

Cause No. D-1-GN-24-007463

**PRESERVE OUR HILL
COUNTRY ENVIRONMENT et
al.,**

Plaintiffs,

V.

**TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY,**

Defendant,

**VULCAN CONSTRUCTION
MATERIALS, LLC,**

Intervenor-Defendant.

IN THE DISTRICT COURT

TRAVIS COUNTY, TEXAS

353RD JUDICIAL DISTRICT

BRIEF OF DEFENDANT
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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GLOSSARY OF ACRONYMS AND TECHNICAL TERMS

<u>Term</u>	<u>Meaning</u>
AR	Administrative Record. The documents and evidence before the Commission when it made its decision in this case.
Commission or TCEQ	Texas Commission on Environmental Quality
ED or Executive Director	TCEQ's Executive Director – Oversees the day-to-day operations of the agency, including processing applications for water pollution abatement plans and preparing recommendations for the Commission.
PHCE	Preserve Our Hill Country Environment
Carrillo	Short name for Cause No. D-1-GN-24-008787, which was consolidated with this matter.
BMP	Best Management Practices
PHCF	Preserve Our Hill Country Foundation
Chapter 213	Edwards Aquifer Rules codified at 30 Tex. Admin. §§ 213.1-.14
Total Suspended Solids (TSS)	Particles suspended in water used as an indicator parameter for evaluating BMP effectiveness.
Water Pollution Abatement Plan (WPAP)	A pollution-prevention plan required under 30 Tex. Admin. Code chapter 213 for regulated activities.

STATEMENT OF THE CASE

This case is an appeal of the Texas Commission on Environmental Quality's ("Commission" or "TCEQ") denial of Plaintiffs' motions to overturn the Commission's Executive Director's approval of a water pollution abatement plan for a quarry in Comal County.¹

STATEMENT OF JURISDICTION

Tex. Water Code § 5.351 waives sovereign immunity for this case. Tex. Gov't Code § 2001.171 does not, because the decision on review is not "a final decision in a contested case."

¹ The Administrative Record (AR) of the Commission proceeding is cited as AR (Item #) at (page #) with the page # corresponding to the PDF page number of the document. Prior to consolidation, separate, identical administrative records were filed in the *Carrillo* and *PHCE* matters. Upon consolidation, the matters were placed under the *PHCE* docket number, and so all cites to the administrative record are to the *PHCE* record. An appendix of referenced AR items is being submitted separately to the Court.

ISSUES PRESENTED

1. TCEQ complied with its rules' requirements for notice and afforded Plaintiffs a meaningful opportunity to participate. Did this violate due process?
2. TCEQ, after consideration of, *inter alia*, Vulcan's description of anticipated activities, including blasting, and geological and other expert assessments of the site and of what practices would prevent pollution of surface water, groundwater, and stormwater at the site, approved a pollution abatement plan requiring Vulcan to adhere to those practices. Did this violate the Edwards Aquifer pollution abatement plan rules?
3. TCEQ approved a pollution abatement plan that includes blasting, a standard quarry method to break up rocks involving a temporary borehole loaded with a blasting agent and identified throughout TCEQ's abatement plan application and guidance, and which, unlike an injection well, does not inject fluids into a subsurface geologic formation. Did this violate rules against the installation of injection wells over the aquifer?

INTRODUCTION

This case centers on a narrow set of regulations that have been administered by the Commission, in some form, for decades. They provide an added layer of protection for the Edwards Aquifer, by requiring water pollution abatement plans for certain activities. Vulcan Construction Materials LLC (Vulcan) submitted a water pollution abatement plan under these rules, the Executive Director approved the plan after technical review, and the Commission declined to overturn that approval.

Plaintiffs filed suit, and in briefing,² present an attenuated due process claim, mischaracterize the Commission's regulations, and ignore that substantial evidence, including lengthy technical reports sealed by a licensed professional engineers and geologist attesting that this plan will protect the aquifer, support the Commission's decision. The Commission correctly applied its regulations, weighed the evidence in the record, and made a decision consistent with the evidence. Under

² Plaintiffs' merits brief omits several issues raised in their original petition. Under the Travis County local rules, Plaintiffs' unbriefed issues are waived and so the State will not address those waived issues in this brief. Travis County Civ. Dist. Ct. Loc. R. 10.5(e).

the substantial evidence standard applicable to this case, this Court should affirm the Commission’s decision.

STATEMENT OF FACTS

Vulcan owns property in Comal County and is in the process of developing that property into a quarry. AR 4 at 10. This suit relates to one of several required regulatory authorizations³ and approvals—a water pollution abatement plan—required because the property is located in the Edwards Aquifer recharge zone. *See* 30 Tex. Admin. Code §§ 213.1-.14. The recharge zone is “that area where the stratigraphic units constituting the Edwards Aquifer crop out, including the outcrops of other geologic formations in proximity to the Edwards Aquifer, where caves, sinkholes, faults, fractures, or other permeable features would create a potential for recharge of surface waters into the Edwards Aquifer.” 30 Tex. Admin. Code § 213.3(27).

