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TCEQ DOCKET NO. 2006-1947-AIR

CHIEF CLERKS OFFICE

**APPLICATION BY RYNO
MATERIALS, INC. FOR AIR
QUALITY STANDARD PERMIT
REGISTRATION NO. 76818**

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**BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

**APPLICANT, RYNO MATERIALS, INC.'S RESPONSE TO REQUESTS FOR
CONTESTED CASE HEARING AND REQUESTS FOR RECONSIDERATION**

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

COMES NOW Ryno Materials, Inc. ("Ryno"), Applicant in this proceeding, and hereby submits this, its *Response to Requests for Contested Case Hearing and Requests for Reconsideration* ("Response"), arguing that all requests for contested case hearing and requests for reconsideration filed with the Texas Commission on Environmental Quality ("TCEQ" or the "Commission") in this proceeding should be denied and Air Quality Standard Permit Registration No. 76818 should be approved, and would respectfully show the Honorable Commissioners as follows:

I. BACKGROUND

Ryno has applied to TCEQ for an Air Quality Standard Permit, Registration No. 76818 (the "Permit"). When approved, the Permit will authorize the construction of a concrete batch plant to be located two miles south of the City of Celina on County Road 53, west of Highway 289 in Collin County, Texas.

Ryno's application for the Permit was filed on September 7, 2005. The application was declared administratively complete on September 13, 2005. All appropriate notices have been published, including: (1) the Notice of Receipt and Intent to Obtain an Air Quality Permit on

September 22, 2005, in the *Dallas Morning News*; (2) the Alternative Language Notice on September 22, 2005, in *El Extra*; (3) the Notice of Application and Preliminary Decision on January 5, 2006, in the *Dallas Morning News*; and (4) the Alternative Language Notice on January 5, 2006, in *El Extra*. A public meeting on the application was held in the City of Celina on February 16, 2006. Because the application was deemed administratively complete after September 1, 1999, the application is subject to the procedural requirements established by House Bill 801.

II. ARGUMENT AND AUTHORITIES

Pursuant to Commission regulations, a request for a contested case hearing is only to be granted if the request is:

- (1) made by the applicant or the executive director;
- (2) made by an *affected person*¹

With regard to the term “affected person” Commission rules provide the following:

(a) For any application, an affected person is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest.

(b) Governmental entities, including local governments and public agencies, with authority under state law over issues raised by the application may be considered affected persons.

(c) In determining whether a person is an affected person, all factors shall be considered, including, but not limited to, the following:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;

¹ 30 TEX. ADMIN. CODE § 55.211(c) (2007) (emphasis added).

(2) *distance restrictions or other limitations imposed by law or on the affected interest;*

* * *

(6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.²

In this proceeding, no individual or entity that meets the Commission's regulatory requirements of "affected person" has requested a contested case hearing.³ Therefore, all requests for contested case hearing should be denied and the Permit should be issued.

Based on correspondence received by the Commission, it appears that requests for a contested case hearing were submitted by seven individuals/couples and private entities:

- (1) Jennifer and Michael Chapman, 425 Dartmoor Drive, Celina, Texas
- (2) Melissa and Thomas Clarke, 200 Dartmoor Drive, Celina, Texas
- (3) Rhonda, Detro, 3928 Preston Hills Circle, Celina, Texas
- (4) Jeanie Ready, 402 Connemara Trail, Celina, Texas⁴
- (5) Marion D. Wood, 3779 Hay Meadow Street, Celina, Texas

² *Id.* § 55.203(a)-(c)(1), (2), & (6) (2007).

³ Also, neither the applicant nor the Executive Director of TCEQ requested a contested case hearing.

⁴ Ms. Ready filed the request for contested case hearing "on behalf of Carter Ranch [Home Owners Association], residents and advisory committee." Texas Administrative Code Title 30, Section 55.205, provides:

(a) A group or association may request a contested case hearing only if the group or association meets all of the following requirements:

- (1) one or more of the members of the group or association would otherwise have standing to request a hearing in their own right

Id. § 55.205(a)(1) (2007). The Carter Ranch subdivision is located more than 440 yards from the site of Ryno's proposed plant, and thus, all individuals living in permanent residences located within the Carter Ranch subdivision are located more than 440 yards from Ryno's proposed plant. As such, no individual member would otherwise have standing to request a contested case hearing in their own right pursuant to Section 382.058 of the Texas Health and Safety Code.

