

Kathleen Hartnett White, *Chairman*
Larry R. Soward, *Commissioner*
H. S. Buddy Garcia, *Commissioner*



Blas J. Coy, Jr., *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

August 13, 2007

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2007 AUG 13 PM 3:31
CHIEF CLERKS OFFICE

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

**RE: CANYON LAKE READY MIX, INC.
TCEQ DOCKET NO. 2007-1000-AIR**

Dear Ms. Castañuela:

Enclosed for filing is the Public Interest Counsel's Response to Request for Reconsideration and Response to Hearing Requests in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script that reads "Christina Mann".

Christina Mann, Attorney
Public Interest Counsel

cc: Mailing List

Enclosure

REPLY TO: PUBLIC INTEREST COUNSEL, MC 103 • P.O. BOX 13087 • AUSTIN, TEXAS 78711-3087 • 512-239-6363

P.O. Box 13087 • Austin, Texas 78711-3087 • 512-239-1000 • Internet address: www.tceq.state.tx.us

printed on recycled paper using soy-based ink

TCEQ DOCKET NO. 2007-1000-AIR

2007 AUG 13 PM 3:31

IN THE MATTER OF
THE APPLICATION OF
CANYON LAKE READY
MIX, INC. FOR AIR
QUALITY STANDARD
PERMIT
REGISTRATION NO.
78844

§
§
§
§
§
§
§
§

BEFORE THE CHIEF CLERK'S OFFICE
COMMISSION ON
ENVIRONMENTAL
QUALITY

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE TO REQUEST
FOR RECONSIDERATION AND RESPONSE TO HEARING REQUESTS**

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

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas
Commission on Environmental Quality (the Commission or TCEQ) and files this
response to requests for reconsideration and requests for hearing in the above-referenced
matter.

PROCEDURAL HISTORY

Canyon Lake Ready Mix, Inc. (Applicant) applied to the TCEQ for an air quality
standard permit for a concrete batch plant (registration no. 78844), received by TCEQ on
April 28, 2006; declared administratively complete May 5, 2006; and technically
complete on June 13, 2006. The Notice of Receipt and Intent to Obtain an Air Quality
Permit was published on May 17, 2006 and June 7, 2006 in the *Times
Guardian*.¹ Applicant published the Notice of Application and Preliminary Decision on
July 19, 2006 in the *Times Guardian*. The Chief Clerk mailed the Executive Director's
Response to Public Comment with the Final Decision Letter on May 25, 2007.

¹ According to the TCEQ Executive Director, the first publication was incomplete and therefore a second
notice was required. See Executive Director's Response to Public Comment, filed with the Chief Clerk on
May 21, 2007, page 1.

STATE OF TEXAS
COMMISSION ON ENVIRONMENTAL QUALITY
TCEQ received one request for reconsideration from Les Bacarisse and requests for a contested case hearing from Ana and Robert Bartlett, John P. Donahue, Robin Nava, and Hefeh Thayer.

REQUEST FOR RECONSIDERATION

Les Bacarisse submitted a request for reconsideration of the Executive Director's decision based on concerns about air quality related to emissions from the proposed facility. The health concerns are within the jurisdiction of the commission to address in the context of proceedings on this application. An evidentiary record, however, would be necessary for OPIC to make a recommendation to the commission as to whether the registration should be denied based on these concerns. Another concern is consideration of wind direction by the Executive Director. As described below, the Commission will not consider case-specific air modeling information when making a decision on an application for registration under a standard permit. Accordingly, the OPIC cannot recommend that the commission grant the requests for reconsideration; however, the OPIC does recommend granting certain hearing requests as discussed below.

REQUEST FOR CONTESTED CASE HEARING

I. APPLICABLE LAW

Under the applicable statutory and regulatory requirements, a person requesting a hearing must file the request in writing with the chief clerk "no later than" 30 days after the chief clerk's transmittal of the executive director's decision and response to comments. 30 TAC §55.201(a) and (c). For air authorizations, a hearing request must be filed during the first comment period in order for the authorization to be subject to further notice and public participation opportunities. TEXAS HEALTH & SAFETY CODE

§382.056(g). Therefore, timely requests for air authorizations include all requests filed in response to the Notice of Intent to Obtain Permit, as well as any additional requests subsequently filed during the comment period and the 30-day period following the transmittal of the response to comments.

