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September 17, 2007

VIA HAND DELIVERY

Ms. LaDonna Castañuela
Office of Chief Clerk (MC-105)
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2007 SEP 17 PM 3:54
CHIEF CLERKS OFFICE

Re: Applicant Canyon Lake Ready Mix, Inc.'s Response to Requests for Contested Case Hearing and Requests for Reconsideration, *Application by Canyon Lake Ready Mix, Inc., for Air Quality Standard Permit Registration No. 78844*, Docket No. 2007-1000-AIR.

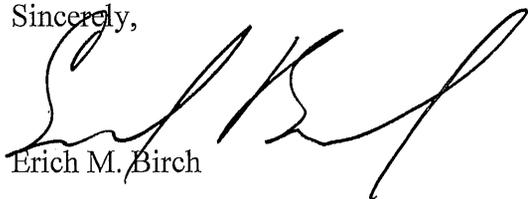
Dear Ms. Castañuela:

This letter serves as notice that the law firm of Birch, Becker & Moorman, LLP has been retained by Canyon Lake Ready Mix, Inc. ("Canyon Lake") as counsel of record in the above-referenced docket. Canyon Lake requests that all interested persons serve all filings or other correspondence relating to this docket on the undersigned.

Also, enclosed for filing in the above-referenced proceeding is an original and eleven copies of *Applicant Canyon Lake Ready Mix, Inc.'s Response to Requests for Contested Case Hearing and Requests for Reconsideration*. Please file this on behalf of Canyon Lake in the above-referenced matter.

If you have any questions, please telephone me at the above number.

Sincerely,


Erich M. Birch

ENCLOSURES

cc: Service List
Mr. Bill Murphy

DOCKET NO. 2007-1000-AIR

2007 SEP 17 PM 3:54

APPLICATION BY CANYON
LAKE READY MIX, INC, FOR
AIR QUALITY STANDARD
PERMIT REGISTRATION NO. 78844

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BEFORE THE TEXAS COMMISSION
ON
ENVIRONMENTAL QUALITY

CHIEF CLERKS OFFICE

**APPLICANT CANYON LAKE READY MIX, 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 Canyon Lake Ready Mix, Inc. ("Canyon Lake"), Applicant in this proceeding, and hereby submits this, its *Response to Requests for Contested Case Hearing and Requests for Reconsideration* ("Response"), arguing that both Requests for Reconsideration should be denied and that only the requests for contested case hearing filed by Helen Thayer and John P. Donahue, Jr. demonstrate that they may be affected persons, and would respectfully show the Honorable Commissioners as follows:

I. BACKGROUND

Canyon Lake has applied to TCEQ for Air Quality Standard Permit Registration No. 78844 (the "Permit"). When approved, the Permit will authorize the construction of a permanent concrete batch plant to be located at 5001 Farm-to-Market Road 2673, Canyon Lake, Comal County, Texas. Canyon Lake's application for the Permit was filed on April 28, 2006. The application was declared administratively complete on May 5, 2006. All appropriate notices have been published, including the: (1) the Notice of Receipt and Intent to Obtain ("NORI") an Air Quality Permit on May 17, 2006 and June 7, 2006, in the *Times Guardian*; and (2) the Notice of Application and Preliminary Decision ("NAPD") on July 19, 2006, in the *Times Guardian*. The public comment period ended on August 18, 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.*

* * *

(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;
- (2) *distance restrictions or other limitations imposed by law on the affected interest;*
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) likely impact of the regulated activity on the health and safety of the person, and on the use of the property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person²

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

² *Id.* § 55.203(a)&(c) (2007) (emphasis added). In addition, Texas Health and Safety Code Section 5.115(a) provides, in relevant part:

For the purpose of an administrative hearing held by or for the commission involving a contested case, “affected person,” or “person affected,” or “person who may be affected” means a person who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the administrative hearing. An

In making the affected person determination, distance restrictions or other limitations imposed by law must be followed.³ The Legislature has specifically and expressly defined those persons who are affected persons by establishing a distance requirement for certain concrete plants. 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.⁴ 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:

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.*⁵

The failure of a person who requests a contested case hearing to meet the distance requirements established by the Legislature is an absolute bar to qualifying as an “affected party.”

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

- (1) Ana and Robert Bartlett
- (2) Robin Nava
- (3) Helen Thayer
- (4) John P. Donahue, Jr.

interest common to members of the general public does not qualify as a personal justiciable interest.