- (6) Christy and Jason Word, 400 Tarpan Trail, Celina, Texas
- (7) Old Celina, Ltd. ("Old Celina")

Hearing requests were also filed by Collin County Commissioner Joe Jaynes (hereinafter "Collin County") and the City of Celina (the "City"). The six individual/couple hearing requestors, Old Celina, Collin County, and the City are not affected persons as contemplated by Commission rules.

A. NONE OF THE INDIVIDUAL/COUPLE HEARING REQUESTERS NOR OLD CELINA MEET THE STATUTORY DISTANCE REQUIREMENT AND THUS ARE NOT AFFECTED PERSONS

As identified above, to grant a request for contested case hearing, the Commission must determine that the requester is an affected person. In making the affected person determination, distance restrictions or other limitations imposed by law must be followed.⁵ The distance limitation requirement is of particular importance with regard to Ryno's application because the Legislature has specifically and expressly defined those persons who are affected persons by establishing a distance requirement. Only those persons or entities who meet the distance requirement of Texas Health and Safety Code Section 382.058 are entitled to a contested case hearing on applications involving the construction of a concrete plant under permits by rule, standard permits, or exemptions.⁶ Texas Health and Safety Code Section 382.058, Notice of and Hearing on Construction of Concrete Plant under Permit by Rule, Standard Permit, or Exemption, provides:

⁵ See *id.* § 55.203(c)(2).

⁶ See TEX. HEALTH & SAFETY CODE ANN. § 382.058(c) (2007).

For purposes of this section, *only those persons actually residing in a permanent residence within 440 yards of the proposed plant may request a hearing under Section 382.056 as a person who may be affected.*⁷

None of the individual/couple hearing requesters nor anyone associated with Old Celina resides in a permanent residence located within 440 yards of the proposed plant, and thus, none are affected persons.

Attachment 1 is an aerial photograph, which identifies the location of Ryno's proposed plant and depicts the area within 440 yards of the proposed plant.⁸ A review of the aerial photograph clearly demonstrates that there are no residences within 440 yards of the Ryno proposed plant. All six of the individual/couple hearing requesters' residences are located further than 440 yards from the proposed plant. Additionally, no permanent residence is located on the Old Celina property within 440 yards of Ryno's proposed plant.⁹ Because none of these hearing requesters reside in a permanent residence located within 440 yards of Ryno's proposed plant, their requests for contested hearing must be denied. They do not qualify as affected persons pursuant to the statutory requirement of Texas Health and Safety Code Section 382.058(c).

⁷ *Id.* (emphasis added).

⁸ See Aerial Focus, Aerial Photograph (Nov. 2006), attached hereto and incorporated herein as Attachment 1.

⁹ In its pleadings, Old Celina identifies that it owns property located adjacent to the site of Ryno's proposed plant. See Motion for Contested Case Hearing or in the Alternative Motion for Reconsideration of the Executive Director's Preliminary Decision, *Application by Ryno Materials, Inc. for Air Quality Standard Permit No. 76818 for Concrete Batch Plant Registration* at 3 (Feb. 27, 2006). Old Celina also identifies that its property is "currently undeveloped." *Id.* As clearly shown on the aerial photograph, there is no development within 440 yards of Ryno's proposed plant, other than the two industrial facilities immediately south of the plant.

