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Via E-Filing

Bridget Bohac, Chief Clerk
Office of the Chief Clerk, MC-105
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

Re: Vulcan Construction Materials, LLC for Air Quality Standard Permit for Concrete Batch Plants Proposed Registration No. 149060

Ms. Bohac,

On behalf of the Boerne to Bergheim Coalition for Clean Environment ("BBCCE"), I submit these comments on the application of Vulcan Construction Materials, LLC ("Vulcan") for Air Quality Standard Permit for Concrete Batch Plant with Enhanced Controls Registration No. 150104.

Identity of the Commenters

The group submitting these comments is the Boerne to Bergheim Coalition for Clean Environment, a Texas non-profit corporation. BBCCE may be contacted through its counsel of record, Charles Irvine of Irvine & Conner PLLC, at the address and phone number below.

1. BBCCE is organized exclusively for charitable and educational purposes as defined in Section 501(c)(3) of the Internal Revenue Code, including, but not limited to, research, development and publication of proposals to ensure the public safety and welfare of residents and to protect the environment and rural character of the Hwy 46E corridor and the surrounding areas from Boerne, Texas to Bergheim, Texas. These activities include monitoring development proposals, including, but not limited to, those that could impact land use, public welfare and safety, air and water quality, wildlife, habitat preservation, natural resources, and the environment in and around

Highway 46E; advocating for the protection and preservation of property in and around Highway 46E; increasing public awareness and understanding of public welfare and environmental issues in and around Highway 46E through media and other educational programs; participating in administrative, common law, or statutory-based litigation designed to further these activities; and reviewing and commenting upon existing and planned practices which may or do impact these issues.

Vulcan has applied for a standard permit for a concrete batch plant with enhanced controls pursuant to the Texas Clean Air Act Section 382.05198. Under Section 382.05199(e), the public comment period for such standard permit applications begins on the first date notice is published and extends to the close of the public hearing. Under Section 382.05199(f), "any person" may submit oral or written statements concerning the application at the public hearing. BBCCE submits these timely comments on its own behalf and on behalf of its members, many of whom have a justiciable interest in the outcome of this proceeding.

Many supporters/members of BBCCE will be affected by the proposed facility. As just a few examples, the following individuals reside near to the proposed plant:

1. Plot 25155
   Pattie and Alex Beebe
   112 Pleasant Valley Drive
   Boerne, Texas 78006

2. Plot 25157
   Odie and Melinda Waters
   104 Pleasant Valley Drive
   Boerne, Texas 78006

3. Plot 25158
   Tim and Janette Young
   608 State Hwy 46E
   Boerne, Texas 78006

4. Plot 25168
   Fernando and Norma Ortiz
   103 Rusty Lane
   Boerne, Texas 78006

Other supporters and members of BBBCE reside very close by.

For example, approximately 2,000 feet to the southeast of the proposed plant is the Hill Country Montessori School. Its address is 50 Stone Wall Drive, Boerne, Texas

78006. This school has students aged 18 months to 3 years in its Toddler Program, and all age groups up to 8th grade. The school uses the outdoor environment every day as a core part of its Montessori philosophy and curriculum. The school also has a small farm with animals and vegetable gardens for each of its classrooms. The school is also an official Monarch Waystation, supporting the reproduction and migration of monarch butterflies. A clean environment is essential to the school and its attendees.

At the current time, only an open pasture separates the schools' open-air playground from the site of the proposed concrete batch plant. Thus, when the wind blows from the northwest, particulate matter and air contaminants will be carried directly toward the playground where children as young as 18 months may be outside. Children are often more susceptible to the health effects of air pollution because their immune systems and developing organs are still immature. Infants and children generally breathe more rapidly than adults, which increases their exposure to any pollutants in the air. Infants and children often breathe through their mouths, bypassing the filtering effect of the nose and allowing more pollutants to be inhaled. Children generally spend significantly more time outdoors than adults, especially during summer months when smog levels are highest. It may also take less exposure to a pollutant to trigger an asthma attack or other breathing ailment due to the sensitivity of a child's developing respiratory system.

