NO. 03-21-00204-CV

IN THE THIRD DISTRICT 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

APPELLEES FRIENDS OF DRY COMAL CREEK AND STOP 3009 VULCAN QUARRY MOTION FOR REHEARING EN BANC

Eric Allmon
State Bar No. 24031819
eallmon@txenvirolaw.com
David Frederick
State Bar No. 07412300
dof@txenvirolaw.com
Marisa Perales
State Bar No. 24002750
marisa@txenvirolaw.com

Perales, Allmon & Ice, P.C.
1206 San Antonio St.
Austin, Texas 78701
(512) 469-6000
(512) 482-9346 (facsimile)

COUNSEL FOR APPELLEES
FRIENDS OF DRY COMAL CREEK
and STOP 3009 VULCAN QUARRY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules & Statutes

I. Introduction

> *If judicial review means* anything*, it is that judicial restraint does not allow* everything.[1]

This case presents a fundamental question of whether this Court is willing to conduct meaningful review of agency decisions. A lack of substantial evidence is merely one statutory basis for reversal of an agency decision, as under the Texas Administrative Procedures Act an agency decision *must* be reversed if it is characterized by *any* of the following errors:

- in violation of constitutional or statutory provision;
- in excess of the agency's statutory authority;
- made through unlawful procedure;
- affected by other error of law;
- arbitrary;
- capricious; or,
- characterized by an abuse of discretion or unwarranted exercise of discretion.[2]

[1] *Paul v. Texas Department of Licensing and Regulation,* 469 S.W.3d 69, 95 (Tex. 2015) (Justice Willette in concurrence) (emphasis in original).

[2] Tex. Gov't Code § 2001.174(2).

In particular, the Texas Supreme Court, as well as this court, has been clear that the arbitrary action of an administrative agency cannot stand.[3] None of the APA's above list of errors is excused by the presence of substantial evidence. Yet, the panel opinion states that, if the record contains substantial evidence to support an agency decision, then *any* other type of error must "shock[] the conscience" to justify reversal.[4] This standard is inconsistent with other decisions by this Court, and nothing in the governing statute creates such a high bar.

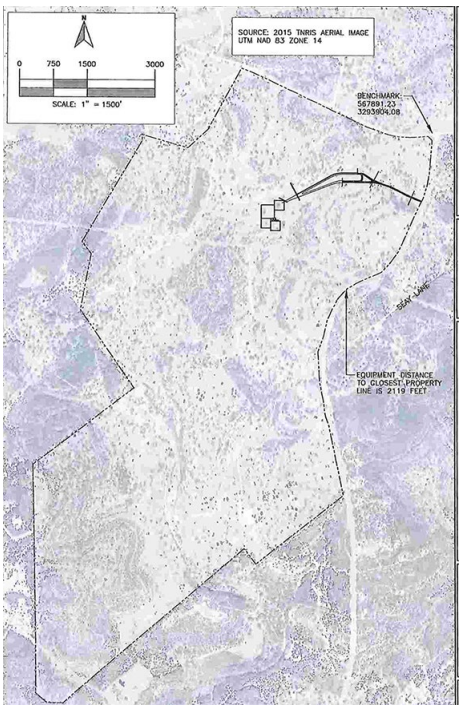
Consistency in the conduct of judicial review is important, and this Court bears a particular role in ensuring that judicial review serves as an effective check on the exercise of executive power. In order to maintain uniformity of the Court's decisions, and in order to deter arbitrary agency decisions, Appellees respectfully request that the Court grant en banc review of the panel decision in this matter.

[3] *Lewis v. Metropolitan Savings and Loan,* 550 S.W.2d 11, 16 (Tex. 1977), *State v. Mid-South Pavers,* 246 S.W.3d 711, 726 (Tex. App. – Austin, 2007, pet. denied).

[4] Slip Op. 10.