³ Vulcan was also required to obtain an air permit authorizing construction and operation of its rock crushing plant. *See Texas Comm’n on Env’tl. Quality v. Friends of Dry Comal Creek*, 669 S.W.3d 506 (Tex. App.—Austin 2023, pet. denied) (affirming issuance of air permit). Vulcan has also been issued authorization number TXR1552SL to operate under TCEQ’s general permit to discharge stormwater associated with construction sites. *See* https://www2.tceq.texas.gov/wq_dpa/index.cfm?fuseaction=home.permit_list_by_permit&permit_number=TXR1552SL.

The Commission has been implementing and enforcing rules to protect the Edwards Aquifer for decades. *See* 23 Tex. Reg. 10418 (Oct. 9, 1998). The rule at issue here provides that before a landowner can commence certain activities with the potential to adversely affect the water quality of the Edwards Aquifer and connected surface water, they must first establish that they will use specific best management practices to prevent migration of pollutants into that water. *See e.g.*, 30 Tex. Admin. Code § 213.5. This is done through a water pollution abatement plan. The Commission approved such a water pollution abatement plan for the Vulcan facility that Plaintiffs seek to challenge.

The plan is based on an assessment of the activities that are to be conducted, and measures to be implemented to protect water quality specific to threats posed by those regulated activities. *See* AR 4 at 21-23 (describing construction and mining operations, including use of blasting agents and methods to achieve protection, including settling ponds, grading, buffers, berms, and such to control stormwater and ensure that 80% of Total Suspended Solids will be removed from water before it leaves the site). The Commission-approved plan includes the installation of on-site control measures, including a 100-foot buffer along the site

perimeter, 50-foot vegetative filter strips, rock berms and silt fencing, all to control sediments such that water quality and recharge to the aquifer are both protected. AR 4 at 98-99; AR 7 at 6-7.

Vulcan's application, as required by rule, included more than 140 pages of data, maps, and other information, including construction and design plans for best management practices, signed and sealed by a Texas licensed professional engineer. AR 4 at 2, 3; AR 14 at 1; *See* 30 Tex. Admin. Code §§ 213.5(b)(4)(C)(vi), 213.5(b)(4)(C)(vii).

Texas licensed professional geoscientist, Henry Stultz III, P.G.⁴ conducted a geologic assessment that identified "sensitive features," features with the potential for rapid infiltration of water into the aquifer. *See* 30 Tex. Admin. Code § 213.3(29); AR 4 at 24-65, 34-37. Features present at the site include six pilot holes drilled for a water availability study, which were plugged and abandoned because very little water was found, as well as six additional possible water wells, some capped, some not. AR 4 at 35. Mr. Stultz assessed all of the sensitive features, both manmade and naturally occurring (caves, sinkholes, etc.) according to

⁴ Mr. Stultz has over 19 years of professional experience as a geoscientist and more than 13 years conducting geologic assessments for water pollution abatement plans in the Edwards Aquifer. AR 25 at 25.

their probability for rapid infiltration, and the plan includes measures to install buffers to filter water as a protective measure around those features with a high probability for rapid infiltration. AR 4 at 34-37. Mr. Stultz's affidavit details his expertise evaluating sensitive features and explaining that the buffers in the plan "serve to preserve water quality and protect sensitive features identified" in the geologic assessment. AR 25 at 25-28. Commission staff also conducted their own geologic site assessment and that assessment found the site to be consistent with Mr. Stultz's report. AR 14 at 2.

The plan is also supported by other technical reports providing all the information required by 30 Tex. Admin. Code § 213.5(b)(4), including descriptions of the regulated activity, information regarding wastewater and stormwater runoff, potential sources of contamination, and descriptions of best management practices. As required, the technical report also included total suspended solids (TSS) removal calculations, which were sealed by a Texas licensed professional engineer. AR 4 at 140-143. The calculations in the application demonstrate that the proposed permanent management practices meet the 80% removal of TSS requirement. AR 4 at 140-143; 30 Tex. Admin. Code § 213.5(b)(4)(D)(ii)(I).

The Commission requires this because TSS is an indicator parameter for assessing the performance of best management practices in protecting water quality. 23 Tex. Reg. 3197 (Mar. 27, 1998). When TSS is being effectively controlled, it is expected that other potential contaminants will likewise be controlled. *Id.* The approved plan meets the requirement that the facility must be designed, constructed, operated, and maintained to ensure that 80% of the incremental increase in the annual mass loading of TSS from the site caused by the regulated activity is removed. 30 Tex. Admin. Code § 213.5(b)(4)(D)(ii)(I); AR 4 at 140-143.

Vulcan's application disclosed that its activities would include blasting and the use of blasting agents (AR 4 at 21). The approved plan included provisions that accord with TCEQ guidelines regarding blasting activities: a 25 foot separation between the water table and mining activities (AR 4 at 22-23, AR 32); a positive slope will be maintained away from faults and other sensitive features to prevent flows from entering them (AR 4 at 23); banks of dry creeks will be maintained at elevations that will not allow flooding (AR 4 at 23); and blasting agents will not be stored onsite over the recharge zone (*Id.*).

