

Jon Niermann, *Chairman*  
Bobby Janecka, *Commissioner*  
Catarina R. Gonzales, *Commissioner*  
Kelly Keel, *Executive Director*



Garrett T. Arthur, *Public Interest Counsel*

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

August 27, 2024

Laurie Gharis, Chief Clerk  
Texas Commission on Environmental Quality  
Office of the Chief Clerk (MC-105)  
P.O. Box 13087  
Austin, Texas 78711-3087

RE: **IN THE MATTER OF THE MOTION TO OVERTURN THE EXECUTIVE  
DIRECTOR'S APPROVAL OF VULCAN CONSTRUCTION MATERIAL  
LLC'S WATER POLLUTION ABATEMENT PLAN #13001906  
TCEQ DOCKET NO. 2024-1115-EAQ**

Dear Ms. Gharis:

Enclosed for filing is the Office of Public Interest Counsel's Response to Motion to Overturn in the above-entitled matter.

Sincerely,

  
Eli Martinez, Senior Attorney  
Assistant Public Interest Counsel

  
Josiah T. Mercer, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

DOCKET NO. 2024-1115-EAQ

IN THE MATTER OF THE MOTIONS	§	BEFORE THE
TO OVERTURN THE EXECUTIVE	§	
DIRECTOR'S APPROVAL OF	§	TEXAS COMMISSION ON
THE WATER POLLUTION	§	
ABATEMENT PLAN BY VULCAN	§	ENVIRONMENTAL QUALITY
CONSTRUCTION MATERIALS, LLC	§	

OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE TO  
MOTIONS TO OVERTURN

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (TCEQ or the Commission) responds to the above-captioned Motions to Overturn as follows:

**I. INTRODUCTION**

The Commission received several motions to overturn the decision of the Executive Director (ED) to approve the Water Pollution Abatement Plan (WPAP) of Vulcan Construction Materials, LLC (Vulcan)—permit no. 13001906. Kira Olson and Milann & Prudence Guckian submitted motions to overturn on their own behalf, and attorney Eric Allmon submitted motions to overturn on behalf of Preserve our Hill Country Environment, Preserve our Hill Country Environment Foundation, Robert Carillo, Cherly Johnson, John Casimir Kucewicz Jr., and Douglas E. Smith (collectively, Movants).

In their motion, Milann and Prudence Guckian claim to reside 358 feet away from the proposed mining area—with their water well only 493 feet away. Similarly, Kira Olson claims to share a fence line with the proposed quarry. She

claims that her well is around 600 feet from the proposed mining areas. Robert Carillo claims to reside directly adjacent to the proposed quarry and raises concerns about the potential impact on groundwater and the spring-fed pond on his cattle ranch. Cheryl Johnson lives 1.6 miles from the proposed quarry and is concerned about the effect on the water well that supplies her home. John Casimir Kucewicz Jr. and Douglas E. Smith both live more than 3 miles from the proposed quarry and share concerns about the potential effect on groundwater and the wells that provide their water.

Preserve our Hill Country Environment and Preserve our Hill Country Environment Foundation state that they are both organizations who work to preserve and protect the natural resources of the Texas Hill Country. In their motion, they state that Milann Guckian, Jacques M. Olivier, Kira M. Olson, Terry Lee Olson, and Donald E. Everingham Jr. are all members of both organizations that would have standing to request a hearing in their own right. Several of these members share a fence-line with the proposed quarry and have water wells that are proximate with the proposed mining areas.

The Movants in this matter share the same basic concerns. They claim that Vulcan and the ED underestimate the effect that the regulated activity will have on water quality and groundwater levels. They argue that they were not given proper notice or a meaningful opportunity to participate in the process. They assert that approval of this WPAP would therefore be an unconstitutional taking of vested property rights in groundwater without due process.

All of the Movants in this matter argue that the WPAP underestimates the effects of Vulcan’s planned mining activities on area water quality and water quantity. They present evidence attempting to show that the WPAP is inconsistent with the Edwards Aquifer Protection Plan, TCEQ rules restricting injection wells, and statutory protections of the Endangered Species Act. They also claim that the WPAP fails to properly account for blasting as a potential source of contamination; that it does not demonstrate that the quarry bottom will not reach and contaminate the aquifer; and that it underestimates the number of karst features that exist below the proposed mine. The Movants argue that, for these reasons, the regulated activity would have a much larger impact on water quantity and quality in the area than the WPAP claims—constituting a taking of property rights in groundwater.