Comments

1. The Applicant failed to satisfy its statutory notice requirements.

Vulcan applied to the TCEQ for an Air Quality Permit Standard Permit for a Concrete Batch Plant with Enhanced Controls. This standard permit is authorized by the Texas Clean Air Act. Applications for a standard permit for a CBP with enhanced controls must meet special statutory requirements, including special statutory requirements governing notice and hearing. *See* Tex. Health & Safety Code §§ 382.05198 & .05199. These notice and hearing provisions, which are provided in lieu of the standard notice and contested case hearing provisions, are critical to the TCEQ's jurisdiction to consider Vulcan's application.

The Legislature made clear that applications for a standard permit for concrete batch plants with enhanced controls must comply with specific substantive requirements and notice and hearing requirements. Tex. Health & Safety Code § 382.05199(a) ("A person may not begin construction of a permanent concrete batch plant that performs wet batching, dry batching, or central mixing under a standard permit issued under Section 382.05198 unless the commission authorizes the person to use the permit as provided by this section.") Because a standard permit issued pursuant to Section 382.05198 would not be subject to the normal procedures

authorizing a contested case hearing, the Legislature included specific notice and hearing requirements that grant the TCEQ jurisdiction to consider these special applications. *See id.* (stating that the notice and hearing requirements in Section 382.05199 "apply only to an applicant for authorization to use a standard permit issued under Section 382.05198.") An applicant who does not meet these requirements must comply with the separate public notice and hearing requirements of Section 382.058 or Section 382.056.

Specifically, an applicant to use a standard permit under Section 382.05198 "**must** publish notice under this section **not later than the earlier of**: (1) the 30th day after the date the applicant receives written notice from the executive director that the application is technically complete; or (2) the 75th day after the date the executive director receives the application." Tex. Health & Safety Code § 382.05199(b) (emphasis added); *see also* Air Quality Standard Permit for Concrete Batch Plants with Enhanced Controls, Condition (2)(B) (Aug. 16, 2004) (same requirement).

Here, TCEQ's technical review was complete on February 2, 2018. *See* Notice of Application and Public Hearing for Proposed Air Quality Registration Number 150104 (March 12, 2018). Thirty days after this date is Sunday, March 4, 2018. The application was received on January 18, 2018. Seventy-five days after this date is April 3, 2018. The earlier of these two days is March 4, 2018. The notice of the application and public meeting was not issued until March 12, 2018. Notice of the application was not published in a newspaper until March 28, 2018. Neither of these dates complies with the clear statutory requirement. **Therefore, Vulcan failed to publish the notice required by Section 382.05199 and Standard Permit Condition (2)(B) in a timely manner.**

It is a cardinal rule of statutory construction that courts give effect to the intent of the legislature. *See Fleming Foods of Tex., Inc. v. Rylander*, 6 S.W.3d 278, 284 (Tex. 1999). Courts construe a statute first by looking at the plain and common meaning of the statute's words. *See id.* When the meaning of statutory language is unambiguous, courts will generally adopt the interpretation supported by the plain meaning of the provision's words and terms. *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 865 (Tex. 1999). The statutory language here is plain and unambiguous: in order to qualify for this standard permit, an applicant "must" publish notice not later than the earlier of two specific dates. Tex. Health & Safety Code § 382.05199(b). Vulcan failed to comply with this mandatory statutory requirement.

Sections 382.05198 and 382.05199 were added by the Legislature through the passage of S.B. 1272 (78(R)) in 2003. The purpose of the bill was to exempt certain concrete batch plants from the contested case hearing process if they were constructed using more enhanced environmental standards. However, in lieu of

authorizing a contested case hearing, the applicant would be required to comply with specific provisions that require notice within a specific time period from the end of technical review and the holding of a public meeting within a specific time period from the publication of this notice.

The legislative history of the bill reinforces that an applicant must comply with these notice provisions. *See* House Research Organization Bill Analysis of S.B. 1272 (May 23, 2003); Senate Research Center Bill Analysis of S.B. 1272 (July 8, 2003). The complete standard permit issuance package likewise makes clear that this standard permit "requires concrete plants to comply with certain administrative requirements, including . . . public notice[.]" TCEQ, Complete Standard Permit Issuance Package at 2 (Aug. 2004); *see also id.* at 8 ("Section 382.05199 requires the commission and the applicant for a standard permit to follow certain procedures regarding public participation in the permit application process."). Given the absence of contested case hearings for these particular standard permit applications, it is especially important that these requirements be strictly construed according to their plain language.