II. Background

The underlying dispute is as to the approval by the Texas Commission on Environmental Quality ("TCEQ") of an air emissions permit for a rock crusher at a proposed "Vulcan" quarry about 7.5 miles east of Bulverde and 11.5 miles west of New Braunfels. The rock crusher itself occupies only a small portion of the site.[5] This is an area with quite a number of rock crushers and quarries.[6] Quarries and roads associated with quarries and rock crushers, by statutory definition,[7] are not subject to air emissions permitting.



Map of Rock Crusher within Quarry Site (Boxes and roads represent the rock crusher roads modeled by Vulcan)

Particulate matter. Rock crushers emit particulate matter ("PM"), i.e., dust, as do the roadways associated with rock crushers and quarries. The particulates of interest in this case are derived from the rock that is quarried and crushed, which, here, is limestone. Two categories of particulate matter are regulated by TCEQ:

[5] The graphic to the right is from Vulcan's revised Air Quality Analysis, Sec. 1 of the A.R., Item 26, p. APP-000286 (**Exhibit 1** to this Motion).

[6] Sec. 2-B3 of the A.R., Item 242. (17 quarries and rock crushers within 25 kilometers of the proposed Vulcan site).

[7] Tex. Health and Safety Code § 382.003(6) (defining "facility;" which is the subset of sources for which TCEQ issues permits).

PM_{10} (10 microns and less in diameter, referred to as "coarse particulate") and $PM_{2.5}$ (2.5 microns and less in diameter, referred to as "fine particulate"). There is no direct federal regulation of the impacts of particulates from the Vulcan crusher, because that crusher will not emit 250 or more tons/year of particulates. However, there is a "state"[8] or "minor" NSR[9] review of particulate and other "criteria" pollutant emissions from new source facilities to determine if they will cause or contribute to a condition of air pollution.

The TCEQ minor NSR review process is set out in a guideline document, *Air Quality Modeling Guidelines* (APDG 6232),[10] and is mostly described correctly in the panel's opinion. The guidelines, however, direct that, for the preliminary minor NSR impact determination, the applicant should "[m]odel all new and/or modified sources. Compare the predicted high concentration at or beyond the property line [to the NAAQS[11] *de minimis* level[12]]." (emphasis added). The guidelines, for the full minor NSR NAAQS analysis, note, "[o]ff-property sources will need to be evaluated." (emphasis added). The guidelines direct the applicant map an "area of

[8] Sec. 1 of the A.R., Item 26 (the revised Air Quality Analysis), pp. APP-000281-282.

[9] "New Source Review."

[10] Sec. 2-B2 of the A.R., Item 234, internal pp. 16-18.

[11] "National Ambient Air Quality Standard."

[12] *De minimis* levels are those below which it is assumed emissions of the contaminant from a facility will be so low as not to contribute to air quality problems.

impact" and, within that area, "[m]odel allowable emission rates for all sources that emit the criteria pollutant." (emphasis added). The guidance definition of "source" is the regulatory definition[13] and does not exclude roads and quarries. Ms. Melton's testimony, quoted by the panel opinion at Slip Op. 26, substituted "facility" for the word "source" used in the guidance.

In a nutshell, Vulcan's minor NAAQS analyses, with one exception, did not explicitly consider sources that were not facilities, and its lone consideration of roadway source emissions was limited to only some roadways at only the Vulcan site and, then, only to long-term off-site concentrations. For its preliminary minor NSR NAAQS impact determination, Vulcan modeled the off-property long-term concentrations attributable to some of the on-property roadway emissions, but it did not do the same for short-term off-property concentrations. It did not model long-term or short-term off-property concentrations attributable to fine particulate quarry emissions. When fine particulate emissions from on-property rock crusher access roadways were considered, the maximum off-site long-term concentration attributable to the crusher/roadway combination was 13 times greater than it was when only crusher emissions were considered.[14] Numerous additional roads will ultimately provide access from excavation areas to the rock crusher and among the

[13] 30 Tex. Admin. Code § 116.10(15).

[14] Sec. 1 of the A.R., Item 26 (the revised Air Quality Analysis), pp. APP-000278.

stockpiles near the crusher. For its full minor NSR NAAQS analyses, Vulcan included the short-term fine particulate emissions (only) from only some of the on-site roadways, none from the quarry and none from roadways or the quarry at a quarry operated by Martin-Marietta and located approximately 6 miles from the proposed plant.

