

No. D-1-GN-24-007463

**IN THE 353RD JUDICIAL DISTRICT COURT
TRAVIS COUNTY, TEXAS**

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

v.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, *Defendant*

and

**VULCAN CONSTRUCTION MATERIALS, LLC,
*Defendant-Intervenor***

**DEFENDANT-INTERVENOR VULCAN CONSTRUCTION MATERIALS, LLC'S
PLEA TO THE JURISDICTION AND RESPONSE BRIEF**

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L	Instructions to Geologists	TCEQ-0585-Instructions, <i>Instructions to Geologists for Geologic Assessments on The Edwards Aquifer Recharge/Transition Zones</i>	Tex. Comm'n on Env't Quality, <i>Instructions to Geologists for Geologic Assessments on the Edwards Aquifer Recharge/Transition Zones</i> , TCEQ-0585-Instructions (Oct. 1, 2004), [https://tinyurl.com/TCEQ0585].
M	1996 Final Rule	1996 Final Rule: Overhaul and Consolidation of Edwards Aquifer Rules	21 Tex. Reg. 12,125 (Dec. 17, 1996)
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O	2005 Final Rule	2005 Final Rule: Development of Edwards	30 Tex. Reg. 4,984 (Aug. 26, 2005)

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GLOSSARY

Best Management Practices or BMPs	A term defined in 30 Tex. Admin. Code § 213.3(5) as a schedule of activities, prohibitions, practices, maintenance procedures, and other management practices to prevent or reduce the pollution of water in the state. BMPs also include treatment requirements, operating procedures, and practices to control site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage. BMPs are those measures that are reasonable and necessary to protect groundwater and surface water quality, as provided in technical guidance prepared by the executive director or other BMPs that are technically justified based upon studies and other information that are generally relied upon by professionals in the environmental protection field and are supported by existing or proposed performance monitoring studies, including, but not limited to, the United States Environmental Protection Agency, American Society of Civil Engineers, and Water Environment Research Foundation guidance.
Edwards Aquifer Rules or Rules	30 Tex. Admin. Code Ch. 213. Unless otherwise specified, all references to the Edwards Aquifer Rules and 30 Tex. Admin. Code Chapter 213 refer to the current provisions effective in 2026.
Executive Director	The Executive Director of the Texas Commission on Environmental Quality
Geological Assessment	A term defined in 30 Tex. Admin. Code § 213.3(13) as a report that is prepared by a geologist describing site-specific geology.
Individual Plaintiffs	Robert Carrillo, Cheryl Johnson, John Casimir Kuciewicz Jr., Kira Olson, Milann and Prudence Guckian, and Douglas E. Smith
Injection Well	A term defined in 30 Tex. Admin. Code § 331.2(59) as a well into which fluids are being injected.
Mining Area	The nine mining areas shown on the Site Plans in Appendices E and F, comprising approximately 956 acres.
Permanent BMPs and Measures	BMPs and measures used during and after completion of construction to control the discharge of pollution from regulated activities.

PHCE	Preserve Our Hill Country Environment
Recharge Zone	A term defined in 30 Tex. Admin. Code § 213.3(27) as generally, 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.
Site Plan	Technical maps that illustrate the final approved temporary and permanent BMPs for Vulcan’s Abatement Plan (Appendices E and F).
Storm Water or Stormwater	A term defined in 40 C.F.R. § 122.26(13) as storm water runoff, snow melt runoff, and surface runoff and drainage.
Surface Water	Water that collects or flows above the ground, including oceans, rivers, lakes, streams, and wetlands.
TCEQ	Texas Commission on Environmental Quality
Technical Report	A required component of a WPAP that meets all requirements outlined in 30 Tex. Admin. Code § 213.5(b)(4).
Temporary BMPs and Measures	BMPs and measures used during and after construction activities to prevent pollution from entering surface streams, sensitive features, or the aquifer, including interim and permanent stabilization practices and structural practices to divert flows from exposed soils, store flows, or otherwise limit runoff and the discharge of pollutants from exposed areas of the site to the degree attainable.
Vulcan	Vulcan Construction Materials, LLC
Vulcan’s Abatement Plan	Vulcan’s February 2024 Water Pollution Abatement Plan (Appendix A), together with the supplemental information and revisions submitted in response to TCEQ’s technical review (Appendix D) and as represented in approved final Site Plans (Appendices E and F).
WPAP	Water Pollution Abatement Plan is a site-specific plan providing scientifically backed water pollution prevention controls, including BMPs, for development over the Edwards Aquifer. Referred to as the Abatement Plan when referencing Vulcan’s specific plan.

NATURE OF THE CASE

Plaintiffs seek judicial review of a final decision from the Texas Commission on Environmental Quality (“TCEQ”) Executive Director approving a Water Pollution Abatement Plan (“WPAP”) under 30 Texas Administrative Code Chapter 213 (“the Edwards Aquifer Rules” or “Rules”).

Defendant-Intervenor Vulcan Construction Materials, LLC (“Vulcan”) holds a construction stormwater permit for the Vulcan Comal Quarry (“Quarry”) on State Highway 46 in Comal County, Texas. Because the Quarry is located over the Edwards Aquifer, separate from any other air or water authorization, Vulcan was also required to obtain an approved WPAP prior to constructing and operating the Quarry. After several technical requests for information and clarification, the Executive Director approved Vulcan’s WPAP (“Vulcan’s Abatement Plan”), consistent with the Edwards Aquifer Rules. Vulcan’s Abatement Plan is not an authorization or permit to discharge.

Plaintiffs Preserve Our Hill Country Environment (“PHCE”), PHCE Foundation, Robert Carrillo, Cheryl Johnson, John Casimir Kucewicz Jr., Kira Olson, Milann and Prudence Guckian, and Douglas E. Smith (collectively, “Plaintiffs”) either commented opposing the proposed Abatement Plan and/or sought to overturn the Executive Director’s approval of the Abatement Plan before

the TCEQ Commissioners. Plaintiffs now attempt judicial review, claiming that the approval exceeded TCEQ's authority and deprived them of due process. Vulcan intervenes in this suit to show that TCEQ complied with all applicable notice and comment procedures, did not exceed its authority in approving Vulcan's Abatement Plan, and did not violate any due process right of Plaintiffs.

STATEMENT OF JURISDICTION

Jurisdiction in this case arises, if at all, under Section 5.351 of the Texas Water Code. The Administrative Procedure Act does not provide a basis for jurisdiction because this matter is not a contested case. Tex. Gov't Code §§ 2001.171, 2001.174. As addressed more fully in Vulcan's Plea to the Jurisdiction, Plaintiffs' claims do not fall within the limited waiver of sovereign immunity provided by Section 5.351. Accordingly, this Court lacks subject-matter jurisdiction over Plaintiffs' claims.

RECORD AND APPENDIX

The record in this appeal consists of the certified Administrative Record filed by the TCEQ in TCEQ Docket No. 2024-1115-EAQ concerning Vulcan's Abatement Plan application for the Comal Quarry and TCEQ's review and approval of that application.

Identical Administrative Records were filed in both Cause No. D-1-GN-24-007463 and Cause No. D-1-GN-24-008787. The actions were later consolidated. Unless otherwise indicated, citations in this brief are to the Administrative Record

in Cause No. D-1-GN-24-007463 under which the consolidated cases were ordered to proceed.

The Administrative Record was delivered to the Court electronically via a ShareFile containing the record index, certification of the record, correspondence, and other materials maintained in TCEQ's files relating to the Abatement Plan application and subsequent administrative proceedings. The record indices and certifications are attached to TCEQ's Notice of Filing of Administrative Records.

The Administrative Record is organized into three sections: (1) Documents relating to (a) the Abatement Plan application and TCEQ's Review, including notices, correspondence, technical submissions, and approval documents, and (b) the subsequent Motions to Overturn, including briefing and related filings; (2) Public comments submitted during the review process; and (3) TCEQ guidance documents.

Citations to the Administrative Record are formatted as "[Section Number]AR[Item Number]" and, where appropriate, "at [Page Number]."

Each Appendix is tabbed alphabetically and labeled with continuous Bates Numbers. On first reference, citations to the appendices are presented as "[Section Number]AR[Item Number], Appendix Tab [Tab Number]," and, where appropriate, "at [VCM_Bates Number]." The Appendix also contains other authorities, including TCEQ-published guidance documents and *Texas Register* documents, included

solely for the Court’s convenience. Those materials are cited, in the first instance as “Appendix Tab [Tab Number], [Document Description]” followed by “at [VCM_Bates Number]” when necessary. All subsequent citations of documents included in an Appendix are made directly to that Appendix: “Appendix [Tab Number],” followed by a Bates Number.

In all instances, citations to the Administrative Record control over any Appendix, which is provided solely as a courtesy reference to facilitate the Court’s review.

ISSUES ON APPEAL

Issue 1: Whether Plaintiffs have met their burden to demonstrate that they are affected persons entitled to seek review under Tex. Water Code § 5.351(c).

Issue 2: Whether Plaintiffs have met their burden to allege a valid waiver of sovereign immunity permitting their challenge to TCEQ's rules and notice procedures.

Issue 3: Whether TCEQ abused its discretion when it approved Vulcan's Abatement Plan that included best management practices and measures designed to prevent pollution to surface water and groundwater from quarry activity that necessarily involves blasting.

Issue 4: Whether TCEQ abused its discretion when it approved Vulcan's Abatement Plan without treating boring holes used for blasting as regulated injection wells.

Issue 5: Whether TCEQ's adherence to the notice procedures prescribed by the Edwards Aquifer Rules deprived Robert Carrillo, Cheryl Johnson, John Casimir Kucewicz Jr., and Douglas E. Smith of due process where each received actual notice of the Executive Director's approval of Vulcan's Abatement Plan and participated during TCEQ proceedings.

STATEMENT OF FACTS

A. **Regulatory Background: TCEQ's Edwards Aquifer Protection Program.**

TCEQ has general jurisdiction over enforcement of water quality rules in Texas. Tex. Water Code § 5.013(a)(3). TCEQ implements the Texas Water Code's directive that "the existing quality of groundwater in the state not be degraded" by ensuring that groundwater protection be conducted "consistent with the protection of the public health and welfare, the propagation and protection of terrestrial and aquatic life, the protection of the environment, the operation of existing industries, and the maintenance and enhancement of the long-term economic health of the state." Tex. Water Code § 26.401(b). At the same time, the statute recognizes that "nondegradation does not mean zero-contaminant discharge." *Id.* In pursuing these objectives, the Texas Legislature "recognizes the important role of the use of the best professional judgment of the responsible state agencies" in implementing Texas groundwater policy and achieving the State's groundwater quality goals. Tex. Water Code § 26.401(d)

The Edwards Aquifer underlies a swath of Central Texas, extending approximately 180 miles in length and ranging from five to 40 miles in width. *See About The Edwards Aquifer*, EDWARDS AQUIFER AUTHORITY, <https://www.edwardsaquifer.org/aquifer-science/about-the-edwards-aquifer/> (last visited July 24, 2026). Because the Edwards Aquifer is a karst aquifer, fractures,

caves, sinking streams, and sinkholes may be “sensitive features,”¹ which could act as conduits to the aquifer from the surface.² Because of these geological features, certain outcrop areas adjacent to the aquifer allow surface water to infiltrate into the subsurface and ultimately recharge the aquifer (the “Edwards Aquifer Recharge Zone” or “Recharge Zone”).