Vulcan failed to comply with its statutory duty to provide public notice within the time period specified in Section 382.05199. Timely, sufficient notice is a jurisdictional requirement for the TCEQ to act on an application. The TCEQ should deny Vulcan's permit application for its failure to comply with statutory requirements.

2. Vulcan's unsatisfactory compliance history, which demonstrates a consistent disregard for the regulatory process and environmental laws, justifies a contested case hearing on this standard permit application and/or the denial of the application.

The TCEQ utilizes compliance history when making decisions regarding the issuance, suspensions, or revocation of permits, including standard permits. 30 Tex. Admin. Code § 60.1(a). The compliance history period includes the five years prior to the date the permit application is received. *Id.* § 60.1(b). Among other things, the compliance history includes any final enforcement orders, judgments, and consent decrees relating to compliance with applicable legal requirements under the TCEQ's jurisdiction; final enforcement orders, judgments, and consent decrees related to violations of the rules of the EPA; chronic excessive emissions events; dates of investigations; all written notices of violation not to exceed one year from the date of issuance of each notice of violation; and the date of letters notifying the executive director of an intended audit conducted and any violations disclosed and having received immunity under the Audit Act. *Id.* § 60.1(c).

When evaluating compliance history during the preparation of draft permits and deciding whether to issue, amend, modify, deny, suspend, or revoke a permit, the Commission especially considers "patterns of environmental compliance." *Id.* § 60.3(a)(1)(B). The Commission may require permit conditions or provisions to address an applicant's compliance history. *Id.* § 60.3(a)(2). The Commission must also deny an application for a permit when a person has an unacceptable compliance history based on violations constituting a recurring pattern of conduct that demonstrates a consistent disregard for the regulatory process. *Id.* § 60.3(a)(3)(E).

We are concerned about the accuracy of Vulcan's compliance history in TCEQ's records and about the results of our review of a subset of Vulcan's violations and self-audit practices. The below comments do not represent a comprehensive review of Vulcan's compliance history; instead, they focus on Vulcan's activities at the site closest to the proposed facility. Limiting these comments to a single site in Bexar County—Vulcan's 1604 operations site—there is a pattern of failing to follow TCEQ rules, of causing conditions that could harm surrounding individuals and the environment, and of abusing the self-audit process to avoid penalties and accurate disclosure of violations. Review of the investigations and audits related to the 1604 operations site does not instill confidence that Vulcan will comply with its permit terms at this site.

A careful, cumulative review of Vulcan's compliance history for all authorizations in Texas, and especially of its nine ready mix facilities, is needed to determine Vulcan's patterns of environmental compliance (or lack thereof).

a. Investigations at Vulcan's 1604 site.

Vulcan Construction Materials LLC has owned and operated the so-called 1604 Ready Mix Concrete Operation at 4303 N. Loop 1604 E., San Antonio, Texas 78247 for many years. Vulcan also has a quarry and asphalt operations at this site. Its history at this site includes multiple investigations and self-audits that resulted in dozens of violations.

Investigation #1122644: Between August 13, 2013 and October 1, 2013, six complaints were made to the TCEQ about dust conditions due to Vulcan's operations at the site. Attachment A. The complainant, who resided approximately 2,000 feet south of the facility site, alleged that dust from the site accumulated on their home's windows and on plants outside their home. The investigator noted that there was dust accumulation on the outside window panes, stationary plants, and electrical meter. *See* Attachment B (Investigation Report 1122644) at 2. At the site, the investigator noted that there was dust stirred by truck traffic on the Loop 1604 westbound access road and on the road at the entrance to the access road. The investigator asked to review a copy of the current permit, but Vulcan provided a

copy of the permit that was expired. *Id.* at 3. The investigator noted that some plant roads were not paved despite a condition in the permit that appeared to require plant roads to be paved with a cohesive hard surface. *Id.*

On a subsequent visit to the site on October 2, sediment was observed being tracked off-site by exiting vehicles. The site management still did not have a copy of the current permit for review. *Id.* at 5. A visit to the complainants this same day showed that dust was visible at two of three homes. The next day, the investigators returned after determining that allowing the asphalt trucks to bypass the wheel wash was considered a failure to property implement BMPs. During a review of their photographs, the investigators also noted the potential for a traffic hazard from the sediment being entrained in the air from truck traffic on the access road. *Id.* at 6.