For full minor NSR NAAQS analyses, one needs to know the background concentrations at the proposed permit site of the air contaminants being modeled. TCEQ allowed Vulcan to represent background particulate concentrations at the proposed site with data from two monitoring stations in an adjoining county. The panel's opinion correctly identifies the rationales for allowing these substitutions. But, the rationales presented by Vulcan[15] do not address whether an entire county is a meaningful unit of measure for population density, whether or how particulate emissions are correlated with population density, the fact the total fine particulate tons/year at the surrogate monitoring sites are tons emitted by "facilities" only, and the fact the background concentration, however divined, of fine particulates at the Vulcan site would, logically, exclude PM attributable to the unbuilt Vulcan quarry and roadways.

Crystalline silica. Some percentage of limestone is crystalline silica – roughly speaking, quartz. Crystalline silica is not a pollutant for which federal

[15] Sec. 1 of the A.R., Item 26 (the revised Air Quality Analysis), pp. APP-000259-261.

criteria have been set, but it is a carcinogen. TCEQ regulates crystalline silica emissions, and it has set *de minimis* levels for crystalline silica off-site concentrations.[16] As with minor-NSR NAAQS analyses, these *de minimis* levels have consequences for a permit applicant. Projected emissions leading to off-site concentrations greater than those levels trigger more thorough health effects analyses.

Statutory law and TCEQ regulation, bars TCEQ from permitting a facility that will contribute to an adverse impact on human health and the environment; that is, TCEQ must make an ultimate finding in the negative on this standard.[17] TCEQ has developed a guidance document, *Modeling and Effects Review Applicability: How to Determine the Scope of Modeling and Effects Review for Air Permits*,[18] that sets out the agency's process for determining how much air dispersion modeling is required of contaminants, such as crystalline silica, for which there are no numerical state or federal standards in order to support the "no adverse health effect" finding.[19]

---

[16] For PM, these are called "significant impact levels" "(SILs"). For crystalline silica these are the "effects screening level" ("ESL"); there are concentration levels for both short- and long-term exposure.

[17] Tex. Health and Safety Code § 382.0518(b)(2); 30 Tex. Admin. Code § 116.111(a)(2)(A).

[18] Sec. 2-B2 of the A.R., Item 223.

[19] Sec. 2-B2 of the A.R., Item 223, internal p. 1: "Applications for projects subject to this process are those with new and modified sources of emissions [of] contaminants for which there are no state or federal ambient air quality standards." And, Sec. 2-B2 of the A.R., Item 223, internal p. 2: "Figure 1, Modeling and Effects Review Flowchart, is used to determine the scope

This guidance document is known as the "MERA." The MERA is an annotated 11-step flow chart with a number of sub-steps. Although the MERA says health effects reviews are not required for PM emissions from rock crushers, it also notes that modeling may be needed to demonstrate compliance with other rules, for example, the particulate federal standards.[20]

The panel opinion does not fully address Protestant/Appellees' argument that the TCEQ's decision was *arbitrary and capricious*, because of TCEQ's violation of state statute and rules barring TCEQ from permitting a facility that will *contribute* to an adverse impact on human health and the environment. TCEQ's interpretation of the applicable statute and rule as limited to the direct consideration of only nearby facilities, to the exclusion of equally-nearby non-facility sources of air pollution, is a matter of regulatory interpretation. This discrimination between equally proximate sources of air pollution is an arbitrary and capricious regulatory interpretation.

The panel opinion rejects the district court's conclusion that "TCEQ's determination that the plant's crystalline silica emissions will not negatively affect human health or welfare is not supported by substantial evidence." The evidence to which the panel points is the MERA guidance. Slip Op. 12-17. The panel opinion

---

of modeling and effects review: … only for the noncriteria or nonregulated constituents where a federal ambient air standard or TCEQ standard does not exist."

