CAUSE NO. D-1-GN-24-007463

PRESERVE OUR HILL COUNTRY ENVIRONMENT AND PRESERVE OUR HILL COUNTRY ENVIRONMENT FOUNDATION, *Plaintiffs,* v. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY *Defendant,* VULCAN CONSTRUCTION MATERIALS, LLC, *Intervenor-Defendant.*	§ § § § § § § § § § § § § § §	IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS 353RD JUDICIAL DISTRICT

CAUSE NO. D-1-GN-24-008787

ROBERT CARRILLO et al., *Plaintiffs,* v. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY *Defendant,* VULCAN CONSTRUCTION MATERIALS, LLC, *Intervenor-Defendant.*	§ § § § § § § § § § § § § § §	IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS 353RD JUDICIAL DISTRICT

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MTO	Motion to Overturn
OPIC	TCEQ's Office of Public Interest Counsel
PHCE	Preserve Our Hill Country Environment and Preserve Our Hill Country Environment Foundation
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RECORD REFERENCES

The Administrative Record is cited as "[AR] [item no.]" and "at [page No.]" where applicable. Separate administrative records were filed in the *Carrillo Matter* and the *PHCE Matter.* Administrative record citations are to the administrative record in the *PHCE Matter* unless indicated otherwise.

STATEMENT OF THE CASE

This case is an appeal of a decision by the Texas Commission on Environmental Quality ("TCEQ") to approve a Water Pollution Abatement Plan ("WPAP") submitted by Intervenor-Defendant Vulcan Construction Materials, LLC ("Vulcan") related to operations at its quarry in Comal County. 1AR14 (Appendix A).

Following the ED staff's review of the WPAP and submittal of public comments, including by several Plaintiffs, the ED ultimately decided to approve the WPAP. This decision was memorialized in a letter dated July 8, 2024. 1AR14.

Following the approval, Plaintiffs timely filed Motions to Overturn the Executive Director's Decision. 1AR15-22 (Appendix B, C, D & E). The motions were overruled by operation of law. In response, Plaintiffs filed this lawsuit, seeking reversal and remand of TCEQ's decision.

ISSUES PRESENTED

1. Due process requires that the method of notice be reasonably calculated, under the circumstances, to apprise the interested parties of the pendency of a governmental action. The sole notice that the Commission provided to the public of Vulcan's pending WPAP approval request was an e-mail from the Commission staff to certain local governments. Robert Carrillo owns adjacent property, including groundwater owned in place, impacted by the WPAP approval, while Cheryl Johnson, John Casimir Kucewicz Jr., and Douglas E. Smith also own property in the area of the Quarry.

   Did the Commission deprive Robert Carrillo, Cheryl Johnson, John Casimir Kucewicz Jr., and Douglas E. Smith of their due process rights, by failing to provide notice reasonably calculated to apprise them of Vulcan's pending application for approval of the WPAP?

2. TCEQ Rules require that a WPAP must identify and describe any activities that would be a potential source of contamination, and require that best management practices must prevent pollution of surface water or groundwater that originates on-site or flows off-site.

   Did the Commission exceed its authority and act arbitrarily and capriciously by approving a Water Pollution Abatement Plan which did not identify blasting as a potential source of contamination, and did not include best management practices directed to prevent pollution of surface water or groundwater from blasting activities?

3. TCEQ Rules define a "well" as "a bored, drilled or driven shaft . . . where the depth of the well is greater than its largest surface dimension," and define "injection well" as "a well into which fluids are being injected." The TCEQ Rules further prohibit injection wells that transect or terminate in the Edwards Aquifer.

   Did the Commission exceed its authority and act arbitrarily and capriciously by approving use of injection wells in the blasting process by means of the completion of a borehole into the Edwards Aquifer subsequently injected with combustible fluid?

STATEMENT OF FACTS

I. Vulcan Submits Application for Water Pollution Abatement Plan for its 1,515-acre quarry in Comal County, Texas.

Except in circumstances not applicable here, a WPAP is required for any regulated activity above the Edwards Aquifer Recharge Zone, and is intended to protect the water quality of the Edwards Aquifer and connected surface streams. 30 Tex. Admin. Code §§ 213.5(a)(1) and 213.1. Among other elements, such a plan must include a technical report identifying any activities or processes which may be a potential source of contamination as well as BMPs and measures to prevent pollutants from entering surface streams, sensitive features, or the aquifer. 30 Tex. Admin. Code §§ 213.5(b)(4)(A)(iv) and 213.5(b)(4)(B)(iii).

