

TCEQ DOCKET NO. 2024-1115-EAQ

MOTION TO OVERTURN THE
EXECUTIVE DIRECTOR'S DECISION
APPROVING AN APPLICATION FOR
AN EDWARDS AQUIFER
PROTECTION PLAN

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BEFORE
THE TEXAS
COMMISSION ON
ENVIRONMENTAL
QUALITY

EXECUTIVE DIRECTOR'S RESPONSE TO MOTIONS TO OVERTURN

TO THE HONORABLE COMMISSIONERS:

COMES NOW, the Executive Director ("ED") of the Texas Commission on Environmental Quality ("TCEQ") and files her Response to the Motion to Overturn (MTO) filed by Kira Olson ("Movant-Olson"), Milann and Prudence Guckian ("Movants-Guckian"), Eric Allmon, on behalf of Robert Carillo, Cheryl Johnson, John Casimir Kucewicz, Jr., and Douglas Smith ("Movant-Individual Landowners"), and Eric Allmon, on behalf of Preserve Our Hill Country Environment Foundation (PHCE) ("Movant-PHCE"), (collectively, "Movants") concerning the ED's decision regarding an application for an Edwards Aquifer Protection Plan, otherwise known as a Water Pollution Abatement Plan ("WPAP") in the above numbered docket.

I. INFORMATION PROVIDED BY THE ED

1. DECISION OF ED

The ED's decision at issue in this matter is in respects to the Edwards Aquifer ("the Edwards") and involves the ED's Office of Compliance and Enforcement's Edwards Aquifer Protection Program's ("EAP Program") approval of Vulcan Construction Material LLC's ("Vulcan") application ("the Application") for WPAP No. #13001906, for operation of a quarry in Comal County, Texas.

2. DECISION ON APPLICATION

The ED reviews WPAP-applications to evaluate compliance with requirements for Best Management Practices ("BMPs") and measures, as described in the TCEQ rules found at Title 30 of the Texas Administrative Code ("30 TAC"), Chapter 213 ("the Edwards Rules"), more specifically at 30 TAC § 213.5(4)(D) and TCEQ's regulatory guidance, *Complying with the Edwards Aquifer Rules - Technical Guidance on Best Management Practices (RG-348)* and *Best Management Practices for Quarry Operations (RG-500)*.

As presented by the Application and other supporting documents submitted to the TCEQ by Vulcan, the ED determined that:

- A. The Application was prepared in general compliance with the provisions and requirements of the TCEQ's Edwards Rules.
- B. The site was generally as described in the Application's required Geologic Assessment ("GA"), verified through a Site Assessment conducted by staff from the EAP Program on April 22 & 24, 2024.
- C. The construction plans, design information, and permanent Best Management Practices ("BMPs") and measures to reduce concentrations of Total Suspended Solids ("TSS") in stormwater represented in the Application were prepared, dated, signed, and sealed by a Texas licensed Professional Engineer.
- D. The Edwards will be protected provided the Applicant complies with the provisions of the WPAP approval letter ("approval letter"), the Application, the WPAP, and its methods to prevent pollution of the Edwards.

3. DOCUMENTATION OF DECISION

The ED's approval of the Application, the decision at issue, is documented through an approval letter, which is akin to a regulatory endorsement that a WPAP-application, which can be thought of as a plan to protect the Edwards through BMPs and other measures to reduce TSS in stormwater flowing towards the Edwards, is not only consistent, but conforms to all applicable rules, regulations, and TCEQ guidance.

4. NATURE OF THE EAP PROGRAM'S PUBLIC NOTICE PROCESS

The TCEQ's Edwards rules set a 90-day deadline for the ED to act on a WPAP-application after it is determined to be administratively complete. The Edwards rules include an opportunity for the public to comment on WPAP-applications and the ED reviews all comments received. Further, any person who disagrees with the ED's decision on a WPAP-application may file an MTO to ask the Commissioners to review the ED's decision. However, it is important to note that the public notice process for Edwards plans including WPAPs differs from that of the public notice process for other TCEQ permitting programs governed by House Bill 801 and Senate Bill 709. WPAP-applications are not subject to the notice and hearing requirements of House Bill 801 or Senate bill 709. These authorizations are governed by a separate notice process provided by the TCEQ's Edwards rules and the Texas Water Code.