The request must substantially comply with the following: give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request; identify the requestor's personal justiciable interest affected by the application showing why the requestor is an "affected person" who may be adversely affected by the proposed facility of activity in a manner not common to members of the general public; request a contested case hearing; list all relevant and material disputed issues of fact that were raised during the comment period that are the basis of the hearing request; and provide any other information specified in the public notice of application. 30 TAC §55.201(d).

Under 30 TAC §55.203(a), 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." This justiciable interest does not include an interest common to the general public. 30 TAC §55.203(c) sets forth relevant factors that will be considered in determining whether a person is affected. These factors include:

- a. whether the interest claimed is one protected by the law under which the application will be considered;
- b. distance restrictions or other limitations imposed by law on the affected interest;
- c. whether a reasonable relationship exists between the interest claimed and the activity regulated;
- d. likely impact of the regulated activity on the health, safety, and use of property of the person;
- e. likely impact of the regulated activity on use of the impacted natural resource by the person; and

- f. for governmental entities, their statutory authority over or interest in the issues relevant to the application.

The commission shall grant an affected person's timely filed hearing request if:

(1) the request is made pursuant to a right to hearing authorized by law; and (2) the request raises disputed issues of fact that were raised during the comment period and that are relevant and material to the commission's decision on the application. 30 TAC

55.211(c).¹

Accordingly, pursuant to 30 TAC §55.209(e), responses to hearing requests must specifically address:

- (1) whether the requestor is an affected person;
- (2) which issues raised in the hearing request are disputed;
- (3) whether the dispute involves questions of fact or law;
- (4) whether the issues were raised during the public comment period;
- (5) whether the hearing request is based on issues raised solely in a public comment 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;
- (6) whether the issues are relevant and material to the decision on the application; and
- (7) a maximum expected duration for the contested case hearing.

In addition to these requirements, the Texas Clean Air Act specifies that only those persons residing in a permanent residence within 440 yards of the proposed plant may request a hearing on a concrete batch plant standard permit registration as a person who may be affected. TEXAS HEALTH AND SAFETY CODE §382.058(c).

II. ANALYSIS OF REQUESTS

A. Affected Persons

¹ A hearing request can not be based on an issue raised solely in comments that have been withdrawn by written letter filed with the chief clerk prior to the filing of the executive director's response to comments. 30 TAC §55.211(c)(2)(A).

Pursuant to 30 TAC §55.203(c)(2), the commission is required to determine distance limitations or other limitations imposed by law when determining who is an affected person entitled to receive a contested case hearing. As previously stated, TEXAS HEALTH & SAFETY CODE §382.058(c) provides that “only those persons actually residing in a permanent residence within 440 yards of the proposed plant may request a hearing under Section 382.056(d) as a person who may be affected.”

Ana and Robert Bartlett and Robin Nava

The Bartletts² and Robin Nava³ submitted hearing requests raising primarily air quality issues. Robin Nava also raises procedural and notice issues. It does not appear that the Bartletts or Robin Nava live within 440 yards of the proposed plant. These requesters have not stated that they live within this distance and there is no other information available to OPIC demonstrating that this requirement is met. OPIC received a map from the Executive Director (ED) via email which shows that Robin Nava and the Bartletts reside more than 440 yards from the proposed facility.⁴ Therefore, OPIC cannot find that those persons that do not provide an argument that they have a residence within 440 yards of the facility are affected persons pursuant to 30 TAC §55.203, and cannot recommend that the commission grant the hearing requests filed by these individuals.

² Dated August 12, 2006, received August 15, 2006 in the Office of the Chief Clerk.

³ Two hearing requests were received from Robin Nava. The first dates July 5, 2006 and received on July 7, 2006 in the Office of the Chief Clerk. A second hearing request, dated June 19, 2007, was received on June 21, 2007 after issuance of the Response to Public Comment.