On March 31, 2024, Vulcan submitted an application to the TCEQ for approval of a Water Pollution Abatement Plan (WPAP) necessary for a 1,515.15-acre quarry located over the Recharge Zone of the Edwards Aquifer.[1]

The geologic assessment contained within the Application included information related to the local geology. The geologic feature assessment identified multiple caves on the site where surface water would potentially enter the groundwater ("sensitive features"), including an uncased open borehole, solution

[1] 1AR1 at 21.

cavities, and sinkholes.[2] This report also acknowledged faults in the vicinity of the site.[3]

The WPAP application described the design and operation of the Quarry. Vulcan stated in the initial application that mining areas would not be completed below an elevation of 1040 feet above mean sea level (ft-msl).[4] The quarry process described in the Application included blasting,[5] but the identification of potential sources of pollution provided in the WPAP application did not include blasting.[6] The WPAP also stated that temporary buffers would be provided around sensitive features, but those features would later be mined.[7]

II. Notice of the WPAP Application was provided solely to select local governments.

On March 22, 2024, the TCEQ Staff e-mailed notice of Vulcan's Application to various local governmental entities in the area, including cities and groundwater districts.[8] Neither TCEQ nor Vulcan provided any other notice of the Application. Pursuant to TCEQ Rules, the deadline for comments ended 30 days after this notice to local governmental entities, which fell on a Sunday. 30 Tex. Admin. Code § 213.4(a)(2). Accordingly, comments were due on Monday, April 22, 2024. On April

[2] 1AR4 at pg. Nos. 29 – 30.
[3] 1AR4 at pg. No. 34.
[4] 1AR4 at pg. No. 22.
[5] 1AR4 at pg. No. 22.
[6] 1AR4 at pg. No. 77.
[7] 1AR4 at pg. No. 21.
[8] 1AR5 at pg. No. 1.

16, 2024 and April 23, 2024, state legislators in the area submitted requests for TCEQ to hold a public meeting relating to the WPAP.[9] No such meeting was held.

Several area landowners (some of them Plaintiffs in this case), including Robert Carrillo, Cheryl Johnson, John Casimir Kucewicz Jr., and Douglas E. Smith did not learn of the Application until after the Executive Director's approval of the Application on July 3, 2024.[10] Accordingly, these persons did not file comments.

Plaintiff Robert Carrillo owns ranchland adjacent to the proposed Quarry to the south, upon which he raises cattle.[11] There is a spring-fed pond on Mr. Carrillo's ranch that has only gone dry a few times in the last 25 years, even during record-breaking droughts.[12] Mr. Carrillo received no notice of the WPAP application until he saw a news article about the WPAP in July of 2024 – after the Executive Director's approval of the WPAP.[13] If he had received notice of Vulcan's WPAP prior to the comment period, Mr. Carrillo would have submitted comments in strong opposition to the WPAP.[14]

Other plaintiffs also own property in the area. Cheryl Johnson owns property approximately 1.6 miles southeast of the Quarry,[15] while John Casimir Kucewicz Jr.

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[9] 4AR33.
[10] *Carrillo Matter* 1AR15 at pg. No. 2.
[11] *Carrillo Matter* 1AR15 at pg. No. 34.
[12] *Carrillo Matter* 1AR15 at pg. No. 34.
[13] *Carrillo Matter* 1AR15 at pg. No. 34.
[14] *Carrillo Matter* 1AR15 at pg. No. 35.
[15] *Carrillo Matter* 1AR15 at pg. No. 42.

owns property approximately 3.5 miles northeast of the Quarry, and Douglas E. Smith owns property approximately 3 miles southeast of the Quarry.[16]

III. Upon learning of the Application, PHCE and some individuals filed comments identifying deficiencies in the Application.

PHCE and several others indirectly learned of the Application prior to the comment period, and filed comments relating to the Application on or before April 22, 2024.[17] In its comments, PHCE noted that a water level of 1022 ft-msl had been recorded on December 5, 2007, and another well in the area had recorded a water level of 1048 feet on December 14, 1998.[18] This is significant because TCEQ guidance for quarrying activities directs that pollution of groundwater in the Edwards Aquifer should be protected by maintaining a 25-foot separation distance between the depth of the excavation and the "potentiometric water surface" (roughly speaking, the water table).[19] The lower level of 1022 feet would be less than 25 feet below the proposed depth of excavation of 1040 ft-msl set forth in the initial application, and the observed level of 1048 feet would place the Quarry floor beneath the water table.[20] In proceedings before the Commission, PHCE also noted that available water level data from several wells within 600 ft of the Vulcan property boundary shows water levels greater than 1022 ft-msl. *See* Figure 1, below.

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[16] *Carrillo Matter* 1AR15 at pg. No. 50.
[17] 1AR19.
[18] 1AR19 at pg. No. 56.
[19] 1AR4 at pg. No. 22.
[20] 1AR19 at pg. No. 56.