From its inception the EAP Program at the TCEQ was intended to be an expedited process that was never designed to include the opportunity for a public meeting or a contested case hearing. The Commission has endorsed the public participation process for WPAP-applications as adequate because it provides sufficient notice to the public, it

allows members of the public to file an MTO if they disagree with the decision, and adding additional steps would significantly lengthen the review process, would require additional agency resources, and the Legislature has similarly spoken to its adequacy through amendments to the Texas Water Code.

5. PROCEDURAL HISTORY AND PUBLIC NOTICE OF APPLICATION

Movants seek to overturn the approval of the Application and its accompanying, supporting material submitted on February 21, 2024, March 7, 2024, June 3 & 25, 2024, and July 1 & 3, 2024. Staff from the EAP Program determined the Application to be administratively complete on March 21, 2024, and then on March 22, 2024, in accordance with Edwards Rules, found at 30 TAC § 213.4(a)(2), informed the affected city, county, and groundwater conservation district. The Application was also posted on the agency website. On the date of the EAP Program's notice of the Application to the local governments, a 30-day window or period for the public to comment on the Application began, ending on April 22, 2024. On July 3, 2024, staff from the EAP Program determined the Application to be technically complete and issued a final approval letter dated July 8, 2024.

6. TECHNICAL REVIEW OF APPLICATION AND ASSOCIATED APPROVAL

For protection of the existing and potential uses of groundwater and to ensure the Texas Surface Water Quality Standards are maintained, the EAP Program regulates activities with the potential to pollute the Edwards and its hydrologically connected surface streams. The protection to the Edwards from a WPAP is the protection against sediment disturbed during regulated activities. Increased sedimentation in karst features and streams can decrease permeability of the water-bearing limestone and inhibit natural groundwater flow, possibly affecting the recharge of the Edwards. A WPAP also protects against pollution of the Edwards from contaminants in the sediment.

An important element of the EAP Program's technical review of WPAP applications is site assessments conducted to observe existing conditions of the site and to evaluate the Geologic Assessment ("GA") performed by applicants for their respective sites. The GA is required to be submitted with the application and must clearly indicate the site's boundaries, existing conditions, and geologic and manmade features at the time a WPAP-application is submitted.

For Vulcan's WPAP application, the site assessment was conducted on April 22 & 24, 2024. Through the site visit and other components of the EAP Program's technical

review, it was determined that the site was as generally described by the GA. The Application's technical review was completed after additional material was received on June 3 & 25, 2024, and July 1 & 3, 2024, and the EAP Program issued a final approval letter dated July 8, 2024, confirming the Application met all requirements of the Edwards Rules (30 TAC Chapter 213) and applicable TCEQ regulatory guidance.

The completion of the technical review that leads to an approval of the Application is also a determination by the EAP Program that compliance with TCEQ's guidance, *Complying with the Edwards Aquifer Rules - Technical Guidance on Best Management Practices (RG-348)* was achieved; and more specifically, that the BMPs contained in the WPAP and its Application demonstrated consistency with TCEQ's guidance, *Best Management Practices for Quarry Operations (RG-500)*.

7. CONSTRUCTION-RELATED ACTIVITIES OVER THE EDWARDS

To conduct 'Regulated Activities' over the Edwards, the Edwards Rules, found at 30 TAC Chapter 213, require an approval letter for a WPAP application be obtained before commencing any regulated activities. In this case, Vulcan applied for a WPAP to authorize clearing, excavating, and any other activities that may alter or disturb the topographic, geologic, or existing recharge characteristics of a site, or that may pose a potential for contaminating the Edwards and hydrologically connected surface streams. According to 30 TAC § 213.5(b)(4), the Technical Report in the WPAP application must outline the BMPs that will be implemented to protect water quality in the Edwards when a regulated activity is proposed over the Edwards' Recharge Zone (RZ).