TEX. HEALTH & SAFETY CODE ANN. § 5.115(a) (2007) (emphasis added).

³ See 30 TEX. ADMIN. CODE § 55.203(c)(2).

⁴ See TEX. HEALTH & SAFETY CODE ANN. § 382.058(c) (2007).

⁵ *Id.* (emphasis added).

A. **ONLY TWO REQUESTS FOR CONTESTED CASE HEARING MAY BE GRANTED.**

1. **Only Helen Thayer and John P. Donahue, Jr. Appear to Be Affected Persons.**

Attachment 1 is a copy of a map attached to the Executive Director's Response to Hearing Requests and Requests for Reconsideration,⁶ which identifies the location of Canyon Lake's proposed plant and depicts the area within 440 yards of the proposed plant.⁷ A review of Attachment 1 clearly demonstrates that only the residences of Helen Thayer and John P. Donahue, Jr. are within 440 yards of the Canyon Lake proposed plant. The residences of Ana and Robert Bartlett and Robin Nava are located more than 440 yards from the proposed plant. Because Ana and Robert Bartlett and Robin Nava do not reside in a permanent residence located within 440 yards of Canyon Lake'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). Only Ms. Thayer and Mr. Donahue appear to be affected persons pursuant to the Texas Health and Safety Code Section 382.058(c).

2. **Only Three Issues Raised by Helen Thayer and John P. Donahue, Jr., Are Disputed Issues of Fact that Are Relevant and Material to the Commission's Consideration of the Pending Application.**

The requests for contested case hearing filed by Ms. Thayer and Mr. Donahue—the only two hearing requesters that appear to qualify as affected persons—raised the following disputed issues:

- (1) Whether dust discharged from the operation of Canyon Lake's proposed plant will result in nuisance conditions.

⁶ See Executive Director's Response to Hearing Requests and Requests for Reconsideration, *Application by Canyon Lake Ready Mix, Inc., Canyon Lake, Comal County*, TCEQ Standard Permit Registration No. 78844, Docket No. 2007-1000-AIR at 5-9 (Aug. 13, 2007) [hereinafter ED's Response].

⁷ See *id.*, attachment labeled "Canyon Lake CBP," attached hereto and incorporated herein as Attachment 1.

- (2) Whether air emissions from Canyon Lake's proposed plant will adversely affect their health.
- (3) Whether air emission from Canyon Lake's proposed plant will adversely affect air quality in the area.
- (4) Whether air emissions from Canyon Lake's proposed plant will adversely affect water wells in the area.
- (5) Whether exhaust emissions from trucks will adversely affect air quality.
- (6) Whether operation of Canyon Lake's proposed plant will adversely affect quality of life as it relates to noise.

Only these six issues were raised by Ms. Thayer and/or Mr. Donahue. All of these six issues were raised during the public comment period.

Only issues (1), (2), and (3), as identified above, are disputed issues of fact that are relevant and material to the Commission's decision on the Pending Application for an air quality permit.⁸ Issues (4), (5), and (6) are not relevant and material to the Commission's decision on the Pending Application for an air quality permit. Issue (4), whether air emissions from Canyon Lake's proposed plant will adversely affect water wells in the area, is not relevant and material to the consideration of the Pending Application because the review of an air quality permit application does not include a water assessment or the consideration of issues involving impact to water wells. Issue (5), whether exhaust emissions from trucks will adversely affect air quality, is not relevant and material to this proceeding because the Commission only has the authority to consider stationary sources of air contaminants during its review of an application for a concrete batch plant. As such, the Commission does not have jurisdiction to consider impacts of exhaust

⁸ See 30 TEX. ADMIN. CODE § 55.55.211(b)(3)(A).

emissions from trucks when determining whether to approve the Pending Application. Issue (6), whether operation of Canyon Lake's proposed plant will adversely affect quality of life as it relates to noise, is not relevant and material to this proceeding because the Commission does not have jurisdiction over noise in relation to its consideration of the Pending Application.

In addition to the six issues raised above, the Executive Director, in his Response to Hearing Requests and Requests for Reconsideration, identifies seven issues⁹ that were raised by Les Bacarisse, Ana and Robert Bartlett, and/or Robin Nava—the three hearing requesters that are not affected persons pursuant to Commission rules. Those seven issues are as follows:

- (a) Whether the air emissions from the proposed facility will adversely affect the environment.¹⁰
- (b) Whether the air emissions from the proposed facility will adversely affect residents' quality of life as it relates to aesthetics and traffic.¹¹
- (c) Whether the proposed facility will be located in an inappropriate area, in that it is too close to a residential area and local winds are particularly strong.¹²
- (d) Whether public notice was proper and adequate.¹³
- (e) Whether road dust and emissions from internal site transport activities were taken into consideration when processing the application.¹⁴

⁹ See ED's Response, *supra* note 6.