The investigation resulted in a notice of violation for failing to fully implement established practices related to Vulcan's storm water pollution prevention plan because trucks leaving the asphalt plant were circumventing the wheel wash. The TCEQ also issued an area of concern for failing to maintain a copy of the permit on site. Despite trucks tracking sediment off-site and dust accumulation on the complainants' properties, no violations were issued related to dust entrainment or other nuisance conditions. Further, no NOV was issued for the fact that plant roads were not paved despite the permit condition requiring roads to be paved. (Vulcan later "discovered" this violation through an audit and TCEQ did not separately issue a violation for it, despite it having been discovered during this investigation.)

Investigation #1145699: Just a few weeks later, on October 19, 2013, a complaint was forwarded to the TCEQ concerning dust in Bexar County (Incident #189831). Nineteen (19) separate complaints about dust were filed over the next eleven days; many of these complaints were compiled into a set of incident numbers (*e.g.*, 189845, 189833, 189844, 190192, 189831). These complaints were made from the same neighborhood as before, located directly south of Vulcan's site. Many of the complainants alleged the dust originated from Vulcan's 1604 Ready Mix Concrete Operation and/or Alamo Cement's 1604 Plant. At least some of the complainants alleged that their family members had become very ill as a result of the nuisance conditions from Vulcan's site.

On October 21, 2013, the TCEQ investigator, Mr. Ortmann, visited two residences, finding visible dust accumulation. While in the neighborhood area, the investigator confirmed the presence of nuisance conditions based on the accumulation of dust. *See* Attachment C (Investigation Report 1145699) at 4. Samples he took this day were later confirmed to consist of approximately 80% cement dust. *See id.* at 5. These laboratory results were consistent with Portland cement.

On October 23, Mr. Ortmann traveled to Vulcan and spoke with the manager via phone. Mr. Ortmann asked if any upset or opacity events had occurred at the facility within the last seven days. An environmental specialist for Vulcan, Ms. Martinez, stated there had not been. (In a self-audit, described below, Vulcan disclosed that it had not been performing opacity testing for certain equipment and/or did not have the results of opacity testing over the preceding six years.) Vulcan and Alamo submitted written answers to questions from the TCEQ in order to understand which company was responsible for the discovered nuisance conditions.

Ultimately, Mr. Ortmann and the TCEQ staff were unable to confirm a responsible party because records from the two companies were inconclusive. Mr. Ortmann recommended future reconnaissance investigations to ensure compliance. We cannot find any evidence of future investigations to follow-up on these issues.[1]

It is beyond the scope of these comments to reinvestigate this matter here except to say that, as described more fully below, during this investigation, Vulcan self-disclosed more than thirty separate violations related to its 1604 site operations. The same day that Vulcan disclosed thirty-three violations at the site related to this audit, the TCEQ closed this investigation, but did not find a responsible party for the nuisance conditions.

Investigations #1151378 and #1191743: On June 21, 2013, San Antonio Water System (SAWS) conducted an industrial stormwater inspection at the 1604 site. During this inspection and review, it was revealed that concentrations of Oil and Grease (O&G) and Total Suspended Solids (TSS) were higher than the benchmark values in its permit. Subsequently, the TCEQ San Antonio Region was forwarded concerns regarding stormwater contamination and air quality for this site. Attachment D. This resulted in Investigation #1151378. On February 4 and 5, 2014, two TCEQ investigators conducted a TPDES Multi Sector General Permit Comprehensive Compliance Investigation of the site. *See* Attachment E (Investigation Report #1151378). The investigators identified twelve non-compliances. *See id*. Vulcan claimed that many of the alleged violations were covered by an ongoing audit that was initiated in November 2013 and for which a Disclosure of Violations was submitted on January 29, 2014 (*i.e.*, after SAWS notified TCEQ of these issues, but before the site visit).

