to be permitted or regulated by TCEQ or the CAA as a "facility." This is not a prohibition against considering emissions from these sources in determining whether a "facility" will meet the requisite standards.

It is a fact that roads and quarries are sources of air contaminants and emissions. It is also a fact that there are at least fourteen aggregate operations and quarries located within a 20-kilometer radius around the proposed Vulcan facility. (2-B3 A.R. 242, Friends Ex. 102). According to TCEQ and Vulcan, quarry and road emissions were neither modeled nor considered for *any* of those other facilities when permitted by TCEQ. They were instead ignored. That is a significant amount of emissions that are not included, considered, factored, addressed, or even acknowledged by modeling or NAAQS analyses. As Appellees' expert Howard Gebhart testified: "At Vulcan, the road and quarry emissions are among the largest and most significant emission sources associated with the project. However, in the

air quality modeling analysis, Vulcan and TCEQ pretend that such emissions do not exist. One cannot ignore the most significant air emissions associated with a project, yet otherwise claim that the permit review analysis has been full and complete." (2-B3 A.R. 240, Friends Ex. 100, 6:24-7:6).

Modeling the emissions from quarries and roads is not the same as regulating them. But these emissions should inform the standards that are applicable to the regulated entities, such as Vulcan, that will be operating in the vicinity of these other emissions. The failure to include quarry and road emissions prevents TCEQ from making the requisite statutory findings for issuance of the permit. There is no way to determine whether a violation of NAAQS has occurred or would occur because the necessary data was not included. TCEQ's failure to require accurate, complete, and comprehensive modeling of all sources in the area of the Vulcan Facility reveals a wholly deficient technical review. TCEQ permitted fourteen similar facilities in the vicinity and cannot continue to turn a blind eye to the cumulative impacts. When one peels back the layers of the exemptions, exceptions, and exclusions in this permitting case, all that is left is a hollow process that does not account for actual emissions, impacts, or hazards to human health or physical property. This is a denial of due process.

Denial of Due Process Through Unfettered and Unlimited Exercise of Discretion by TCEQ and Unjustified Deference to TCEQ in Air Permitting Program

TCEQ was accorded significant deference throughout the course of this proceeding, including in the Court of Appeals' opinion. Perhaps the Court's reasoning on agency deference is best described by this statement made in reference to the exclusion of quarry and road emissions from Vulcan's modeling: "[s]o long as the TCEQ gives reasonable consideration to such matters, as it did here, courts must leave the question of what constitutes "adequate" consideration to the agency's informed discretion." *Friends of Dry Comal Creek*, 2022 WL 4540955, *14-15. It is unclear exactly what constitutes a "reasonable consideration" by the agency. In this case, the Court relied on TCEQ's testimony regarding representative background concentrations as indirectly including and considering road and quarry emissions. *Id*. at *14. Notwithstanding the significant challenges Appellees made to this conclusion that the representative background concentrations obtained from the TCEQ stationary monitors were not truly representative of the Vulcan site, it seems tenuous at best that such indirect—if at all—consideration of quarry and road emissions could rise to the level of "reasonable consideration."

This quandary over what constitutes "reasonable consideration" by an agency or "adequate consideration" highlights the larger problems that underscore the gravity of the due process violations in this proceeding: the unfettered and unlimited discretion exercised by TCEQ and the unjustified deference to TCEQ in the air permitting program. An agency's informed discretion should not be absolute. And it

is difficult to comprehend how such discretion can be "informed" when little to no actual, site-specific data is considered in the permitting process.

Deference to the agency is appropriate where the underlying process is fair, transparent, and thorough. Agency deference cannot excuse an otherwise invalid process. TCEQ excluded from consideration a significant amount of critical data that directly impacts the way the Vulcan Facility will be authorized to operate and the impacts to public health in the community. It is a process in name only. Moreover, this system of unfettered discretion and deference to TCEQ, where agency guidance is given the power of a rule, exemptions from site-specific data and analysis are unlimited, and contested hearings are marred by the exclusion of relevant, site-specific data and evidence, obliterates any meaningful check and balance on the agency's authority and forecloses a truly fair proceeding. Due process demands more, and Appellees' substantial rights were prejudiced by the unfettered agency discretion and deference in this case.

The Substantial Evidence Standard as Applied in this Case is a Denial of Due Process by Creating an Inconsistent Standard of Proof and Irrefutable Presumption

The Court applied the substantial evidence standard to this case in determining whether to uphold the TCEQ's Order. Reeh Appellees maintain that TCEQ's Order is not supported by substantial evidence in this case. Further, Reeh Appellees believe that the manner in which the substantial evidence standard is applied in this case

creates a conflict with other standards and burdens of proof, undermining the meaning of any contested administrative proceeding, and violating important protections of due process for Appellees.