B. NEITHER COLLIN COUNTY NOR THE CITY IDENTIFIES A JUSTICIABLE INTEREST THAT QUALIFIES IT AS AN AFFECTED PERSON

Neither Collin County nor the City meets the one and only prerequisite established by the Legislature for being an affected person in a case involving a concrete plant to be authorized through a standard permit. As identified above, “*only* those persons actually residing in a permanent residence within 440 yards of the proposed plant may request a hearing under Section 382.056 as a person who may be affected.”¹⁰ The Texas Clean Air Act (“TCAA”) defines the term “person” as an individual, corporation, organization, government or governmental subdivision or agency, business trust, partnership, association, or any other legal entity.”¹¹ Both Collin County and the City would be a “person” pursuant to the TCAA. Since neither can reside in a permanent residence within 440 yards of Ryno’s proposed plant, neither Collin County nor the City can qualify as an affected person in this case as specifically prescribed by the Legislature.¹²

As identified above, for a local government, such as Collin County or the City, to qualify as an affected person pursuant to TCEQ’s rules, it must have authority under state law over issues raised by the application.¹³ Ryno has filed an application for an air quality permit for the construction and operation of a concrete batch plant. Air quality permitting and enforcement authority regarding concrete batch plants has been vested in TCEQ by the Texas Legislature.¹⁴

¹⁰ TEX. HEALTH & SAFETY CODE ANN. § 382.058(c).

¹¹ *Id.* § 382.003(10) (2007).

¹² Perhaps it could be argued that a city or county resides in its principle place of business or main office. Here, neither the City nor Collin County has any office within 440 yards of Ryno’s proposed plant; thus, neither the City nor Collin County qualifies as an affected person pursuant to Section 382.058.

¹³ *See* 30 TEX. ADMIN. CODE § 55.203(b).

¹⁴ *See, e.g.*, TEX. HEALTH & SAFETY CODE ANN. §§ 382.05198 & 382.05199 (2007).

Also, TCEQ's general powers and duties identify that it is to establish the level of quality to be maintained in the state's air and control the quality of the state's air.¹⁵

Neither Collin County nor the City has authority under state law for the air quality permitting issues raised in Ryno's application. The only issues to be considered with regard to approval of the standard permit for a particular concrete plant are air quality issues. As previously identified, air quality permitting and enforcement authority regarding concrete batch plants has been vested in TCEQ by the Texas Legislature.

While Collin County claims that it has authority under Texas Health and Safety Code Section 121.003(a) to protect public health, welfare, and the safety of the persons within the County, it fails to raise any public health or welfare issues in its hearing request. Instead, as the basis for its hearing request, Collin County argues that the *potential* future construction of Collin County's "Outer Loop" highway may impact Ryno's proposed plant site. The siting and construction of the Outer Loop highway is still in the planning process and through the years many different routes for the Outer Loop have been identified by various consultants for the county. No final route has been identified and at this time it is unknown when or whether the Outer Loop will be constructed. The potential construction of a highway at some yet-to-be-determined future date is not within the Commission's jurisdiction in an air quality permitting proceeding.

Collin County also raises an additional prospective issue related to the City's possible future condemnation action against Ryno. Again, this is a prospective issue wholly unrelated to the air quality permitting jurisdiction of the Commission. Also, Collin County does not have a

¹⁵ See *id.* § 382.011(2)&(3) (2007).

justiciable interest in *the City's* possible condemnation of the Ryno property, and the City does not raise this issue at all. For all of these reasons, Collin County has failed to raise any justiciable interest and thus fails to qualify as an affected person under Section 55.203.

The site of Ryno's proposed plant is not within the City's corporate boundaries. Instead, it is in the City's extraterritorial jurisdiction ("ETJ"). The City claims it is an affected person citing to statutes related to its authority within its corporate boundaries. For example, the City references Texas Health and Safety Code Section 382.112, claiming that the TCAA "requires the Commission to give 'maximum consideration' to a local government's recommendation regarding a Commission determination."¹⁶ The City fails to note the entirety of Section 382.112, which clearly limits such a recommendation to areas within the local government's territorial jurisdiction or corporate boundary. Section 382.112 states:

A local government may make recommendations to the commission concerning a rule, determination, variance, or order of the commission that affects an area *in the local government's territorial jurisdiction*. The commission shall give maximum consideration to a local Government's recommendations.¹⁷

¹⁶ Request for Reconsideration of the Executive Director's Response to Public Comment and Request for Contested Case Hearing, *In the Matter of the Application of Ryno Materials, Inc., for Air Quality Permit No. 76818, Collin County, Texas* at 2 n.1 (Nov. 10, 2006) (citing to TEX. HEALTH & SAFETY CODE ANN. § 382.112).

