Cause No._____

FRIENDS OF DRY COMAL CREEK and STOP 3009 VULCAN QUARRY,	§	IN THE DISTRICT COURT OF
Plaintiffs,	§	TRAVIS COUNTY, TEXAS
v.	§	
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY,	§	_____ DISTRICT COURT
Defendant.	§	

PLAINTIFFS' ORIGINAL PETITION

TO THE HONORABLE JUDGE OF THE COURT:

COME, NOW, Friends of Dry Comal Creek and Stop 3009 Vulcan Quarry ("Plaintiffs") and file this original petition seeking judicial review of actions of the Texas Commission on Environmental Quality ("TCEQ," "the Commission," or "Defendant") and, in support thereof, would respectfully show the following:

I. OVERVIEW OF THE CASE

1. Plaintiffs are citizens' groups, many of whose members live in a rapidly-urbanizing area northwest of New Braunfels, Texas. They, other citizens, and the Comal ISD protested the Defendant state agency's proposed issuance of an air pollution permit to Vulcan Construction Materials, LLC, for a rock crusher at its proposed quarry in the midst of this area northwest of New Braunfels.
2. The permitting procedure garnered wide public attention, because, among other reasons, the area just south and east of the proposed Vulcan crusher site is dense with sources of limestone dust, i.e., particulate matter released by limestone mining, crushing and

hauling. Crystalline silica is a component of limestone dust and is a human carcinogen. There are at least 14 of these limestone-dust-emitting sources within 20 kilometers (roughly, 12.4 miles) of the proposed Vulcan crusher site. Immediately below is a reproduction of an exhibit from the administrative record for this case, to which 10- and 20-kilometer radii around the proposed Vulcan site (Site #10) have been added; the exhibit gives some understanding of the extent to which limestone dust generators already burden the area.