¹⁰ See *id.* at 5 & 7 (identified as Issue 3).

¹¹ See *id.* at 5 & 7 (identified as Issue 4).

¹² See *id.* at 5 & 7 (identified as Issue 5).

¹³ See *id.* at 6 & 9 (identified as Issue 10).

¹⁴ See *id.* at 6 & 9 (identified as Issue 11).

- (f) Whether Texas Administrative Code Title 30, Section 111.155 applies to the Pending Application.¹⁵
- (g) Whether air modeling conducted as part of the promulgation of the Concrete Batch Plant Standard Permit was adequate.¹⁶

The Executive Director has correctly determined that Issues (b) and (c), as identified above, were not relevant and material, and thus were not appropriate referable issues.¹⁷ The Executive Director also correctly determined that Issues (f) and (g), as identified above, were not raised during the public comment period, and thus were not appropriate referable issues.¹⁸

The Executive Director should not have recommended referral of Issues (a), (d), and (e), as identified above. Texas Administrative Code Title 30, Section 55.211(b), in relevant part, states:

The Commission will evaluate public comment, executive director's response to comment, requests for reconsideration, and requests for contested case hearing and may:

* * *

(3) determine that a hearing request meets the requirements of this subchapter and:

(A) if the request raises disputed issues of fact that were raised during the comment period, that were not withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director's Response to Comment, and that are relevant and material to the commission's decision on the application¹⁹

¹⁵ See *id.* at 6 (identified as Issue 12).

¹⁶ See *id.* at 6 (identified as Issue 13).

¹⁷ See *id.* at 7-8 (identified as Issues 4 & 5).

¹⁸ See *id.* at 6 (identified as Issues 12 & 13).

¹⁹ 30 TEX. ADMIN. CODE § 55.211(b)(3)(A).

As contemplated by Section 55.211(b)(3)(A), the Commission is to determine whether a particular hearing request raised disputed issues of fact that were raised during the comment period, that have not been withdrawn, and that are relevant and material to the Commission's decision on the Pending Application. Issues (a), (d), and (e) were all raised by Robin Nava, whom has already been determined not to be an affected person pursuant to Commission rules.²⁰ Issues (a), (d), and (e) should not be referred to hearing because they were not raised as disputed issues of fact by Ms. Thayer or Mr. Donahue as required by Texas Administrative Code Title 30, Section 55.211(b)(3)(A).

3. Four Months Is an Appropriate Duration for the Contested Case Hearing.

Because of the limited number of disputed factual issues identified as relevant and material, as discussed above, Canyon Lake agrees with the Executive Director's recommendation that the contested case hearing should last no longer than four months from the preliminary hearing to the proposal for decision.²¹

B. ALL REQUESTS FOR RECONSIDERATION SHOULD BE DENIED.

Dale Leacock and Les Bacarisse filed Requests for Reconsideration with the Commission regarding Canyon Lake's Pending Application. In support of the Requests for Reconsideration each of the requesters identifies a number of alleged deficiencies with the Pending Application.

²⁰ While Mr. Donahue identified that the Pending Application had only recently come to his attention, allegedly because of the type of sign posted by Canyon Lake, he did not raise public notice issues as concerns in his letter, and thus public notice was not an issue raised as a basis for his request for contested case hearing. See Letter from Mr. John P. Donahue, Jr., to Office of the Chief Clerk, Texas Comm'n on Env'tl. Quality (June 21, 2006). Mr. Donahue's earlier request for contested case hearing did not address public notice at all. See Letter from Mr. John P. Donahue, Jr., to Office of the Chief Clerk, Texas Comm'n on Env'tl. Quality (undated, received by the Office of the Chief Clerk on June 19, 2006).

²¹ See ED's Response, *supra* note 6, at 9.

The Executive Director has considered the Pending Application in detail over the past sixteen months. The Executive Director has correctly determined that Canyon Lake has provided all necessary and relevant information in support of the Pending Application and is in compliance with applicable laws and Commission regulations. Neither of the requesters identifies any information that brings the Executive Director's review into question.

