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GLOSSARY OF ABBREVIATIONS AND TECHNICAL TERMS

| Term | Description |
|-----------------------------------|---|
| APA | Administrative Procedure Act |
| Application | October 20, 2023 Application for Standard Permit for Permanent Rock and Concrete Crusher filed by Dry Creek Materials, LLC |
| AQA / Protectiveness Review | Air Quality Analysis or Protectiveness Review performed by TCEQ to determine health impacts of operations under a standard permit |
| AR | Administrative Record: cites will be by TCEQ designated item number and then to the page of that PDF as follows: AR Item # at p. #. |
| Crusher | A rock crusher breaks larger rocks or concrete down into cobblestones, gravel, or other smaller pieces. Those smaller pieces are sorted by size so they can be used for pavement, construction, and other uses. |
| Final Order | TCEQ's April 22, 2024 decision to approve application for Air Quality Standard Permit for Permanent Rock and Concrete Crusher for TCM (AR Item 15) |
| ED | Executive Director of TCEQ |
| EPA | Environmental Protection Agency |
| ESLs | Effects Screening Levels |
| FCAA | Federal Clean Air Act |
| NSR | New Source Review |
| Proposed Crusher | The proposed permanent rock and concrete crusher facility to be sited at 4196 HWY 276, Quinlan, Hunt County, Texas. |

| Term | Description |
|---|--|
| PM / PM _{2.5} / PM ₁₀ | Particulate Matter / Particulate Matter with diameter less than 2.5 microns / Particulate Matter with diameter less than 10 microns |
| NAAQS | National Ambient Air Quality Standards |
| OPIC | Office of Public Interest Counsel |
| RTC | Response to Comments |
| SILs | Significant Impact Levels |
| Standard Permit | Uniform statewide permit issued by TCEQ authorizing the operation of Permanent Rock and Concrete Crushers that meet certain criteria under 30 TEX. ADMIN. CODE § 116.601-615 |
| SIP | State Implementation Plan |
| Friends of Union Valley | Community organization created to protect Hunt County residents and supported by hundreds of Hunt County landowners and elected officials. |
| TCAA | Texas Clean Air Act, TEX. HEALTH & SAFETY CODE § 382.001, <i>et seq.</i> |
| Dry Creek or Applicant | Dry Creek Materials, LLC, applicant to operate the proposed permanent rock and concrete crusher facility |
| TCEQ | Defendant Texas Commission on Environmental Quality |

INTRODUCTION

Plaintiffs Dan and Lisa Washington (the "Washingtons") and Friends of Union Valley, LLC (the "Friends of Union Valley") (collectively "Plaintiffs") have challenged the Texas Commission on Environmental Quality's ("TCEQ") approval of Dry Creek Materials, LLC's ("Dry Creek") Proposed Crusher in Hunt County, arguing that it fails to protect public health. TCEQ approved the Application in an arbitrary and capricious manner without considering PM₁₀ emissions from large stockpiles or PM_{2.5} emissions from the stockpiles, background emissions, and engines that operate the Proposed Crusher. TCEQ's Final Order was also arbitrary and capricious for failing to consider the abysmal compliance history with habitual violations of Dry Creek's owner and operator, Tony McLarry.

TCEQ's Response incorrectly characterizes this appeal as a "collateral attack" on the Standard Permit and incorrectly claims that Plaintiffs have not identified any conditions of the Standard Permit that Dry Creek has failed to meet. Plaintiffs, however, do not challenge the Standard Permit; rather, they are requesting the Court reverse and remand the TCEQ's Final Order approving Dry Creek's permit because it is invalid, arbitrary, or unreasonable based on the specific information contained in Dry Creek's Application and Dry Creek's compliance history.

STANDARD OF REVIEW

Plaintiffs ask this Court whether TCEQ’s particular authorization of Dry Creek’s proposed operation of a Crusher under the applicable Standard Permit was invalid, arbitrary or unreasonable.¹ TCEQ asks this Court to apply an obsolete deferential standard of review while the Texas Supreme Court recently held that “[a]dministrative agencies in Texas have seemingly never enjoyed the [Chevron] deference once endorsed by the U.S. Supreme Court ... [since] the Supreme Court has decidedly abandoned *Chevron* as ‘fundamentally misguided.’”² TCEQ never references *Loper* or *Accident Fund Ins. Co.*, both of which provide the applicable framework for the legal standard for judicial review of an agency decision under the APA.