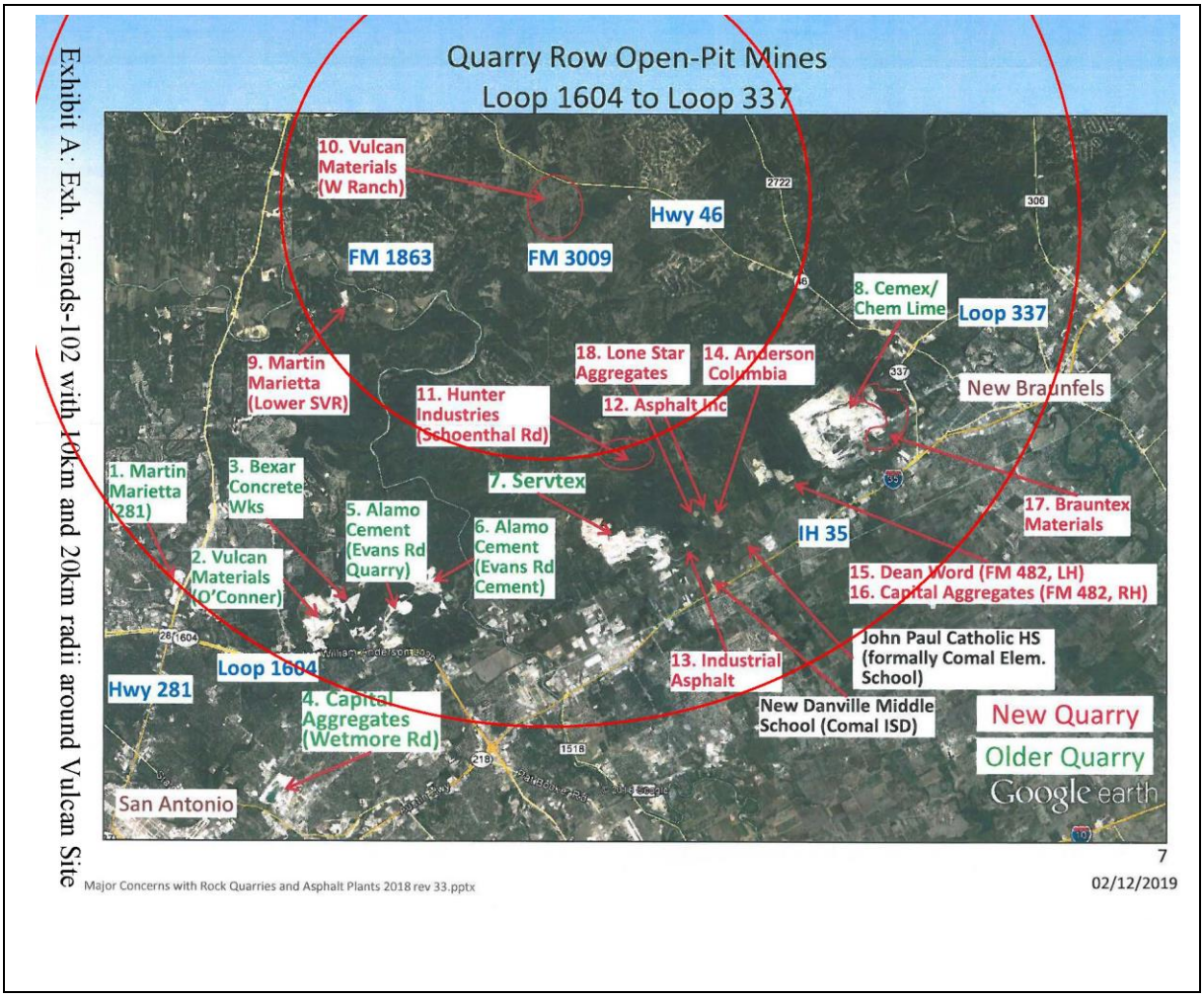

Figure 1: Exhibit A: Exhibit Friends 102 with 10km and 20km Radii Around Vulcan Site

3. The protests of Plaintiffs and many, many other individuals and entities led to a June 10 and 11, 2019, contested case hearing on the air pollution permit application. At hearing, the principal issues in contention were the crystalline silica content of particulate emissions that would emanate from Vulcan crusher and related sources, the degree of emissions reductions that ought to be required at this facility (as compared to those from a similar uncontrolled facility), the level of health impacts analyses required before permitting the Vulcan facility, and the sources and types of emissions that have to be included in various computer modeling analyses that support permitting decisions. In the course of litigating these issues, a discovery dispute arose regarding data about the crystalline silica content of the limestone to be crushed, and the ALJs' resolution of that dispute, Plaintiffs allege, was both erroneous and impermissibly handicapped Plaintiffs' cross-examination rights.

4. Plaintiffs and other protestants were ultimately unsuccessful in their challenges to the draft permit, and the Defendant Commission on November 21, 2019, approved issuance of the final permit. Plaintiffs timely moved for rehearing, that motion was overruled by operation of law, and this Original Petition for judicial review timely followed. Attachment A to this Original Petition is a copy of Plaintiffs Motion for Rehearing.[1]

II. PARTIES

5. Plaintiff Friends of Dry Comal Creek is an unincorporated membership association of individuals. It has an environmental protection mission in an area including the area of

[1] Attachment A is incorporated herein for all purposes.

the proposed Vulcan rock crusher and quarry. Among its members are individuals owning property and residing along Farm-to-Market Road 3009 immediately to the east of the proposed rock crusher and quarry site. Its members have a number of concerns regarding the proposed rock crusher, including the impacts on their properties and health of particulate air emissions emanating from the operation of the rock crusher and its associated emission sources. Plaintiff Friends of Dry Comal Creek was determined by Defendant TCEQ to be a person affected by the permitting and operation of the Vulcan rock crusher.

6. Plaintiff Stop 3009 Vulcan Quarry, too, is an unincorporated membership association of individuals. It is an environmental advocacy entity formed specifically to attempt to protect the people living near and the environment near the proposed Vulcan rock crusher and quarry. So, it has a more narrow geographic scope than does Plaintiff Friends of Dry Comal Creek. The two groups have a significant membership overlap. Plaintiff Stop 3009 Vulcan Quarry's members have a number of concerns very similar to those of the members of Friends of Dry Comal Creek, e.g., impacts on their properties and health of particulate air emissions emanating from the operation of the rock crusher and its associated emission sources. Stop 3009 Vulcan Quarry, also, was determined by Defendant TCEQ to be a person affected by the permitting and operation of the Vulcan rock crusher.

7. Defendant Texas Commission on Environmental Quality is the Texas state administrative agency with responsibility for regulating air and water pollution; it operates the "New Source Review" or "NSR" permitting program pursuant to which the

permit approval at issue in this suit occurred. Defendant may be served through its Executive Director, Mr. Toby Baker, at 12015 N. Interstate 35, Park 35 Office Complex, Austin, Texas 78753.

II. JURISDICTION

8. Jurisdiction lies in this Court pursuant to §382.032, Health and Safety Code, and §2001.176(b)(1), Gov't Code.

III. DISCOVERY

9. This case is an appeal of an administrative agency's actions. To the extent discovery is allowed, it should be controlled by a Level 3 discovery plan. Tex. R. Civ. Proc. § 190.4.