Since the 1970s, TCEQ has administered the Edwards Aquifer Protection Program to protect the Edwards Aquifer by regulating activities that may affect groundwater quality through that program, embodied in the Edwards Aquifer Rules, which are intended to “protect existing and potential uses of groundwater and maintain Texas Surface Water Quality Standards.”³ *See generally* 30 Tex. Admin. Code §§ 213.1–.5; Appendix Tab O, 30 Tex. Reg. 4,984 (Aug. 26, 2005), at VCM_001240. Since 1996, TCEQ has required best management practices (“BMPs”) as essential components of WPAPs as the “reasonable, necessary, and the

¹ A sensitive feature is a “permeable geologic or manmade feature located on the recharge zone or transition zone where: (A) a potential for hydraulic interconnectedness between the surface and the Edwards Aquifer exists; and (B) rapid infiltration to the subsurface may occur.” 30 Tex. Admin. Code § 213.3(29).

² A karst aquifer is an underground water system formed in soluble bedrock, primarily limestone or dolomite.

³ The Edwards Aquifer Protection Program has evolved over several decades. State regulators first required water pollution abatement plans in 1974 and, by 1984, required them for regulated residential, commercial, and industrial developments. The BMP requirements were added in 1996. *See* Tex. Comm’n on Env’t Quality, *Regulatory History of the Edwards Aquifer*, <https://www.tceq.texas.gov/permitting/eapp/history.html> (last modified Apr. 17, 2026).

most cost-effective way to directly address specific, demonstrated water quality threats and to avoid duplication or conflict with local regulations.” Appendix Tab M, 21 Tex. Reg. 12,125 (Dec. 17, 1996), at VCM_001089–90.

Under the Rules, an owner planning to conduct a “regulated activity” in the Recharge Zone must submit a WPAP and obtain the Executive Director’s approval before beginning construction. 30 Tex. Admin. Code §§ 213.3(28), 213.4(a)(1), 213.5(a)(1). Regulated activities include construction and post-construction activities—such as land clearing, infrastructure development, and other alterations to a site’s topographic, geologic, or recharge characteristics—that have the potential to pollute the Edwards Aquifer or hydrologically connected surface streams. *Id.* § 213.3(28).

A WPAP application must provide the site-specific geological, engineering, and operational information necessary to identify and address potential contamination risks before regulated activities begin. *Id.* § 213.5(b). The application must include a Geologic Assessment prepared by a qualified geologist that evaluates site conditions and identifies geologic and manmade features that may provide pathways to the aquifer. *Id.* § 213.5(b)(3). A Technical Report describing the proposed development, potential sources of contamination, anticipated wastewater and stormwater impacts, and the temporary and permanent BMPs and measures that

will be implemented is also required. *Id.* § 213.5(b)(4). The BMPs and measures must be supported by engineering plans prepared by a licensed professional engineer and by inspection and maintenance programs designed to ensure that pollutants do not enter surface streams, sensitive features, or the aquifer. *Id.* § 213.5(b)(4)(B)(iii), (vi)–(vii), (C)(iii), (vi)–(vii). Before and during construction activities, temporary BMPs and measures must be implemented to prevent pollutants from entering surface streams, sensitive features, or the aquifer as provided under *id.* § 213.5(b)(4)(B). For permanent BMPs and measures, the Rules impose a quantitative performance standard: subject to specified exceptions, the BMPs must ensure removal of at least 80% of the incremental increase in total suspended solids loading from the site caused by the regulated activity. *Id.* § 213.5(b)(4)(D)(ii)(I). Each of the temporary and permanent practices and measures must be designed, constructed, operated, and maintained in accordance with technical guidance prepared or accepted by the Executive Director. *Id.*

Chapter 213 establishes general performance requirements for a WPAP, but the WPAP design process requires comprehensive technical development based on site-specific information and regulated activity. For these reasons, TCEQ published detailed guidance and instructions explaining methods applicants may use to demonstrate compliance. TCEQ guidance documents align with design requirements

and BMP standards in the Rules. *See, e.g.,* 30 Tex. Admin. Code § 213.5(b)(4)(D)(ii)(I).

- TCEQ's *Instructions to Geologists for Geologic Assessments on the Edwards Aquifer Recharge/Transition Zones* guides geoscientists in identifying potential contaminant pathways, classifying sensitive features, and developing the site-specific information necessary to support BMP design. Appendix Tab L, Tex. Comm'n on Env't Quality, *Instructions to Geologists for Geologic Assessments on the Edwards Aquifer Recharge/Transition Zones*, TCEQ-0585-Instructions (Oct. 1, 2004) <https://tinyurl.com/TCEQ0585>, at VCM_001052–55.
- TCEQ's RG-348, *Complying with the Edwards Aquifer Rules: Technical Guidance on Best Management Practices*, addresses temporary erosion and sediment controls, nonstructural practices, permanent structural BMPs, innovative technologies, sensitive-feature protection, and pollutant-removal calculations. 3AR31, Appendix Tab I at VCM_000691.
- TCEQ also published RG-500, *Best Management Practices for Quarry Operations: Complying with the Edwards Aquifer Rules*, provides relevant quarry considerations such as separation of mining area from groundwater elevation, sensitive features, perimeter controls, haul roads, fueling, spill prevention, quarry pits, and process water. 3AR32, Appendix Tab J at VCM_001018–19.

Applications are submitted electronically and undergo administrative review before entering technical review. Once an application is administratively complete, the applicable TCEQ regional office posts the application for public review, notifies the affected city, county, and groundwater conservation district, and reviews timely comments. 30 Tex. Admin. Code § 213.4(a)(2). As part of its technical review, the Executive Director ordinarily conducts an on-site assessment, evaluates the

application and Geologic Assessment for technical completeness, and may issue notices of deficiency and request additional information. Tex. Comm'n on Env't Quality, *Edwards Aquifer: Application and Review Process*, 'Technical Review,' <https://www.tceq.texas.gov/permitting/eapp/review.html> (last accessed July 24, 2026). A WPAP is only approved if the application complies with the Edwards Aquifer Rules and is protective of the aquifer during and after construction.

Approval of a WPAP is not the end of the agency's oversight. The plan holder must implement, inspect, maintain, and repair the approved BMPs and measures; must obtain Executive Director approval before materially modifying the approved activities; and remains subject to enforcement for noncompliance with Chapter 213 or the approved plan. *See id.* §§ 213.4(j)–(k), 213.5(b)(4)(B)(vi)–(vii), (C)(vi)–(vii), 213.10. Additionally, compliance with an approved WPAP does not displace applicable local ordinances or other water quality requirements. *Id.* § 213.1(2).

Although the underlying project to this administrative challenge is a quarry, TCEQ does not exercise general regulatory authority over industrial quarrying or mining operations. Rather, TCEQ's authority in this context is limited to protection of water quality, and the only agency action challenged in this action is TCEQ's approval of the Abatement Plan under the Edwards Aquifer Rules. Chapter 213 thus supplements rather than displaces TCEQ's other water quality programs. As TCEQ

explained during the 1996 rulemaking, the Edwards Aquifer Rules “do not regulate in a totally independent manner” but instead “build upon and expand” protections established through other TCEQ permitting, licensing, and spill response programs addressing surface and groundwater pollution. Appendix M at VCM_001089. A WPAP approval therefore does not authorize quarry operations, mining activities, pollution, stormwater discharge, or wastewater discharge; it is a pollution prevention plan, not a permit. A WPAP imposes additional site-specific pollution prevention obligations on top of other existing applicable permitting, and water quality requirements. *See* 30 Tex. Admin. Code § 213.1(2).

B. Factual Background: Vulcan’s Quarry and Abatement Plan; Plaintiffs and Their Opposition.

1. Vulcan Comal Quarry.

Vulcan owns and operates the Vulcan Comal Quarry in the West Fork Dry Comal Creek watershed in Comal County, Texas. The Quarry is located above the Edwards Aquifer Recharge Zone. 1AR4, Appendix Tab A at VCM_000011. At the Quarry, Vulcan produces construction aggregates that help grow and sustain communities’ infrastructure and transportation safety improvements through roads, bridges, residential and commercial buildings, schools, and hospitals.

Vulcan proposed to construct and operate the Quarry, including nine Mining Areas and associated plant areas, offices, shops, driveways, and haul roads. 1AR4 at

21. Because those activities constitute “regulated activity” under the Edwards Aquifer Rules, Vulcan obtained approval of a WPAP before beginning construction. Appendix A at VCM_000011; *see* 30 Tex. Admin. Code §§ 213.2–.3.

On the 1,515.16-acre site, construction of the plant, truck loading, and haul roads will comprise approximately 13.91 acres, the nine proposed Mining Areas will comprise approximately 956 acres, and the remaining approximately 545 acres will serve as floodplain and buffer or berm areas. 1AR7, Appendix Tab D at VCM_000274. Vulcan will first begin mining in Mining Area 1 and once the area is at final grade, it will expand into the plant and stockpile area to serve the rest of the additional Mining Areas in turn. *Id.* Quarry mining will progress in small increments of 10 to 15 acres per year, with clearing and stripping delayed until necessary for mining. *Id.* Vulcan will use blasting agents during the mining process, but it will not store such materials onsite over the Recharge Zone. *Id.* Vulcan will also maintain a buffer of approximately 100 feet adjacent to all neighboring properties, a large portion of which will be left in its native condition. *Id.*

On February 20, 2024, Vulcan submitted its application for approval of its Abatement Plan for the Quarry. 1AR1; Appendix A at VCM_000007. The application addressed Vulcan’s proposed regulated activities at the new quarry and included the materials required by the Edwards Aquifer Rules, including a Geologic

Assessment and Technical Report. Appendix A at VCM_000007; 1AR4, Appendix Tab C; 1AR4, Appendix Tab B; Appendix D at VCM_000274–76, VCM_000295, VCM_000315–20. The application was signed and sealed by a licensed Texas professional engineer as required. Appendix D at VCM_000312.