Under the APA, the reviewing court shall reverse and remand the decision to the agency if it finds that the decision was in violation of a statutory provision or was arbitrary or capricious.³ The Court “need not and under the APA may not defer to an agency interpretation of the law” to determine whether the Final Order approving Dry Creek’s Application for a new rock Crusher was in violation of TEX. HEALTH &

¹TEX. HEALTH & SAFETY CODE § 382.032(e); *TXI Operations, LP v. Tex. Comm’n on Env’t Quality*, 665 S.W.3d 203, 208 (Tex. App.—Austin 2023, pet. denied) .

² *Accident Fund Ins. Co. of Am. v. Tex. Dep’t of Ins.*, 707 S.W.3d 110, 114-15 (Tex. 2025) (Young, J. joined by Sullivan, J., concurring) (citing *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024)).

³ TEX. GOV’T CODE § 2001.174(2)(E)-(F)

SAFETY CODE § 382.002 and 30 TEX. ADMIN. CODE § 116.615(1).⁴ Moreover, when an agency fails to follow its own unambiguous regulations, that decision must be reversed.⁵

ARGUMENT

I. TCEQ failed to establish that the Application is protective of public health.

TCEQ alleges that Plaintiffs failed to identify a single Standard Permit condition that Dry Creek failed to meet.⁶ That is patently incorrect. The Final Order approving Dry Creek’s Proposed Crusher is in direct violation of permit conditions set forth in 30 TEX. ADMIN. CODE § 116.615(1) because it does not protect public health and welfare.

Defendant incorrectly claims that the Standard Permit for rock crushers contains the “exclusive list” of conditions that an applicant must satisfy (e.g.

⁴ *Accident Fund Ins. Co. of Am.*, 707 S.W.3d 110, 114-15 (Tex. 2025) (Young, J. joined by Sullivan, J., concurring) (noting “Administrative agencies in Texas have seemingly never enjoyed the deference once endorsed by the U.S. Supreme Court, *see Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), although our cases have occasionally hinted that ‘the analysis in which we engage is similar,’ *R.R. Comm’n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 625 (Tex. 2011). If ever there were a time to transform similarity into sameness (a doubtful proposition all along in this context), it is certainly not now, when the Supreme Court has decidedly abandoned *Chevron* as ‘fundamentally misguided.’”).

⁵ *Pub. Util. Comm’n of Tex. v. Gulf States Util. Co.*, 809 S.W.2d 201, 207 (Tex. 1991) (internal citations omitted); *see also TGS-NOPEC Geophysical v. Combs*, 340 S.W.3d 432, 438-39 (Tex. 2011) (deference is not unlimited and not due where an agency fails to employ the particular statutory meaning of a defined term).

⁶ TCEQ Br. at 24.

throughput caps, hours-of-operation limits, etc.).⁷ However, Section 116.615 explicitly states “the following general conditions are applicable to holders of standard permits, but will not necessarily be specifically stated within the standard permit document.”⁸ Specifically, “emissions from the facility ... must comply with all applicable rules and regulations of the commission adopted under Texas Health and Safety Code, Chapter 382, and with the intent of the Clean Air Act (TCAA), *including protection of health and property of the public.*”⁹ Under Section 116.615(1), therefore, TCEQ cannot approve applications like Dry Creek’s unless it is unequivocally proven that public health and welfare are protected from the Proposed Crusher.

Congress has instructed EPA to set *primary* air quality standards that are necessary to protect public health, which must include a margin of safety.¹⁰ While EPA sets the NAAQS, individual states determine how those standards are met, and Texas has its own SIP demonstrating how it will *achieve* the NAAQS through its permitting programs, as evidenced by TEX. HEALTH & SAFETY CODE § 382.012. Standard permits are part of the SIP because TCEQ represented to EPA that the NAAQS will be met under the standard permit program. The inclusion of the Standard Permit as part of the SIP does not imply that any facility is entitled to automatic approval, irrespective of its compliance with the NAAQS.