The Executive Director has provided a detailed analysis of the Requests for Reconsideration filed by Dale Leacock and Les Bacarisse and Canyon Lake agrees with the Executive Director's conclusion that both Requests for Reconsideration should be denied. The issues raised by both requesters have been the subject of the Executive Director's comprehensive review of Canyon Lake's Pending Application. Neither requester provides new information identifying deficiencies in the Executive Director's review. Thus, neither Dale Leacock nor Les Bacarisse provides a basis in support of reviewing the Executive Director's determination. As such, both Requests for Reconsideration should be denied.

III. ALTERNATIVE DISPUTE RESOLUTION

Canyon Lake desires to be a good neighbor in the area where its proposed plant will be located and wishes to resolve the concerns of the hearing requestors, if possible. To that end, Canyon Lake is amenable to participating in alternate dispute resolution procedures.

IV. CONCLUSION AND PRAYER

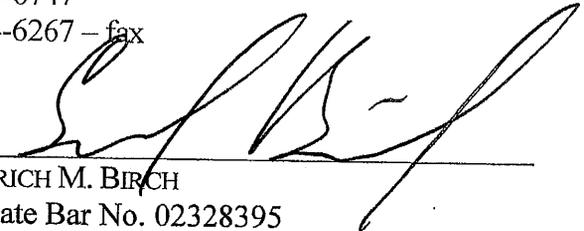
For the foregoing reasons, Canyon Lake Ready Mix, Inc. respectfully requests that the Honorable Commissioners of the Texas Commission on Environmental Quality:

- (A) Determine whether Helen Thayer and John P. Donahue, Jr. are affected persons
- (B) Deny the requests for contested case hearing filed by Ana and Robert Bartlett and Robin Nava because it is clear that they are not affected persons.
- (C) If the Commission determines that Helen Thayer and John P. Donahue are affected persons, then refer the following issues for contested case hearing:
 - (1) Whether dust discharged from the operation of Canyon Lake's proposed plant will result in nuisance conditions.
 - (2) Whether air emissions from Canyon Lake's proposed plant will adversely affect their health.
 - (3) Whether air emission from Canyon Lake's proposed plant will adversely affect air quality in the area.
- (D) Decline to refer Issues (4), (5), and (6), as raised by Helen Thayer and/or John P. Donahue, Jr. and as identified above, for contested case hearing because they are not relevant and material to the processing of the Pending Application.
- (E) Decline to refer Issues (a) through (g), as identified above, for contested case hearing because they are either (1) not relevant and material (*i.e.*, Issues (b) and (c)); (2) not raised during the comment period (*i.e.*, Issues (f) and (g)); and/or (3) not raised in the hearing requests filed by Helen Thayer and/or John P. Donahue, Jr. (*i.e.*, Issues (a), (d), and (e)).
- (F) Deny all Requests for Reconsideration filed regarding the Pending Application.
- (G) Specify that the duration of the contested case hearing should be four months from the preliminary hearing to the proposal for decision.

- (H) Determine whether to recommend alternative dispute resolution as a method for resolving this matter.

Respectfully submitted,

Erich M. Birch
Birch, Becker & Moorman, LLP
7000 North MoPac Expressway
Plaza 7000, Second Floor
Austin, Texas 78731
(512) 514-6747
(512) 514-6267 – fax

By: 

ERICH M. BIRCH
State Bar No. 02328395

**ATTORNEYS FOR CANYON LAKE READY
MIX, INC.**

CERTIFICATE OF SERVICE

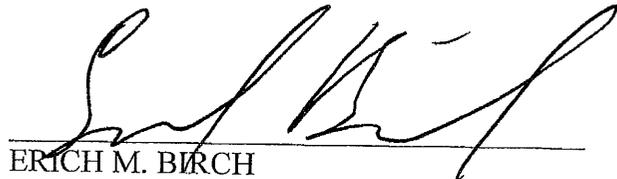
I certify that an original and eleven true and correct copies of the foregoing document have been filed with the Office of the Chief Clerk of the Texas Commission on Environmental Quality. I also certify that a true and correct copy of the foregoing document has been served upon all required individuals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