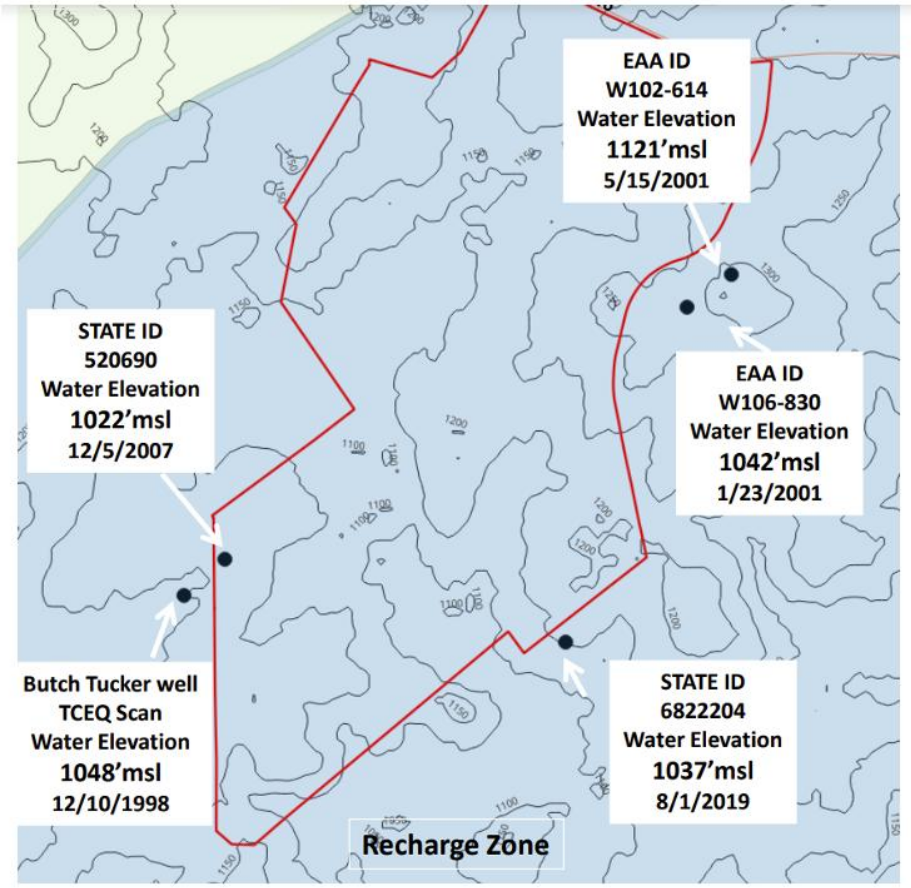

Figure 1, Water Elevation in Wells Near Vulcan[21]

Vulcan's mining will occur within the watershed of the West Fork of Dry Comal Creek.[22] The West Fork is normally dry but carries a large amount of water during major flood events, which are frequent in the Hill Country area.[23] The West Fork of the Dry Comal Creek is an environmentally significant feature. The FEMA 100-Year floodplain follows along the West Fork of the Dry Comal Creek as it flows through the Quarry site.[24] Mining will leave the West Fork elevated between pits.

[21] 1AR19 at pg. No. 62.
[22] 1AR4 at pg. No. 10.
[23] 1AR19 at pg. No. 65.
[24] 1AR4 at pg. No. 145.

The West Fork of the Dry Comal Creek will become "perched" as Mining Areas 4, 8, 9 and 7 are excavated.