The Executive Director declared the application administratively complete on March 21, 2024. 1AR3. The following day, the TCEQ regional office distributed the administratively complete application to affected local governments and groundwater authorities, including the Edwards Aquifer Authority, the City of Bulverde, and Comal County, and made the application available on TCEQ’s website for public comment. *See* 30 Tex. Admin. Code § 213.4(a)(2); 1AR5. The notice stated that comments were due by April 21, 2024, the end of the 30-day comment period. *Id.*

The Executive Director conducted technical review of the application. That process involved substantial iterative correspondence between Vulcan and the agency. TCEQ requested revisions and additional information concerning, among other matters, the quarry depth, sensitive feature protections, temporary sediment controls, haul roads and stream crossings, process water management, and permanent stormwater controls on May 20, 2024. Appendix D at VCM_000267–68. Vulcan responded with amended application materials on June 3, 2024. *Id.* at

VCM_000269–71. TCEQ issued another request for information on June 11, 2024, and Vulcan submitted additional revisions and supporting materials in response, followed by further supplemental materials addressing final crossing designs, pond liner specifications, and sediment controls. *See id.* at VCM_000288–89, VCM_000310, VCM_000321 (TCEQ correspondence requesting additional information); *see also id.* at VCM_000290–309, VMC_000311–20, VCM_000322–27 (Vulcan responses providing requested information).

On July 8, 2024, after reviewing the original application and the amended and supplemental materials submitted during technical review, the Executive Director approved the plan subject to the conditions stated in the approval letter. 1AR14, Appendix Tab G. The application and supporting materials, as amended, supplemented, and finally approved, are referred to as “Vulcan’s Abatement Plan” or the “Abatement Plan.”

2. Plaintiffs and Their Alleged Interests.

This consolidated action began as two separate lawsuits challenging TCEQ’s approval of Vulcan’s Abatement Plan. In the first, Preserve Our Hill Country Environment and Preserve Our Hill Country Environment Foundation filed suit together. This brief refers to those organizations collectively as the “Organizational Plaintiffs” and to their pleading as the “PHCE Original Petition.” In the second,

Robert Carrillo, Cheryl Johnson, John Casimir Kucewicz Jr., Kira Olson, Milann and Prudence Guckian, and Douglas E. Smith filed a separate action; this brief refers to those individuals collectively as the “Individual Plaintiffs” and to their pleading as the “Carrillo et al. Original Petition.”⁴ The actions were later consolidated. Unless otherwise specified, “Plaintiffs” refers collectively to the Organizational Plaintiffs and the Individual Plaintiffs.

Preserve Our Hill Country Environment and Preserve Our Hill Country Environment Foundation are affiliated but separate nonprofit entities. Preserve Our Hill Country Environment asserts that it is a 501(c)(4) organization whose mission is to protect the Texas Hill Country from what it characterizes as the insufficiently regulated expansion of the aggregate industry. PHCE Original Petition ¶ 7. Preserve Our Hill Country Environment Foundation asserts that it is a Texas 501(c)(3) nonprofit that researches environmental hazards, educates communities regarding natural-resource preservation, and advocates for environmental-protection legislation and regulations. *Id.* ¶¶ 7–8.⁵

⁴ Plaintiffs have narrowed the issues between their original petition and brief, waiving certain issues. Travis (Tex.) Civ. Dist. Ct. Loc. R. 10.5(e). Accordingly, Vulcan does not address any issues Plaintiffs did not brief.

⁵ Nevertheless, the petition defines the two entities collectively as “PHCE” or “Plaintiffs” and thereafter pleads their participation, claims, and alleged injuries collectively. *See id.* p. 1, ¶¶ 4–6. Therefore, in this brief, “PHCE” or “Organizational Plaintiffs” will refer to Preserve Our Hill Country Environment and Preserve Our Hill Country Environment Foundation as jointly referenced in PHCE’s Original Petition.

Both organizations claim that they submitted written comments and requested a public meeting concerning Vulcan’s Abatement Plan. *Id.* ¶ 4. Neither asserts that they own property, groundwater, or a water well near the Quarry or that approval of the Abatement Plan directly injured either organization. Instead, both Organizational Plaintiffs rely on alleged injuries to individual members. The petition initially alleges that “members of PHCE” are affected differently from the general public because of “the close proximity of their homes” to the Quarry and the Quarry’s “possible impact on the groundwater underlying their property.” *Id.* ¶ 9. The PHCE Original Petition identifies five member individuals: Milann Guckian, Jacques M. Olivier, Kira M. Olson, Terry Lee Olson, and Elizabeth May James. *Id.* Organizational Plaintiffs’ member-specific claims identify each of those individuals as a member of both Preserve Our Hill Country Environment and Preserve Our Hill Country Environment Foundation. *Id.* ¶¶ 10, 12–15.

The PHCE Original Petition therefore relies on the same five individuals and the same speculative allegations regarding property and groundwater-related injuries to support both organizations’ asserted affectedness. Neither Organizational Plaintiff asserts an independent basis of affectedness.⁶ *See id.* ¶¶ 9–16.

⁶ PHCE’s Original Petition also advances broader allegations collectively on behalf of both organizations. PHCE speculates that the Quarry could reduce water available to support tourism and hospitality businesses, diminish surrounding property values and the County’s tax base, and purportedly impose economic harms without creating corresponding high paying employment. *Id.*

- Jacques M. Olivier is purportedly a member of PHCE and PHCE Foundation but is not an Individual Plaintiff. According to PHCE, he resides at 1509 Cabernet in New Braunfels, approximately 2.3 miles from Vulcan’s property line. PHCE alleges that Mr. Olivier is concerned about the Quarry’s potential effects on the groundwater that may be beneath his property and the underlying aquifers. PHCE claims his residence is supplied by Texas Water Company,⁷ which operates 40 Trinity Aquifer wells serving his property. *Id.* ¶ 12.
- Terry Lee Olson is alleged to be a member and board member of PHCE and PHCE Foundation but is not an Individual Plaintiff. PHCE claims that Mrs. Olson resides at 414 Saur Road in Bulverde, on property she owns that reportedly shares a fence line with Vulcan on the southwest side of Vulcan’s property. Her water well is allegedly located approximately 750 feet from the Quarry’s fence line. PHCE maintains that Mrs. Olson is concerned about the Quarry’s potential effects on her well, the groundwater beneath her property, and the underlying aquifers. *Id.* ¶ 14.
- Elizabeth May James is reportedly a member, founder, and board member of PHCE and PHCE Foundation but is not an Individual Plaintiff. According to PHCE she resides at 30838 FM 3009 in New Braunfels, allegedly “downstream” of the Quarry. PHCE claims that her property’s fence line is approximately 108 feet from Vulcan’s eastern fence line, and her private water well is approximately 289 feet from Vulcan’s fence line. PHCE further alleges that Mrs. James is concerned about the Quarry’s potential effects on her well, the groundwater beneath her property, and the underlying aquifers. *Id.* ¶ 15.
- Milann Guckian claims to be a member and founder of PHCE and PHCE Foundation and is also an Individual Plaintiff. Prudence Guckian is an

¶¶ 26–27. Such alleged community-wide effects are not based on evidence in the record before TCEQ and are not attributed to either organization individually or tied to the property, groundwater, or water supply of any identified member. The Individual Plaintiffs’ Petition repeats substantially the same allegations. Carrillo et al. *Id.* ¶¶ 24–25.

⁷ Although Texas Water Company provided public comments on Vulcan’s Abatement Plan, it did not seek to overturn the Plan through a motion or petition for judicial review, nor did it join any such challenge. Texas Water Company, and its interests, are not before the Court.

Individual Plaintiff, but the petitions do not allege that she is a member of either organization. The Guckians claim to reside at 30954 FM 3009 in New Braunfels, allegedly “downstream” of the Quarry. PHCE alleges the Guckian property’s fence line is to be approximately 107.02 feet from Vulcan’s eastern fence line; their front porch is allegedly approximately 258.01 feet from Vulcan’s fence line and 358.16 feet from Mining Area No. 7; and the one well presumed to be approximately 4,800 to 5,000 feet from Vulcan’s industrial water well and approximately 493 feet from Mining Area No. 7. 1AR19, Appendix Tab H at VCM_000519. PHCE alleges that Milann Guckian is concerned about the Quarry’s potential effects on the groundwater beneath the property and the underlying aquifers and believes the Quarry threatens her home and quality of life. PHCE Original Petition ¶¶ 10–11. As Individual Plaintiffs, Milann and Prudence Guckian repeat the same proximity and water source allegations and further presume that they own groundwater that will be polluted. Carrillo et al. Original Petition ¶¶ 11–13.

- Kira M. Olson is reportedly a member, founder, and board member of PHCE and PHCE Foundation and is also an Individual Plaintiff. The PHCE Original Petition claims she resides at 245 Saur Road in Bulverde, on property she owns that allegedly shares a fence line with Vulcan on the southwest side of Vulcan’s property. Her water well is allegedly located less than 600 feet from Vulcan’s fence line. PHCE alleges that Ms. Olson is concerned about the Quarry’s potential effects on her well, the groundwater beneath her property, and the underlying aquifers. *Id.* ¶ 13. As an Individual Plaintiff, she claims that she owns groundwater near the proposed activities and that TCEQ’s approval places the quality of that groundwater at risk. *Id.* ¶ 14.
- Robert Carrillo is an Individual Plaintiff. The petitions do not identify him as a member of either Organizational Plaintiff. He alleges that he owns a residence at 111 Marlana Drive in San Antonio and ranchland along FM 3009 that is adjacent to the Quarry to the south. His ranchland allegedly includes a spring-fed pond that has run dry only a few times in 25 years and serves as a water source for his cattle. Mr. Carrillo further speculates that he owns groundwater that will be polluted. *Id.* ¶ 7.

- Cheryl Johnson is an Individual Plaintiff. The petitions do not identify her as a member of either Organizational Plaintiff. She alleges that she owns property at 1422 Tramonto, approximately 1.6 miles southeast of the Quarry. She claims her property lies above groundwater and underlying aquifers, and her property relies on water supplied by Texas Water Company. Ms. Johnson further speculates that she owns groundwater that will be polluted. *Id.* ¶ 8.
- John Casimir Kucewicz Jr. is an Individual Plaintiff. The petitions do not identify him as a member of either Organizational Plaintiff. He alleges that he owns property at 1270 Trailhead, approximately 3.5 miles northeast of the Quarry. He claims his property lies above groundwater and underlying aquifers, and his property relies on Texas Water Company's wells for domestic water. Mr. Kucewicz alleges that those wells draw from the Edwards Aquifer and that the operations associated with the approved Abatement Plan have the potential to contaminate that groundwater. *Id.* ¶ 9.
- Douglas E. Smith is an Individual Plaintiff. The petitions do not identify him as a member of either Organizational Plaintiff. He alleges that he owns property at 419 Bridle Trail, approximately three miles southeast of the Quarry. He claims his property lies above groundwater and underlying aquifers, and he relies on Texas Water Company's wells for his residence. Mr. Smith further alleges that the groundwater beneath his property is directly adjacent to the Edwards Aquifer and flows southeast, that Texas Water Company's wells draw from the Edwards Aquifer, and that the operations associated with Vulcan's approved Abatement Plan have the potential to contaminate the water he uses. *Id.* ¶ 10.