[20] Sec. 2-B2 of the A.R., Item 223, internal p. 6.

ultimately holds that the MERA, itself, is substantial evidence that the plant's crystalline silica emissions will not negatively affect health and welfare. Earlier, the panel opinion characterizes the MERA as announcing the manner in which the TCEQ expects, but is not required, to exercise its discretion in future proceedings. Slip Op. 16. The concept that a guidance document may, itself, be evidence of a "fact" recounted within it and, yet, in general, the agency that nominally authored the guidance document has discretion to disregard it – well, that is going to further muddle the already-difficult law of (a) the interface of guidance documents and regulations and (b) what "substantial" evidence means.

The panel opinion also finds independent-of-MERA substantial evidence that Vulcan's plant's crystalline silica emissions will not negatively affect human health or welfare. That evidence is the PM2.5 full minor-NSR PM modeling Vulcan did, adjusted for crystalline silica using the contested assumption that 0.2% by weight of the limestone crushed is crystalline silica and, as already noted, disregarding all quarry PM emissions, all Martin-Marietta roadway PM emissions and some of the Vulcan roadway PM emissions. One really cannot have "substantial" evidence of a fact, if so much relevant evidence is omitted from the finding of the fact. The failure to consider relevant evidence is arbitrary.

Other criticisms of Panel Opinion. The panel opinion occasionally mis-reads the role of the MERA, vis-à-vis minor-NSR NAAQS analyses. The panel

says, for example, "Thus, the MERA guidance, which obviated the need for Vulcan to conduct a full health-effects analysis or minor-source NAAQS analysis regarding the expected emissions of crystalline silica from the proposed plant …" Slip Op. 17. But, the MERA by its terms does not address NAAQS analyses (i.e., it exists to guide analyses of the impacts of contaminants for which there are no NAAQS), and there is are no NAAQS for crystalline silica.

The panel opinion indicates that, because the preliminary modeling of the off-site impacts of crystalline silica concentrations attributable to Vulcan's rock crusher were below the TCEQ's *de minimis* level, shortcomings in Vucan's air-dispersion modeling could not have prejudiced the Protestant's substantial rights. Slip Op. 25. Even disregarding the omission of crystalline silica emissions from the quarry and all the short-term and some of the long-term crystalline emissions from the site roadways, the panel's opinion is incorrect as to PM. PM emissions are not subject to MERA review but, rather, to minor-NSR NAAQS modeling requirements.

The panel opinion, later, says, "because the modeling of Vulcan's preliminary-impact analysis showed that crystalline silica levels were below the applicable SIL, it was not necessary for Vulcan to conduct a full minor-source NAAQS analysis …" Slip Op. 27-28. Again, the duty to conduct minor-NSR modeling for off-site PM concentrations is independent of the question of the d*e minimis* level for crystalline silica. While it is true that the Commission is charged

to issue a permit, if emissions from a facility will not contravene the intent of the Texas Clean Air Act, it is also true that TCEQ regulation, enforceable under federal law,[21] commits that "The [NAAQS] as promulgated pursuant to section 109 of the Federal Clean Air Act, as amended, will be enforced throughout all parts of Texas." 30 Tex. Admin. Code § 101.21.

III. Standard for En Banc Review

En banc review of a matter is appropriate where necessary to secure or maintain uniformity of the court's decisions or when extraordinary circumstances require en banc consideration. Tex. R App. P. 41.2(c). This is such a case.

IV. Consistent with Texas Supreme Court, the Austin Court of Appeals precedent applies a two-inquiry analysis in conducting judicial review of agency decisions, with limited or no deference on questions of law.

The Austin Court of Appeals is relatively frequently presented with judicial appeals of administrative agency decisions governed by Texas Government Code § 2001.174. When considering these appeals, the Court has consistently looked to the analytical framework established by the Texas Supreme Court in *Texas Health Facilities Commission v. Charter Med-Dallas, Inc.*,[22] whereby the "[s]ubstantial-evidence analysis entails two component inquiries: (1) whether the agency made

[21] 40 C.F.R. § 52.2270(c).