8. VULCAN'S WPAP APPLICATION

The Application submitted by Vulcan proposes a quarry that will have an area of approximately 1,515.16 acres. The Application identifies regulated activities in the form of construction of a quarry, plant area, offices, shop areas, driveway, and associated appurtenances, with portable toilets for wastewater generated on site. The impervious cover will be 13.81 acres, 0.90% of the entire site. Other quarry details, exhibits, and process pond details are included in the application materials.

9. VULCAN'S GEOLOGIC ASSESSMENT

According to Vulcan's GA, the surficial units of the site are the Upper Glen Rose Member of the Glen Rose Limestone and the Dolomitic Member and Basal Nodular Member of the Kainer Formation. The GA identified seven sensitive geologic features (S-12, S-15, S-19, S-23, S-27, S-33, and S-35). Sensitive features are defined by the EA

Rules, found at 30 TAC § 213.3(29), as permeable geologic or manmade features located on the RZ where a potential for hydraulic interconnectedness between the surface and the Edwards Aquifer exists and where rapid infiltration to the subsurface may occur. Of the seven identified sensitive geologic features, S-15, S-19, S-23, and S-33 are within the boundaries of the quarry pit and are proposed to be eventually removed through mining. Prior to excavation, these four sensitive features will be protected by natural vegetated buffers until such time as the area of the sensitive features is mined. Features S-12 (cave), S-27 (sinkhole), and S-35 (sinkhole) are located outside the boundaries of the quarry pit and must remain undisturbed with permanent natural vegetated buffers. No regulated activities, such as construction or soil disturbing activities, may take place within the natural buffers.

10. IMPACT OF APPLICATION APPROVAL ON DECISIONS FREE OF ERROR

The very nature of the approval letter, a culmination of announcements by the ED of her multiple determinations after identifying and verifying that the WPAP, sometimes referred to as a “Plan to protect the Edwards” conforms and is consistent with all applicable rules, regulations, and TCEQ guidance, shows the multiple checks and verifications that a WPAP application involves.

In addition to the affirmative findings of the EAP Program during the technical review, the decision at issue, the ED’s approval of a WPAP application, documented through an approval letter, is the ED’s declaration that that a WPAP application conforms to all applicable rules, regulations, and TCEQ guidance.

Therefore, for Movants to prevail they must identify the deficiencies within the WPAP, the Application, and any inadequacies of the ED’s position as it relates to her decision at issue. This requires Movants to present evidence that directly contradicts the findings, determinations, and verification that make up the ED’s approval. However, in consideration of the EAP Program’s regulatory determinations and the documentation supporting them, the ED’s decision was appropriate under the facts of this case, state law, and TCEQ rules and policies. Therefore, the ED respectfully recommends that the Commissioners deny all MTOs filed by all Movants, as denial is appropriate because Movants failed to demonstrate that the ED’s decision, her approval of the Application, contained any deficiency that requires overturning the ED’s decision. In support, the ED would respectfully show as follows:

II. REQUIREMENTS FOR MOTIONS TO OVERTURN

The TCEQ rules, found at 30 TAC § 50.139(b), state that an MTO must be filed no later than 23 days after the TCEQ mails notice of the ED's decision. For purposes of determining timeliness, notice of the ED's decision was mailed on July 8, 2024, and the deadline to file an MTO was July 31, 2024. Therefore, Movants' MTOs were timely as they were filed on July 31, 2024.

According to 30 TAC § 50.119(d), an MTO must identify with particularity the subject of the complaint and must state the legal and factual basis for the claimed error.

The TCEQ rules, found at 30 TAC § 50.139, require that an MTO must identify with particularity the erroneous decision, any erroneous evidentiary or legal rulings, and the legal and factual basis for the claimed error.