V. CLAIM

10. Plaintiffs claim their substantial rights have been prejudiced, because the November 21, 2019, decision of Defendant approving the application of Vulcan Construction Materials, LLC, for air quality permit number 147392L001 was affected by errors of law, made pursuant to unlawful procedure, and was based on arbitrary and capricious precursor decisions.

11. In addition to prejudice to Plaintiffs' constitutional and statutory due process rights, issuance of the permit prejudices Plaintiffs' substantial rights due to the impairment of Plaintiffs' health and welfare that will result from the permitted operations. Milann and Pru Guckian, 30954 FM 3009, New Braunfels, Texas 78132, and Liz M. James, 30838 FM 3009, New Braunfels, Texas 78132, are members of Friends of Dry Comal Creek and of Stop 3009 Vulcan Quarry. The Guckians and Ms. James live immediately to the east of the site of the permitted facility. The Guckians and Ms. James engage in outdoor

activities in the area of their residences, including walking for aesthetic enjoyment of the immediate environment. The issuance of air quality permit number 147392L001 to Vulcan Construction Materials, LLC, authorizes the emissions of contaminants, including crystalline silica, that will frequently disperse onto properties where the Guckians and Ms. James regularly engage in outdoor activities. This dispersion of particulate matter, i.e., of limestone dust, will compromise the Guckians' and James' enjoyments of their properties. This dispersion of crystalline silica will also potentially result in short-term irritation of the respiratory tract, including lung inflammation. Friends of Dry Comal Creek and Stop 3009 Vulcan Quarry are concerned that authorization of the facility will place the Guckians and Ms. James and other members at elevated risks of long-term impacts of exposure to crystalline silica, including silicosis and lung cancer.

12. The individual findings of fact and conclusions of law of which Plaintiffs complain are set out in detail in Attachment A, the Plaintiffs' Motion for Rehearing, and are incorporated to this Original Petition. In summary, Plaintiffs' claim:

    A. Discovery and trial process errors. The administrative law judge erred in failing to compel properly pursued discovery regarding the crystalline silica content of the rock to be crushed at and, thus, the dust to be emitted from the Vulcan facility and associated sources and, then, in restricting at trial cross-examination on this issue to the extent that Plaintiffs were denied the process rights they are due in an adjudicative hearing;

    B. Elevation of staff guidance over statute. Defendant TCEQ impermissibly invoked an appendix in a guidance document to unlawfully supersede the regulatory requirement that the agency conduct a review of the health effects of air emissions from the rock crusher facility;

    C. Failure to require case-by-case determination of appropriate emission reduction levels. State laws require a permit applicant to present a case-by-

case demonstration that emissions from its facility will not exceed Best Available Control Technology levels, but Defendant TCEQ unlawfully allowed Vulcan to forgo the case-by-case requirement in making its demonstration;

D. (i) Capricious exclusion of relevant data from computer modeling. Defendant TCEQ required permit applicant Vulcan to undertake air dispersion modeling of emissions from the rock crusher and other nearby stationary sources, but, then, Defendant capriciously and unlawfully allowed Vulcan to exclude emissions from stationary sources for which the Defendant does not issue permits;

(ii) Further capricious exclusion of relevant data from computer modeling Defendant TCEQ arbitrarily – and inconsistently with EPA and Defendant's own guidance – further limited the stationary sources from which emissions had to be included in the air dispersion modeling to such sources within 10 kilometers of the rock crusher site; and

E. Failure to require determination of concentrations certain diesel exhaust emissions. Diesel engine exhaust is carcinogenic to humans, so Defendant requires ground-level concentrations of the contaminant in particle form be determined and compared to a specified screening level that, if exceeded, triggers further analyses but, although Vulcan will use three diesel-fired engines, Defendant inexplicably and unlawfully did not require that determination in this instance.

VI. PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that this court reverse Defendant's approval of the application for and the issuance of Permit No. 147392L001 to Vulcan Construction Materials, LLC, and remand the application to Defendant for lawful evaluation. Plaintiffs, also, pray that the Court assess court costs against the Defendant and accord Plaintiffs any further relief to which they may show themselves entitled.