[22] *Texas Health Facilities Com'n v. Charter Medical-Dallas, Inc.*, 665 S.W.2d 446 (Tex. 1984).

findings of underlying facts that logically support the ultimate facts and legal conclusions establishing the legal authority for the agency's decision or action and, in turn, (2) whether the findings of underlying fact are reasonably supported by evidence."[23]

Under this Court's precedent, these inquiries involve different levels of deference.

A determination of whether the findings of underlying fact are reasonably supported by evidence is "highly deferential" and the court will find that underlying findings of fact are reasonably supported by the evidence, even if the evidence preponderates against the finding.[24] But, this Court has observed that, "*[i]n contrast*, the first inquiry, concerning the extent to which the underlying facts found by the agency logically support its ultimate decision or action, may entail embedded questions of law *that we review de novo*."[25] As Justice Smith writing for this Court has emphasized, "[a]lthough we are required to defer to an agency's findings of fact

[23] *Dyer v. Texas Comm'n on Env'tl Quality,* 639 S.W.3de 721, 730-731 (Tex. App. – Austin, 2019, *aff'd* 646 S.W.3d 498)("*Dyer*")(quoting *AEP Tex. Commercial & Indus. Retail, Ltd. P'ship v. Public Utility Comm'n,* 436 S.W.3d 890, 905 (Tex. App. – Austin, no pet.)("*AEP*").

[24] *AEP* at 905.

[25] *Id.* (emphasis added), *City of El Paso v. Public Utility Com'n of Texas,* 344 S.W.3d 609, 619 (Tex. App. – Austin, 2011, no pet.), *Buddy Gregg Motor Homes v. Motor Vehicle Bd. Of Texas Dept. of Transp.,* 156 S.W.3d 91, 99 (Tex. App. – Austin, 2004, pet. denied).

when reviewing an agency order, if an issue on appeal involves a question of law, we review that issue *de novo."*[26]

The review of an agency's interpretation of its own regulations or a statute that it is charged with implementing is one area where the Austin Court of Appeals has held that judicial deference has meaningful limits. In *Employees Retirement System v. Lowy,* Chief Justice Byrne wrote that the court would normally defer to an agency's interpretation of its own rule or a statute within its area of expertise, but that such deference "is not conclusive or unlimited," and does *not* apply in several circumstances:

- The regulation or statute at issue is not vague, ambiguous, or leaving room for a policy determination;
- The agency's interpretation is unreasonable; or,
- The agency's interpretation is plainly erroneous.[27]

The consideration of whether an agency's interpretation is *unreasonable* is a far cry from asking whether the agency's interpretation *shocks the conscience.*

[26] *City of San Antonio v. Public Utility Comm'n of Texas,* 506 S.W.3d 630, 646, citing *Tex. Dep't of Pub. Safety v. Allocca,* 301 S.W.3d 364, 367 (Tex. App. – Austin 2009, pet. denied).

[27] *Employee Retirement System of Texas v. Lowy,* 635 S.W.3d 250, 253 (Tex. App. – Austin, 2021, no pet.).

V. The panel opinion requires that an agency decision "shock the conscience" in order to warrant reversal on any ground other than lack of substantial evidence.

This case presents questions of whether TCEQ acted consistent with its own rules in issuing Vulcan's requested permit. In particular, the Court is called upon to determine whether TCEQ acted arbitrarily in exempting rock crusher emissions from the health-protectiveness review required by 30 Tex. Admin. Code § 116.111(a)(2)(A). TCEQ's exemption was based on unreasonable application of extra-regulatory policies, and an unreasonable interpretation of the rule. The two policies that TCEQ allowed to override this rule are TCEQ modeling guidances that have never been adopted by rule. The other is the use of extra-regulatory, "effects screening levels" as a regulatory standard. In determining whether the emissions from Vulcan's facility would contribute to an unhealthy condition, TCEQ unreasonably interpreted one of its guidances to require the consideration of "facilities" located at or near the proposed rock crusher site but to bar consideration of equally (or closer) non-facility air pollution sources. Considering that silica and particulates are equally hazardous regardless of the categorization of the source, there was no reasonable basis on which to rely when creating this distinction.