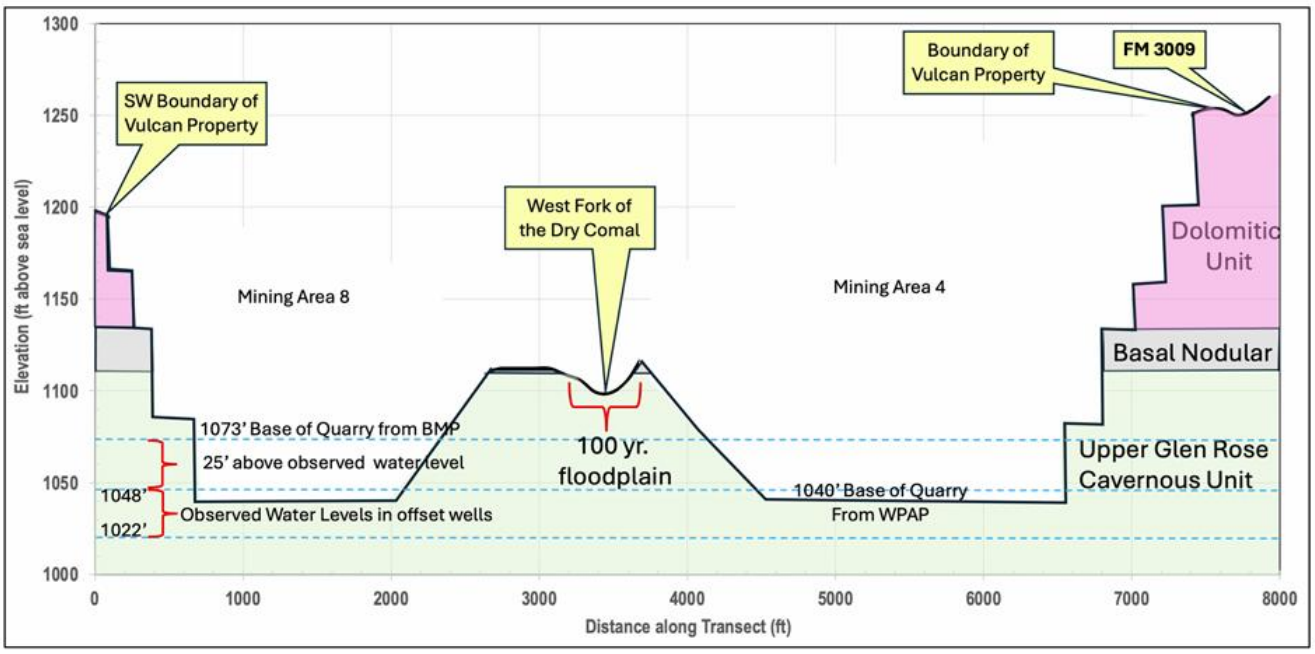

Figure 2, Schematic Cross Section with Estimated Topography after Mining and Water Levels based on Available Data[25]

PHCE's comments also noted that the Comal Springs are the largest springs in the Southwestern U.S., and are fed by groundwater from the Edwards Aquifer.[26] Rare and endangered species dependent upon these springs include the Fountain Darter, Comal Springs Dryopid Beetle, and the Peck's Cove Amphipod.[27] PHCE's comments noted that, particularly the ammonium nitrate foil oil mixture (ANFO)

[25] 1AR19 at pg. No. 56.
[26] 1AR19 at pg. No. 4.
[27] 1AR19 at pg. No. 4.

used in the blasting process would potentially have negative impacts upon these rare and endangered species.[28]

PHCE's comments further noted that in identifying activities that were potential sources of contamination at the site, the Application had not identified blasting, but, instead, only identified temporary sources during construction and potential sources after development of the Quarry.[29] PHCE had noted that blasting activities used ANFO, and that up to 28% of this ANFO remained as a residual not combusted during mining, with the nitrate contained in the ANFO readily dissolvable in groundwater and able to travel downgradient along groundwater flow paths.[30] PHCE contended that each boring completed by Vulcan then filled by Vulcan with ANFO constituted an "injection well," as that term is defined in the TCEQ Rules, while noting that such a well is prohibited within the Edwards Aquifer by the TCEQ Rules.[31]

By letter dated June 3, 2024, Vulcan revised its Application to state that Mining Areas will not be mined below 1047 feet above mean sea level (ft-msl), but failed to identify the potentiometric water surface.[32]

[28] 1AR19 at pg. No. 5.
[29] 1AR19 at pg. No. 16.
[30] 1AR19 at pg. No. 11.
[31] 1AR19 at pg. No. 17.
[32] 1AR7 at pg. No. 8.

IV. TCEQ's Executive Director approved the WPAP on July 8, 2024, which Plaintiffs challenged by the filing of Motions to Overturn with the Commissioners of the TCEQ.

On July 8, 2024, the Executive Director of the TCEQ issued a letter approving Vulcan's Application.[33] Plaintiffs Robert Carrillo, Cheryl Johnson, John Casimir Kucewicz Jr., and Douglas E. Smith filed a Motion to Overturn on July 31, 2024, pointing out that they had not been provided notice of the application prior to the Executive Director's July 8, 2024 decision, and identifying many of the same substantive errors as had been identified in PHCE's comments. Kira Olson filed a similar Motion to Overturn noting that she had not received notice of the application, and alleging the same substantive errors as noted by PHCE.[34] PHCE also filed a Motion to Overturn on July 31, 2024, raising the substantive issues which it had raised in its comments, as well as alleging that notice was deficient.[35] Milann and Prudence Guckian likewise filed an individual MTO.[36]

On August 13, 2024, the Commission requested briefing regarding the MTOs, and extended the time for the Commission to act on the MTOs until September 26, 2024.[37] In responses filed to the MTO, the Executive Director and Vulcan defended the Executive Director's approval of the WPAP.[38] The Office of Public Interest

[33] 1AR14 at pg. No. 1.
[34] 1AR17.
[35] 1AR18-21
[36] 1AR22.
[37] 1AR23.
[38] 1AR24-25.