All of the Movants in this matter also raise concerns about the lack of notice as well as the failure to provide meaningful opportunities for public participation in this matter. They claim that no public notice was posted when the application was declared administratively complete. Additionally, they point to the fact that no public meeting was provided despite multiple comments requesting that one be held. They also argue that the 30-day comment period provided in this matter was too short for the public to effectively respond to a 149-page technical document. Finally, the ED did not respond to public comments in writing.

## II. PROCEDURAL ISSUES

Title 30, TAC, Chapter 213 Subchapter A addresses regulated activities that have the potential for polluting the Edwards Aquifer and hydrologically connected surface streams. The ED has been specifically delegated the authority to review and act on an application subject to authorizations under Chapter 213.<sup>1</sup> However, the applicant or a person affected may file with the chief clerk a motion to overturn (MTO) the ED's final action on an Edwards Aquifer protection plan, modification to a plan, or exception under §50.139.<sup>2</sup>

Title 30, TAC, Chapter 50 Subchapter G requires that an MTO be filed within 23 days after notice of approval of the application has been mailed<sup>3</sup> unless general counsel, by written order, extends the period of time for filing motions.<sup>4</sup> Because the TCEQ mailed the approval on July 8, 2024, the period to file a motion to overturn closed on July 31, 2024. Each of the Movants timely submitted their motions on or prior to July 31, 2024.

## III. DISCUSSION

As a preliminary matter, OPIC finds that each of the Movants has raised material and relevant issues of fact under the Commission's jurisdiction and reside in sufficient proximity to the proposed activity to be found a person affected under 30 TAC § 213.1(3). OPIC therefore finds that the Movants have

---

<sup>1</sup> 30 TAC § 213.1(3).

<sup>2</sup> *Id.*

<sup>3</sup> 30 TAC § 50.139(b).

<sup>4</sup> 30 TAC § 50.139(e).

the right to seek Commission review of the ED's approval, in addition to any rights of judicial review.

The issues that the movants have raised relating to deficient notice due to the public not receiving notice of the WPAP, no public meeting being held, no response to public comment being issued by the ED, and an exceedingly short comment period compounded by a lengthy and highly technical application constitute areas of legitimate concern that could more appropriately be considered in a rulemaking proposal. However, the current notice rules for a WPAP application were appropriately adhered to through the provision of copies of the application to affected incorporated cities, groundwater conservation districts, and counties in which the proposed regulated activity will be located in accordance with Commission rules.<sup>5</sup> Further, while the ED is required to review all comments filed within 30 days of the date the application is mailed to local governmental entities,<sup>6</sup> this application is excepted from the response to comments requirements of Chapter 55 as an application where the opportunity for a contested case hearing does not exist under other laws.<sup>7</sup> Lastly, unless a local state legislator makes a request, public meetings are held at the discretion of the ED and are not mandatory. While we recognize the Movant's predicament in the instant case—where a 30-day comment period poses obvious and daunting time constraints in the face of a technically sophisticated operation posed over a geologically complex and ecologically

---

<sup>5</sup> 30 TAC § 213.4(a)(2).

<sup>6</sup> 30 TAC § 213.4(a)(2).

<sup>7</sup> 30 TAC § 55.101(g)11.

sensitive region—we cannot determine that “the ED’s approval of the WPAP was arbitrary and capricious, made through unlawful procedure, and in violation of statutory and regulatory requirements” due to her adherence to the comment period prescribed in Commission rules for this type of approval.