In the Investigation Report and Exit Interview Form, Vulcan was cited for eight separate violations, including: failure to implement adequate erosion and

[1] The next year, a dust complaint investigation (#1198157) was undertaken in a neighborhood northeast of Vulcan's site in response to more complaints. Nuisance conditions were observed at the complainant's property, but once again, no responsible party was found.

sediment control BMPs adjacent to an outfall adjacent to Elm Waterhole Creek; failure to maintain BMPs at two other outfalls; failure to develop additional BMPs after noting TSS exceedances at three outfalls; failure to properly conduct the 90-day exceedance investigation following TSS exceedances at these three outfalls (with a notable exceedance of 13,600 mg/L at one outfall); O&G samples were 400% more than the previous year; failure to update the SWP3 BMP maintenance log following the annual site evaluation; failure to conduct routine inspections of some areas; failure to conduct semi-annual benchmark monitoring for 2012; and failure to sample for metals identified in the inventory of exposed materials list and on the SWP3 Monitoring Requirements. *See* Attachment E. Each of these issues was in addition to the ten issues identified in the self-audit described below. There were four additional areas of concern that were deemed covered by the self-audit.

Vulcan contested the alleged violations cited in this Notice of Violation. *See* Attachment F (Investigation Report 1191743). After review, the TCEQ withdrew two violations and de-elevated two more, but kept the other four as Category B violations. *See id*.

b. Audits at Vulcan's 1604 site.

The Texas Environmental, Health, and Safety Audit Privilege Act (the "Audit Act"), Tex. Health & Safety Code Chapter 1101, grants privilege from disclosure from certain documents gathered as part of an environmental self-audit.[2] The Act also provides immunities from penalties for violations that are voluntarily disclosed and corrected within a reasonable amount of time. Under the Act, unless the TCEQ affirmatively grants an extension, then the audit must be completed within a "reasonable time not to exceed six months after: (1) the date the audit is initiated; or (2) the acquisition closing date [if conducted under Section 1101.053]." Tex. Health & Safety Code § 1101.052. Further, a disclosure is voluntary, and thus immune from administrative or civil penalty for the violation disclosed, only if the person making the disclosure "initiates an appropriate effort to achieve compliance, pursues that effort with due diligence, and corrects the noncompliance within a reasonable time." *Id*. § 1101.152(a)(5).

First, Vulcan issued a Notice of Audit to the TCEQ for its 1604 Stone and Base Plant on October 26, 2012. *See* Attachment G (Notice of Audit). This notice stated that the planned audit would commence on November 6, 2012. Vulcan did not file a voluntary disclosure of violations until October 23, 2013, nearly a year later. Attachment H (Disclosure of Violations); *See* Tex. Health & Safety Code § 1101.052(a) (requiring audit to be completed within a reasonable time not to exceed

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[2] The Audit Act was previously Article 4477cc of Vernon's Texas Civil Statutes, but was recodified in 2017 without substantive changes in the Texas Health and Safety Code. *See* S.B. 1488 at § 20.002 (2017).

six months after the date the audit is initiated). As TCEQ confirmed via email, Vulcan did not apply for an extension in writing for this audit. *See* Attachment I (email from TCEQ confirming no extensions of the audit). Thus, Vulcan is not entitled to an evidentiary privilege or immunity from penalties because the audit period had expired. *See* TCEQ, A Guide to the Texas Environmental, Health, and Safety Audit Privilege Act at 6-7 (RG-173) (Nov. 2013).

Interestingly, Vulcan submitted its Disclosure of Violations for the 1604 site **on the exact same day** that TCEQ arrived on the site to conduct sampling and to otherwise discuss the nuisance Investigation #1145699 described above. It is not unreasonable to assume that Vulcan was attempting to invoke evidentiary privilege and immunity for violations that could have been – and should have been – discovered by the TCEQ or disclosed to the TCEQ during its open investigation.

This disclosure identified ten separate violations at the site, some of which dated as far back as 2005. *See* Attachment H. Among other violations, Vulcan identified that it had failed to perform opacity testing for certain equipment and/or records of opacity testing were incomplete; the hourly air permit production limitation was exceeded at times; and records of repairs and maintenance of emissions abatement systems were not maintained or available. *See id*. Each of these were recurring violations of its air permit. Vulcan's proposed solution to not meeting its hourly production limitations was to seek authorization to increase these limitations.