Counsel ("OPIC") suggested that while a rulemaking would be appropriate to consider in order to address the notice problems presented, OPIC recommended denial of the MTOs.[39] Each of the Plaintiffs then filed replies to the various responses to the MTO on September 6, 2024.[40] Plaintiffs filed suit on September 20, 2024, and the Commission took no action on the MTOs, rendering them overruled by operation of law on September 26, 2024.

[39] 1AR26.
[40] 1AR27-29.

SUMMARY OF ARGUMENT

TCEQ's approval of Vulcan's WPAP for its Comal County Quarry was marked by procedural and substantive errors which render that decision arbitrary and capricious, requiring reversal of TCEQ's decision to approval Vulcan's WPAP.

Robert Carrillo, Cheryl Johnson, John Casimir Kucewicz Jr., and Douglas E. Smith each own real property interests that are threatened by TCEQ's approval of Vulcan's WPAP. Mr. Carrillo is the owner of adjacent real property (including groundwater) warranting protection. Due process required that the TCEQ protect these property interests by using a method of notice reasonably calculated to apprise such landowners of the pendency of Vulcan's application. Yet, TCEQ neither employed nor required any method of notice reasonably calculated to apprise these persons of the pendency of the application. Mailed notice to Mr. Carrillo was necessary in order to meet the minimum requirements of due process to protect his interests, but TCEQ instead provided him with no notice of Vulcan's pending application. Notice by publication and sign posting was necessary in order to meet the minimum requirements of due process to protect the interests of Cheryl Johnson, John Casimir Kucewicz Jr., and Douglas E. Smith. Yet, even such limited notice was not provided. TCEQ deprived these persons of the required due process, and in doing so, acted arbitrarily in approving Vulcan's WPAP.

TCEQ further violated its own rules by approving the WPAP despite its failure to address blasting associated with the Quarry operations. TCEQ's Rules require that *any* activity which could be a potential source of contamination be identified, and that best management practices be implemented to prevent pollution of groundwater and surface waters as a result of such activities. Yet, even though Vulcan failed to identify blasting as an activity potentially causing contamination of groundwater or surface water, and failed to identify best management practices preventing pollution of surface waters and groundwater as a result of blasting, TCEQ approved Vulcan's WPAP. This approval of the WPAP despite the omission of such critical information and protections violated TCEQ's own rules, and was thus arbitrary and capricious.

TCEQ also violated its own rules by approving Vulcan's WPAP despite Vulcan's proposal to conduct blasting in a manner that will utilize injection wells. The borings used by Vulcan as part of the blasting process constitute "wells" under the plain language of the TCEQ Rules, and the placement of combustible fluids within those wells renders these borings "injection wells" under the plain language of the TCEQ Rules. Since the TCEQ Rules explicitly prohibit the completion of an injection well into the Edwards Aquifer, it was arbitrary and capricious for TCEQ to approve the completion of these injection wells into the Edwards Aquifer.

For these reasons, TCEQ's approval of Vulcan's WPAP should be reversed as arbitrary and capricious, with this matter remanded to the TCEQ for proceedings consistent with the judgment in this case, including proper notice of the WPAP application.

ARGUMENT

I. Standard of Review.

The standards of review that apply to this court's review of the Commission's decision are as follows. Tex. Gov't Code § 2001.174; *see, e.g., Texas Commission on Environmental Quality and Guadalupe-Blanco River Authority v. National Wildlife Federation*, 2026 WL 668291, *2 (Tex. App.—15th, 2026)(pet. denied)("*GBRA*"). On questions of law, the administrative decision is not entitled to deference. *Id.*

Violations of due process.

The proceedings of an administrative agency must meet the requirements of due process, and an agency's decision is arbitrary when its final order denies parties due process of law. *Lewis v. Metropolitan Sav. And Loan* Ass'n, 550 S.W.2d 11, 16 (Tex. 1977), *Oncor Elec. Delivery Co. LLC v. Public Utility Com'n of Texas,* 406 S.W.3d 253, 265 (Tex. App. – Austin 2013 no pet.). To determine whether an interest is entitled to due process, the court looks to the nature of the interest at stake. *County of Dallas v. Wiland,* 216 S.W.3d 344, 352 (Tex. 2007). The Fourteenth Amendment of the United States Constitution protects interests in life, liberty, and property. U.S. Const. amend. XIV, § 1 ("No State shall ... deprive any person of life, liberty, or property, without due process of law....").

Interpretation and application of rules.