3. Plaintiffs' Opposition to Vulcan's Abatement Plan.

During the public comment period, the Executive Director received 140 public comments, including those submitted by Plaintiffs Kira Olson, Milann and Prudence Guckian, Preserve Our Hill Country Environment, and Preserve Our Hill Country Environment Foundation. *See* 2AR30, 147–48, 202–62.

On July 31, 2024, all Plaintiffs, along with other individuals and an organization who chose not to seek judicial review, filed four motions to overturn the Executive Director's decision. Appendix H; *see also* PHCE Original Petition ¶ 5; Carrillo *et al* Original Petition ¶ 5 (evidencing that all Plaintiffs participated in motion to overturn process). On August 13, 2024, TCEQ's General Counsel requested briefing on the motions and extended the deadline for the TCEQ Commissioners to act on them to September 26, 2024. 1AR23. The Executive Director, TCEQ's Office of Public Interest Counsel, and Vulcan each submitted briefs that supported approval of Vulcan's Abatement Plan and urged the Commissioners to deny the motions. 1AR24–26. Plaintiffs filed reply briefs on September 6, 2024. 1AR27–29. After the Commissioners took no action on the motions to overturn, the motions were overruled by operation of law on September 26, 2024.

SUMMARY OF THE ARGUMENT

This is not an Administrative Procedure Act appeal. Texas Water Code Section 5.351 permits judicial review only at the request of a “person affected” by the decision. Plaintiffs cannot satisfy that requirement because the Abatement Plan authorized no discharge or groundwater withdrawal but instead imposed protective obligations on Vulcan. Their alleged injuries depend on speculation that Vulcan may violate those obligations or that future operations may harm groundwater or property. The Third Court has held that mere location within the same aquifer system, without evidence that the claimant’s well will be affected, establishes only conjectural harm. *Save Our Springs All., Inc. v. City of Dripping Springs*, 304 S.W.3d 871, 883 (Tex. App.—Austin 2010, pet. denied). Plaintiffs’ notice theory likewise falls outside Section 5.351’s limited waiver because it asks the Court to create requirements absent from TCEQ’s rules.

Even if the Court reaches the merits, TCEQ’s decision must be affirmed under the deferential abuse of discretion standard. TCEQ reviewed the Geologic Assessment, Technical Report, engineering plans, and BMPs, issued requests for additional information, and required supplements before approval. The application disclosed the Quarry’s drill and blast sequence and use of blasting agents, while the site-specific design addresses potential impacts through inward grading, protection

of creek banks and sensitive features, temporary and permanent BMPs, and a 25-foot separation between any mining activities (including blasting) and the groundwater elevation. Plaintiffs neither rebut nor acknowledge those protections. Their injection well theory is further removed from the record: Vulcan proposed no injection well, and TCEQ approved none. An Abatement Plan does not authorize underground injection, which requires a separate permit under Texas Water Code Chapter 27 and 30 Texas Administrative Code Chapter 331. Vulcan and TCEQ acknowledged requirements would apply if an injection well were proposed. None was.

Plaintiffs' due process claim also fails. TCEQ followed the notice and participation procedures prescribed by the Edwards Aquifer Rules. Due process requires notice and an opportunity to be heard, not every additional procedure a party prefers. Several Plaintiffs submitted comments, and all pursued motions to overturn after receiving notice. Plaintiffs' actual notice negates any theoretical deprivation caused by the approval because the Abatement Plan neither takes their groundwater nor authorizes its pollution. Federal case law does not justify adding mailed notice, publication, and signage requirements that TCEQ rejected during rulemaking.

The Court should grant Vulcan's plea to the jurisdiction or, alternatively, affirm TCEQ's approval.

STANDARD OF REVIEW

Plaintiffs' jurisdictional burden is reviewed first. A plea to the jurisdiction challenges the Court's subject matter jurisdiction, including whether sovereign immunity has been waived and whether Plaintiffs have standing. Whether a trial court has subject matter jurisdiction is a question of law reviewed de novo. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004); *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993). Plaintiffs bear the burden to affirmatively demonstrate jurisdiction. *Miranda*, 133 S.W.3d at 226; *Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002). Section 5.351 waives immunity only for a person affected by a ruling, order, or decision made by the Executive Director under delegated authority, after exhaustion of administrative remedies. *Tex. Water Code* § 5.351(c); *Tex. Comm'n on Env't Quality v. Bonser-Lain*, 438 S.W.3d 887, 894 (Tex. App.—Austin 2014, no pet.).

This appeal was not made after a contested case hearing. Accordingly, the Administrative Procedure Act provisions governing judicial review of contested cases do not directly apply. *Tex. Gov't Code* §§ 2001.171, 2001.174; *West v. Tex. Comm'n on Env't Quality*, 260 S.W.3d 256, 261 (Tex. App.—Austin 2008, pet. denied). Judicial review instead arises, if at all, under *Water Code* Section 5.351(c), which authorizes review of certain rulings, orders, or decisions delegated to the

Executive Director. Because Section 5.351 does not specify a standard of review, courts review the agency decision for abuse of discretion. *Brazos Elec. Power Coop., Inc. v. Tex. Comm’n on Env’t Quality*, 576 S.W.3d 374, 383 (Tex. 2019); *Tex. Comm’n on Env’t Quality v. City of Waco*, 413 S.W.3d 409, 423–25 (Tex. 2013).

The abuse of discretion standard is analogous to the arbitrary and capricious standard. *City of El Paso v. Pub. Util. Comm’n*, 883 S.W.2d 179, 184 (Tex. 1994). Substantial evidence in the record supporting the agency’s decision is often dispositive in determining whether the agency abused its discretion. *Sierra Club v. Tex. Comm’n on Env’t Quality*, 455 S.W.3d 214, 224 (Tex. App.—Austin 2014, pet. denied); *see also City of Waco*, 413 S.W.3d at 424–25. Substantial evidence requires more than a scintilla, but it does not require the evidence to preponderate in favor of the agency. *Citizens Against Landfill Location v. Tex. Comm’n on Env’t Quality*, 169 S.W.3d 258, 264 (Tex. App.—Austin 2005, pet. denied). The issue is not whether the Court would have reached the same decision, but whether reasonable minds could have reached the decision TCEQ made. *Id.* Once the dispute reaches district court, the agency’s findings, inferences, conclusions, and decision are presumed to be supported by substantial evidence, and Plaintiffs bear the burden to prove otherwise. *Id.*; *Pub. Util. Comm’n v. Tex. Indus. Energy Consumers*, 620

S.W.3d 418, 427 (Tex. 2021). An agency may also abuse its discretion if it fails to analyze or apply the law correctly. *Brazos*, 576 S.W.3d at 383.

Pure questions of statutory construction are reviewed de novo. *Brazos*, 576 S.W.3d at 383; *Traxler v. Entergy Gulf States, Inc.*, 376 S.W.3d 742, 747 n.23 (Tex. 2012). Courts construe agency rules using ordinary text principles, beginning with the rule's plain text. *Tex. Comm'n on Env't Quality v. Maverick County*, 642 S.W.3d 537, 544 (Tex. 2022). An agency's construction of its own rules is entitled to deference unless plainly erroneous or inconsistent with the rule. *Pub. Util. Comm'n v. Gulf States Utils. Co.*, 809 S.W.2d 201, 207 (Tex. 1991).

ARGUMENT

I. PLEA TO THE JURISDICTION

The State itself, as well as agencies like TCEQ, enjoys the protection of the doctrine of sovereign immunity. *Tex. A&M Univ.-Kingsville v. Lawson*, 87 S.W.3d 518, 520 (Tex. 2002). Unless a plaintiff affirmatively establishes that the court has jurisdiction by pointing to either (1) an express legislative waiver of sovereign immunity and consent to a specific lawsuit, or (2) an independent constitutional right to judicial review, the court does not have subject matter jurisdiction over a lawsuit. *IT-Davy*, 74 S.W.3d at 853, 855; *Cont'l Cas. Ins. Co. v. Functional Restoration Assocs.*, 19 S.W.3d 393, 404 (Tex. 2000).

Plaintiffs brought all claims and allege that the Court has jurisdiction over the controversy under Section 5.351 of the Texas Water Code. PHCE Plaintiffs Original Petition ¶ 19; Carrillo *et al* Plaintiffs Original Petition ¶ 17. As relevant here, Section 5.351 provides that:

a person affected by a ruling, order, or decision on a matter delegated to the executive director under Section 5.122 or other law may, after exhausting any administrative remedies, file a petition to review, set aside, modify, or suspend the ruling, order, or decision not later than the 30th day after . . . the date the appeal is overruled by operation of law in accordance with commission rules.

Tex. Water Code § 5.351(c). The Legislature explicitly limited the waiver of sovereign immunity in three ways: suit may only be brought (1) by a “person

affected,” (2) after exhaustion of available administrative remedies, and (3) against administrative actions that are regulatory in nature. *Id.*; *Bonser-Lain*, 438 S.W.3d at 894 (citing *IT-Davy*, 74 S.W.3d at 859). Plaintiffs are not “persons affected” entitled to review because they allege no concrete, particularized, and imminent injury, and their asserted property interest concerns a shared resource without any exclusive entitlement to use. Furthermore, portions of their claims do not dispute TCEQ’s regulatory actions but amount wholly to a policy argument seeking to change TCEQ’s Edwards Aquifer public participation rules.

A. Plaintiffs Are Not “Persons Affected” Entitled to Review.

Whether Plaintiffs qualify as “persons affected” is jurisdictional. In evaluating the ability to bring a claim under Texas Water Code Section 5.351, courts regularly apply the standards for an “aggrieved” person under the Texas Administrative Procedure Act. *See e.g., Tex. Dep’t of Protective & Regulatory Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 186 (Tex. 2004); *Hooks v. Tex. Dep’t of Water Res.*, 611 S.W.2d 417, 419 (Tex. 1981); *Bonser-Lain*, 438 S.W.3d at 894; *Elizondo v. Tex. Nat. Res. Conservation Comm’n*, 974 S.W.2d 928, 932 (Tex. App.—Austin 1998, no pet.). Under those authorities, “[t]he terms ‘aggrieved’ and ‘affected’ are synonymous and both relate to the requirement that a person show a ‘justiciable interest.’” *Hooks*, 611 S.W.2d at 419. Standing for purposes of judicial review exists

only for a person “suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.” *Mega Child Care*, 145 S.W. 3d at 191. To satisfy this requirement, a plaintiff must demonstrate that they have suffered a concrete, particularized, and imminent injury resulting from the challenged decision; hypothetical or speculative harm cannot establish a personal justiciable interest. *Tex. Comm’n on Env’t Quality v. San Antonio Bay Estuarine Waterkeeper*, 714 S.W.3d 270, 284 (Tex. App. [15th Dist.] 2025, pet. granted); *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304–05 (Tex. 2008).