⁴ See black and white copy of Executive Director’s map entitled Canyon Lake CBP attached. (Attachment 1)

Helen Thayer

Ms. Thayer states that she lives within 60 feet of the proposed concrete batch plant. OPIC finds that Ms. Thayer has made a showing that she satisfies applicable statutory criteria and is entitled to a hearing. She raises health issues related to air quality in her hearing request timely received on June 15, 2007 in the Office of the Chief Clerk. The ED has produced a map which shows that Ms. Thayer lives within 440 yards of the proposed facility.⁵

OPIC finds that Ms. Thayer satisfies the requirements of 30 TAC §55.203 concerning the determination of an affected person. Ms. Thayer has raised the issue of the effects of emissions from the proposed plant on her health, an interest protected by the Texas Clean Air Act, the law under which the application will be considered. 30 TAC §55.203(c)(1). The information that she provides indicates that her property is within 440 yards of the proposed plant and there is a likelihood that emissions from the proposed plant will affect her health and her use of her property. 30 TAC §55.203(c)(4). Therefore, there is a reasonable relationship between Ms. Thayer's concerns and the proposed standard permit. 30 TAC §55.203(c). There is a reasonable relationship between Ms. Thayer's concern with her health and property and the activity regulated. 30 TAC §55.203(c)(3). Therefore, Ms. Thayer has expressed a personal justiciable interest which is an interest not common to the general public. OPIC recommends that the commission find that she is an affected person and grant her request for hearing.

John P. Donahue

Mr. Donahue does not state that he lives within 440 yards of the proposed concrete batch plant. However, his given residential address of 5004 FM 2673 appears to

⁵ *Id.*

be nearly adjacent or adjacent to the batch plant's proposed location of 5001 FM 2673. OPIC has received a map via email from the Executive Director (ED) plotting the requesters relative to the proposed location. Mr. Donahue lives within 440 yards.⁶ OPIC finds that Mr. Donahue satisfies the requirements of 30 TAC §55.203. Mr. Donahue has raised the issue of the effects of emissions from the proposed plant on his health, an interest protected by the Texas Clean Air Act, the law under which the application will be considered. 30 TAC §55.203(c)(1). The information that he provides indicates that his property is within 440 yards of the proposed plant and there is a likelihood that emissions from the proposed plant will affect his health and his use of her property. 30 TAC §55.203(c)(4). Therefore, there is a reasonable relationship between Mr. Donahue's concerns and the proposed standard permit. 30 TAC §55.203(c). There is a reasonable relationship between Mr. Donahue's concern with his health and property and the activity regulated. 30 TAC §55.203(c)(3). Therefore, Mr. Donahue has expressed a personal justiciable interest which is an interest not common to the general public. OPIC recommends that the commission find that he is an affected person and grant his request for hearing.

B. Issues Raised in the Hearing Requests⁷

1. Will emissions from the proposed activities adversely affect the health conditions of affected persons?
2. Was the wind direction properly evaluated?
3. Were the emissions from trucks properly considered?
4. Will the proposed activities contribute to excessive noise?
5. Will the proposed activities negatively affect groundwater quality in nearby drinking wells?
6. Did the sign displayed at the site comply with sign-posting notice requirements?

⁶ *Id.*

⁷ See Hearing Request of Helen Thayer, received June 15, 2007. See also Hearing requests of John Donahue, received June 16, 2006, June 19 2006, June 22, 2006, and June 23, 2006. Several of these are fax duplicates.

C. Issues raised in Comment Period

The issues raised in the hearing requests were also raised in the comment period and have not been withdrawn. 30 TAC §§55.201(c) and (d)(4), 55.211(c)(2)(A).

D. Disputed Issues

There is no agreement between the Requesters and the applicant or Executive Director on the issues raised in the hearing requests.

E. Issues of Fact

If the Commission considers an issue to be one of fact, rather than one of law or policy, it is appropriate for referral to hearing if it meets all other applicable requirements. See 30 TAC §55.211(b)(3)(A) and (B). OPIC finds that all issues raised by affected persons are issues of fact.

G. Relevant and Material Issues

The hearing requests raise issues relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4) and 55.211(c)(2)(A). In order to refer an issue to SOAH, the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny this permit.⁸ Relevant and material issues are those that are governed by the substantive law under which this permit is to be issued.⁹ An issue concerning the health effects (See Issue No. 1 above) of the proposed activity on affected persons is relevant and material to the commission decision on this registration application because it relates to whether the applicant can comply

⁸ See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-251(1986) (in discussing the standards applicable to reviewing motions for summary judgment the Court stated "[a]s to materiality, the substantive law will identify which facts are material. ... it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs.")

⁹ *Id.*

with the terms of the standard permit. Proper notice of the application is also an issue which is relevant and material to the Commission decision. Therefore, whether the sign displayed at the site complied with sign-posting notice requirements is relevant and material.