Movants raise a suite of technical issues that address areas of serious concern relating to water quality and groundwater levels, dangerous contaminants such as ammonium nitrate/fuel oil and other nitrates, the depth of the quarry bottom and other potential pathways to the Edwards Aquifer, potential impacts on endangered species, and contentions that the proposed activities constitute an injection well. Without a response to comments, it is difficult to determine from the record the extent to which the specifics of each of these concerns were analyzed by staff, or what the precise basis of their determination may have been. However, the application was evaluated by TCEQ staff and experts from Regions 11 and 13 to determine general compliance with the requirements of Chapter 213 of the Commission rules. The permanent best management practices (BMPs) and measures represented in the application were prepared by a Texas licensed professional engineer, and the plan holder is required to comply with all provisions of 30 TAC Chapter 213 and all technical specifications in the approved plan.<sup>8</sup>

---

<sup>8</sup> See “Approval of a Water Pollution Abatement Plan Vulcan Comal Quarry; Located SW of FM 3009 and SH 46; Comal County, Texas Edwards Aquifer Protection Program ID No. 13001906; Regulated Entity No. RN111942793,” Permanent Pollution Abatement Measures at Standard Conditions, No. 2.

To prevent the pollution of stormwater runoff originating on-site or upgradient of the site and potentially flowing across and off the site after construction, natural vegetative filter strips, designed using the TCEQ technical guidance, *RG-348, Complying with the Edwards Aquifer Rules: Technical Guidance on Best Management Practices*, will be implemented to treat stormwater runoff. The approved permanent BMPs and measures meet the required 80 percent removal of the increased load in total suspended solids caused by the project.<sup>9</sup>

According to the Geologic Assessment (GA) included with the application, the surficial units of the site are the Upper Glen Rose Member (Kgru) of the Glen Rose Limestone and the Dolomitic Member (Kekd) and Basal Nodular Member (Kekbn) of the Kainer Formation. Seven sensitive features (S-12, S-15, S-19, S-23, S-27, S-33, S-35) were identified in the GA. Of these, four features (S-15, S-19, S-23, S-33) are located within the proposed quarry pit limits and are proposed to be eventually removed through mining. Prior to quarry excavation, the sensitive features must be protected by natural vegetation buffers until such time as the area of the quarry containing the sensitive features will be mined. No regulated activities, such as construction or soil disturbing activities, may take place within the natural buffers. The site assessment conducted on April 22, 2024, and April 24, 2024 by TCEQ staff determined the site to be generally as described by the GA.<sup>10</sup>

---

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at Geology.



The plan requires that if any sensitive feature is encountered during construction, replacement, or rehabilitation on the project, all regulated activities must be immediately suspended near it and notification must be made to TCEQ staff. Temporary BMPs must be installed and maintained to protect the feature from pollution and contamination. Regulated activities near the feature may not proceed until the ED has reviewed and approved the methods proposed to protect the feature and the aquifer from potentially adverse impacts to water quality.<sup>11</sup>

All water wells, including injection, dewatering, and monitoring wells shall be identified in the geologic assessment and must be in compliance with the requirements of the Texas Department of Licensing and Regulation 16 TAC Chapter 76 and all other locally applicable rules, as appropriate.<sup>12</sup>

Given these protections, and without sufficient evidence from the contentions of the Movants to establish insufficiency of the ED's technical review of such magnitude that demonstrates an arbitrary and capricious decision made through unlawful procedure in violation of statutory and regulatory requirements, we must recommend denial of the motions. While we reiterate that a rulemaking petition may be an appropriate mechanism to seek additional insight and reasonable opportunities for public participation in the WPAP analysis process, there is insufficient evidence in the available record,

---

<sup>11</sup> *Id.* at Standard Conditions, No. 10.

<sup>12</sup> *Id.* at Standard Conditions, No. 2.

including the ED's review documents and the present motions, to recommend the ED's decision be overturned.

#### IV. CONCLUSION

The Office of Public Interest Counsel finds that the ED complied with existing notice and public participation requirements for a WPAP and did not fail to address or clearly err in their analysis of the technical issues raised by Movants. OPIC therefore recommends denial of the motions.