Plaintiffs are not attempting to usurp this statutorily mandated process by imposing site-specific modeling. Plaintiffs ask that TCEQ abide by the requirements in the TCAA to ensure that all emissions sources meet the NAAQS and protect public

⁷ TCEQ Br. at 22, 31.

⁸ 30 TEX. ADMIN. CODE § 116.615.

⁹ *Id.* at § 116.615(1) (emphasis added); TEX. HEALTH & SAFETY CODE § 382.017.

¹⁰ See *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 465 (2001) (citing 42 U.S.C. § 7409(b)(1)).

health as required by 30 TEX. ADMIN. CODE § 116.615 and TEX. HEALTH & SAFETY CODE § 382.012.

II. Defendants improperly recast Plaintiffs' claims as a collateral attack on the 2008 Standard Permit and do not address Plaintiffs' true claim that TCEQ failed to consider air emissions from very large stockpiles.

TCEQ's Brief repeatedly reframes Plaintiffs' arguments to fit its narrative argued in prior cases. Plaintiffs' appeal is not a collateral attack on the Standard Permit. Plaintiffs do not argue that modeling was required by Dry Creek. Plaintiffs do not ask this Court to add a permit condition not already included in the Standard Permit. Rather, Plaintiffs argue that TCEQ failed to comply with the permit condition that requires air emissions from the Proposed Crusher be under the NAAQS so that TCEQ can comply with its statutory mandate to protect public health. Plaintiffs have not raised any "policy choices" for how TCEQ elects to implement its standard permit program. TCEQ has no choice but to protect public health and ensure facilities meet the NAAQS. 30 TEX. ADMIN. CODE § 101.21 is very clear that "*Primary and Secondary Ambient Air Quality Standards ... will be enforced throughout all parts of Texas.*"¹¹ Defendant overlooks Plaintiffs' complaint that the Final Order fails to protect public health from Dry Creek's Crusher because TCEQ never considered: (1) PM₁₀ emissions from very large stockpiles 20 years ago when it conducted its protectiveness review for justifying this Standard Permit, or (2) PM_{2.5} emissions from

¹¹ 30 TEX. ADMIN. CODE § 101.21 (emphasis added).

Dry Creek's large stockpiles, background emissions, or from the engines that operate the Crusher.

Defendant cites numerous cases that purportedly support its claim that Plaintiffs' arguments are collateral attacks on the Standard Permit, but those cases are easily distinguishable from this case. A collateral attack seeks to invalidate or avoid the effect of a final agency order outside a direct challenge to that order.¹² *Chocolate Bayou*, was a water rights case in which the appellants did not timely seek an available contested case hearing.¹³ They belatedly challenged a permit, and the court of appeals held that because appellants did not timely request a contested case hearing, they had not exhausted their administrative remedies and the claims operated as collateral attacks on the Commission's final order.¹⁴ It is undisputed that Plaintiffs here exhausted all administrative remedies before seeking a judgment from this Court.

Rawls involved an attempt to relitigate matters already committed to and decided by the Commission.¹⁵ There, Mr. Rawls contended that the applicant's proposed batch plant and an adjacent asphalt plant might exceed the NAAQS for

¹² See *Chocolate Bayou Water Co. & Sand Supply v. Tex. Nat. Res. Conservation Comm'n*, 124 S.W.3d 844 (Tex. App.—Austin 2003, pet. denied).

¹³ *Id.* at 847-48.

¹⁴ *Id.* at 852; see *Friends of Canyon Lake, Inc. v. Guadalupe-Blanco River Auth.*, 96 S.W.3d 519, 524, 532 (Tex. App.—Austin 2002, pet. denied) (This case also involved a party that failed to exhaust their administrative remedies, and the court questioned how it would be able to attack the application in question without collaterally attacking the final order of the Commission).

¹⁵ *Rawls v. Tex. Comm'n on Env'tl. Quality*, No. 11-05-00368CV, 2007 WL 1849096, at *1 (Tex. App.—Eastland June 28, 2007, no pet.)