Respectfully Submitted,

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ATTACHMENT A

SOAH DOCKET NO. 582-19-1955
TCEQ DOCKET NO. 2018-1303-AIR

APPLICATION OF VULCAN CONSTRUCTION MATERIALS, LLC, FOR PERMIT NO. 147392L001 IN COMAL COUNTY, TEXAS	**§ § § §**	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

MOTION FOR REHEARING

TO THE HONORABLE COMMISSIONERS:

Come now, Friends of Dry Comal Creek and of Stop 3009 Vulcan Quarry, referred to in the Proposal for Decision as "Friends Protestants," and move the Commission to rehear its November 21, 2019, final decision in this docket. Rehearing is justified on the following topics for the following reasons.

1. Failure to require or conduct a health effects review for the Vulcan facility

Sec. 382.0518, Tex. Health & Safety Code, directs that the Commission may permit a facility only if the Commission finds no indication the facility will harm the public's health and physical property. To similar effect are 30 TAC § 116.11(a)(2)(A)(i) and 30 TAC § 101.4.

TCEQ staff conducts a preconstruction technical review during the air permitting process. According to the staff's guidance document, MERA,[1] "this review ensures that the operation of a proposed facility will comply with all the rules of the TCEQ and intent of the TCAA, and not cause or contribute to a condition of air pollution. A review of an

[1] APDG 5874, Modeling and Effects Review Applicability (2009), p. 1.

air permit application involves an assessment of … human health and welfare effects related to emissions from production and planned maintenance, startup, and shutdown (MSS) activities."

However, for the Vulcan facility, the staff did not require and Vulcan did not undertake a MERA analysis. There was no health effects review required, because the staff and Vulcan considered rock crusher facilities exempt from that review. This position, in turn, was based on Appendix B of the MERA guidance, which is a list of facilities for which allegedly, no health effects review is required.

Reliance on the exemption in the guidance document and the absence of a health effects review of the facility that flows from that reliance were in error. The Texas Legislature has specifically provided that TCEQ must utilize the rulemaking process to establish general policy.[2] In *Rodriguez v. Service Lloyds Insurance Company*,[3] at 255, the Texas Supreme Court has noted that, "we cannot defer to an administrative interpretation that is plainly erroneous or inconsistent with the regulation." A presumption favors the adoption of rules of general applicability through the formal rulemaking process, and an agency's failure to follow the clear unambiguous language of its own regulation is arbitrary and capricious.[4] This is because the formal rulemaking process assures that the public and affected persons will receive notice of rules of general

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2 Tex. Water Code § 5.105.

3 *Rodriguez v. Service Lloyds Insurance Company*, 997 S.W.2d 248, 254 (Tex. 1999). See also *El Paso Hosp. District v. Texas Health & Human Services Comm'n,* 247 S.W.3d 709, 715 (Tex. 2008).

4 *Rodriguez*, at 255.

applicability and have an opportunity to be heard.[5] The Legislature has delegated rulemaking power to agencies in the expectation that rules of general applicability will be adopted through the formal rulemaking process,[6] and, so, agencies lack the power to create binding policy by means of guidance documents.[7]

The failure to require or conduct a health review of the Vulcan facility violated the statutory and regulatory provisions, was in excess of the agency's statutory authority and was arbitrary and capricious.[8]

2. Failure to model the off-site impacts of emission sources that are not, themselves, "facilities"

Neither Vulcan nor the TCEQ staff included in the modeling inventory used for the air dispersion modeling known stationary sources of emissions that were not, themselves, "facilities." This failure would have made not credible the health effects review of the Vulcan facility, had such a review been undertaken. As is, the failure made impossible the negative finding required by 382.0518(b)(2), Tex. Health & Safety Code and violated 30 TAC § 1176.111(a)(2)(J).

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5 *Rodriguez*, at 255.

6 *Rodriguez*, at 255.

7 See, *Brinkley v. Texas Lottery Comm'n*, 986 S.W.2d 764, 769 (Tex. App. – Austin, 1999) no pet.

8 Consequently, without limitation, Findings of Fact Nos. 21, 22, 23, 24, 25, 26, 32, 33, 45, 46, and 49 were not supported by substantial evidence considering the reliable and probative evidence in the record, violated the applicable statutory and regulatory provisions, were in excess of TCEQ's statutory authority, and were arbitrary and capricious. Furthermore, without limitation, Conclusions of Law Nos. 5, 12, 14, and 15 were in excess of TCEQ's statutory authority, and were arbitrary and capricious.