The approved plan is one component in the landscape of regulation that applies to sites operating over the Edwards Aquifer. The Commission's rules, including permitting requirements, relating to water quality, waste management, air quality, stormwater management, spill response, and remediation all still apply to activities taking place over the Edwards Aquifer. *See* 23 Tex. Reg. 10402 (Oct. 9, 1998). Furthermore, agency oversight continues even after an abatement plan is approved. The plan requires on-going maintenance for management practices as well as agency approval for any plan modifications. AR 14 at 4 (Standard Condition 16); 30 Tex. Admin. Code §§ 213.4(j)(1)-(3) 213.5(b)(4)(B)(vi), 213.5(b)(4)(C)(vii). The agency retains enforcement authority over the regulated activities and the approved plan. 30 Tex. Admin. Code §§ 213.4(k), 213.10.

The Commission's Executive Director approved the final pollution abatement plan on July 8, 2024. AR 14. Plaintiffs moved to overturn that decision and the Commission extended its deadline to act on the motion. It invited and received additional briefing and submittals, AR 23, before allowing the motions to be denied by operation of law on September 26, 2024.

STANDARD OF REVIEW

Tex. Water Code § 5.351 authorizes suits for judicial review of a final decision of the Commission, in this case, its denial of Plaintiffs' motions to overturn the Executive Director's approval of Vulcan's pollution abatement plan. Although the decision was not made in a contested-case format, the standard of review is still substantial evidence. *See Boerne to Bergheim Coal. for Clean Env't v. Texas Comm'n on Env'tl. Quality*, 657 S.W.3d 382, 390 (Tex. App.—El Paso 2022, no pet.); *Texas Comm'n on Env'tl. Quality v. City of Waco*, 413 S.W.3d 409, 424-425 (Tex. 2013); *see also City of San Antonio v. Texas Water Comm'n*, 407 S.W.2d 752, 756 (Tex. 1966) (appeals under predecessor statute to § 5.351 are “to be tried under the substantial evidence rule”).

Under the substantial evidence standard of review, the Commission's order is presumed to be valid and supported by substantial evidence and Plaintiff bears the burden of proving otherwise. *Dyer v. Texas Comm'n on Env'tl. Quality*, 639 S.W.3d 721, 731 (Tex. App.—Austin, 2019, pet. granted) *affirmed by Dyer v. Texas Comm'n on Env'tl. Quality*, 646 S.W.3d 498 (Tex. 2022).

The Court reviews the evidence as a whole to determine if reasonable minds could have reached the same conclusion as the agency in the disputed action. *Citizens Against Landfill Location v. Texas Comm’n on Env’tl. Quality*, 169 S.W.3d 258, 264 (Tex. App.—Austin 2005, pet. denied). The reviewing court may not substitute its judgment for that of the agency and may consider only the record on which the agency based its decision. *Id.* The issue before the court is not whether the agency reached the correct conclusions but whether there is some basis in the record for its action. *Id.* Although substantial evidence is more than a mere scintilla, the evidence in the record may preponderate against the agency’s decision and nonetheless amount to substantial evidence. *Id.* The court presumes that the agency’s findings, inferences, conclusions, and decisions are supported by substantial evidence. *Id.* The burden to prove otherwise is on the party seeking review. *Id.*

In addition, the court should sustain the agency’s order on any legal basis shown in the record. *Public Util. Comm’n v. Southwestern Bell Tel. Co.*, 960 S.W.2d 116, 121 (Tex. App.—Austin 1997, no pet.). “[W]e will sustain a Commission order if it is correct on any theory of law applicable to the case, and that regardless of whether or not the Commission gives

a correct legal reason for such order, or whether or not it gives any reason at all therefor.” *Gulf Land Co. v. Atlantic Refining Co.*, 131 S.W.2d 73, 77 (Tex. 1939); *see also R.R. Comm’n of Tex. v. City of Austin*, 524 S.W.2d 262, 279 (Tex. 1975).

The substantial evidence standard of review also considers whether an agency decision is arbitrary, capricious, or characterized by an abuse of discretion. An agency’s decision is arbitrary or results from an abuse of discretion if the agency failed to consider a factor the legislature directs it to consider; considered an irrelevant factor; or weighed only relevant factors but still reached a completely unreasonable result. *City of El Paso v. Pub. Util. Comm’n of Tex.*, 883 S.W.2d 179, 184 (Tex. 1994). In essence, the court determines whether the agency genuinely engaged in reasoned decision-making. *Heritage on San Gabriel Homeowners Ass’n v. Texas Comm’n on Env’tl. Quality*, 393 S.W.3d 417, 423 (Tex. App.—Austin 2012, pet. denied).