PM₁₀.¹⁶ In *Rawls*, the appellant failed to exhaust his administrative remedies by not timely requesting a hearing and suing after the permit was issued, so any contention that emissions may violate state or federal law was a collateral attack on an agency's interpretation and application of relevant statutes when issuing a permit after a proceeding that Mr. Rawls did not participate in.¹⁷ Here, however, Plaintiffs properly participated in the permitting process and are not collaterally attacking a permit—they are seeking judicial review of an agency decision to approve construction and operation of dangerous concrete and rock Crusher.

Indeed, *Boerne to Bergheim*, supports Plaintiffs' position.¹⁸ There, the court upheld TCEQ's reliance on the Protectiveness Review specifically regarding the Standard Permit for a Concrete Batch Plant with Enhanced Controls.¹⁹ Appellants argued that TCEQ failed to consider adverse short and long term side effects of air pollutants on children attending a school within 3,000 feet of a concrete batch plant as required by TEX. HEALTH & SAFETY CODE § 382.052.²⁰ The court found that the Protectiveness Review inherently included an analysis of potential impacts to schools within 3,000 feet. The court did not address, however, whether a concrete batch plant

¹⁶ *Id.* at *1, 5.

¹⁷ *Id.* at *5.

¹⁸ See TCEQ Brief at 18 (Defendant incorrectly refers to *Boerne to Bergheim* as a case decided by the Austin Court of Appeals, but it was decided by the El Paso Court of Appeals).

¹⁹ *Boerne to Bergheim Coal. for Clean Env't v. Tex. Comm'n on Env'tl. Quality*, 657 S.W.3d 382 (Tex. App.—El Paso 2022, no pet.).

²⁰ *Id.* at 385.

(or rock crusher) will be protective of public health when that proposed facility will not conduct operations consistent with the assumed operations when TCEQ conducted its Protectiveness Review.²¹

In this instance, Plaintiffs make a very different argument than the appellants in *Boerne*. In this case, Plaintiffs contend that TCEQ failed to demonstrate that the Proposed Crusher operated within the assumptions on which TCEQ relied when it authorized Dry Creek's Standard Permit. Dry Creek's facility includes emissions sources and stockpile quantities not accounted for in the Protectiveness Review; unlike in *Boerne*, Plaintiffs are not attacking the adequacy of the Protectiveness Review itself, rather, Plaintiff is challenging TCEQ's arbitrary and capricious conclusion that Dry Creek's Proposed Crusher is protective of public health despite operational differences never contemplated as part of the review process.

Because Plaintiffs challenge TCEQ's application of the Standard Permit rather than the validity of the Standard Permit itself, Defendants' collateral attack argument fails.

²¹ *Id.* at 395.

III. TCEQ's 2008 Protectiveness Review for the Crusher Standard Permit only modeled up to five acres of stockpiles but Dry Creek's Application represented its Crusher will have six acres of stockpiles.

Dry Creek represented in its Application, specifically its emissions calculations, that it will have six acres of stockpiles.²² That is a very large footprint for stockpiles. So large, in fact, that it is more than the maximum of five acres that TCEQ modeled for PM_{2.5} and PM₁₀ emissions from a crusher back in 2006.²³ Defendant continues to ignore that Dry Creek's Proposed Crusher will have *six* acres of stockpiles and instead relies on a different part of the Application where Dry Creek *also* represents that it will only have five acres of stockpiles, without explaining the conflicting representations.²⁴

Further, TCEQ argues that because there is no maximum stockpile acreage limit, the amount of stockpiles is irrelevant, and the ED cannot deny a registration based on factors the Standard Permit does not contemplate.²⁵ TCEQ's position is illogical because it conflates the absence of a maximum stockpile acreage limit with the relevance of stockpile acreage in the Protectiveness Review. While the Standard Permit may not state an express limit to the size of stockpiles, the Standard Permit absolutely requires that total emissions from all sources are under NAAQS. That

²² AR Item 1 at p. 48.

²³ AR Item 28 at pp. 13-14, 16-17.

²⁴ AR Item 1 at p. 16.