The TCEQ staff required Vulcan undertake air dispersion modeling to determine air quality impacts from the Vulcan facility.[9] That modeling requires, as model inputs, emissions drawn from an emissions inventory. TCEQ's modeling guidance,[10] p. 14, provides that "[t]he modeling emissions inventory consists of the emissions from facilities to be permitted, as well as other applicable on- and off-property emissions." In this docket, emissions from roadways and quarries at the Vulcan site and near that site were not included in the emissions inventory. Friends' engineer, Howard Gebhart, explained the obvious, that the non-regulation of roads and quarries does not logically justify disregarding contaminants contributed by those sources when permitting or analyzing the impacts of sources that TCEQ does regulate.[11]

Vulcan's failure to consider and TCEQs' failure to require consideration of road and quarry emissions from sources on Vulcan's property, alone, led to a failure to demonstrate that the to-be-permitted project will not cause a violation of the NAAQS. Mr. Gebhart testified "these fugitive dust emissions, if properly quantified and analyzed, would likely dwarf the emissions from the rock crusher and other processing equipment that were analyzed …"[12] This is certainly credible. Vulcan's modeling of the fugitive $PM_{2.5}$ emissions from the small stretch of roadways entering the crusher site reflected that those emissions were annually more than 14 times the annual emissions from the rock

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9 Admin. R., Tab D, App. Ex. 22, pp. APP 000281-284.

10 APDG 6232, *Air Quality Modeling Guidelines* (2015).

11 Exh. Friends-100 (Gebhart direct testimony), p. 6:16-18.

12 Exh. Friends – 100 (Direct testimony of Howard Gebhart), p. 5:5-15.

crusher "facility," itself.[13] Vulcan's limited modeling indicated almost 76% of the $PM_{2.5}$ NAAQS would be consumed at at least one off-site receptor location.[14] This is calculated without consideration of the Vulcan quarry or any explicit consideration of the Martin Marietta quarry or of any of its roadways or of any emission sources beyond a 10 km radius. As documented in Friends' closing argument, the Cemex/Chem Lime, Brauntex Materials, Anderson Columbia, Lone Star Aggregates, Asphalt, Inc., Hunter Industries on Schoenthal Road, Servtex, Vulcan Materials (O'Conner), Bexar Concrete Works, some of the Martin Marietta Hwy. 281, Alamo Cement on Evans Road, Industrial Asphalt, Dean Word and Capital Aggregates on FM 482 open pit mines are all within 20 km of the proposed Vulcan rock crusher.

Failure to require modeling of the off-site impacts of emission sources that are not, themselves, "facilities" violated statutory and regulatory provisions, was in excess of the agency's statutory authority and was arbitrary and capricious. [15]

3. Failure to require in the emissions modeling inventory facilities and known stationary sources of emissions with, at the most limited radius, 20 kilometers

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13 Admin. Rec., Tab D, Exh. 22, internal p. 34, table; "Results of the Minor NSR Modeling Analyses."

14 Admin. Rec., Tab D, Exh. 22, Table 1.

15 Consequently, without limitation, Findings of Fact Nos. 21, 22, 23, 24, 25, 26, 32, 33, 41, 44, 45, 46, 48, and 49 were not supported by substantial evidence, violated the applicable statutory and regulatory provisions, were in excess of TCEQ's statutory authority, and were arbitrary and capricious. Furthermore, without limitation, Conclusions of Law Nos. 5, 12, 14, and 15 were in excess of TCEQ's statutory authority, and were arbitrary and capricious.

Vulcan's full NAAQS air dispersion modeling explicitly included only emission sources within 10 km of the Vulcan site. This was justified, apparently, on the basis that it is what TCEQ staff had allowed.[16] There was no underlying logic or factual basis given for the opinion that 10 km is an appropriate radius. And, actually, TCEQ's Air Quality Modeling Guidelines (APDG 6232),[17] Appendix C, indicates that, for NAAQS analyses, 50 km is the radius from which sources' emissions are retrieved for modeling. The testimony from Vulcan's witness on the topic of the radius within which stationary emissions sources should be included in the emissions inventory was to the effect that radius was in accord with EPA's Guideline on Air Quality Models in 40 C.F.R. Part 51, Appendix W.[18] But, Appendix W does not recommend a 10 km radius. Appendix W indicates that nearby sources, so, sources that merit individual emissions modeling, will, in most cases, lie within 10 to 20 km of the source under consideration for permitting.[19]

TCEQ's failure to require that Vulcan include in the modeling inventory facilities and known stationary sources of emissions within, at the most limited radius, 20 kilometers was not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole and was arbitrary or capricious and characterized by abuse of discretion or clearly unwarranted exercise of discretion. [20]

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16 Exh. App-DK1 (Direct Testimony of David Knollhoff), p. 17:20-22.