Plaintiffs are not “persons affected.” Plaintiffs rely principally on the proximity of identified individuals to Vulcan’s fence line and unspecified fears regarding groundwater contamination to establish affected person status. But the Abatement Plan does not authorize any polluting activity—it serves the inverse purpose of implementing detailed technical practices and measures Vulcan will abide under its Abatement Plan to prevent pollutants from entering surface streams, sensitive features, or the aquifer. 30 Tex. Admin. Code § 213.5(b)(4)(B)(iii), (D)(ii)(I). Plaintiffs’ alleged injuries rest on speculation about future noncompliance, and their reliance on groundwater availability is misplaced given that the Abatement Plan addresses water quality—not quantity. Plaintiffs’ claims are unsubstantiated

and disconnected from how Individual Plaintiffs suggest they may be affected by activity in the Quarry. Their alleged claims of impaired property use, quality of life, property values, county tourism, and regional water availability are not unique to Individual Plaintiffs.

1. The Abatement Plan Does Not Authorize Any Polluting Activity.

Fundamentally, this lawsuit does not concern a wastewater permit authorizing discharges that could affect groundwater. A WPAP is not a permit and the Abatement Plan does not *authorize* Vulcan to discharge pollutants or to withdraw groundwater. Vulcan remains independently obligated to obtain and comply with any other permits, approvals, and legal requirements applicable to the project, including those imposed by authorities other than TCEQ and for matters beyond the scope of Plaintiffs’ petitions for judicial review. Accordingly, Plaintiffs cannot trace any alleged injury to authority granted by the Abatement Plan because the Abatement Plan grants no authority to pollute in the first place.

Instead, under the Abatement Plan, Vulcan has undertaken prospective regulatory compliance obligations. The Abatement Plan functions as a protective mechanism—a compliance plan submitted to TCEQ in advance of construction to ensure that Vulcan’s regulated activities preserve the “existing quality of groundwater.” 30 Tex. Admin. Code § 213.1(1). Approval of the Abatement Plan

required rigorous agency review that is reflected here by TCEQ’s issuance of multiple notices of deficiency, each of which required Vulcan to revise and supplement its proposed plan before approval. *See* Appendix D at VCM_000288–89, VCM_000310, VCM_000321 (TCEQ correspondence requesting additional information); *see also* Appendix D at VCM_000290–309, VCM_000311–20, VCM_000322–27 (Vulcan responses providing requested information). Only after that iterative review did TCEQ determine that the Abatement Plan adequately mitigates risks to the Edwards Aquifer and hydrologically connected surface streams as required under title 30 Texas Administrative Code Section 213.1(1).

Principally, Plaintiffs do not identify any injury that flows from the preventative measures that TCEQ approved—only speculation that Vulcan’s operations will fail to comply with regulatory provisions. Such conjecture falls well short of the concrete, particularized, and imminent injury required to establish standing and does not render Plaintiffs “persons affected.” Their real complaint is not that the Abatement Plan permits pollution, it is that Plaintiffs wish for more requirements beyond what regulations require. The assertion that an agency *could* have imposed more stringent requirements is not an injury.

In *Collins v. TNRCC*, the Third Court rejected a similar attempt to base standing on unsupported “fears” that a regulated entity might violate its permit and

pollute the groundwater. *Collins v. Tex. Nat. Res. Conservation Comm'n*, 94 S.W.3d 876, 883 (Tex. App.—Austin 2002, no pet.). There, Collins alleged that the permitted operator may not properly implement odor-minimizing measures because they were “difficult to install and might fail.” *Id.* The court rejected that argument, emphasizing that the permit authorized only correctly installed measures and that TCEQ had relied on expert affidavits from engineers supporting the approved technology. *Id.* As *Collins* makes clear, the fear that a regulated entity will violate the law does not establish a justiciable interest sufficient to bring a claim. Nor can the purported interest be based on the contention that an agency should have required more than the law demands. Because Plaintiffs identify no concrete injury arising from the Abatement Plan as approved, they have not shown that they are “persons affected.”

2. Plaintiffs Have Not Demonstrated a Concrete, Particularized, and Imminent Injury to Their Groundwater Interests.

Plaintiffs’ asserted groundwater interests do not make them “persons affected” by approval of Vulcan’s Abatement Plan. Their allegations concern two distinct interests—the availability of groundwater and its quality. Neither is sufficiently connected to the agency action under review.

Groundwater supply. Plaintiffs first allege that nearby landowners own the groundwater beneath their property and are entitled to produce a “fair share” of that water and claim that the Abatement Plan authorizes activity that will increase groundwater withdrawal. *See* PHCE Original Petition ¶¶ 37–44; Carrillo *et al.* Original Petition ¶¶ 38–45. Whatever the scope of their property rights, TCEQ’s approval of the Abatement Plan did not adjudicate, authorize, limit, or otherwise alter any Plaintiff’s right to produce groundwater. The Edwards Aquifer Rules do not allocate groundwater, authorize withdrawals, establish pumping limits, or determine the amount of groundwater available to neighboring landowners or to Vulcan. *See* 30 Tex. Admin. Code § 213.1. Allegations that Vulcan may withdraw groundwater for Quarry operations do not convert the WPAP approval into an authorization to pump, much less an adjudication of competing water rights. *See Maverick County*, 642 S.W.3d at 544 (once TCEQ promulgates rules governing an application process, it must act within those rules); *Tex. Comm’n on Env’t Quality v. Sierra Club*, 455 S.W.3d 228, 240 (Tex. App.—Austin 2014, pet. denied) (matters outside the agency’s authority over the challenged approval are not part of the review proceeding). In any event, whatever rights Plaintiffs or Vulcan may have to produce groundwater underlying their real property are not adjudicated by TCEQ. *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 833 (Tex. 2012). And Plaintiffs’ estimate in

a non-technical unsupported declaration that Quarry operations may require groundwater does not establish an injury. PHCE Original Petition ¶¶ 40–43; Carrillo *et al.* Original Petition ¶¶ 41–44. A generalized prediction of future pumping fails to establish that approval of the Abatement Plan injured individual Plaintiffs’ water rights.

Groundwater quality. Plaintiffs’ water quality assertions fail for a different reason: they have not connected any alleged insufficiency in Vulcan’s Abatement Plan to any individual Plaintiff’s particular water source.

Texas courts require more than proximity and possibility. Standing turns on site-specific evidence that contamination will reach the plaintiff’s property or water source. *Save Our Springs*. controls that inquiry. 304 S.W.3d at 883–84. There, two association members used residential wells. One lived approximately one-quarter mile from the proposed development, and another owned property within 200 feet. *Id.* The association submitted expert evidence that pollutants from proposed development would enter runoff flowing into the Edwards Aquifer. *Id.* The alleged injury that the developments might pollute “some well water in the area” and that the members used well water nearby was conjectural and insufficient to show that members’ properties were at least potentially downflow from the developments. *Id.* “The fact that the [plaintiff’s property] is somewhere in the contributing zone and

an SOS member's well is somewhere in the recharge zone is not, by itself, sufficient to show harm that is imminent and not merely conjectural or speculative.” *Id.* By comparison, *City of Kyle v. Knight* confirms the nature of the required showing. No. 03-21-00378-CV, 2023 WL 5597360, at *7–8 (Tex. App.—Austin 2023, no pet.). There, plaintiffs presented a site-specific dye study, evidence that dye was detected in twenty-three wells and eighteen springs in the Edwards Aquifer, and mapping and expert testimony showing that pollution from the development would flow toward property and water sources used by the organization's members. *Id.*

Plaintiffs' exhibits relate to general possibilities that pollutants may enter and move through a karst aquifer—not from Vulcan's activities. They cite regional nitrate data, historic water levels, a dye-trace study conducted elsewhere in the Edwards Aquifer, and contamination associated with a different quarry. But none of that information identifies a groundwater flow path from a source within the Vulcan Quarry to a well, pond, or water supply used by any individual. Plaintiffs themselves acknowledge the deficiency: their motions to overturn state that “there is no evidence showing exactly where the nitrate pollution will go, and which water wells will be most at risk of contamination,” and propose that a future dye-trace study be conducted to answer those questions. Appendix H at VCM_000365, VCM_000484. Plaintiffs are no different than those in *Save Our Springs*, contending that quarry

activities may introduce pollutants into groundwater and that they own or use groundwater in the vicinity without showing an alleged source of contamination connecting the Quarry to any particular groundwater pathway.

Plaintiffs' proximity to Vulcan's fence line is of no import. The Quarry comprises more than 1,500 acres. Distance from the fence line does not establish distance from an alleged potential source of contamination and is irrelevant to groundwater flow direction. The Guckians allege that their porch is approximately 358 feet from Mining Area No. 7, but do not show that their well is downflow from that mining area or hydrologically connected to it. Nor are individual Plaintiffs' asserted properties situated in a common location from the Quarry. Plaintiffs' own pleadings place Carrillo south of the Quarry; the Olsons along the southwestern boundary; the Guckians and James near the eastern boundary; Johnson and Smith southeast of the Quarry; and Kucewicz northeast of it. PHCE Original Petition ¶¶ 10, 12–15; Carrillo et al. Original Petition ¶¶ 7–14. Plaintiffs cannot infer that groundwater leaving unidentified operational areas will travel in every direction and affect each of their disparate water sources. At best, Plaintiffs offer an unsupported proximity-and-possibility theory like *Save Our Springs* rejected, not the site-specific hydrologic proof *City of Kyle* requires.

Plaintiffs' allegations concerning Texas Water Company are similarly misplaced since the water company participated in the public comment process for Vulcan's Abatement Plan but did not appeal TCEQ's approval. Plaintiffs have no justiciable interest in Texas Water Company's groundwater and a statement that the Quarry poses a "potential threat" to the company's wells does not establish that a particular well supplying an individual Plaintiff will be adversely affected. *DaimlerChrysler*, 252 S.W.3d at 304–05.

While Plaintiffs rely on generalized evidence concerning karst aquifers and contamination events occurring elsewhere, the Administrative Record contains project-specific professional geological, and engineering BMPs and measures specifically appropriate for the Quarry. Plaintiffs have not shown that TCEQ's approval of Vulcan's Abatement Plan affects any individual Plaintiff's right to produce groundwater or will actually or imminently impair any individual Plaintiff's water quality. Therefore, Plaintiffs' asserted groundwater injuries remain conjectural and do not make them "persons affected."