²⁵ TCEQ Br. at 31-32.

inherently requires consideration of emissions from every acre of stockpiles. TCEQ has not made this demonstration because TCEQ's decision that the Crusher will meet the NAAQS was based on modeling from 2006 that only considered five acres of stockpiles.

Moreover, Section (1)(A)(ii) of the Standard Permit includes stockpiles in the definition of "associated sources."²⁶ "Associated sources are *sources of air emissions related to the rock or concrete crushing operations*, that are not "facilities" ... *Associated sources include*, but are not limited to, *stockpiles* and outdoor work areas...."²⁷ As part of the Standard Permit, TCEQ requires facilities to implement and document measures to control emissions from stockpiles. These requirements include maintaining stockpile dust-suppression records, complying with minimum setback distances from property lines, limiting stockpile height, and minimizing dust emissions through the use of water spraying, dust-suppressant chemicals, or covering stockpiles as appropriate.²⁸ Clearly, emissions from stockpiles are essential to conforming with the NAAQS, as TCEQ originally modeled in 2006.²⁹

Plaintiffs are not asking this Court to impose site-specific modeling or adopt additional Standard Permit conditions, they are asking the Court to determine that

²⁶ TCEQ Apx.1 at 17.

²⁷ TCEQ Apx.1 at 17 (emphasis added).

²⁸ TCEQ Apx.1 at 23.

²⁹ AR Item 28 at pp. 13-14, 16-17.

TCEQ did not require Dry Creek to meet certain conditions before issuing the permit to Dry Creek. TCEQ must require some way of showing that PM₁₀ and PM_{2.5} emissions from Dry Creek's Proposed Crusher will comply with the NAAQS since it does not align with the operational specifications considered when determining the Standard Permit was protective. Until TCEQ makes that demonstration, it has not proven the Proposed Crusher will be protective of public health, the Final Order has not violated TEX. HEALTH & SAFETY CODE § 382.002 and TEX. ADMIN. CODE § 116.615, or Dry Creek's operations will meet the NAAQS after considering combined emissions from all sources.

IV. TCEQ's Final Order violates TEX. HEALTH & SAFETY CODE § 382.002 and TEX. ADMIN. CODE § 116.615 because TCEQ failed to prove that Dry Creek's emissions will not exceed NAAQS for PM₁₀ or PM_{2.5}.

TCEQ failed to consider how the additional acre of stockpiles would impact PM₁₀ and PM_{2.5} emissions at Dry Creek's facility. To provide support for the 2008 Protectiveness Review, TCEQ modeled emission rates for rock crushers based upon stockpile area in acres and compiled its results into an interoffice memorandum.³⁰ However, TCEQ only modeled PM₁₀ emissions for a stockpile area up to five acres. The emissions from Dry Creek's additional acre of stockpiles are critical because TCEQ's modeling memorandum projected that a proposed crusher operating with five acres of stockpiles would result in a total of 146 µg/m³ at the property boundary,

³⁰ AR Item 28 at pp. 13-14.

which is only $4 \mu\text{g}/\text{m}^3$ below the legal limit.³¹ TCEQ's failure to account for the additional acre of stockpiles, as represented by Dry Creek, means there is no way to know if public health is protected or if the NAAQS have been exceeded. Until TCEQ proves that an additional acre of stockpiles will not contribute to an exceedance of PM_{10} , Dry Creek's facility is not protective of public health.

Just as with TCEQ's modeling of PM_{10} emissions, TCEQ only modeled $\text{PM}_{2.5}$ emissions for a stockpile area up to five acres. Compounding this error, the TCEQ modeling memorandum further states that the TCEQ's analysis did not include background $\text{PM}_{2.5}$ emissions or $\text{PM}_{2.5}$ emissions from engines. At the proposed facility, $\text{PM}_{2.5}$ is at least $9.2 \mu\text{g}/\text{m}^3$ when considering the 2008 Protectiveness Review air dispersion modeling that estimated the $\text{PM}_{2.5}$ maximum ground level concentration to be $1.7 \mu\text{g}/\text{m}^3$ from non-engine sources combined with a background concentration of $7.5 \mu\text{g}/\text{m}^3$.³² Dry Creek's Proposed Crusher will have additional $\text{PM}_{2.5}$ emissions from the additional acre of stockpiles and multiple engines that TCEQ never considered. Consequently, TCEQ's Final Order approved a Proposed Crusher that never proved its emissions will comply with the NAAQS at the time the Application

³¹ AR Item 28 at p. 16.