17 Admin. Rec., Tab D, Exh. 48.

18 Exh. App-DK1 (Direct Testimony of David Knollhoff), p. 17:18-23.

19 40 C.F.R. Part 51, Appx. W, § 8.3.3(b)(iii).

20 Consequently, without limitation, Findings of Fact Nos. 21, 22, 23, 24, 25, 26, 32, 33, 38, 41, 44, 45, 46, 48, and 49 were not supported by substantial evidence considering the

4. Failure to undertake or to require Vulcan to undertake a case-by-case "Best Available Control Technology ("BACT")" analysis of the emission sources that are concededly facilities

In this docket, TCEQ apparently acted in accord with the understanding of the Vulcan that "a permit applicant, such as Vulcan, is not required to consider whether a emissions control would be BACT, when a different emissions control has previously been determined to be Tier I BACT, unless there has been a subsequent technical development that may indicate that a more stringent emission control is technically practicable and economically reasonable."[21]

BACT says what it means: "Best" Available Control Technology that is considered technically practical and economically reasonable for the facility.[22] It is not just a technology (level of control, really[23]) that was found to be adequate for another similar facility in the past.

The agency's guidance document on evaluating BACT demonstrations is clear that a case-by-case evaluation of the circumstances of the particular facility is required. "The permit reviewer must ensure that the administrative record

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reliable and probative evidence in the record, violated the statutory and regulatory provisions, were in excess of TCEQ's statutory authority, and were arbitrary and capricious. Furthermore, without limitation, Conclusions of Law Nos. 5, 12, 14, and 15 were in excess of TCEQ's statutory authority, and were arbitrary and capricious.

21 Exh. App-GN1, p. 27:17-29.

22 30 TAC § 116.10(1) and § 382.0518(b)(1), Tex. Health & Safety Code.

23 "BACT may be expressed in terms of an emissions limit (e.g., as a pound per hour or ton per year number), or a performance criterion (e.g., a percentage destruction efficiency or pound per million British Thermal Units [lb/MMBtu])." Exh. ED-8 (APDG 6110, *Air Pollution Control, How to Conduct a Pollution Control Evaluation*), p. 3.

provided by the applicant for the selected BACT is sound, comprehensive, and adequately supports the conclusions of the BACT review. *Failure to consider all potentially applicable control alternatives constitutes an incomplete BACT analysis*." (emphasis added.) It also says,[24] in reference to the Texas BACT Tier 1 analysis, "The TCEQ has established Tier I BACT requirements for a number of industry types. This information can be accessed at the TCEQ website. *However, these BACT requirements are subject to change through TCEQ case-by-case evaluation procedures*." (Emphasis added.) Later, the document provides:[25] "BACT proposals are approved on a case-by-case basis. While a *specific BACT proposal may be different than those accepted as BACT in recent permit reviews*, the proposal must have an overall emission reduction performance that is at least equivalent to those previously accepted as BACT." (emphasis added.)

TCEQ's failure to undertake or to require Vulcan to undertake a case-by-case BACT analysis of the to-be-permitted emission sources that are concededly facilities violated the statutory and regulatory provisions, was in excess of the agency's statutory authority and was arbitrary and capricious. [26]

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24 Exh. ED-8, p. 12.

25 Exh. ED-16.

26 Consequently, without limitation, Findings of Fact Nos. 21, 27, 29, 30, 31, and 38 were not supported by substantial evidence, violated the statutory and regulatory provisions, were in excess of TCEQ's statutory authority, and were arbitrary and capricious. Furthermore, without limitation, Conclusions of Law Nos. 5, 11, 12, 14, and 15 violated statutory and regulatory provisions, were in excess of TCEQ's statutory authority, and were arbitrary and capricious.

5. Failure to conduct or to require Vulcan to conduct an analysis of the impacts on the public's health and physical property of diesel engine exhaust as particulate matter

The Vulcan rock crusher would include three diesel fuel fired engines, which would emit exhaust, including carbon monoxide, nitrogen oxides, sulfur dioxide and particulate matter.[27] Diesel engine exhaust is carcinogenic to humans.[28]

TCEQ has established "effects screening levels" for diesel engine exhaust as particulate matter.[29] Ground-level concentrations of a pollutant in excess of its screening level may or may not be cause for concern, ultimately. But, if the ground-level concentration of a contaminant exceeds its screening level, more evaluation, per TCEQ guidance, of the health impacts of the presence of the contaminant in that level must be undertaken.