Ms. LaDonna Castañuela Office of the Chief Clerk (MC-105) Texas Commission on Environmental Quality P.O. Box 13087 Austin, Texas 78711-3087 (512) 239-3300 (512) 239-3311 (Fax)	For the Office of the Chief Clerk of the Texas Commission on Environmental Quality
Mr. Tim Eubank Environmental Law Division (MC-173) Texas Commission on Environmental Quality P.O. Box 13087 Austin, Texas 78711-3087 (512) 239-0600 (512) 239-0606 (Fax)	For the Executive Director of the Texas Commission on Environmental Quality
Mr. Beecher Cameron Air Permits Division (MC-163) Texas Commission on Environmental Quality P.O. Box 13087 Austin, Texas 78711-3087 (512) 239-1250 (512) 239-1300 (Fax)	
Ms. Helga Chatelle Technical Staff, Air Permits Division (MC-163) Texas Commission on Environmental Quality P.O. Box 13087 Austin, Texas 78711-3087	
Mr. Michael D. Gould Technical Staff, Air Permits Division (MC-163) Texas Commission on Environmental Quality P.O. Box 13087 Austin, Texas 78711-3087	

<p>Ms. Christina Mann Office of Public Interest Counsel (MC-103) Texas Commission on Environmental Quality P.O. Box 13087 Austin, Texas 78711-3087 (512) 239-6363 (512) 239-6377 (Fax)</p>	<p>For the Office of Public Interest Counsel of the Texas Commission on Environmental Quality</p>
<p>Ms. Bridget Bohac Office of Public Assistance (MC-108) Texas Commission on Environmental Quality P.O. Box 13087 Austin, Texas 78711-3087 (512) 239-4000 (512) 239-4007 (Fax)</p>	<p>For the Office of Public Assistance of the Texas Commission on Environmental Quality</p>
<p>Mr. Kyle Lucas Alternative Dispute Resolution (MC-222) Texas Commission on Environmental Quality P.O. Box 13087 Austin, Texas 78711-3087</p>	<p>For the Office of Alternative Dispute Resolution of the Texas Commission on Environmental Quality</p>
<p>Mr. Les Bacarisse 1460 OC Trout Drive Canyon Lake, Texas 78133-5542</p>	<p>Request for Reconsideration</p>
<p>Ana and Robert Bartlett 1041 Blue Water Drive Canyon Lake, Texas 78133-5377</p>	<p>Request for Contested Case Hearing</p>
<p>Mr. John P. Donahue 3950 Lariat Ridge New Braunfels, Texas 78132-2039</p>	<p>Request for Contested Case Hearing</p>
<p>Robin Nava P.O. Box 1658 Canyon Lake, Texas 78133-0021</p>	<p>Request for Contested Case Hearing</p>
<p>Ms. Helen Thayer 4915 Farm-to-Market Road 2673 Canyon Lake, Texas 78133-5170</p>	<p>Request for Contested Case Hearing</p>

Dale Leacock 642 Highland Terrace Drive Canyon Lake, Texas 78133-5267	Request for Reconsideration
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On this the 17th day of September, 2007,


ERICH M. BIRCH

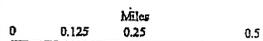
Canyon Lake CBP



Protecting Texas by
Reducing and
Preventing Pollution

Texas Commission on Environmental Quality
Information Resources Division
GIS Team (MC-197)
P.O. Box 13087
Austin, TX 78711-3087

July 18, 2007



Projection: Texas Centric Mapping System (TCMS), Albers Equal-Area, Meters

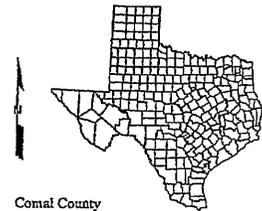
1 inch equals 0.4 miles

440 Yards = 1/4 Mile

Legend

- Hearing Requestor Residence
- 440-Yard Radius Around Proposed Facility
- Proposed Facility Boundary

Sources: The DOQQ (Digital Orthophoto Quarter Quadangle) aerial imagery was obtained from the USDA Farm Service Agency's National Agriculture Imagery Program (NAIP). The 2004 imagery is color infrared (CIR) at one-meter resolution. The hearing requestor's addresses and proposed facility property lines were provided by the TCEQ Office of Legal Services (OLS) and digitized or geocoded by the TCEQ Information Resources Division using Geographic Data Technology (GDT) street data, 2006-2007 and supplementary maps as a reference.



Comal County

This map was generated by the Information Resources Division of the Texas Commission on Environmental Quality. This map was not generated by a licensed surveyor, and is intended for illustrative purposes only. No claims are made to the accuracy or completeness of the data or to its suitability for a particular use. For more information concerning this map, contact the Information Resources Division at (512) 239-0800.

ATTACHMENT 1