³² AR Item 28 at p. 20, Gasparini Affidavit at ¶ 19.

was filed, which was 12.0 micrograms per cubic meter ($\mu\text{g}/\text{m}^3$), and the Crusher will clearly exceed the current NAAQS of $9.0 \mu\text{g}/\text{m}^3$.³³

V. TCEQ granted Dry Creek’s Standard Permit without considering the owner and operator’s abysmal compliance history.

TCEQ is required to consider compliance history when deciding whether to grant a permit application. According to 30 TEX. ADMIN. CODE § 60.1, TCEQ must consider “compliance-related information about a person, specific to the site which is under review, *as well as other sites which are owned or operated by the same person.*” TCEQ argues that compliance history reviews are limited to a review of the compliance history of the person to be regulated, while ignoring 60.1(c). While the definition of “person” describes “[a]n individual, corporation, organization, government or governmental subdivision or agency, business trust, partnership, association, or any other legal entity,”³⁴ nothing in that definition limits TCEQ to only considering Dry Creek Materials and not its managing member, Mr. McLarry, as the same person. While Dry Creek is a distinct legal entity, Mr. McLarry is responsible for directing it and for operations at the Proposed Crusher.

It is direct evidence that Dry Creek and Mr. McLarry are one in the same because Mr. McLarry signed relevant paperwork as part of Dry Creek’s Application,

³³ EPA, National Ambient Air Quality Standards for Particulate Matter, 78 Fed. Reg. 3,085 (Jan. 15, 2013).

³⁴ 30 TEX. ADMIN. CODE § 3.2(25).

and it is a massive leap for TCEQ to equate Mr. McLarry—the owner—with Dry Creek’s outside environmental consultant. Further, Mr. McLarry’s signature on the Application is evidence that he likely created a new entity, Dry Creek Materials LLC, in a possible attempt to evade detection of his prior violations. TCEQ’s compliance history rules cannot possibly be structured to allow such gaming of the system.

TCEQ cannot simultaneously treat the managing member as sufficiently responsible to certify the truthfulness and completeness of the application while treating that same individual's compliance history as irrelevant to the evaluation of the applicant's fitness and reliability. If a person with a poor compliance record can simply create a new LLC to avoid TCEQ’s compliance history review, the review process is inherently useless and undermines TCEQ’s designation to protect public health.

CONCLUSION AND PRAYER

Based on the foregoing reasons, TCEQ’s Final Order arbitrarily and capriciously issued a Standard Permit to Dry Creek Materials, LLC in violation of 30 TEX. ADMIN. CODE § 116.615(1) and TEX. HEALTH & SAFETY CODE § 382.002, which require emissions from the facility be protective of public health. TCEQ has not proven that Dry Creek’s facility will be protective of human health since it neglected to consider PM₁₀ emissions from an extra acre of stockpiles and PM_{2.5} background and engine emissions. Additionally, TCEQ approved the Application without ever considering the less than stellar compliance history of Mr. McLarry.

Pursuant to TEX. GOV'T CODE § 2001.174, the Court must reverse the TCEQ Final Order and remand this matter so TCEQ can ensure Plaintiffs and many other nearby residents are protected by implementing its statutory duty to vigorously protect public health.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In compliance with Texas Rule of Appellate Procedure 9.4(i)(3) and Travis County Local Rule 10.5, I hereby certify that the foregoing Brief contains 4,481 words, as calculated by the computer program used to prepare this document.

/s/ Adam M. Friedman

Adam M. Friedman

CERTIFICATE OF SERVICE

I certify that on the 15th day of June 2026, the foregoing document was electronically filed with the Clerk of the Court using the electronic case filing system, and that a true and correct copy was served on the following lead counsel or party representative for all parties listed below via electronic service:

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