Here, neither Vulcan nor the agency determined maximum ground level concentrations of diesel engine emissions as particulate matter using the accepted protocol of applying emission factors provided by the engine manufacturer or the EPA. Without knowledge of the ground-level concentrations of diesel engine exhaust emissions as particulate matter, there could be and there was no showing that ground level concentrations would have no adverse impacts on the public's health and physical property.

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[27] Administrative Record p. APP-000022, Friends Ex. 200, p. 12 (Prefiled testimony of Dr. Thomas Dydek).

[28] Friends Ex. 200, p. 12-13 (Prefiled testimony of Dr. Thomas Dydek).

[29] Friends Ex. 200, p. 12(Prefiled testimony of Dr. Thomas Dydek).

The failure TCEQ to conduct or to require Vulcan to conduct an analysis of the impacts on the public's health and physical property of diesel engine exhaust as particulate matter violated the statutory and regulatory provisions, was in excess of the agency's statutory authority and was arbitrary and capricious.[30]

6. Order No. 2's bar of discovery necessary for an adequate presentation of Friends' case, and subsequent limitation of cross-examination and denial of motion to conduct additional discovery related to undisclosed discoverable consulting expert.

A significant contested issue in this docket was the crystalline silica content of the rock to be crushed and whether that content would lead to emissions of crystalline silica that would be a threat to the public's health and physical property. In pursuit of discovery that would allow Friends to determine the crystalline silica content of the rock to be crushed at the Vulcan site, Friends served timely pre-trial production requests seeking (request no. 4):

> all documents associated with any subsurface investigation performed within the Facility Property. This request includes, without limitation:
> a. All boring logs for any boring within the Facility Property;
> b. All field notes for ay boring within the Facility Property;
> c. All Drillers notes associated with any boring within the Facility Property; and
> d. All sampling results for any sample collected within the Facility Property.

[30] Consequently, without limitation, Findings of Fact Nos. 21, 22, 23, 25, 26, 32, 33, 38, 48, and 49 were not supported by substantial evidence considering the reliable and probative evidence in the record, violated the statutory and regulatory provisions, were in excess of TCEQ's statutory authority, and were arbitrary and capricious. Furthermore, without limitation, Conclusions of Law Nos. 5, 12, 14, and 15 were not supported by substantial evidence considering the reliable and probative evidence in the record, violated statutory and regulatory provisions, were in excess of TCEQ's statutory authority, and were arbitrary and capricious.

Request for production number 5 requested "all documents related to any analysis or evaluation of the characteristics of the materials which Vulcan intends to process at the Facility."

Vulcan asserted a “trade secret” objection to this request and refused to produce any responsive material, even under a protective order. Friends moved to compel production. Ultimately, the ALJ ruled in Order No. 2 that the information was “trade secret” information, the nondisclosure, even under a protective order, of which would not work an injustice. On the injustice question, the order provided:

> [i]t does not appear that nondisclosure will work injustice. However, it would create an injustice if Applicant were allowed to use the privileged information in any way as part of the additional evidence in support of the permit. Applicant's additional evidence may not rely on any responsive information that was not produced, and Applicant may not cross-examine using that information, either.

At hearing, Friends’ counsel attempted to develop some bases for evaluating the Vulcan position that the crystalline silica concentrations of the rock to be crushed. Vulcan’s witness regarding the geology at the site, Dr. Eversull, testified that she had in fact “certainly” reviewed many of the materials which had been withheld as trade secret material,[31] and that there was “a lot of communication” between herself and the person who had created much of the material withheld as trade secret.[32]

Dr. Eversull said photographs of the drilled core material or drilling logs from those coring efforts were not the “sole basis” for her opinion that Vulcan’s sampling of

[31] Tr. V. 1, 163-164.

[32] Tr. V. 1, 165.

the material to be quarried was properly done and, thus, yielded "representative" crystalline silica values. Asked if the photographs or drilling logs provided some of the basis for her "representativeness" opinion, Dr. Eversull answered: "Do the core logs that I may or may not have looked at or the photographs that I may or may not -- I feel like you're asking me to say that something I've said -- I can't remember if I saw every photo, and you're asking me if that was the basis for my opinion, and I -- I can't swear that I saw every photo or every page of the handwritten log."[33] This level of evasiveness could have been countered, memory could have been refreshed, had counsel for Friends had the discovery material Friends properly sought and that Order No. 2 denied. As counsel for Friends sought to further explore the role of the withheld material in the formation of her opinion despite the witness' evasive answers, counsel for Vulcan objected, and the judge instructed Friends' legal counsel that, "I think we should move on."[34] This decision to cut off questioning seeking to identify the role of the privileged material was in error, was a violation of constitutional and statutory provisions guarantying litigants in administrative proceedings the rudiments of fair play and a true adjudicatory proceeding, and was arbitrary or capricious or reflected the abuse of discretion.