Plaintiffs here raise issues involving the interpretation of rules promulgated and administered by the Commission. Such questions are reviewed *de novo*. Tex. Gov’t Code § 2001.042. But a court may properly give consideration to an agency’s legal determination that is reasonable

and does not conflict with the plain language of the statute. *Id.*; *see also R.R. Comm’n of Texas v. Tex. Citizens for a Safe Future and Clean Water*, 336 S.W.3d 619, 630 (Tex. 2011); *Texas Comm’n on Env’tl. Quality v. Maverick Cnty.*, 642 S.W.3d 537, 546 (Tex. 2022) (affirming TCEQ’s interpretation of its rule because it harmonizes all the words in the rule, rather than focusing on a single part). The Commission’s expertise and analysis here are significant because the regulatory scheme concerns a specialized subject matter. *See* Tex. Gov’t Code § 2003.047(d) (acknowledging the “technical or other specialized” matters that come before TCEQ).

SUMMARY OF THE ARGUMENT

Plaintiffs do not dispute that the Commission complied with the applicable notice provisions for water pollution abatement plans. Instead, they baselessly challenge the constitutionality of the Commission’s notice requirement for abatement plans. Their due process claims lack merit. As an initial matter, Plaintiffs fail to properly allege a protected liberty or property interest impaired by the Commission’s approval of Vulcan’s pollution abatement plan. Without a protected interest, any procedural protection they receive comes from

the governing rules—and, undisputedly, the Commission followed those rules. Even assuming Plaintiffs successfully alleged a protected interest, Plaintiffs were afforded multiple opportunities to be heard: they submitted comments, filed motions to overturn with supporting technical materials, and submitted additional briefing after the Commission extended the deadline. The Commission complied with its rules and provided Plaintiffs all process due.

Plaintiffs focus much of their argument on the blasting activities associated with quarry operations, alleging violation of Commission rules. They argue that blasting was not identified as a potential source of contamination on a specific page of the application and mischaracterize blasting boreholes as injection wells. These arguments ignore the evidence in the record and incorrectly apply the Commission's regulations. Blasting is a routine part of quarry operations and contemplated in both the Commission's application forms and its guidance; further, it was specifically identified in the application materials. The Commission's approved plan imposes a 25-foot buffer between groundwater and mining activities and includes additional management practices that are designed to protect

groundwater, surface water, and stormwater. Plaintiffs' contention that blasting boreholes are somehow underground injection wells is based on a strained interpretation of Commission rules that does not align with the basic nature of quarry blasting, the mining of rock rather than injection of fluids into geologic formations for disposal or storage as an injection well. Plaintiffs mischaracterize boreholes as injection wells, contrary to Commission regulations.

The Commission's decision to approve the water pollution abatement plan accords with its regulations and guidance and is supported by evidence in the record. Under the substantial evidence standard of review, this Court should affirm the Commission's decision.

ARGUMENT

I. TCEQ complied with its notice rules and afforded Plaintiffs a meaningful opportunity to participate.

By rule, TCEQ has set out the procedures for notice regarding the processing and approval of an Edwards Aquifer protection plan. The TCEQ regional office is required to provide copies of applications to:

affected incorporated cities, groundwater conservation districts, and counties in which the proposed regulated activity will be located.

30 Tex. Admin. Code § 213.4(a)(2).⁵ Any person may file comments and the executive director is required to review all comments that are timely filed. *Id.*

The Commission complied with the rule. AR 5 (Email Notice of Edwards Aquifer Protection Plan Application to Local Governments and Groundwater Conservation District Representatives). Tacitly acknowledging this, Plaintiffs instead challenge the constitutionality of the rule, claiming that the Commission's adherence to the rule deprived them of constitutionally protected interests. They are mistaken.

A. TCEQ's decision did not deprive Plaintiffs of constitutionally protected interests.

Plaintiffs allege that their due process rights were denied because notice of the application was not directly mailed and/or published and posted on signs. But “[t]he constitutional right to due process is not... an abstract right to hearings conducted according to fair procedural rules. Rather, it is the right not to be deprived of life, liberty, or property without such procedural protections.” *Monk v. Huston*, 340 F.3d 279, 282-

⁵ During the rulemaking process for Section 213.4(a)(2), the agency considered public comments requesting additional public notice, such as newspaper publication, but, after due consideration, the agency found the proposed rule provided sufficient public notice and made no changes to the adopted rule language. 23 Tex. Reg. 10434-10435 (Oct. 9, 1998).

83 (5th Cir. 2003); *See University of Tex. Med. Sch. v. Than*, 901 S.W.2d 926, 931 (Tex.1995) (holding the very nature of due process negates setting inflexible procedures that could be universally applicable).

Absent such a liberty or property interest, Plaintiffs are not entitled to pre-deprivation procedural protections.

Our first inquiry in a procedural due process claim is whether the plaintiff has been deprived of a property or liberty interest deserving protection under the federal and state constitutions. If a plaintiff fails to allege the deprivation of such an interest, the plaintiff has failed to allege a due process claim.