III. CLAIMS AND ARGUMENTS OF MOVANTS

The ED respectfully recommends that the Commission find that all the Movants' claims and arguments in the MTOs are without merit. Movants' MTOs contain only unsubstantiated assertions of inadequacy without providing detail as to the specifics of the WPAP Movants find lacking. This aspect of Movants' MTOs is contrary to the provisions of 30 TAC § 50.119(d), which states that an MTO must identify with particularity the subject of the complaint and must state the legal and factual basis for the claimed error. Movants' MTOs makes unsubstantiated claims about Vulcan's WPAP.

Movants' claims and arguments are unrelated to the WPAP's focus, which is protecting the water quality and recharge of the Edwards, protecting existing and potential uses of groundwater, and that the quality of the Edwards and groundwater complies with the Texas Surface Water Quality Standards. The various arguments raised by Movants are addressed below in greater detail.

First, the ED responds to the argument that approving the Vulcan's WPAP-application constitutes a taking in the form of groundwater depletion and clarifies that groundwater below the surface of an individual's land is governed by the rules of a Groundwater Conservation District, or the rule of capture, and is a matter outside the scope of a WPAP review.

Next, Movants allege that the notice process was invalid, or that the EAP Program erred in providing the Application to the public according to the TCEQ's notice rules. As addressed above and despite there being no federal requirement for notice and comment for WPAP-applications, the EAP Program did provide notice of Vulcan's WPAP application, as numerous comments were received and then reviewed for relevance after

a 30-day distribution of the notice was provided according to the provisions of 30 TAC § 213.4(a)(2).

On March 22, 2024, the Application was posted on the TCEQ website, and the EAP Program informed the affected city, county, and groundwater conservation district per 30 TAC § 213.4(a)(2), which initiated the 30-day public comment period. The public comment period ended April 22, 2024, and TCEQ staff reviewed all timely comments, completed the technical review, addressed constituent concerns as appropriate, and ensured program rules and guidance were met.

Neither takings, nor notice of this Application are appropriate issues to raise in a challenge of a WPAP.

Movant-Guckian, Movant-PHCE, and Movant-Individual Landowners raise issues about the TCEQ's Underground Injection Control program ("UIC program"), water supply, water usage, and that pollution from the site will negatively affect endangered species such as the Fountain Darter (*Etheostoma fonticola*), the Comal Springs Dryopid Beetle (*Stygoparnus comalensis*), the Comal Springs Riffle Beetle (*Heterelmis comalensis*), and the Peck's Cave Amphipod (*Stygobromus pecki*).

However, the EAP Program and its oversight has no authority to and does not regulate groundwater rights. A WPAP is also not the correct mechanism to address protection of Endangered species. Groundwater availability is an appropriate issue to raise to the applicable groundwater conservation district. Endangered species are appropriately addressed by the US Fish and Wildlife Service. Related to the references from Movants to the TCEQ's UIC program, the authority for regulating underground injection under the TCEQ's UIC rules in 30 TAC Chapter 331, the Texas Injection Well Act, the EPA's UIC regulations, or even the Federal Safe Drinking Water Act, does not contemplate regulating blasting to facilitate quarrying and surface mining, as described by Movants. Nor do any of these statutory authorities or regulatory schemes consider blasting, as described by the movant, to be the injection of fluid or the operation of injection wells. None of which are appropriate issues to raise in a challenge of a WPAP.

MOVANT-GUCKIAN

Without pointing to any specific actions or omissions of the EAP Program, Movant Guckian alleges that the WPAP does not properly address sensitive features on site, as well as other claims about sensitive features that are not accurate.

The WPAP process includes the required GA submittal with the application materials and Vulcan's GA and WPAP identifies the sensitive features on site and provides

measures of protection for the identified sensitive features. Further, TCEQ's Instructions to Geologists guidance (TCEQ-0585) include the following features and how to rank their presence if encountered: caves, solution cavities, solution-enlarged fracture(s), faults, other natural bedrock features: vuggy rock, reef deposits, manmade features in bedrock, swallow holes, sinkholes, non-karst closed depressions, and zone clustered or aligned features. Of the seven identified sensitive geologic features: S-15, S-19, S-23, and S-33 are in the limits of the quarry pit and are proposed to be eventually removed through mining. Prior to excavation, the four sensitive features will be protected by natural vegetated buffers until such time as the area of the sensitive features is mined. Features S-12 (cave), S-27 (sinkhole), and S-35 (sinkhole) are located outside the limits of the quarry pit and must remain undisturbed with permanent natural vegetated buffers. Any additional sensitive geologic features identified during mining activities that are not identified in the GA are reported to the EAP Program. These features may require mitigation to ensure protection of the aquifer and approval from the EAP Program.