A reviewing court construes administrative rules using statutory construction principles, giving effect to the plain meaning of words and considering the statutory scheme and rules as a whole. *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 438-39 (Tex. 2011); Tex. Gov't Code §§ 311.011(a), 311.023(1). The reviewing court determines if the Commission's interpretation "is plainly erroneous or inconsistent with" the rule. *Pub. Util. Comm'n of Tex. v. Gulf States Utils., Co*., 809 S.W.2d 201, 207 (Tex. 1991). Whether the Commission failed to follow its own rules presents a question of law. *Smith v. Montemayor*, No. 03-02-00466-CV, 2003 WL 21401591, at *4 (Tex. App.—Austin June 19, 2003, no pet.). The Commission acts arbitrarily and capriciously when: (1) it defies its own rules' clear, unambiguous language, *id*.; *Zimmer US, Inc. v. Combs*, 368 S.W.3d 579, 585 (Tex. App.—Austin 2012, no pet.), or (2) when it acts without reference to guiding rules and principles, *Nucor Steel-Tex. v. Pub. Util. Comm'n of Tex*., 363 S.W.3d 871, 884 (Tex. App.—Austin 2012, no pet.). *See also* Tex. Gov't Code §§ 2001.174 (2)(B)-(C), 2001.174 (F) (requiring reversal of findings, inferences, conclusions, or decisions that exceed agency authority, are unlawful procedure, or are arbitrary or capricious).

II. TCEQ deprived individual plaintiffs of due process by failing to provide notice reasonably calculated to apprise them of the pendency of Vulcan's WPAP Application.

A. Due process requires that TCEQ employ a method of notice reasonably calculated, under the circumstances, to apprise the interested parties of the pendency of the action.

It is well established that the fundamental requirement of procedural due process under the United States Constitution is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *Matzen v. McLane*, 659 S.W.3d 381, 392 (Tex. 2021). Of course, a person cannot speak to a matter unless the person knows that their interests are potentially impacted by a government decision. Due process thus requires that the method of notice be reasonably calculated, under the circumstances, to apprise the interested parties of the pendency of the action. *Morris v. State,* 804 S.W.2d 22, 25 (Tex. App. – Austin 1994 writ dism'd w.o.j.) *citing Peralta v. Heights Medical Ctr., Inc.,* 485 U.S. 80 (1988).

Resolution of whether administrative procedures are constitutionally sufficient requires an analysis of the governmental and private interests that are affected. *Mathews v. Eldridge,* 424 U.S. 319, 334 (1976). In particular, identifying the dictates of due process requires considering: 1) the private interest that will be affected by the official action; 2) the risk of erroneous deprivation of such interest through the procedures used, and 3) the Government's interest, including the

function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews* at 335.

B. Under the circumstances presented in this case, mailed notice to impacted adjacent landowners such as Mr. Carrillo was required to satisfy the requirements of due process, while published notice and sign posting was required for other landowners in the vicinity, including Cheryl Johnson, John Casimir Kucewicz Jr., and Douglas E. Smith.

1. Mr. Carrillo, and others, hold a private property interest in groundwater that is impacted by Commission approval of the WPAP.

In this case, the impacted private interests of individual plaintiffs are worthy of effective notice of the pending WPAP approval application. In Texas, landowners possess a vested property right in groundwater beneath their land. Tex. Water Code § 36.002(a) ("The legislature recognizes that a landowner owns the groundwater below the surface of the landowner's land as real property."). In the case of *Edwards Aquifer Authority v. Day*, the Texas Supreme Court noted that "groundwater rights are property rights subject to constitutional protection[.]" 369 S.W.3d 814, 833 (Tex. 2012). Groundwater is valued as part of the land. *Edwards Aquifer Authority v. Bragg,* 421 S.W.3d 118, 146 (Tex. App. – San Antonio, 2013 pet. denied).

Pollution of groundwater as a result of Quarry operations would impair the interests of surrounding landowners. Mr. Carrillo's property includes a spring-fed pond which has rarely gone dry and is a source of drinking water for his cattle. The

contamination of groundwater beneath his property would result in the contamination of this important feature of his surface estate. The groundwater of landowners further away would also be at risk. Since the aquifer beneath the Quarry is very porous, any contamination would have a rapid impact upon the quality of the aquifer.[41] Persons such as Mr. Carrillo rely upon groundwater of a sufficient quality to preserve the economic viability of rural land uses, such as ranching. Others in the area rely upon groundwater as the source of domestic water for their residences.

Furthermore, the potential for contaminated surface runoff implicates the surface rights of adjacent and nearby landowners, whose property interests are compromised if highly-polluted surface water is permitted to enter upon their real property.

2. The limited input relating to water pollution abatement plans creates a significant risk of the erroneous deprivation of property rights, including contamination of groundwater.