OPIC does not find the remaining issues to be relevant and material to the Commission's decision on this application. Whether the wind direction (Issue No. 2 above) was properly considered is a part of the air dispersion modeling conducted by the TCEQ when creating the standard permit, and "evidence regarding air dispersion modeling may not be submitted at a hearing." See TEXAS HEALTH & SAFETY CODE §382.058(d). Truck emissions (Issue No. 3 above) are not relevant and material because TCEQ only regulates the batch plant itself, as a stationary source, and therefore does not have jurisdiction to address the emissions from the trucks operating on site. Likewise, TCEQ does not regulate noise (Issue No. 4). Concerns about the proposed activities' impacts on groundwater quality (Issue No.5) are not relevant and material to the Commission's decision on *this* standard permit. There may be other authorizations required related to water contamination. Therefore, this issue is not relevant and material.

H. Issues Recommended for Referral

OPIC recommends that the following disputed issues of fact be referred to the State Office of Administrative Hearings for a contested case hearing:

1. Will emissions from the proposed activities adversely affect the health conditions of affected persons?
2. Did the sign displayed at the site comply with sign-posting notice requirements?

I. Maximum Expected Duration of Hearing

Commission Rule 30 TEX. ADMIN. CODE § 55.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that no hearing shall be longer than one year from the first day of the preliminary hearing to the date the proposal for decision is issued. To assist the Commission in stating a date by which the judge is expected to issue a proposal for decision, and as required by 30 TEX. ADMIN. CODE § 55.209(d)(7), OPIC estimates that the maximum expected duration of a hearing on this application would be six months from the first date of the preliminary hearing until the proposal for decision is issued.

III. CONCLUSION

OPIC recommends referring the matter to SOAH for an evidentiary hearing on the issues recommended above. OPIC further recommends a hearing duration of six months.

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By 
Christina Mann
Assistant Public Interest Counsel
State Bar No. 24041388
(512)239.6363 PHONE
(512)239.6377 FAX

CERTIFICATE OF SERVICE

I hereby certify that on August 13, 2007 the original and eleven true and correct copies of the Office of the Public Interest Counsel's Response to Requests for Reconsideration and Response to Hearing Requests were 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, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail


Christina Mann

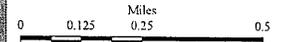
ATTACHMENT 1

Canyon Lake CBP



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

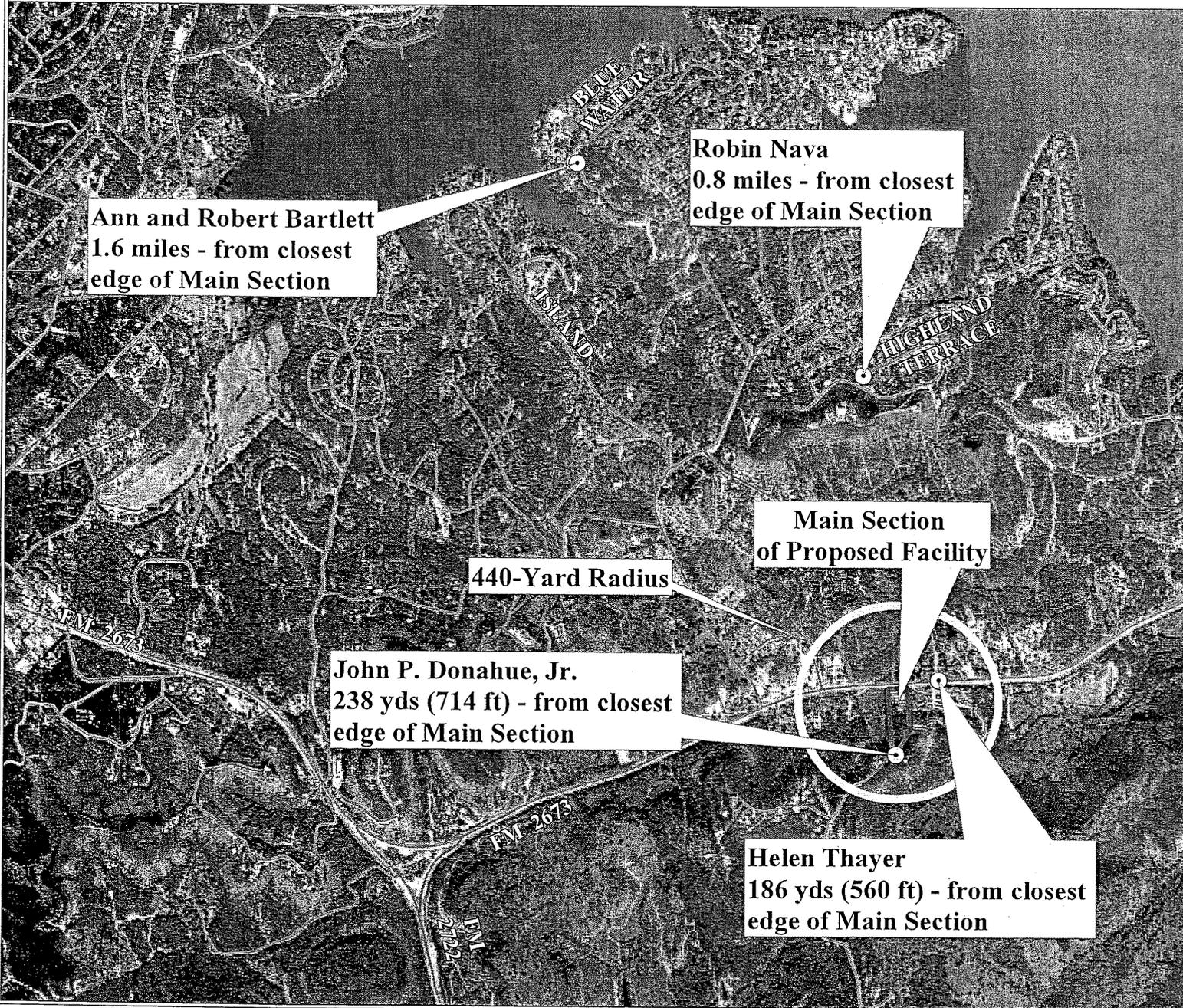
- Hearing Requestor Residence
- 440-Yard Radius Around Proposed Facility
- Proposed Facility Boundary