¹⁷ TEX. HEALTH & SAFETY CODE ANN. § 382.112 (2007) (emphasis added) (using the term "territorial jurisdiction" as opposed to "extraterritorial jurisdiction").

In other words, Section 382.112 does not authorize local government recommendations for areas outside their territorial jurisdiction, *i.e.*, within their ETJ.¹⁸ The City's authority in the ETJ is limited.¹⁹

The City does not raise any issues that are within its statutory authority in its ETJ and that are within the Commission's jurisdiction during its consideration of an air quality standard permit. Instead, it attempts to rely on such issues as alleged decreases in property tax revenues that are not within Commission jurisdiction for this type of case.

For all of the above reasons, Collin County and the City are not affected persons, and their requests for contested case hearing should be denied.

C. ALL REQUESTS FOR RECONSIDERATION SHOULD BE DENIED

Collin County, the City, and Old Celina also filed Requests for Reconsideration with the Commission regarding Ryno's application. In support of the Requests for Reconsideration each of the requesters identifies a number of alleged deficiencies with Ryno's application. The Executive Director has considered Ryno's application in detail over the past sixteen months.

¹⁸ The City also cites to other statutes that have the same corporate boundary limitation. For example, Section 382.111 of the Health and Safety Code provides: "A local government has the same power and is subject to the same restriction as the commission under Section 382.015 to inspect the air and to enter public or private property *in its territorial jurisdiction* . . ." *Id.* § 382.011 (2007) (emphasis added).

¹⁹ *See, e.g.*, TEX. LOCAL GOV'T CODE ANN. § 212.003. Section 212.003 of the Texas Local Government Code, relating to municipal regulation of subdivisions and property development, states:

(a) The governing body of a municipality by ordinance may extend to the extraterritorial jurisdiction of the municipality the application of municipal ordinances adopted under Section 212.002 and other municipal ordinances However, unless otherwise authorized by state law, in its extraterritorial jurisdiction a municipality shall not regulate:

(1) the use of any building or property for business, industrial, residential, or other purposes

TEX. LOCAL GOV'T CODE ANN. 212.003(a)(1) (2007).

The Executive Director has correctly determined that Ryno has provided all necessary and relevant information in support of its application and in compliance with applicable laws and TCEQ regulations. None of the three requesters identify any information that brings the Executive Director's review into question.

For example, Old Celina and the City allege that Ryno failed to publish notice in the proper newspaper, but both Old Celina and the City ignore the requirements of the applicable notice rule. Texas Administrative Code Title 30, Section 39.603(c) states:

Unless otherwise specified, when this chapter requires published notice of an air application, the applicant shall publish notice in a newspaper of general circulation in the municipality in which the facility is located or is proposed to be located or in the municipality nearest to the location or proposed location of the facility²⁰

As identified by the affidavits of publication and the tear sheets provided by Ryno to the Commission, the appropriate notices were published in the *Dallas Morning News*. The Commission has routinely accepted the *Dallas Morning News* as a newspaper of general circulation throughout Collin County. Contrary to the requesters' argument, the notice is not required to be published in a newspaper published in the city where the proposed plant is to be located. All of the requesters related notice claims are based on similar incorrect readings of the applicable regulations, as has previously been addressed in the *Executive Director's Response to Public Comment*.²¹

²⁰ 30 TEX. ADMIN. CODE § 39.603(c) (2007).

²¹ See Executive Director's Response to Public Comment, *Application by Ryno Materials, Inc., Collin County, Texas, TCEQ Air Quality Permit No. 76818* (Oct. 11, 2006).

Collin County's Request for Reconsideration rests wholly on the issues identified above with regard to its request for contested case hearing. For the reasons discussed above, Collin County's Request for Reconsideration should also be denied.