Exactly six months later, Vulcan provided an update of the progress of its corrective actions for these violations. Many of the violations were uncorrected. Vulcan provided further updates to the DOV on October 27, 2014; July 20, 2016; March 20, 2017; and July 7, 2017. One would not characterize a company that takes five years to complete an audit for a single site as having pursued its effort with due diligence and correcting the noncompliance within a reasonable time.

Second, Vulcan issued another Notice of Audit to the TCEQ for its 1604 Stone and Base Plant on November 19, 2013, less than a month after submitting its first audit. *See* Attachment J (Notice of Audit). This audit was conducted in the middle of TCEQ's open Investigation #1145699.

Vulcan filed a Disclosure of Violations on January 29, 2014. Attachment K (Disclosure of Violations) This DOV identified an additional twenty-three violations:

- Ten separate violations related to Vulcan's stormwater permit;

- An air violation for failing to obtain maintenance, startup, and shutdown (MSS) authorization for the 1604 Stone and Base Plant;

- Five air violations for its 1604 Astec Asphalt Plant at the site, including failing to submit start of operation and start of construction; failing to obtain MSS authorization; failing to mark all equipment with the TCEQ regulated entity number; failing to conduct initial determination of compliance stack sampling for PM after startup of the facilities; and failing to pave all roads as required to achieve maximum control of dust emissions and to maintain compliance with TCEQ regulations;

- Two air violations for its 1604 Asphalt Concrete Plant, including failing to submit start of construction and completion of construction notification, and failing to obtain MSS authorization; and

- Five air violations for its 1604 Ready Mix Concrete Operation, including failing to submit start of construction and completion of construction notification for three separate permits; documentation of testing related to 40 CFR Part 60 for a crusher; failing to obtain MSS authorization for three permits by rule; failing to maintain MSS records for two permits; and failing to construct and maintain permanent spray bars at all crushers, shaker screens, and material transfer points.

See id. Many of these air violations were years old. Despite some violations dating back to 1991, the TCEQ did not discover them, even during permit renewal review. The failure to pave all roads to control dust emissions was a seven-year ongoing violation that should have been discovered during permit renewal and certainly should have been discovered by Mr. Ortmann during his visit related to Investigation #1122644 – he actually saw that some roads were unpaved and read the provision requiring paved roads, but he still did not issue a violation. *See* Investigation Report #1122644. These actions do not instill confidence in TCEQ to identify violations, investigate complaints, and/or issue notices of violations.

Neither the privilege nor the immunity applies if an audit is conducted in bad faith or if the person fails to take timely, appropriate action to achieve compliance. Vulcan sought to immunize itself from penalties and from public disclosure of its violations at least twice with respect to its 1604 site during active TCEQ investigations. The first of these audits deserves neither privilege nor immunity because the audit was not timely under the statute. The second of these audits, submitted a mere month after the disclosure of violations for the first audit, was arguably undertaken in bad faith and thus should not receive immunity from all violations disclosed.

In TCEQ's guidance on the Audit Act, the question is asked, "Can a person be in "continuous audit" such that it can receive immunity from all violations discovered and disclosed?" *See* TCEQ, A Guide to the Texas Environmental, Health, and Safety Audit Privilege Act at 13 (RG-173) (Nov. 2013). The agency answers itself:

> That is unlikely. The Audit Act generally limits the audit period to six months. It is doubtful that a person could justify such consecutive audits without raising the suspicion that it is conducting its audits in bad faith.

Id. But that is exactly what Vulcan did at its 1604 site: during an active TCEQ investigation into real nuisance conditions, it submitted an untimely Disclosure of Violations in October 2013 and then immediately submitted another Notice of Audit in November 2013. These two audits discovered and disclosed three-three individual violations, many of which applied to multiple permits.

Vulcan should not be entitled to privilege or immunity for these violations, and the TCEQ should update Vulcan's compliance history to accurately reflect these many violations and others at sites around the state. Vulcan's activities at the 1604 site alone exhibit repeated ongoing violations, a failure to bring the facilities into compliance in a reasonable amount of time, and constitute a pattern of non-compliance and disregard of environmental laws. *See* Tex. Health & Safety Code § 1101.158 (stating that immunity does not apply to such patterns of disregard); 30 Tex. Admin. Code § 60.3(a)(1)(B) (stating that an agency shall consider compliance history and should especially consider "patterns of environmental compliance").