Movant-Guckian also alleges that the groundwater monitoring plan is inconsistent with TCEQ's BMPs. However, this claim is without merit as there was no monitoring plan approved by the EAP Program. Vulcan revised its application and demonstrated compliance with *Best Management Practices for Quarry Operations (RG-500)* by identifying a 25-foot vertical separation from the quarry floor to the on-site well groundwater level.

MOVANT-OLSON

Movant-Olson states that dye trace studies must be conducted; however, these types of studies are not required by the Edwards Rules, and the EAP Program has no authority to require them.

Movant-Olson raises concerns about ammonium nitrate fuel oil (ANFO) leaking into the Edwards and their water supply. However, Vulcan's quarry floor depth is required to be at least 25 ft from the groundwater level per *Best Management Practices for Quarry Operations (RG-500)*. Additionally, Vulcan represented in the application that blasting agents will not be stored onsite, further reducing any risk of contamination to the Edwards.

MOVANT-PHCE & MOVANT-INDIVIDUAL LANDOWNERS

Movant-PHCE and Movant-Individual Landowners allege that Vulcan's GA did not identify other additional sensitive features. Movant-PHCE's expert, Dr. Brian Smith,

hypothesizes that there should be more sensitive geologic features on site than reported. The EAP Program, specifically a licensed Profession Geologist, conducted a comprehensive site assessment over two days, and no additional features were found.

Movant-PHCE and Movant-Individual Landowners allege that the Application does not demonstrate that the quarry floor will not reach the aquifer beneath, thereby directly contaminating groundwater. Section 2.1 of TCEQ RG-500 states "The best way to estimate this level is to use the water level measured in a water supply well or boring on-site for which historical data are available. The TCEQ will accept the water-table elevation measured in December 2007 either on-site or in the nearest off-site well as the elevation from which the 25 ft separation applies." Vulcan revised its application on June 3, 2024, to comply with requirements in *Best Management Practices for Quarry Operations (RG-500)*.

Movant-PHCE and Movant-Individual Landowners state a monitoring plan was approved by the EAP Program. A monitoring plan was not approved, and Vulcan revised its Application on June 3, 2024, to demonstrate compliance with *Best Management Practices for Quarry Operations (RG-500)* by identifying a 25-foot vertical separation from the quarry floor to the on-site groundwater level.

Movant-PHCE and Movant-Individual Landowners express concerns regarding Aquifer contamination to the Edwards but cite to a different WPAP. This WPAP is for a different site and is in a different county. The WPAP process involves a large amount of site-specific data and using a WPAP from another project in another county does not translate or support challenging Vulcan's WPAP.

IV. CONCLUSION

Movant MTOs seek to overturn the ED's decision based on issues unrelated and that are not required in the approved WPAP. As such, Movants MTOs lack the necessary identification with particularity of the subject of the complaint and the legal or factual basis for claiming the ED's decision was in error.

Contrary to Movants' assertions, provided the Vulcan complies with the WPAP application and the WPAP, the Edwards will be protected. The assertions of inadequacy in Movants' MTOs lack the particularity necessary for the Commission to consider its MTO. The ED properly evaluated the WPAP application and found it complies with all applicable EA-Rules. The ED respectfully recommends that the Commissioners deny Movants' MTOs, or, in the alternative, take no action on the MTOs and allow them to be overruled by operation of law.

Respectfully submitted,

Texas Commission on Environmental Quality

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REPRESENTING THE EXECUTIVE DIRECTOR
OF THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

CERTIFICATE OF SERVICE

I certify that I have served a true and correct copy of the foregoing was filed with the Chief Clerk's Office on August 27, 2024.



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