This issue goes to the inquiry of whether the findings of underlying facts logically support the legal conclusions reached by the agency – a question that this Court has repeatedly said involves only limited judicial deference to the agency.

Yet, the panel opinion states that, for this type of inquiry, the circumstances warranting reversal are not merely "narrow" – the error involved must "be based on a violation of due process or some other unfair or unreasonable conduct that *shocks the conscience*." Slip Op. 10. The authority cited for this standard is a footnote in a prior 2009 memorandum opinion by this Court where nothing shocking was found,[28] and a 1989 opinion by the El Paso Court of Appeals.[29]

VI. En Banc review is necessary to maintain uniformity of the Court's decisions.

The standard of review applied by the panel decision is dramatically out of step with the standard of review applied in other decisions made by this Court, including recent decisions. Even where an agency decision is supported by substantial evidence, this court has recognized that a lack of substantial evidence is only one type of error identified in Texas Government Code § 2001.174,[30] and the

[28] *Santulli v. Tex. Bd. of Law Examiners*, No. 03-06-00392-CV, 2009 WL 961568, at *4 (Tex. App.—Austin Apr. 10, 2009, pet. denied) (attorney suspension with allegation of due process violation).

[29] *Texas State Bd. of Dental Exam'rs v. Silagi*, 766 S.W.2d 280, 285 (Tex. App.—El Paso 1989, writ denied). *Kawasaki Motors Corp. U.S.A., v. Tex. Motor Vehicle Comm'n*, 855 S.W.2d 792, 795 (Tex. App.—Austin 1993, no writ), noted the El Paso Court of Appeals had "suggested" the additional hurdle to a finding of arbitrary decision-making, but Kawaski did not endorse the suggestion. Similarly, this Court in an earlier (1990) case had opined, only, "If *Silagi* is the law …" *Lone Star Salt Water Disposal Co. v. R.R. Comm'n of Tex.*, 800 S.W.2d 924, 930 (Tex. App.—Austin 1990, no writ).

[30] *Texas Department of Insurance v. State Farm Lloyds,* 260 S.W.3d 233, 242 (Tex. App. – Austin, 2008 no pet.).

Court has developed an analytical framework to determine whether the agency decision is in error for reasons other than a lack of substantial evidence.

In contrast, the panel decision effectively limits the inquiry on judicial review to a question of whether the decision is supported by substantial evidence, requiring that any other type of error meet the highly subjective and virtually impossible bar of shocking the judge's conscience. If the panel decision is allowed to stand, then the decisions of this court will reflect significantly different approaches to the consideration of error in agency decisions other than the lack of substantial evidence.

VII. Application of the proper standard would warrant reversal of the TCEQ's decision, as was found by the trial court.

The panel opinion reversed the trial court's decision that the evidence of negative impact from crystalline silica emissions was insubstantial. The panel opinion relied, first, on the fact the TCEQ staff and Vulcan followed, as the panel saw it, the procedures of a non-regulatory guidance document, the MERA, and arrived at an end-point indicating no negative impact on the off-site public from crystalline silica exposure. The second basis for the panel's opinion was that the panel found, after all, substantial evidence of no negative impact to the off-site public from crystalline silica exposure.

There is no dispute that the off-site crystalline silica concentrations are a function of the crystalline silica concentration of the limestone that is quarried,

hauled and crushed. Air dispersion modeling calculates what the off-site PM concentrations and, therefore, the crystalline silica concentrations, will be.

Vulcan's preliminary minor-NSR modeling on which both Vulcan and the agency relied as an input to the MERA process is not described in any detail in the MERA. That modeling, instead, is described in another non-regulatory guidance document, *Air Quality Modeling Guidelines* (APDG 6232).[31] As earlier in this motion explained, that document, fairly read, indicates emissions from on-site sources, not only on-site facilities, should be modeled. Vulcan did not do this.