Friends also had submitted Interrogatory No. 4, asking that Vulcan identify all discoverable consulting witnesses whose work had been reviewed or may be relied upon

[33] Tr. V. 1, 166-167,

[34] Tr. V. 1, 168.

by a testifying expert,[35] and Request for Production No. 1, seeking all documents that had been provided to, reviewed, or developed for a consulting expert whose impressions or opinions had been reviewed by a testifying expert.[36] Vulcan did not assert the trade secret privilege in response to these requests, but, rather, said that it had no documents response to Request for Production No. 1, and asserted that it had no information responsive to Friends request for the identification of all discoverable consulting experts by Interrogatory No. 4.[37]

Furthermore, under cross-examination at the hearing, Dr. Eversull testified that her opinions expressed in the matter were based partly upon her reliance on the expertise of Ms. Cummings -- the person who performed much of the work that had been withheld pursuant to the trade secret privilege and with whom Dr. Eversull had had numerous conversations apparently regarding the nature of the geology at the site.[38] This reliance was contrary to Vulcan's prior representations during the discovery process, in which Vulcan had claimed that it had no consulting experts whose opinions had been reviewed by its testifying experts.[39] In light of this testimony regarding Dr. Eversull's reliance upon the opinions of a consulting expert, counsel for Friends Protestants moved for a

[35] Friends Ex. 502, p. 8.

[36] Friends Ex. 502, p. 10.

[37] Friends Ex. 502, pp. 8 & 10.

[38] Tr. V. 1, 180.

[39] Friends Ex. 502.

continuance in order to obtain and review the material asserted to be trade secret.[40] That motion was denied.[41] The denial of that motion was in error, was a violation of constitutional and statutory provisions guarantying litigants in administrative proceedings the rudiments of fair play and a true adjudicatory proceeding, and was arbitrary or capricious or reflected the abuse of discretion. Not only was the material improperly shielded as trade secret material, but it was improper for the judge, and by extension the TCEQ, to allow the withholding of material response to Friends Protestants' Interrogatory No. 4 and Request for Production No. 1, as the trade secret privilege had not been timely raised in response to those discovery requests.

As a matter of law, the Order No. 2 shielding of this dubiously-"confidential trade secret" information created an injustice, in that it deprived Friends of information necessary for an adequate presentation of Friends' case. Order No. 2 resulted in a violation of constitutional and statutory provisions guarantying litigants in administrative proceedings the rudiments of fair play and a true adjudicatory proceeding, and Order No. 2, as well as the rulings identified herein at the hearing on the merits, were arbitrary or capricious or reflected the abuse of discretion. [42]

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[40] Tr. V. 1, 182-183.

[41] Tr. V. 1, 215.

[42] Consequently, without limitation, Findings of Fact Nos. 21, 22, 23, 24, 25, 26, 32, 33, 45, and 46 were not supported by substantial evidence, violated the statutory and regulatory provisions, were in excess of TCEQ's statutory authority, and were arbitrary and capricious. Furthermore, without limitation, Conclusions of Law Nos. 12, 13, 14, and 15 violated statutory and regulatory provisions, were in excess of TCEQ's statutory authority, and were arbitrary and capricious.

Summary of Erroneous Findings and Conclusions

For reasons explained, above, the following findings of fact in the Commission's November 21, 2019, final order are in error.

Findings: 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 38, 39, 41, 44, 45, 46, 48, and 49.

Conclusions: 5, 11, 12, 13, 14, and 15.

Additionally, as noted above, the ALJ's Order No. 2, and the rulings at the hearing limiting cross-examination regarding the withheld material, and denying Friends' request for additional material, were in error.

Conclusion and Prayer

In light of the foregoing deficiencies in Vulcan's permit application and in the evidence necessary to support the § 382.0518(b) findings the Commission must make and in the process – as distorted by Order No. 2 – that led to this Commission's November 21, 2019, final order, Protestant Friends prays the Commission rehearing that decision and, on rehearing, deny Vulcan's permit application.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was filed at TCEQ on December 16, 2019, and served electronically to the parties below.

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