We make the following specific comments and requests related to Vulcan's compliance history:

- We request public disclosure of the compliance history report for Vulcan Construction Materials LLC that TCEQ relied on in its review of this standard permit application.

- We request that an up-to-date compliance history report for Vulcan Construction Materials LLC covering the five-year period prior to the submission of this application be made public to ensure its accuracy. This compliance history should identify every registration, permit, or other authorization and any notices of violation issued to and environmental audits undertaken by Vulcan.

- We request that all of the violations associated with the audit of the 1604 site beginning on November 6, 2012 become a part of Vulcan's compliance history, as they are not privileged or immune under the Audit Act and were not disclosed pursuant to a valid open audit.

- We request that all information regarding these violations become a part of the public record, as they are not privileged under the Audit Act and were not disclosed pursuant to a valid open audit.

- We ask for an explanation from TCEQ relating to the November 6, 2012 audit and why the disclosed violations were treated as privileged and immune from penalty when the audit did not comply with statutory deadlines.

- We ask for an explanation from TCEQ relating to the November 19, 2013 audit, and why the TCEQ allowed Vulcan to undertake a consecutive audit at the 1604 site during an open and ongoing investigation into Vulcan's activities that may have produced nuisance conditions.

- We ask for clarification as to whether TCEQ undertook any reconnaissance investigations following Investigation #1122644, as recommended by the TCEQ investigator. If so, we ask for information regarding these investigations.

BBCCE lacks confidence in Vulcan's ability to meet its permit conditions, to accurately and in good faith to audit itself, to otherwise disclose known violations that are ongoing and serious, and to act with due diligence and reasonableness to correct its violations. Vulcan's behavior with respect to a single site in Bexar County suggests, among other things, that it will act in bad faith during ongoing TCEQ investigations to rely on the Audit Act so as to limit public access to information and to immunize itself from penalties.

The TCEQ's actions in both the investigations and through the audit processes also do not instill confidence. The TCEQ allowed Vulcan to impermissibly use the Audit Act to shield itself from ten violations and then allowed Vulcan to immediately open a second audit at the same site during an ongoing investigation to shield itself from twenty-three additional violations. TCEQ investigators also failed to identify multiple ongoing, obvious violations and failed to issue notices of violations even after reviewing the exact permit conditions that were being violated.

We understand that some of these past issues are not fully resolvable today. But we ask that TCEQ investigate Vulcan's audit issues identified above, carefully review any current and future audits by Vulcan, update Vulcan's compliance history and ensure its complete accuracy, and act diligently in the future to ensure these same mistakes are not made again. We maintain that these actions and others by Vulcan constitute a pattern of environmental non-compliance that justifies not granting this standard permit. We do not think it is appropriate for an entity with such past issues to apply for and be granted a special statutory standard permit that excludes the right to a contested case hearing.

3. Vulcan's application does not satisfy applicable TCEQ regulations and standard permit requirements.

Section 382.05198 contains specific requirements applicable to permanent concrete batch plants with enhanced controls. *See* Tex. Health & Safety Code § 382.05198. The standard permit issued by TCEQ incorporates these requirements. An applicant who does not meet the requirements of the standard permit issued under Section 382.05198 "must comply with" either (1) Section 382.058 to obtain authorization to use a standard permit issued under Section 382.05195 or a permit by rule adopted under Section 382.05196; or (2) Section 382.056 to obtain a permit issued under Section 382.0518. *Id.* § 382.05199(a).

TCEQ Form PI-1S states that "[a]ny technical or essential information needed to confirm that facilities are meeting the requirements of the standard permit must be provided. Not providing key information could result in an automatic deficiency and voiding of the project." *See* Form PI-1S at VI.

We have reviewed a copy of the permit application dated January 18, 2018. Based on our initial review, we have concerns that the application is incomplete and does not satisfy the applicable TCEQ regulations.

First, Vulcan misrepresented that public notice would be published no later than 30 days after receipt of written notice from the TCEQ that the application was technically complete. *See* Checklist for Air Quality Standard Permits, (2)(B)(i). As demonstrated above, Vulcan did not satisfy this requirement.