The substantial evidence standard is a long-running standard used in judicial review of administrative decisions. *See* Tex. Gov't Code 2001.174. What exactly this standard means, however, is anything but clear. In this case, the Court of Appeals applied the following standards for substantial evidence review:

> Under the substantial evidence rule we review the evidence as a whole to determine if it is such that reasonable minds could have reached the same conclusion as the agency in the disputed action. We may not substitute our judgment for that of the agency and may only consider the record on which the agency based its decision. The issue before us is not whether the agency reached the correct conclusion but whether there is some basis in the record for its action. Although substantial evidence is more than a mere scintilla, the evidence in the record may actually preponderate against the agency's decision and nonetheless amount to substantial evidence. We presume that the agency's findings, inferences, conclusions, and decisions are supported by substantial evidence, and the burden to prove otherwise is on the appellant. Finally, the agency's decision should be reversed only if the party challenging the decision demonstrates that the absence of substantial evidence has prejudiced the party's substantial rights.

Citizens Against Landfill Location v. Texas Comm'n on Envtl. Quality, 169 S.W.3d 258, 264 (Tex. App.—Austin 2005, pet. denied)(citations omitted); *Friends of Dry Comal Creek*, 2022 WL 4540955 at *5. As set forth above, the substantial evidence standard creates a virtually irrefutable presumption in favor of the agency's decision. At the administrative contested case level, the standard and burden of proof is by a

preponderance of the evidence. 30 Tex. Admin. Code § 80.17(a). And yet, when the case goes on appeal, the Court's treatment of the substantial evidence standard demonstrates that far less than a preponderance of the evidence is required.

Despite the use of the word "substantial" in the judicial review standard, the Court's reasoning suggests that all that is required is more than a mere scintilla of evidence, which is arguably far less than a preponderance of the evidence. *Friends of Dry Comal Creek*, 2022 WL 4540955 at *5. The Court's reasoning on substantial evidence review states that the preponderance of the evidence can be against the agency's decision and yet substantial evidence can still be found. *Id*. This is an incredibly low bar for an agency to meet.

The issue becomes murkier when considering how the Court looks at the prejudice to "substantial rights" standard, which is what is required to overcome a presumption of substantial evidence. The Court's treatment of "substantial" in this context seems much stricter—rising to the level of something greater than a preponderance of the evidence but not clearly defined beyond that point. It is the same word and yet two very different and seemingly unequal treatments, which unfairly benefits administrative agencies to the prejudice and detriment of those parties challenging agency decisions—namely, the public.

The use and application of the substantial evidence standard, therefore, is itself a violation of Appellees' due process rights. As applied in this case, it is unclear

how, if at all, Appellees could have ever overcome that presumption. When considered within the context of the due process violations in this case—the denial of access to relevant and important evidence of Vulcan's core samples, the allowance of Vulcan to present expert witnesses who had reviewed the excluded evidence without granting Appellees any right to cross examine those witnesses on that information, and the exclusion of significant emissions sources from surrounding quarries and roads from the modeling and calculations used to determine impacts from the Vulcan facility—the prejudice to Appellees is substantial, harmful, and irreparable. Accordingly, TCEQ's Order should be overturned and the District Court's Order should be affirmed.

CONCLUSION AND PRAYER

Vulcan is seeking authorization to operate a rock crushing facility in Comal County. This project will change the face of this rapidly growing portion of Comal County for decades to come. The facility will be permitted to operate twenty-four hours a day, seven days per week, in close proximity to homes, businesses, and schools. At the time of hearing, 3,456 children and youth were in attendance at these schools, which is expected to increase up to 4,850 children and youth. Although Vulcan will be operating a large quarry with this rock crushing facility, no emissions from the proposed quarry or any other currently existing and operating quarry were directly considered in this proceeding. Most of the data relied upon was based on the

experience of TCEQ and its MERA guidance. What little site-specific data existed was excluded from consideration in the proceeding by Vulcan. Appellees were not only denied access to 38 out of 41 core samples taken by Vulcan but they were denied any ability to question Vulcan's witnesses regarding this data. TCEQ has created a permitting program that is little more than a ministerial stamp based on pre-existing generalized data and calculations and exemptions. The hollowness of the process is affirmed by the overly deferential substantial evidence presumption applied in this case. Multiple violations of due process occurred in this proceeding, rendering the TCEQ Order arbitrary, capricious, and an abuse of discretion. Reeh Appellees respectfully pray that this Court grant this Motion and reconsider the issues presented by Appellees in this appeal *en banc* and determine that the District Court's Final Judgment reversing and remanding TCEQ's Final Order should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TRAP 9.4(i)

This is to certify that the foregoing Brief of Appellees consists of 4,390 words, in accordance with Texas Rule of Appellate Procedure 9.4(i)(2).

/s/ James D. Bradbury

James D. Bradbury

CERTIFICATE OF SERVICE

On this 31st day of October, 2022, a true and correct copy of the forgoing electronically filed document was served on the following parties through the electronic filing manager:

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