B. Plaintiffs' Policy and Rulemaking Arguments Are Outside Section 5.351's Sovereign Immunity Waiver.

Plaintiffs' due process and notice allegations seek to impose new procedural requirements on TCEQ. This effort is not properly raised under Water Code Section 5.351, which waives sovereign immunity only for challenges to regulatory actions,

not for generalized policy grievances or attempts to force rulemaking. *Bonser-Lain*, 438 S.W.3d at 894–95. Section 5.351 applies only “to review administrative actions of a regulatory nature” and does not extend to other types of claims. *IT-Davy*, 74 S.W.3d at 858–59. The statute only permits review of a “final and appealable” agency act—one that imposes obligations, denies rights, or fixes a legal relationship. *City of Austin v. Tex. Comm’n on Env’t Quality*, 303 S.W.3d 379, 384 (Tex. App.—Austin 2009, no pet.); *see also Tex. Comm’n on Env’t Quality v. Sierra Club*, No. 03-12-00625-CV, 2014 WL 902513, at *2–3 (Tex. App.—Austin Mar. 7, 2014, no pet.).

The only action that may be challenged under Section 5.351 in this proceeding is the TCEQ’s decision to approve Vulcan’s Abatement Plan. Plaintiffs’ assertion that TCEQ should have provided specific notice of the Executive Director’s receipt of the Abatement Plan to nearby landowners, an action not required by the Edwards Aquifer Rules, is a policy play about how Plaintiffs believe TCEQ’s rules should be modified—not a challenge to any actionable regulatory decision. Even if framed as a challenge to agency conduct, the final agency order at issue here is not an action denying notice. *Sierra Club*, 2014 WL 902513, at *2–3 (holding that agency correspondence that does not present a new substantive determination is not a

reviewable action under Section 5.351). Plaintiffs' notice arguments target precisely this kind of non-final, procedural conduct and should be rejected.

Plaintiffs' due process claim in this administrative appeal is functionally indistinguishable from a request that the agency adopt new rules requiring additional notice. Texas courts have squarely held that refusals to engage in rulemaking, or claims that an agency should adopt different procedures, are not subject to judicial review under Section 5.351. *Bonser-Lain*, 438 S.W.3d at 894–95. Allowing Plaintiffs' policy suggestion to proceed would impermissibly expand the statute's limited waiver by converting policy proposals into judicially reviewable claims. Because Plaintiffs seek to alter agency rules rather than challenge a final regulatory action, their notice theory falls outside Section 5.351's sovereign immunity waiver and must be dismissed for lack of jurisdiction.

II. TCEQ DID NOT ABUSE ITS DISCRETION IN APPROVING THE ABATEMENT PLAN.

Even if this Court determines it has jurisdiction to review TCEQ's decision, the Court should affirm TCEQ's approval of the Abatement Plan.

Texas Water Code Section 5.351(c) authorizes judicial review of certain rulings, orders, or decisions delegated to the Executive Director. Tex. Water Code § 5.351(c). Courts review such agency decisions under a deferential abuse of discretion standard. *Brazos*, 576 S.W.3d at 383; *City of Waco*, 413 S.W.3d at 423–

25. This standard is analogous to arbitrary and capricious review and recognizes that courts are not authorized to substitute their judgment for that of the agency. *City of El Paso*, 883 S.W.2d at 184–85.

In determining whether an agency abused its discretion, courts examine whether substantial evidence in the record supports the agency’s decision. *Sierra Club*, 455 S.W.3d at 224; *City of Waco*, 413 S.W.3d at 424–25. While substantial evidence requires more than a mere scintilla, it does not require that evidence in the record even weigh in favor of the agency’s decision. *Citizens Against Landfill*, 169 S.W.3d at 264. In fact, “evidence in the record may actually preponderate against the agency’s decisions and nonetheless amount to substantial evidence.” *Id.*

The relevant inquiry is whether reasonable minds *could* have reached the same conclusion as the agency, not whether the court *would* reach the same decision. Thus, substantial evidence does not require the Agency reach the “correct” conclusion in some absolute sense; only a reasonable one supported by the record. *Id.* Under judicial review, TCEQ’s findings, inferences, conclusions, and decisions are presumed to be supported by substantial evidence unless Plaintiffs prove otherwise. *Id.*; *Tex. Indus. Energy Consumers*, 620 S.W.3d at 427.

Here, TCEQ acted well within its discretion in approving Vulcan’s Abatement Plan. The agency properly reviewed the Abatement Plan under the Edwards Aquifer

Rules, evaluated the Geologic Assessment, Technical Report, and BMPs, and determined that the application satisfied the requirements of the Rules. Because TCEQ reached a reasonable conclusion supported by the administrative record, Plaintiffs cannot establish that the agency abused its discretion.

A. Substantial Evidence Supports TCEQ's Reasonable Determination That the Approved Abatement Plan Will Prevent Pollution.

TCEQ relied on substantial evidence in the administrative record and reasonably determined that the Abatement Plan identified all potential sources of contamination and will prevent pollution, as required by the Rules. Plaintiffs mistake an unnecessary label for a missing review of Vulcan's Technical Report and ask the Court to replace TCEQ's technical judgment with their own. But the question is whether the record reasonably supports TCEQ's determination that the Abatement Plan identifies and controls the Quarry's potential contamination sources. It does. The Geologic Assessment and Technical Report identify the potential sources of contamination, the pathways by which pollutants could reach protected waters or features, and the engineered BMPs and other measures designed to prevent that result. Vulcan disclosed blasting, TCEQ considered it as part of the Quarry's integrated mining operation, and the approved design controls the pathways by which pollutants could reach surface water, sensitive features, or the aquifer.

Vulcan’s Abatement Plan does not contain a bullet point that states “blasting is a potential source of contamination” but it is not required to—the Plan catalogues the BMPs and measures at the Quarry that will minimize pollution and comply with the Rules for all potential sources of contamination, including blasting. Plaintiffs contend that TCEQ violated the Rules because Vulcan’s Technical Report did not separately designate blasting as a “potential source of contamination” or identify a BMP expressly labeled as a control for blasting. Pls.’ Br. 22–23, citing 30 Tex. Admin. Code § 213.5(b)(4)(A)(iv), (b)(4)(B)(iii). This narrow construction interprets the phrase “potential source of contamination” in isolation from the other requirements of the WPAP like the Geological Assessment and Technical Report.

“Regulated activity” identifies the construction and post-construction activities or processes that trigger the obligation to obtain an Edwards Aquifer Protection Plan. 30 Tex. Admin. Code § 213.3(28). The Technical Report, a requirement for every WPAP, must “describe any activities or processes which may be a potential source of contamination.” *Id.* § 213.5(b)(4)(A)(iv). Chapter 213 does not define “potential source of contamination.” It does, however, define “pollution” as an alteration or contamination of water that renders the water harmful or impairs its usefulness for a lawful or reasonable purpose. *Id.* § 213.3(24). The adjoining rule provisions require engineered BMPs and measures that “prevent pollutants from

entering surface streams, sensitive features, or the aquifer.” *Id.* § 213.5(b)(4)(B)(iii), (b)(4)(C)(iii). Read together with the Geologic Assessment, the requirements for a WPAP call for a site-specific evaluation of the property, the regulated activity, the pollutants it may generate, the pathways by which those pollutants could reach protected waters or features, and a set of BMPs designed to control discharge of pollution from regulated activity. *See id.* § 213.5(b).

The Rules do not require every single constituent step of a project to be independently highlighted as a potential source of contamination under Section 213.5(b)(4)(A)(iv). Plaintiffs’ reading would require an applicant to separately classify clearing, excavation, drilling, blasting, loading, hauling, crushing, equipment operation, and every other component of a project without regard to the project’s design or controls.

The Court should defer to TCEQ’s interpretation that “potential source of contamination” and “regulated activity” as used in the Edwards Aquifer Rules do not require an itemized catalogue of potential contaminants. Courts enforce the unambiguous language of an administrative rule, but when the rule is vague, ambiguous, or leaves room for policy determinations, they defer to the agency’s reasonable interpretation of its own rule unless that interpretation is plainly erroneous or inconsistent with the rule’s text. *Rodriguez v. Service Lloyds Ins. Co.*,

997 S.W.2d 248, 254–55 (Tex. 1999); *Gulf States Utils. Co.*, 809 S.W.2d at 207. Here, TCEQ’s interpretation in its review and approval of Vulcan’s Abatement Plan of the undefined phrases “potential source of contamination” and “regulated activity,” which necessarily require the agency to exercise technical judgment considering the proposed activity, site geology, engineered BMPs and measures designed to prevent pollution, was reasonable and consistent with the language in the Rules. Plaintiffs’ preference for a different interpretation does not permit the Court to substitute Plaintiffs’ wishes for the agency’s reasonable application of its own Rules.

1. Vulcan Disclosed, and TCEQ Considered, Blasting as Part of Vulcan’s Planned Mining Operation.

The record forecloses any suggestion that Vulcan concealed blasting or that TCEQ did not consider it when it approved the Abatement Plan. The Project Description clearly identified the proposed site use as a quarry and stated that “[b]lasting agents will be utilized in the mining process” but “will not be stored onsite over the recharge zone.” Appendix D at VCM_000274. The Project Description also describes the typical quarrying sequence as clearing, stripping, drilling, blasting, loading the quarried material into haul vehicles, hauling it to the plant, processing the rock, and loading it for export. *Id.* at VCM_000275. The Temporary Stormwater Section likewise addresses the maintenance of flow to

sensitive features identified “during excavation, blasting, or construction.” *Id.* at VCM_000306. Blasting was expressly presented as an integral part of the mining process.

The Executive Director’s technical review proceeded with that understanding. The Executive Director issued successive requests for information and revised materials for the Abatement Plan that addressed, among other matters, the quarry floor elevation, sensitive feature protections, temporary erosion and sediment controls, stream crossings, process water management, pond liners, and permanent stormwater controls. Appendix D at VCM_000267–68, VCM_000288–89, VCM_000310, VCM_000321. Vulcan responded by revising and supplementing the application. Appendix D at VCM_000269–87, VCM_000290–309, VCM_000311–20, VCM_000322–327. The Executive Director then determined the application, as revised, was compliant with Chapter 213 and approved the Abatement Plan and its “methods to protect the Edwards Aquifer,” subject to the approved technical specifications and conditions. Appendix G at VCM_000335.

The record supports the reasonable inference that the Executive Director considered blasting in the context in which Vulcan presented it—as part of a mining process governed by the pit design, stormwater management system, groundwater separation, buffers, sensitive feature protections, and operational restrictions.

2. The Abatement Plan and the Quarry's Engineering Design Address All Contamination Pathways, Including Any Potentially Impacted by Blasting or Blasting Agents.

The relevant inquiry is whether the final design and combination of measures are reasonable and necessary to address the pathways by which contaminants associated with construction and operation of the Quarry could reach protected water. The Abatement Plan is not required to contain a measure titled “blasting BMP.” The Rules require the Technical Report to describe the temporary and permanent BMPs the applicant will implement, and those BMPs must prevent pollutants from entering surface streams, sensitive features, or the aquifer. 30 Tex. Admin. Code § 213.5(b)(4)(B)(iii), (b)(4)(C)(iii). TCEQ’s guidance document RG-348 provides general technical guidance for an extensive array of possible temporary BMPs to manage erosion and sediment control, and permanent BMPs, both structural and non-structural, to meet the qualitative pollution reduction requirements in the Rules. Appendix I at VCM_000701, VCM_000827, VCM_000869. Guidance in RG-500 more directly contemplates the circumstances presented by quarry activity. Appendix J at VCM_001018.