The risk of erroneous deprivation of these groundwater rights is significant in this case. The value of groundwater depends upon the quality of the groundwater. Quarrying involves heavy equipment, equipment maintenance areas, refueling operations, and often facilities such as concrete or asphalt batch plants.[42] The act of removing rock which separates these activities from the water table makes the

[41] 1AR19 at pg. No. 54.
[42] 1AR32 at pg. No. 9.

groundwater system much more vulnerable.[43] The development of a WPAP is intended to address this vulnerability to prevent the contamination of area groundwater, such as that owned by Mr. Carrillo.

Yet, the WPAP approval process involves minimal public involvement. The application consists solely of information provided by the applicant. Notice of the application is solely provided to cities, groundwater conservation districts, and counties in which the quarry is to be located, and a single 30-day comment period is allowed immediately following notice to these local entities. 30 Tex. Admin. Code § 213.4(a)(2). No opportunity for an evidentiary hearing is provided, and the Executive Director is not even required to respond to comments received.

After the Executive Director's approval of a WPAP, a person may file a motion to overturn the Executive Director's decision (if they happen to learn about the application from a local governmental entity), asking that the three commissioners of the TCEQ reverse the ED's approval. 30 Tex. Admin. Code § 50.139. But, there is no requirement that the Commission seek briefing or consider such a motion at a public meeting, the motion to overturn process does not involve an evidentiary hearing, and the Executive Director's approval of the WPAP is effective upon the approval of the WPAP despite the filing of a motion to overturn.

[43] 1AR32 at pg. No. 9.

For persons such as Mr. Carrillo, owning groundwater directly adjacent to the Quarry, the risk of erroneous deprivation of their groundwater rights by the allowance of insufficiently mitigated groundwater pollution is acute due to the close proximity of their property. While this risk is attenuated with distance from the Quarry, a genuine potential for degradation of groundwater quality for some distance from the Quarry remains, given that nitrate from ANFO is unlikely to break down into less hazardous components and will travel downgradient along groundwater flow paths.[44]

3. The additional governmental burden of mailed notice to the addresses of adjacent landowners listed with the tax appraiser's office, published notice, and sign-posting is minimal.

TCEQ uses much more effective methods of achieving notice when issuing other types of authorizations. For example, TCEQ Rules require that notice of an application for a water quality permit be published in a newspaper of the largest circulation in the county in which the facility is located or proposed to be located within 30 days of the application being declared administratively complete. 30 Tex. Admin. Code § 39.551(b)(1), § 39.418(b)(1), and § 39.405(f)(1). TCEQ's rules also require mailed notice to adjacent and downstream landowners for water quality permit applications. 30 Tex. Admin. Code § 39.551(b)(2). This is accomplished by

[44] 1AR19 at pg. No. 54.

first-class mail to the addresses currently listed for property within the publicly-available tax appraisal district records. For air permits and municipal solid waste permits, TCEQ rules require the posting of signs by the applicant upon the property where the facility is authorized or proposed. 30 Tex. Admin. Code §§ 39.604, 330.57(i)(2).

The fiscal and administrative burdens of these more effective methods of public notice are minor. The requirements that an applicant post signs on the property, and publish notice, only results in an administrative burden of the TCEQ permitting staff reviewing the language and design to be used in such notices. While the burden of mailing notice is greater, it is still slight. As with wastewater discharge permits, TCEQ may require that an applicant assemble the list of adjacent landowners from readily-available tax appraisal district data and submit that list in electronic form to the TCEQ. The sole administrative burden upon the TCEQ is the processing of these lists to create a mailing. The sole fiscal cost is the cost of postage to mail such notices.

Balancing the potential for deprivation of Mr. Carrillo's interest in groundwater with the burdens to the State, adequate notice to satisfy the requirements of due process due to Mr. Carrillo required the provision of mailed notice to adjacent landowners utilizing the addresses publicly available through the county tax assessor's office, as is done for TCEQ wastewater discharge permits.

Notice only to local governments certainly was not reasonably calculated to apprise him of the pendency of Vulcan's WPAP application.

Non-adjacent landowners in the vicinity, such as Cheryl Johnson, John Casimir Kucewicz Jr., and Douglas E. Smith, were entitled to published notice and the posting of signs upon the property for which the WPAP is being approved. These are the methods of notice which would have been reasonably calculated to apprise area landowners of Vulcan's WPAP application. Yet, none of these methods were employed in this case.

By approving the WPAP without providing Mr. Carrillo with mailed notice of TCEQ's consideration of the WPAP, and without provision of notice to Cheryl Johnson, John Casimir Kucewicz Jr., and Douglas E. Smith by published notice and signage, TCEQ deprived these persons of their due process rights, rendering TCEQ's approval of the WPAP arbitrary and capricious.