In any event, the non-regulatory MERA process turns from its outset on the product of calculations guided by another non-regulatory document. That product indicated, based on a contested estimate of the crystalline silica content of the limestone, that the off-site concentrations of crystalline silica would be below certain thresholds, the short- and long-term "effects screening levels" or "ESLs." These, too, are non-regulatory guidance as to what are, theoretically, very safe "low" concentrations of various air contaminants. Because the results of preliminary modeling executed (mis-executed, Appellees contend) consistently with a non-regulatory guidance document indicate off-site crystalline silica impacts will be below some non-regulatory, putatively safe concentration levels, the non-regulatory MERA authorizes terminating the health effects inquiry.

[31] Sec. 2-B2 of the A.R., Item 234, internal pp. 16-18.

The error of this reliance on the extra-regulatory MERA and ESLs is compounded by the unjustified interpretation of 30 Tex. Admin. Code § 116.11(a)(2)(A) as discriminating between close facilities versus equally-close non-facility sources of air pollution, such as a quarry. Altogether, these errors render the decision arbitrary and capricious, even if supported by substantial evidence.

Decision-making based on this stack of non-regulatory, presumably alterable in the TCEQ's discretion, set of inputs did not shock the consciences of the panel justices. But, it is, at least, decision-making characterized by clearly unwarranted exercise of discretion. The fact that one's conscience is not shocked by the clearly unwarranted exercise of discretion should not legitimize the resulting decision.

The panel's second ground for believing there is, independent of the MERA, substantial evidence of no negative impact to the off-site public from crystalline silica exposure is just as tenuous. The second ground accepts as credible evidence the output of the full minor-NSR air dispersion modeling conducted by Vulcan, because that modeling also followed the non-regulatory *Air Quality Modeling Guidelines* (APDG 6232). Again, Appellees' position is that the plain text of that document indicates that emissions from all on-site sources (i.e., the Vulcan crusher, the quarry and all the Vulcan roadways) and all off-site sources within 10

kilometers[32] (i.e., the Martin-Marietta quarry and roadways) should have been modeled but were not modeled. Additionally, full minor-NSR modeling requires one to input a background concentration at the facility site of the contaminant for which dispersion is being modeled. For this, Vulcan used and TCEQ accepted surrogate concentrations from an adjoining county. Those decisions were made in reliance on Appendix D of the *Air Quality Modeling Guidelines* (APDG 6232).[33] And, in the end, the "no negative off-site impact" turns on the assumption the non-regulatory ESLs are, in fact, markers of a safe level of contamination.

This decision-making suffers from the same or a greater degree of unwarranted exercise of discretion as did the decision-making that relied on the MERA. This decision-making depends the non-regulatory, nominally discretionary, modeling guidance that justified the inputs to the MERA process; it depends on the non-regulatory ESLs, and it depends on the non-regulatory appendix justifications for determining surrogate background levels of contamination. This decision-making apparently does not shock the conscience, but it is analogous to a house of cards and, as the trial court judge saw, should not stand.

[32] This 10 km radius for nearby sources is not one Appellees accept, but it is the radius TCEQ staff deemed acceptable.

[33] Sec. 2-B2 of the A.R., Item 234, internal pp. 44-49.

Finally, regarding the PM modeling, the second half of the panel's opinion does not address this very directly. The opinion critiques the trial court's Conclusion of Law 14 (defects in Vulcan's air dispersion modeling) by focusing on the modeling of off-site crystalline silica concentrations. Whereas the MERA applies to non-criteria pollutants, such as crystalline silica, it explicitly does not apply to criteria pollutants, such as PM. "Applications for projects subject to this [MERA] process are those with new and modified sources of emissions [of] contaminants for which there are no state or federal ambient air quality standards."[34] And, "Figure 1, Modeling and Effects Review Flowchart, is used to determine the scope of modeling and effects review: … only for the noncriteria or nonregulated constituents where a federal ambient air standard or TCEQ standard does not exist."[35]

The state law is that "the [NAAQS] as promulgated pursuant to section 109 of the Federal Clean Air Act, as amended, will be enforced throughout all parts of Texas." 30 Tex. Admin. Code § 101.21. Adequate air dispersion modeling is how that commitment is honored. The faults in Vulcan's PM monitoring were discussed in this motion's discussion of the faults in its crystalline silica health effects analysis that did not depend on the MERA. Basically, the PM modeling relies on, and mis-reads, Appellees contend, the non-regulatory *Air Quality Modeling Guidelines*

[34] Sec. 2-B2 of the A.R., Item 223, internal p. 1.