Second, Vulcan did not provide an adequate plot plan. The application refers to paved roads for transport on the site, but the plot plan supplied by the applicant does not clearly identify the location of these roads. This failure to provide a complete plot plan is inconsistent with the requirements found in the standard permit for concrete batch plants with enhanced controls. *See* 2004 Standard Permit for CBPECs at (1)(A) (requiring a scaled plot plan of the plant site). Further, based on this plot plan, we cannot be sure that the proposed plant will comply with the required distance limitations or setbacks found in the standard permit. *See id.* at (3)

(K) (establishing a 100-foot setback requirement for all stationary equipment, stockpiles, or vehicles). The plot plan should depict the facility's roads, thereby affirmatively demonstrating compliance with these setback requirements or the alternative requirement that each road is bordered by fencing at leas 12 feet high.

Third, we are concerned with apparent contradictions in Vulcan's representations in the application and, in particular, the effect these contradictions have on Vulcan's emissions calculations. Under Rule 116.615(2), all representations regarding construction plans, operating procedures, and maximum emission rates in any registration for a standard permit become conditions upon which the facility must be constructed and operated. 30 Tex. Admin. Code § 116.615(2). An applicant is prohibited from making inconsistent representations under this rule because inconsistent representations cannot both become conditions upon which the facility must be constructed and operated.

In the application, Vulcan states that it will comply with the 300 yd^3/hr production rate limitation found in the standard permit. Given the proposed operating schedule of 8,760 hours/year, this amounts to authorization up to 2,628,000 yd^3 concrete. However, Vulcan also represents in the application that it will not exceed 100,000 yd^3 concrete per year. *See, e.g.*, Project Description; Table 20. Both of these inconsistent representations cannot be true. Vulcan should be required to confirm what production rate limit will apply to its proposed facility.

If Vulcan intends to limit itself to 300 yd^3/hr, then the emission calculations provided in the emission rate calculation worksheet – which is erroneously dated February 2017, well before the application was submitted to the TCEQ – are inaccurate. The "maximum material mass flow rate" in this worksheet appears to assume operations of approximately only 330 hours per year. *See* Emission Rate Calculation Worksheet (stating, e.g., a flow rate of 279.8 tons/hour and 93,250 tons/year of aggregate). This calculation worksheet must be updated to represent the maximum production rate for which Vulcan seeks authorization. If the facility will be limited to operating 330 hours per year, that should alternatively be made clear and should become a condition upon which the facility must operate.

4. The Commission has not adequately addressed nuisance or health impacts on individuals residing near the proposed facility or the Montessori school located within 3,000 feet of the proposed facility.

Generally, BBCCE and its members are concerned that contaminants from the plant will potentially result in harm to the health, safety and welfare of nearby residents, as well as the use and enjoyment of properties, including the school, near the proposed plant. 30 Tex. Admin. Code § 101.4 (prohibiting injury or adverse effect on human health or welfare, animal life, vegetation, or property). These

emissions will be produced as a result of the storage of materials at the site, the transfer and processing of these materials, as well as the dust produced by traffic entering and exiting the facility and in traffic areas. The dust and particulates produced by the operation of the plant can produce emissions harming these interested individuals. The construction and operation of the facility may also produce nuisance conditions in the area around the proposed plant. *See id.* (prohibiting nuisance).

The Texas Clean Air Act contains a standalone requirement that the Commission "shall consider possible adverse short-term or long-term side effects of air contaminants or nuisance odors from" any new facility that is located within 3,000 feet of a school on the individuals attending the school facilities. Tex. Health & Safety Code § 382.052. The Commission has not done so. The protectiveness review undertaken with respect to this standard permit did not specifically consider these adverse side effects on attendees of schools located within a certain distance of concrete batch plants with enhanced controls. The Commission must consider these effects with respect to the attendees of the Hill Country Montessori School.

Conclusion

We appreciate this opportunity to comment on the application. Based on the above issues, we maintain that Vulcan has failed to follow mandatory notice and hearing requirements that are jurisdictional for this statutorily authorized standard permit. The permit application must be denied on these grounds. We further maintain that it is not appropriate for Vulcan to be authorized by a standard permit that does not allow for a contested case hearing given Vulcan's pattern of non-compliance at other facilities.

Sincerely,

Irvine & Conner, PLLC

by */s/ Charles W. Irvine*

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