Sources: The DOQQ (Digital Orthophoto Quarter Quadrangle) 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.



Ann and Robert Bartlett
 1.6 miles - from closest edge of Main Section

Robin Nava
 0.8 miles - from closest edge of Main Section

John P. Donahue, Jr.
 238 yds (714 ft) - from closest edge of Main Section

Helen Thayer
 186 yds (560 ft) - from closest edge of Main Section

440-Yard Radius

Main Section of Proposed Facility

BLUE WATER

ISLAND

HIGHLAND TERRACE

FM 2673

FM 2673

FM 2722

MAILING LIST
CANYON LAKE READY MIX, INC.
TCEQ DOCKET NO. 2007-1000-AIR

FOR THE APPLICANT:

William P. Murphy, Owner
Canyon Lake Ready Mix, Inc.
1929 Canyon Bend
Canyon Lake, Texas 78133-5057
Tel: (210) 658-4947
Fax: (210) 658-0681

JD Kelley, General Manager
Murphy's Mobile Concrete
P.O. Box 8
Converse, Texas 78109-0008

FOR THE EXECUTIVE DIRECTOR:

Tim Eubank, Staff Attorney
Texas Commission on Environmental Quality
Environmental Law Division, MC-173
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-0600
Fax: (512) 239-0606

Michael D. Gould, Technical Staff
Texas Commission on Environmental Quality
Air Permits Division, MC-163
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-1097
Fax: (512) 239-1300

FOR OFFICE OF PUBLIC ASSISTANCE:

Bridget Bohac, Director
Texas Commission on Environmental Quality
Office of Public Assistance, MC-108
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-4000
Fax: (512) 239-4007

FOR ALTERNATIVE DISPUTE
RESOLUTION:

Kyle Lucas
Texas Commission on Environmental Quality
Alternative Dispute Resolution, MC-222
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-4010
Fax: (512) 239-4015

FOR THE CHIEF CLERK:

LaDonna Castañuela
Texas Commission on Environmental Quality
Office of Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-3300
Fax: (512) 239-3311

REQUESTERS:

Les Bacarisse
1460 OC Trout Dr.
Canyon Lake, Texas 78133-5542

Ana & Robert Bartlett
1041 Blue Water Drive
Canyon Lake, Texas 78133-5377

John P. Donahue
3590 Lariat Ridge
New Braunfels, Texas 78132-2039

Robin Nava
P.O. Box 1658
Canyon Lake, Texas 78133-0021

Helen Thayer
4915 FM 2673
Canyon Lake, Texas 78133-5170