[35] Sec. 2-B2 of the A.R., Item 223, internal p. 2.

(APDG 6232) and on Appendix D of that document (the latter, the rationales for the surrogate background PM concentrations selected). The panel opinion concludes these sorts of guidelines are not "rules," because decision-makers have the discretion to disregard them. Decision-making that relies so heavily on practices that may be, without any stated guiding principles, abandoned is decision-making characterized by clearly unwarranted exercise of discretion.

(The mis-reading of which Appellees complain apparently arises, because Texas has elected to exclude mines, quarries and roadways from the requirement to secure an NSR permit. The implications, if any, of this election when modeling the off-site impacts of operations on sites that plainly do include these non-permitted sources is among the things that notice and comment rulemaking would very likely have surfaced.)

VIII. Conclusion & Prayer

For the foregoing reasons, Appellees urge the full Court to rehear this case. Appellees appreciate that this is a request for extraordinary relief. However, judicial review of administrative adjudications will become an apparition of reality, if a finding of substantial evidence – the original denotation of "substantial" having already pretty much faded away – leaves eligible for correction only those errors that shock conscience.

Respectfully submitted,

/s/ Eric Allmon
Eric Allmon
State Bar No. 24031819
eallmon@txenvirolaw.com

David Frederick
State Bar No. 07412300
dof@txenvirolaw.com
Marisa Perales
State Bar No. 24002750
marisa@txenvirolaw.com

PERALES, ALLMON & ICE, P.C.
1206 San Antonio Street
Austin, Texas 78701
Telephone: (512) 469-6000
Facsimile: (512) 482-9346

COUNSEL FOR APPELLEES
FRIENDS OF DRY COMAL
CREEK and STOP 3009 VULCAN
QUARRY

CERTIFICATE OF SERVICE

By my signature below, I certify that on October 31, 2022, a copy of the foregoing document was served upon the parties identified below via electronic service.

/s/ Eric Allmon
Eric Allmon

Texas Commission on Environmental Quality	Mark A. Steinbach Assistant Attorney General State Bar No. 24056653 mark.steinbach@oag.texas.gov and Erin K. Snody Assistant Attorney General State Bar No. 24093056 Erin.Snody@oag.texas.gov OFFICE OF THE ATTORNEY GENERAL
Vulcan Construction Materials, LLC	Keith A. Courtney State Bar No. 04892700 kcourtney@mcginnislaw.com and Derek L. Seal State Bar No. 00797404 dseal@mcginnislaw.com MCGINNIS LOCHRIDGE LLP
Jeffrey Reeh, Terry Olson, Mike Olson, and Comal Independent School District	James D. Bradbury Texas Bar No. 02814500 jim@bradburycounsel.com and Courtney Cox Smith Texas Bar No. 24045711 ccox@bradburycounsel.com JAMES D. BRADBURY, PLLC

EXHIBIT 1

WESTWARD
Environmental. Engineering. Natural Resources.
P.O. Box 2205 Boerne, Texas 78006
(830) 249-8284 Fax: (830) 249-0221
TBPE REG. NO.: F-4524
TBPG REG. NO.: 50112

PLOT PLAN - MODELING
PENDING PERMIT 147392L001
VULCAN CONSTRUCTION MATERIALS, LLC
BULVERDE, COMAL COUNTY, TEXAS

REV.	DESCRIPTION	BY	DATE

IMAGE:	2015 SMITHSON VALLEY SE
ISSUE DATE:	10/04//2017
DRAWN BY:	AK
CHECKED BY:	DSK
SCALE: 1" =	1500'
JOB NO.:	10003-458

SHEET NO.:
1
OF 3

APP-000286