The approved permanent BMPs satisfy Chapter 213’s prescribed quantitative pollution control performance standard. 30 Tex. Admin. Code § 213.5(b)(4)(D)(ii)(I). Vulcan will install 50-foot natural vegetative filter strips

around the plant, haul roads, and other impervious areas, designed under RG-348 to remove 80 percent of the increase in total suspended solids. Appendix D at VCM_000274–75. TCEQ found that these approved permanent BMPs meet the required 80 percent TSS removal standard, inclusive of blasting agents. Appendix G at VCM_000336.

Vulcan’s Abatement Plan also controls the pathways by which water and pollutants associated with mining could leave the mining areas, enter sensitive features, or reach the aquifer. “To the maximum extent practicable,” Vulcan’s temporary BMPs and other measures will maintain flow to naturally occurring sensitive features identified in the Geologic Assessment, during TCEQ inspections, or “during excavation, blasting, or construction.” Appendix D at VCM_000306. Vulcan will not mine into creeks or waterways receiving offsite drainage; the mining areas are designed so water will not exit those areas; and the stormwater outside the mining areas will continue downstream after passing through the approved BMPs, thereby preserving flow to downstream streams and sensitive features. *Id.* Vulcan considered blasting in the stormwater analysis and the BMP design distinguishes between water retained within the mining areas and runoff allowed to continue downstream after treatment.

The Quarry's design builds its most important protection into the quarry floor to require all site disturbance activity, including blasting, to remain above the elevation of the water table, plus a 25-foot separation. Appendix J at VCM_001019. In response to TCEQ's technical review, Vulcan revised the minimum mining elevation from 1,040 to 1,047 feet above mean sea level. Appendix D at VCM_000269, VCM_000275–76. The revised higher elevation preserves the 25-foot separation from the identified potentiometric water surface contemplated by RG-500. *Id.*; Appendix J at VCM_001019. This means that all mining activities or other disturbances, including blasting, must remain 25 feet above the groundwater. The Abatement Plan also requires a positive slope away from faults and sensitive features to prevent flows from entering them. Appendix D at VCM_000276. These measures directly address the potential risks that mining or blasting could create or intersect pathways toward groundwater.

Furthermore, the Abatement Plan prevents any communication between the mining areas and offsite drainage, eliminating any surface water pathway by which material associated with mining, including blasting, could leave the pits and reach surface streams or sensitive features. First, the mining areas are designed to retain stormwater. They will be graded to permit ponding within the mined portions, thereby controlling stormwater within the pits and protecting the floodplain. *Id.* at

VCM_000314. The Temporary Stormwater Section directly states that “the mining areas do not allow water to exit the site,” and RG-500 likewise recognizes quarry operations within pit areas from which no surface discharge will occur. *Id.* at VCM_000306; Appendix J at VCM_001018, VCM_001036–37.

Second, the Plan prevents offsite drainage from entering the mining areas. Vulcan will not mine into creeks or waterways receiving offsite drainage and may not mine into jurisdictional waterways without obtaining the required agency approvals and submitting a proposed modification for further TCEQ review. Appendix D at VCM_000279, VCM_000305–06. As mining proceeds, Vulcan must maintain the banks of dry creeks at elevations that prevent flooding into the mining areas, keep stream crossings above the elevation of the 2-year, 24-hour storm, and maintain a 25-foot buffer on either side of the floodplain. Appendix D at VCM_000279. Together, these design and operational measures isolate the mining areas from surrounding drainage: water cannot leave the pits, and offsite flows cannot enter and carry material associated with mining into surface waters.

Third, the Abatement Plan controls erosion and sediment generated by mining operations. Water is stored in the Mining Areas until it is evaporated. Temporary buffers will be maintained around naturally occurring sensitive features within the mining areas until they are mined, in compliance with RG-500. *Id.* at VCM_000306.

Outside the mining areas, stormwater will continue downstream only after passing through those BMPs. *Id.*

Fourth, the Abatement Plan protects identified sensitive features. Temporary buffers consisting of silt fence or sediment control rolls will remain around naturally occurring sensitive features until features within the mining areas are reached through ordinary quarry progression. *Id.* Sensitive features S-12, S-27, and S-35, which lie outside the Mining Areas and quarry pits, will remain undisturbed within permanent natural vegetated buffers, and no regulated activity may occur within those buffers. Appendix G at VCM_000336. If an additional sensitive feature is encountered, work near the feature must stop until TCEQ reviews and approves measures protecting the feature and the aquifer. *Id.* at VCM_000337.

The Abatement Plan protects the Aquifer without separately itemizing every blasting agent used in the mining process. Plaintiffs nevertheless assume, based principally on the general chemical properties of ammonium nitrate and promotional material from a South African mining company, that residual nitrate from blasting will presumably escape the mining areas and reach protected waters. *See* Pls.' Br. 24–25; Appendix H at VCM_000479 (citing the promotional material); *see also id.* at VCM_000495, VCM_000501, VCM_000511 (citing and referring to the promotional material). That threadbare theory does not confront, much less rebut,

the record evidence concerning Vulcan's engineering design, geological findings, mining elevations, stormwater containment, and sensitive feature protections. Nor does it account for the numerous BMPs and other protective measures described in detail in the record and incorporated into the approved Abatement Plan.

Taken together, these and other provisions in the Abatement Plan address all contamination pathways. Stormwater within the mining areas is retained there; stormwater outside those areas is controlled by BMPs before continuing downstream; offsite drainage is kept out of the pits; mining remains separated from groundwater; and identified sensitive features are protected by grading, buffers, and stop-work requirements. The Rules required an adequate system of BMPs and measures, not a duplicative control separately captioned as a "blasting BMP." Plaintiffs are therefore simply wrong in assuming that because "blasting" is not given its own subheading, that the Abatement Plan omits measures to protect the Aquifer from "contamination as a result of the blasting process." Pls' Br. at 22.

B. TCEQ Complied with the Rules in Approving Vulcan's Abatement Plan Without Authorizing Injection Wells.

TCEQ's approval of Vulcan's Abatement Plan did not violate the Rules because the approval does not, and cannot, authorize construction or operation of an underground injection well over the Recharge Zone. The Rules prohibit waste disposal wells regulated under Chapter 331 on the Recharge Zone. 30 Tex. Admin.

Code § 213.8(a). Vulcan acknowledged that waste disposal wells regulated under Chapter 331 are prohibited on the Recharge Zone and not proposed for the project. Appendix A at VCM_000013. And the geoscientist who conducted the Geologic Assessment attested that he did not identify any injection wells on the site. 1AR25, Appendix Tab K at VCM_001046.

Rather than identify an actual injection well, Plaintiffs attempt to recharacterize assumed blasting boreholes as “injection wells” by combining definitions drawn from separate regulatory programs and supplying purported factual details absent from the administrative record. Plaintiffs claim that future blasting will involve boreholes that qualify as “wells” because their depth will exceed their largest surface dimension; that ANFO will be placed into those boreholes; and that ANFO is a “fluid” under the Underground Injection Control rules. Pls.’ Br. 23–24. From those assumed premises, they leap to the conclusion that Vulcan will operate prohibited injection wells. *Id.* But Plaintiffs lack any administrative record evidence to support such bald assertions about boreholes. Appendix H at VCM_000501, VCM_000507. Without record evidence, Plaintiffs cannot assume a particular blasting method, agent, borehole configuration, and depth as established facts. Pls.’ Br. 22–24.

Chapter 213 defines a “well” by its dimensions, but the Injection Well Act defines an “injection well” by its function. *Compare* 30 Tex. Admin Code § 213.3(39) (defining “well” broadly and geometrically), *with* Tex. Water Code § 27.002(11) (defining “injection well” by its function as an opening “used to inject, transmit, or dispose of” waste into subsurface stratum). The definition of an injection well requires more than an opening that qualifies as a well and material that qualifies as a “fluid.” As indicated in the statutory definition, the opening must be used to inject, transmit, or dispose of that material into a subsurface stratum. Plaintiffs’ theory reads this use requirement out of the statute to substitute the proposition that movable material is placed into a hole. The Legislature defined the term “injection well” and Plaintiffs selective omission does not change the statutory definition.

The Edwards Aquifer regulatory scheme preserves the same distinction: TCEQ’s approval letter contains conditions that govern any future borings and water wells, including injection wells. Appendix G at VCM_000337 (Abatement Plan approval letter describing Standard Conditions 7 and 10 for borings and water wells); *see Maverick County*, 642 S.W.3d at 544.

The Rules must be read according to their text and in the context of the overall regulatory scheme. *See Maverick County*, 642 S.W.3d at 544. And to the extent the relevant terms leave room for interpretation, TCEQ’s reasonable construction and

application of its own regulatory scheme are entitled to serious consideration and should be upheld unless plainly erroneous or inconsistent with the governing text. *See R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 624–25 (Tex. 2011); *Rodriguez*, 997 S.W.2d at 254–55; *Gulf States Utils. Co.*, 809 S.W.2d at 207.

The record is clear. No underground injection well over the Recharge Zone is proposed or authorized.

III. TCEQ'S ADHERENCE TO THE EDWARDS AQUIFER RULES DID NOT DEPRIVE PLAINTIFFS OF DUE PROCESS.

Plaintiffs' due process claims attempt to convert a desire to change TCEQ's established notice procedures into an alleged constitutional violation. Plaintiffs concede that TCEQ complied with the notice procedure in the Edwards Aquifer Rules at title 30 Texas Administrative Code Section 213.4(a)(2) and that Plaintiffs themselves had actual notice of the proceedings. Pls.' Br. 2, 4, 8. Plaintiffs do not identify the deprivation of a concrete, protected interest requiring heightened procedures. Nor do they show that TCEQ's prescribed procedures fall short of constitutional minimums. Instead, Plaintiffs complain only that additional procedures—such as individualized notice, publication, or signage—were not provided. But no such procedures are constitutionally required absent a statutory mandate. Due process imposes only limited, flexible requirements in the

administrative context; it does not guarantee any particular form of proceeding nor entitle parties to their preferred set of procedural protections. Instead, the Constitution requires only that agency procedures be reasonably designed to provide notice and a meaningful opportunity to be heard, as happened here.

A. TCEQ Complied with the Notice Procedures Prescribed by the Edwards Aquifer Rules.

The Rules establish a specific framework for public notice and participation for an Edwards Aquifer Protection Plan application. Once an application is administratively complete, the appropriate TCEQ regional office distributes the application to the identified affected city, county, and groundwater conservation district. Those entities and the public then have 30 days to submit comments to the regional office. 30 Tex. Admin. Code § 213.4(a)(2). The Rules do not require TCEQ to mail individual notice to neighboring property owners, publish notice in a newspaper, post signs at the project site, or hold a public meeting.