Coastal Habitat All. v. Pub. Util. Comm’n of Texas, 294 S.W.3d 276, 286 (Tex. App. – Austin 2009, no pet.) (citing *Spring Branch Indep. Sch. Dist. v. Stamos*, 695 S.W.2d 556, 560–61 (Tex.1985)); *see also, Univ. of Tex. Med. Sch. at Houston v. Than*, 901 S.W.2d 926, 929 (Tex.1995).

Plaintiffs assert interests in groundwater, but they don’t own the groundwater under Vulcan’s property or provide any legal basis that allows them to dictate activities on another landowner’s property. *See Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75, 80 (Tex. 1999); *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 833 (Tex. 2012). Moreover, the Commission’s decision does not impair or deny any rights Plaintiffs’ might have regarding that water. Rather, Plaintiffs interests,

according to their claims, might be affected in the future, by Vulcan's activities—not by this approval of a plan to protect the Edwards Aquifer. Plaintiffs' deprivation is hypothetical and relies on speculation that groundwater contamination may occur. The Austin Court of Appeals considered this argument in *Collins v. Texas Nat. Res. Conservation Comm'n*, 94 S.W.3d 876, 884 (Tex. App.—Austin 2002, no pet.) and rejected it. Collins, a neighboring landowner complained that a wastewater-retention facility would pollute groundwater. *Id.* at 883. The Court specifically rejected his argument that he had a liberty or property interest that entitled him to pre-deprivation procedural protection. *Id.*

While the environmental damage and nuisance that [the claimant] *predicts* would surely deprive him of his valuable property rights, we note that the permit does not authorize such failures. . . . The permit itself requires an operation subject to oversight so that it will not deprive [the claimant] of any concrete liberty or property interest. Mere speculation of failure in the face of conflicting evidence about the improved operation of the site under the permit does not deprive [the claimant] of protected liberty or property rights.

Collins, 94 S.W.3d at 883-884. That holding applies here. Plaintiffs fear that the plan's requirements for retention ponds, buffer zones, berms, silt fences, vegetative filter strips, and such might fail to capture contaminants sufficiently, which might occur in sufficient concentrations

to pollute groundwater, which might flow to their property. This epitomizes “mere speculation of failure in the face of conflicting evidence”—it does not establish a protected liberty or property interest. *Id.*

Because Plaintiffs have not established a constitutionally protected interest impaired by the Commission’s decision, whatever due process rights they may have must be found in the rules—and the Commission provided the notice required by the rules. The crux of Plaintiffs’ claim is that they simply disagree with the rule because they think it’s bad policy. But such considerations are the province of the agency, subject to the oversight of the Legislature, not the judiciary. As the Commission’s Public Interest Counsel noted in its response to the motions to overturn, a rulemaking proposal would be the more appropriate mechanism to put this issue before the Commission. AR 26 at 6, 9.

Moreover, the Legislature has spoken on this issue—and it approved the process afforded by 30 Tex. Admin. Code § 213.4(a)(2), the rule the Commission followed here. When it enacted Texas Water Code Section 26.137, regarding the Comment Period for Edwards Aquifer Protection Plans, it specifically stated that: “The commission shall

provide for a 30-day comment period in the review process for Edwards Aquifer Protection Plans in the Contributing Zone of the Edwards Aquifer *as provided in 30 T.A.C. Section 213.4(a)(2).*” See HB 2912, 77 RS (2001) (emphasis added).⁶

B. TCEQ afforded Plaintiffs a meaningful opportunity to present their concerns.

Additionally, Plaintiffs’ complaint that they did not receive personalized mailed notice ignores the fact that they received actual notice and participated in the agency proceedings. Plaintiffs had numerous, meaningful opportunities to be heard – and they were heard – thus satisfying any possibly applicable due process requirements. What process is due in an administrative proceeding, even when a party does establish a protected interest, is measured by a flexible standard that depends on the practical requirements of the circumstances. *See Than*, 901 S.W.2d at 930 (citing *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)). The court must balance: (1) the government's interest, including the fiscal and administrative burdens of additional or substitute procedural requirements; (2) the private interest that will be

⁶ Section 213.4(a)(2) as it existed in 2001 can be found in 23 Tex. Reg. 10399, 10480 (Oct. 9, 1998) and shows the language remains the same today.

affected by the official action; and (3) the risk of an erroneous deprivation of such interests by the actual procedures used. *Id.* Further, although due process does not require actual notice, courts have recognized that actual notice can defeat a claim of a due process violation. *Pierce v. Tex. Racing Comm’n*, 212 S.W.3d 745, 758 (Tex. App. – Austin 2006, pet. denied); *McMaster v. Public Utility Comm’n of Texas*, 2012 WL 3793257 (Tex. App. – Austin 2012, no pet.).