The City's letters and Request for Reconsideration are replete with factual inaccuracies regarding both the proposed plant and the regulatory requirements. For example, contrary to the City's claims Celina Elementary School is not 2,000 feet from the proposed plant site. As shown on Attachment 1, Celina Elementary School is well over a mile from Ryno's proposed plant.

The City also raises a number of issues regarding Ryno's application that appear to really be issues with TCEQ's application process and form. The City's comments question the meaning of certain terms in TCEQ's registration checklist, raise issues related to how compliance will be evaluated and how often TCEQ will inspect the site, and even asks why the application does not specifically identify how records will be made available to the public. Neither these issues nor the litany of issues like these that are raised by the City are relevant in an air quality permitting proceeding. Questions about TCEQ rules and checklists can only be raised in rulemaking processes or during the development of such checklists. Issues related to compliance and enforcement are appropriately addressed outside of permitting through TCEQ's investigation and enforcement processes, and the availability of records to public entities is addressed through state law. The City is attempting to re-write state law and TCEQ rules through a permitting proceeding. Such a review is not appropriate in a permitting forum. The *Executive Director's Response to Public Comment* has addressed all of the City's concerns and has again concluded that Ryno's application is in compliance with all regulatory requirements. The City's Request for Reconsideration should be denied.

For all of the reasons identified above, the Requests for Reconsideration submitted by the City, Collin County, and Old Celina must be denied.

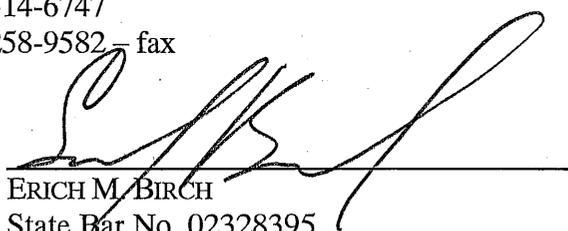
III. CONCLUSION AND PRAYER

All requests for contested case hearing and requests for reconsideration filed in this proceeding should be denied because they were not submitted by affected persons, as required by statute and TCEQ rules, nor do they raise issues worthy of being reconsidered by the Executive Director. Ryno Materials, Inc. respectfully requests that the Honorable Commissioners of the Texas Commission on Environmental Quality deny all requests for contested case hearing and requests for reconsideration and approve Air Quality Standard Permit Registration No. 76818.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that an original and eleven true and correct copies of the foregoing document have been filed with the Office of the Chief Clerk of the Texas Commission on Environmental Quality. I also certify that a true and correct copy of the foregoing document has been served upon all required individuals and entities as identified on the General Counsel's Mailing List for this docket via facsimile, certified mail return receipt requested, hand delivery, overnight delivery, or electronic mail addressed to:

<p>Office of Chief Clerk ATTN: Agenda Docket Clerk, MC-105 Texas Commission on Environmental Quality P.O. Box 13087 Austin, Texas 78711-3087 (mail) 12100 Park 35 Circle, Building F Austin, Texas 78753 (delivery) Fax: (512) 239-3311</p>	<p>CHIEF CLERK'S OFFICE 2007 JAN 12 PM 3:15</p>
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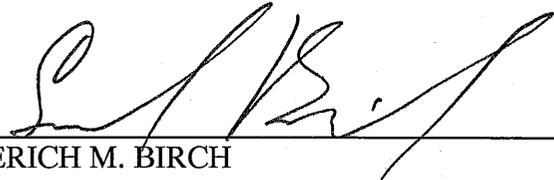
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<p>Ms. Jody Henneke Director Office of Public Assistance, MC-108 Texas Commission on Environmental Quality P.O. Box 13087 Austin, Texas 78711-3087 (mail) 12100 Park 35 Circle, Building F Austin, Texas 78753 (delivery) Fax: (512) 239-4007</p>	<p>For the Office of Public Assistance of the Texas Commission on Environmental Quality</p>
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On this the 12th day of January, 2007,


ERICH M. BIRCH