III. TCEQ violated its own rules by failing to require that the WPAP identify and address blasting as a potential source of contamination.

TCEQ's Rules, at 30 Tex. Admin. Code § 213.5(b)(4)(A)(iv) require that the technical report supplied in an application must, "describe any activities or processes which may be a potential source of contamination." The same rules at 30 Tex. Admin. Code § 213.5(b)(4)(B)(iii) provide that "BMPs and measures must prevent

pollutants from entering surface streams, sensitive features, or the aquifer as provided under this paragraph."

In identifying the potential sources of contamination, the Application only identifies temporary sources during construction and potential sources that may affect stormwater discharges from the site after development.[45] As noted above, blasting is not identified within the Application as a potential source of contamination.[46] The plain text of 30 Tex. Admin. Code § 213.5(b)(4)(A)(iv) requires that the technical report, "must describe *any* activities or processes which may be a potential source of contamination." There is no question that blasting can be a potential source of contamination.[47]

The identification of activities which may be a potential source of contamination is critical because the TCEQ Rules require that "BMPs and measures must prevent pollutants from entering surface streams, sensitive features, or the aquifer." 30 Tex. Admin Code § 213.5(b)(4)(B)(iii).

Since Vulcan's Application does not acknowledge blasting as an activity that can be a potential source of contamination, Vulcan's WPAP does not propose any measures directed to the protection of the Edwards Aquifer from contamination as a result of the blasting process. For these reasons, the Application fails to comply with

[45] 1AR4 at pg. No. 77.
[46] 1AR4 at pg. No. 77.
[47] 1AR19 at pg. Nos. 16 – 17.

30 Tex. Admin. Code § 213.5(b)(4)(A)(iv), and 30 Tex. Admin Code § 213.5(b)(4)(B)(iii), and TCEQ violated its own rules by approving the WPAP despite these deficiencies. TCEQ's approval of the WPAP was, accordingly, arbitrary and capricious for this reason.

IV. TCEQ violated its own rules by authorizing the installation of injection wells terminating in the Edwards Aquifer.

Under the plain meaning of the TCEQ Rules, the boreholes which Vulcan proposes to complete as part of the blasting process constitute injection wells which are prohibited in or through the Edwards Aquifer. Under 30 Tex. Admin. Code § 213.3(39), "well" is defined as "[a] bored, drilled, or driven shaft, or an artificial opening in the ground made by digging, jetting, or some other method, where the depth of the well is greater than its largest surface dimension. A well is not a surface pit, surface excavation, or natural depression." TCEQ's regulations governing injection wells define the term "well" in a similar manner. 30 Tex. Admin. Code § 331.2(120). The TCEQ Rules provide that an "injection well" would include "[a] well into which fluids are being injected." 30 Tex. Admin. Code § 331.2(59). In turn, a "fluid" is a "material or substance which flows or moves whether in a semisolid, liquid, sludge, gas or any other form or state." 30 Tex. Admin. Code § 331.2(47).

The boreholes used for blasting are "wells," since they are bored shafts with a depth greater than their largest surface dimension. The ANFO placed within these wells constitutes a "fluid" since it is a material which flows or moves.

TCEQ's own Edwards Aquifer regulations clearly and unambiguously prohibit such an injection well in the Edwards Aquifer:

> For applications submitted on or after September 1, 2001, injection wells that transect or terminate in the Edwards Aquifer, as defined in § 331.19 of this title (relating to Injection Into or Through the Edwards Aquifer), are prohibited except as provided by § 331.19 of this title.

30 Tex. Admin. Code § 213.8(c).

Under the plain meaning of the TCEQ rules, Vulcan's planned blasting method includes the termination of injection wells within the Edwards Aquifer in contravention of the TCEQ Rules. The Commission's decision to approve Vulcan's WPAP authorizing this activity was, thus, inconsistent with the plain language of the TCEQ rules. Accordingly, TCEQ's approval of the WPAP was arbitrary and capricious for this reason as well.

CONCLUSION AND PRAYER

For the reasons described above, Plaintiffs request that this Court reverse the Commission's approval of Vulcan's WPAP and remand the matter to the TCEQ for further proceedings consistent with the Court's judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Based on a word count run by the computer program used to prepare this document, this Initial Brief contains 4,754 words, excluding the portions of the document exempt from the word count under Texas Rule of Appellate Procedure 9.4(i)(1).

/s/ Eric Allmon
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CERTIFICATE OF SERVICE

I do hereby certify that on March 17, 2026, a true and correct copy of the above and foregoing document has been served via electronic service to the counsel of record listed below.

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