Plaintiffs had an opportunity to comment on the application and, additionally, an opportunity to present arguments directly to the Commission in motions to overturn. *See* 30 Tex. Admin. Code §§ 213.1(a)(3), 50.139. Plaintiffs fully participated in this process. Three submitted public comments to the Commission. *See* AR 30 at 147 (Olson), 202 (PHCE); AR 37 at 105 (PHCE, PHCF). And the Commission required Vulcan to make changes to the protection plan—to raise the mining activity floor—in response to concerns raised by PHCE and PHCF. *See* ARs 6-7 (Executive Director staff issued a notice of deficiency to Vulcan requiring a 25-foot buffer between the groundwater and mining activity floor (AR 6) and Vulcan submitted amended application pages updating

the mining activity floor to 1,047 msl (AR 7)); AR 30 at 218-219 (PHCE comment raising concerns regarding the mining floor depth).

Plaintiffs were also heard through the substantial motions to overturn and briefing and evidence they submitted to the Commission. ARs 15-22 (MTOs), ARs 27 – 29 (MTO Replies). Indeed, the Commission specifically invited parties to submit briefing and extended the time for it to act on the motions by 90 days to allow for that briefing to occur and be considered. AR 23. Thus, Plaintiffs had ample time to present arguments directly to the Commission and put forward their best evidence. And they did so. Plaintiffs provided not only comments, but substantive technical analysis, including a report by Dr. James Doyle, AR 28 at 12-21, and a technical report from Brian Smith, a Texas licensed geoscientist, that detailed Plaintiffs' technical concerns to the Commission. AR 19 at 46. Plaintiffs were given a meaningful opportunity to be heard, just as the rules contemplate and the Legislature has deemed appropriate.

II. TCEQ reasonably interpreted its rules, and its approval of the pollution abatement plan is supported by substantial evidence.

The Commission's denial of Plaintiffs' motions to overturn was reasonable, supported by evidence, and consistent with the Commission's reasonable interpretation and application of its regulations in Chapter 213. The Commission had before it an extensive record, including the application itself, the record of the Executive Director's review of the application, more than 800 public comments, and substantive motions to overturn the Executive Director's decision to approve the pollution abatement plan, including responses and replies. After reviewing the record and weighing the evidence, the Commission reached a reasonable decision to affirm the Executive Director's decision.

A. Substantial evidence in the record demonstrates that the plan meets applicable TCEQ rules and accords with TCEQ guidance regarding protective measures for blasting.

As set forth above, ample evidence in the record, including Mr. Stultz's expert geologic assessment, the Commission staff's own geologic assessment, and the plans developed by licensed engineers with particular expertise in this area, supports the determination that the

plan will protect the Edwards Aquifer from potential contamination related to Vulcan's activities at the site. AR 4 at 2 (Texas licensed engineer seal of the application); AR 4 at 24-69 (Stultz's geologic assessment); *See* AR 14. Thus, it meets the rule's requirement that management practices and measures prevent pollution of surface water, groundwater, and stormwater. *See* 30 Tex. Admin. Code § 213.5(b)(4)(C).

Here Plaintiffs argue semantics rather than substance. They complain that because a single page of the application does not list blasting as a potential source of groundwater contamination, the approval violates the rules' requirements that applications describe activities that may be a potential source of such contamination and that plans include measures to prevent pollutants from entering the aquifer. Plaintiffs' Brief at 21-22; referencing 30 Tex. Admin. Code §§ 213.5(b)(4)(A)(iv) and 213.5(b)(4)(B)(iii).

But this is wrong. The application clearly discloses that "[b]lasting agents will be utilized in the mining process" in paragraph 5 of the Project Description. AR 4 at 21; *see also* AR 7 at 6 (Revised Attachment C). It also provides that a 25-foot separation will be maintained between mining activities and "the elevation of the potentiometric water surface."

AR 7 at 7. This accords with TCEQ guidance for best management practices for quarry operations, which explains that:

To prevent pollution of groundwater in the Edwards Aquifer, the TCEQ recommends a minimum separation of 25 feet between the quarry-pit floor and the groundwater level for quarries in the recharge zone. This distance is based on the maximum propagation of fractures from blasting operation.

AR 32 at 10 (TCEQ, Best Management Practices for Quarry Operations: Complying with the Edwards Aquifer Rules). The Commission reasonably relied on on-site well data from Well Report # 520690 that showed the groundwater level as 1,022 feet above mean sea level. AR 4 at 54; *See* AR 6 at 1. TCEQ Guidance specifies that on-site well data is preferred and should be used if available. *See* AR 32 at 10.⁷ The Commission's decision to require Vulcan to establish and maintain a 25-foot buffer between the identified groundwater level and mining activities by setting the maximum depth of any mining activity at 1,047 feet above mean sea level is supported by the evidence and accords with the rules and applicable guidance. AR 6 at 1; AR 7 at 1; AR 14 at 2 (Standard Condition 1).

⁷ AR 32, TCEQ Regulatory Guidance 500, Best Management Practices for Quarry Operations, Complying with the Edwards Aquifer Rules, Michael E. Barrett, Ph.D., P.E., Bradley J. Eck, Ph.D., P.E. (Jan. 2012).