Respectfully submitted,

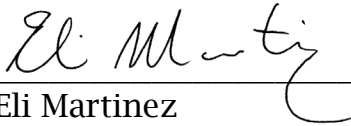
Garrett T. Arthur  
Public Interest Counsel

By   
Eli Martinez  
Assistant Public Interest Counsel  
State Bar No. 24056591  
(512) 239-3974

By:   
Josiah T. Mercer  
Assistant Public Interest Counsel  
State Bar No. 24131506  
(512) 239-0579

**CERTIFICATE OF SERVICE**

I hereby certify that on August 27, 2024, the Office of Public Interest Counsel's Response to Motions to Overturn was filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, electronic mail, Inter-Agency Mail or by deposit in the U.S. Mail.

  
Eli Martinez

Mailing List  
Vulcan Construction Materials, LLC  
TCEQ Docket No. 2024-1115-EAQ

Eric Allmon  
Lauren Ice  
Lauren Alexander  
Perales, Allmon & Ice, P.C.  
1206 San Antonio Street  
Austin, Texas 78701  
512/469-6000 FAX 512/482-9346  
[eallmon@txenvirolaw.com](mailto:eallmon@txenvirolaw.com)  
[lauren@txenvirolaw.com](mailto:lauren@txenvirolaw.com)  
[lalexander@txenvirolaw.com](mailto:lalexander@txenvirolaw.com)

Richard Spry  
Vulcan Construction Materials, LLC  
10101 Reunion Pl., Suite 500  
San Antonio, Texas 78216  
[spryr@vmcmail.com](mailto:spryr@vmcmail.com)

Lisa Dyar  
McGinnis Lochridge  
1111 W. 6th St., Bldg. B, Ste. 400  
Austin, Texas 78703  
512/495-6168 FAX 512/505-6368  
[ldyar@mcginnislaw.com](mailto:ldyar@mcginnislaw.com)

Caleb Chance, P.E.  
Pape-Dawson Engineers, Inc.  
2000 NW Loop 410  
San Antonio, Texas 78213  
[cchance@pape-dawson.com](mailto:cchance@pape-dawson.com)

Kira Olson  
245 Saur Road  
Bulverde, Texas 78163  
210/889-4657  
[kirafallspring@gmail.com](mailto:kirafallspring@gmail.com)

Milann and Prudence Guckian  
30954 FM 3009  
New Braunfels, Texas 78132  
830/885-2723 361/947-7101  
[bgr@gvtc.com](mailto:bgr@gvtc.com)

Lori Wilson  
TCEQ Austin Regional Office MC R 11  
P.O. Box 13087  
Austin, Texas 78711-3087  
512/339-2929 FAX 512/339-3795  
[Lori.wilson@tceq.texas.gov](mailto:Lori.wilson@tceq.texas.gov)

Charmaine Backens  
Todd Galiga  
TCEQ Environmental Law Division MC 173  
P.O. Box 13087  
Austin, Texas 78711-3087  
512/239-0600 FAX 512/239-0606  
[charmaine.backens@tceq.texas.gov](mailto:charmaine.backens@tceq.texas.gov)  
[Todd.Galiga@tceq.texas.gov](mailto:Todd.Galiga@tceq.texas.gov)

Eli Martinez  
Josiah T. Mercer  
TCEQ Office of Public Interest Counsel MC 103  
P.O. Box 13087  
Austin, Texas 78711-3087  
512/239-6363 FAX 512/239-6377  
[eli.martinez@tceq.texas.gov](mailto:eli.martinez@tceq.texas.gov)  
[josiah.mercer@tceq.texas.gov](mailto:josiah.mercer@tceq.texas.gov)

Docket Clerk  
TCEQ Office of Chief Clerk MC 105  
P.O. Box 13087  
Austin, Texas 78711-3087  
512/239-3300 FAX 512/239-3311  
<https://www14.tceq.texas.gov/epic/efiling/>

Ryan Vise  
TCEQ External Relations Division MC 118  
P.O. Box 13087  
Austin, Texas 78711-3087  
512/239-0010 FAX 512/239-5000  
[pep@tceq.texas.gov](mailto:pep@tceq.texas.gov)

Kyle Lucas  
TCEQ Alternative Dispute Resolution MC 222  
P.O. Box 13087  
Austin, Texas 78711-3087  
512/239-0687 FAX 512-239-4015  
[Kyle.lucas@tceq.texas.gov](mailto:Kyle.lucas@tceq.texas.gov)