The history of the Edwards Aquifer Rules confirms that the absence of newspaper or individual notice was not an oversight. During rulemaking, commenters specifically urged TCEQ to expand public notice, including by requiring publication in local newspapers. Appendix Tab N, 23 Tex. Reg. 10,399 (Oct. 9, 1998), VCM_001175–76. TCEQ considered but declined to adopt such proposals. Instead, the agency explained that “any person may obtain information

regarding pending [Edwards Aquifer Protection Plan] applications from the appropriate regional office and may [submit] comments within the provided time.” *Id.* at VCM_001176. TCEQ modified the rule to clarify when the 30-day comment period begins but retained a notice system centered on distribution to affected governmental entities and public access through the regional offices. *Id.*

TCEQ followed that framework here. The Executive Director declared Vulcan’s Abatement Plan application administratively complete on March 21, 2024. 1AR3. The following day, TCEQ distributed the application to the affected governmental entities and advised them that comments were due by April 21, 2024. 1AR5. The application was also made available for public review through TCEQ’s San Antonio Regional Office. Plaintiffs identify no step required by Section 213.4(a)(2) that TCEQ omitted. Indeed, Plaintiffs’ brief acknowledges that TCEQ followed the notice procedure prescribed by the Edwards Aquifer Rules. Pls.’ Br. 2, 4, 8.

Once TCEQ adopts rules governing an application process, it must follow them. *Maverick County*, 642 S.W.3d at 544–45. Here, it did. Plaintiffs cannot establish unlawful procedures by identifying forms of notice that the governing rule does not require.

B. Plaintiffs Had Actual Notice and Meaningful Opportunities to Participate.

The record independently defeats Plaintiffs’ claim because Plaintiffs had actual notice and used the available procedures. Four of the Individual Plaintiffs, PHCE and PHCE Foundation submitted comments during the public review period, including robust objections to Vulcan’s Abatement Plan. 2AR30 at 147–48, 202–62; PHCE Original Pet. ¶¶ 4, 31–32. The public comment process demonstrates that notice was effective. TCEQ received more than 140 public comments concerning the Abatement Plan, reflecting broad public awareness and participation in the public comment process. *See* 1AR30. The remaining Plaintiffs obtained actual notice and invoked the motion to overturn process. *See* Appendix H. Plaintiffs supported their motions to overturn with affidavits and many of the same objections they now present to the Court. They then filed replies after the Executive Director, Vulcan, and the Office of Public Interest Counsel responded. 1AR23–1AR29. Thus, every Plaintiff now before the Court either participated during the comment period or invoked the available administrative remedy after receiving actual notice.

Actual notice of an administrative proceeding is dispositive as to a due process violation. *Pierce v. Tex. Racing Comm’n*, 212 S.W.3d 745, 758–59 (Tex. App.—Austin 2006, pet. denied) (“evidence that a party received actual notice of a hearing may defeat the party’s claims on appeal for due process violations”). *Tex. Comm’n*

on *Env't Quality v. Denbury Onshore, LLC* is particularly instructive. No. 03-11-00891-CV, 2014 WL 3055912 (Tex. App.—Austin July 3, 2014, no pet.) (mem. op.) There, TCEQ did not provide a mineral owner with the mailed notice expressly required by the Injection Well Act. The mineral owner nevertheless obtained actual notice of the administrative proceeding while administrative remedies remained available. The Third Court held that the actual notice satisfied due process because the owner who had knowledge still could have intervened, offered testimony, or otherwise sought relief from TCEQ. *Id.* at *9. Furthermore, the Court held that the other plaintiffs could not complain about notice allegedly denied to someone else because they were not personally injured by that omission. *Id.* at *10.

This case presents a weaker due process claim than in *Denbury Onshore*. Plaintiffs identify no failure by TCEQ to provide notice expressly required by statute or rule. Indeed, the record reflects substantial public participation, with more than 140 comments submitted regarding the Abatement Plan. And, as in *Denbury Onshore*, Plaintiffs had actual knowledge while administrative remedies remained available. They did not merely possess theoretical access to those remedies. They used them.

C. Plaintiffs Were Not Entitled to Additional Notice or Procedures.

The U.S. Constitution does not guarantee any specified form of agency procedure. Due process in the administrative context is inherently flexible and does not import judicial procedures into agency decision making. *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) (citing *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 143 (1940)). The core requirements are far more limited: notice and opportunity to be heard. *Id.* at 348–49.

Fundamentally, a procedural due process claim requires the deprivation of a protected liberty or property interest. Plaintiffs identify no such deprivation here. In *Collins*, the court rejected a due process claim premised on speculative future impacts from an agency permit. The permit did not authorize the alleged injury and the facility remained subject to agency oversight. 94 S.W.3d at 883–85. The applicable rule expressly stated that issuance of the permit did not authorize “any injury to persons or property or an invasion of other property rights.” *Id.* at 883–84 (discussing 30 Tex. Admin. Code § 305.122(c)). As the court explained, “[m]ere speculation of failure in the face of conflicting evidence about the improved operation of the site under the permit does not deprive Collins of protected liberty or property rights.” *Id.* at 884. The same reasoning applies here. Approval of Vulcan’s Abatement Plan did not adjudicate Plaintiffs’ groundwater rights, grant

Vulcan a right to interfere with their groundwater, or authorize contamination. Vulcan remains bound by Chapter 213, the approved Abatement Plan, the approval conditions, and continuing TCEQ oversight and enforcement. Appendix G at VCM_000336–38. Plaintiffs’ perceived deprivation therefore depends on speculation that Vulcan will violate the approval or that the required controls will fail, and that resulting contamination will then reach a particular Plaintiff’s water source. That chain of assumptions does not establish a present deprivation of a protected interest.

Moreover, Texas courts have repeatedly rejected claims that due process requires contested case hearings or similar trial-like procedures absent a statutory entitlement. There is no inherent right to such proceedings before an agency, and any entitlement must arise from statute or rule. *See, e.g., City of Waco*, 413 S.W.3d at 419–20 (holding no right to a contested case absent statutory authorization); *Bacon v. Tex. Historical Comm’n*, 411 S.W.3d 161, 180 (Tex. App.—Austin 2013, no pet.) (rejecting due process right to trial-like administrative hearing where governing law affords procedural discretion); *Ranna & Co., LLC v. Tex. Comm’n on Env’t Quality*, No. 03-16-00724-CV, 2018 WL 2347009, at *2–3 (Tex. App.—Austin May 24, 2018, no pet.) (explaining no entitlement to contested case hearing when not provided in applicable statutes or rules). Even where significant property

interests are asserted, “due process never requires all the trial-like procedures of a statutory contested case hearing.” *Collins*, 94 S.W.3d at 884–85. The Legislature has reinforced this flexible constitutional baseline by expressly vesting TCEQ with discretion to determine what procedures are necessary to satisfy public participation. *See* Tex. Water Code § 5.115. The Texas Water Code authorizes the TCEQ to decide whether additional measures—such as public meetings or hearings—are warranted in the agency’s rules, reflecting legislative intent that the agency is best positioned to tailor procedures to the circumstances. *Id.*

Accordingly, TCEQ acts through “a less formal, less expensive, and less time-consuming proceeding” to satisfy due process. *City of Waco*, 413 S.W.3d at 424. Consistent with that approach, in *Tex. Comm’n on Env’t Quality v. Bosque River Coal.*, the Texas Supreme Court upheld the TCEQ’s denial of a contested case hearing where the agency relied on notice, public comment, and internal review procedures, confirming that these mechanisms fall within TCEQ’s discretion. 413 S.W.3d 403, 408 (Tex. 2013).

Even if the Court applies the *Mathews v. Eldridge* balancing test, each factor favors TCEQ. 424 U.S. at 335, 347–49. First, the private interest is attenuated because approval of Vulcan’s Abatement Plan neither adjudicated Plaintiffs’ groundwater rights nor authorized contamination or interference with their use of

groundwater. Plaintiffs' asserted deprivation instead depends on speculative future contamination resulting from assumed failures of the approved controls. Second, any risk of erroneous deprivation was minimal. The Edwards Aquifer Rules made the application available for public review and provided a defined comment period; several Plaintiffs submitted comments; and every Plaintiff had actual notice and an opportunity to present objections through the motion to overturn process. Individual mailed notice, newspaper publication, or signs at the site would have added no meaningful safeguard for Plaintiffs, who actually learned of the proceeding and participated in it. Third, the additional procedures Plaintiffs demand would require TCEQ to create an entirely new notice regime, including rules defining who must receive notice, the geographic reach of that notice, and the appropriate publication and posting requirements. The Constitution does not require a court to impose that policy scheme, particularly where *Mathews* directs courts to weigh the administrative burden of additional procedures and to give substantial weight to the good faith judgments of those charged with administering the regulatory program. 424 U.S. at 335.

Finally, even if Plaintiffs could identify some technical deficiency in notice—which they cannot—any such error would be harmless and does not warrant constitutional adjudication. Courts avoid reaching constitutional questions where

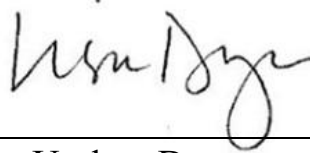
disputes can be resolved on non-constitutional grounds, particularly where no concrete deprivation has occurred. *In re B.L.D.*, 113 S.W.3d 340, 349 (Tex. 2003). Here, the applicable statutory and regulatory scheme independently safeguards against the harms Plaintiffs allege, including impacts to groundwater quality. Because Plaintiffs received both constructive and actual notice, were afforded meaningful opportunities to participate, and participated, there is no due process violation.

Because TCEQ provided notice, an opportunity for comment, and the motion to overturn process required by law and consistent with its statutory authority, due process is satisfied. Plaintiffs' attempt to compel more formal procedures without any statutory directive directly conflicts with TCEQ's statutory discretion and cannot override the agency's lawful choice to proceed through less formal means.

PRAYER

For these reasons, Vulcan respectfully requests that the Court grant its plea to the jurisdiction and dismiss Plaintiffs' claims for lack of subject matter jurisdiction. Alternatively, Vulcan requests that the Court deny Plaintiffs' requested relief and render judgment affirming the approval of Vulcan's Abatement Plan. Furthermore, Vulcan requests all other relief to which it may be entitled.

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 Response Brief contains 12,693 words, excluding the portions of the document exempt from the word count under Texas Rule of Appellate Procedure 9.4(i)(1) and Travis County Local Rules.

/s/ Lisa Dyar

Lisa Uselton Dyar

CERTIFICATE OF SERVICE

I certify that on July 24, 2026, a true and correct copy of Defendant-Intervenor Vulcan Construction Materials, LLC's Response Brief, was electronically served upon the following counsel of record by e-service and/or email:

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