The Commission considers blasting to be an ordinary part of quarry operations, and the approved plan includes measures to protect against groundwater contamination. Indeed, not only does the agency discuss blasting in the Commission's Best Management Practices for Quarry Operations, but the agency's application forms themselves specifically reference blasting. Form TCEQ-0602, Temporary Stormwater Section, requires a description of "how, to the maximum extent practicable ... measures will maintain flow ... during excavation, blasting, or construction." AR 4 at 83. Similarly, Form TCEQ-0600, Permanent Stormwater Section, requires applicants to affirm their understanding that measures must maintain water flow "during excavation, blasting, or construction." AR 4 at 113.

The Commission does not require identification of which specific blasting chemical a quarry operator might use. This is because the rule instead uses TSS as an indicator parameter for measuring the performance of best management practices. 23 Tex. Reg. 3197 (Mar. 27, 1998). Vulcan submitted a plan, sealed by a licensed professional engineer, with supporting calculations, that showed that the practices and measures it included in that plan "have been designed, and will be

constructed, operated, and maintained to ensure that 80% of the incremental increase in the annual mass loading of total suspended solids (TSS) from the site caused by the regulated activity is removed.” AR 4 at 111, 140-143. Because TSS is effectively controlled, the Commission reasonably determined that other potential contaminants will likewise be controlled. *See* 23 Tex. Reg. 3197 (Mar. 27, 1998). Here, the plan contains multiple practices for managing the active area of the quarry, i.e. where blasting would be occurring, to prevent water from leaving the site and reaching surface water. AR 4 at 98-99 (Temporary BMPs); AR 4 at 103 (Drainage Area Map). Vulcan is also required to plan for the inspection, maintenance, and repair of management practices on site (AR 14 at 2, 4, (Standard Conditions 6, 16); 30 Tex. Admin. Code §§ 213.5(b)(4)(B)(vi), 213.5(b)(4)(C)(vii)) and to comply with all provisions of Chapter 213 (AR 14 at 2, Condition 1). Nor did Commission staff simply rely on Vulcan’s initial application. Rather, staff, in several instances, requested additional information, information that further supports the decision. *See* ARs 6, 8, 10, 12. The Commission’s determination that the plan meets the requirements of the Edwards Aquifer rules is reasonable and supported by record evidence. *See* AR 4 at 140-143; AR 14 at 2

(Permanent Pollution Abatement Control Measures), at 4 (Standard Condition 15); 30 Tex. Admin. Code § 213.5(b)(4)(D)(ii)(I).

Plaintiffs may disagree with the Commission's determinations, but the Commission is the expert agency and has, as a matter of law, the final word on the weight of the evidence after reviewing the record before it. *Texas Comm'n on Envtl. Quality v. Save Our Springs All., Inc.*, 668 S.W.3d 710, 726 (the agency is tasked with determining "the meaning, weight, and credibility to assign conflicting evidence, and we may not set aside an agency decision because testimony was conflicting or disputed or because it did not compel the agency's decision")(quoting *Sanchez v. Tex. State Bd. of Med. Examiners*, 229 S.W.3d 498, 511 (Tex. App.—Austin 2007, no pet.)). While Plaintiffs may disagree with the weight the Commission gives a piece of evidence, the law is clear that the Commission has the discretion to determine the weight of the evidence before it. *Id.*

Plaintiffs' arguments on this issue amount to dissatisfaction with the exact format in which Vulcan filled out the application. However, imperfect filling out of the form of an application is not grounds for reversal where there is a reasoned final decision supported by evidence

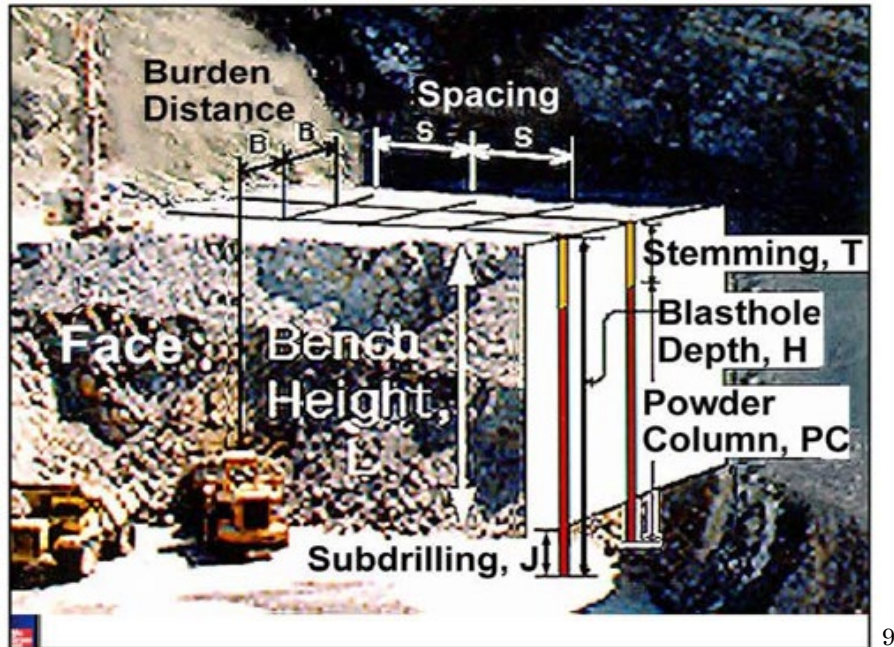
in the record. *See Dyer v. Texas Comm’n on Env’tl. Quality*, 646 S.W.3d 498, 502 (Tex. 2022) (holding that when the record demonstrates the agency was aware of and considered the alleged application deficiency, and evidence supports the agency’s decision, the decision is not arbitrary or capricious). The purpose of an application is to provide the agency the information it needs to reach a decision. The agency properly relied upon its technical knowledge, experience, and expertise to determine if it had enough information to act on the application and found here that it did. *See Hunter Indus. Facilities, Inc. v. Texas Nat. Res. Conservation Comm’n*, 910 S.W.2d 96, 111 (Tex. App. –Austin 1995, writ denied); *Phillips Petroleum Co. v. Texas Comm’n on Env’tl. Quality*, 121 S.W.3d 502, 509 (Tex. App. – Austin 2003, no pet.); *Reliant Energy, Inc. v. Pub. Util. Comm’n of Texas*, 62 S.W.3d 833, 838 (Tex. App.— Austin 2001, no pet.) (recognizing that where the legislature created an agency to centralize expertise in a certain regulatory area the agency should be given a large degree of latitude to accomplish its regulatory function). The application identified blasting and the use of blasting agents as an activity at the site, and the approved abatement plan implements practices designed to prevent blasting from impacting the aquifer. *See*

AR 4 at 22; AR 6 at 1; AR 7 at 1; AR 14 at 2 (Standard Condition 1). The Commission acted properly.

B. That the approved plan contemplates blasting does not violate TCEQ's rules regarding underground injection wells.

Plaintiffs' contention that blasting boreholes are somehow underground injection wells similarly relies, again, on semantics while ignoring the actual substance of the issue: that the approved plan protects groundwater. Specifically, Plaintiffs' strained, counter-intuitive interpretation of one definition misconstrues the basic purpose of the regulatory program at issue. The boreholes referenced by Plaintiffs are not underground injection wells regulated under TCEQ's underground injection well rules. Underground injection wells are subsurface structures used for the subsurface emplacement of fluids for waste disposal or storage in a geologic formation. *See* 30 Tex. Admin. Code §§ 331.2(58), (59)(defining injection well and injection operations); *See also* Tex. Water Code § 27.002(defining injection well). Blasting is a routine part of quarry activities; it does not involve storage or disposal of anything in the geologic substrata. Indeed, an EPA published paper sets forth "a step-by-step procedure for designing the blast hole layout and

calculating the amount of explosives for blasting rock,” and contains a diagram showing how the process works.⁸



As shown above, the blasting materials are not injected into a subsurface geologic formation for disposal or storage. Blasting boreholes are holes in the ground and *not* wells used to inject fluids for disposal or storage miles underground. They are fundamentally different in depth and function. See 30 Tex. Admin. Code §§ 331.2(58), (59) (defining injection well and injection operations). Here, once the blast occurs, the hole ceases to exist.

⁸ <https://semspub.epa.gov/work/01/550567.pdf> at Slide 3.

⁹ *Id.* at Slide 8.

Further, the purpose of blasting is to loosen the rocks for *removal from the site*. Plaintiffs' allegations that blasting might leave residue which might wash down into the aquifer ignore the fact that the blasted rocks are not left on the site. *See* AR 7 at 7 (stating 95% of material in the mined area will be hauled to the plant for processing). Indeed, the whole purpose of the blasting is to take the material elsewhere. And significantly – as already discussed – all mining activity, including blasting boreholes, is prohibited from going below the 25-foot buffer zone that exists between the aquifer and quarry pit bottom. AR 6 at 1; AR 7 at 1, 8; AR 14 at 2 (Standard Condition 1). Nothing in this plan purports to approve any type of injection activity that would transect or terminate in the Edwards Aquifer or any other formation. *See* AR 14. Plaintiffs' attempt to characterize boreholes as injection wells is incorrect and inconsistent with Commission regulations.

PRAYER

For these reasons, the Texas Commission on Environmental Quality respectfully prays that this Court affirm the Commission's decision in all respects. The Commission further prays for such other and further relief to which it may be entitled.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the Brief of Defendant Texas Commission on Environmental Quality contains 5,828 words and therefore complies with the word limit found in Tex. R. App. P. 9.4(i)(2)(B) and Travis County Local Rules.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the ***Brief of Defendant Texas Commission on Environmental Quality*** has been served upon the following counsel electronically through an electronic filing manager on July 24, 2026:

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23 TexReg 10399: 1998 Adoption

23 TexReg 3192: 1998 Proposal