

TCEQ DOCKET NO. 2015-0041-AIR

APPLICATION BY BARTOO READY MIX, LLC FOR AIR QUALITY STANDARD PERMIT FOR CONCRETE BATCH PLANT, REGISTRATION NO. 120783, MELISSA, COLLIN COUNTY	§ § § § § §	BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
---	----------------------------	---

**APPLICANT BARTOO READY MIX, LLC'S
RESPONSE TO REQUESTS FOR CONTESTED CASE HEARING**

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

COMES NOW Bartoo Ready Mix, LLC (“Bartoo”), Applicant in this proceeding, and herby submits this, its *Response to Requests for Contested Case Hearing*, arguing that (1) the requests for contested case hearing filed with the Texas Commission on Environmental Quality (“TCEQ” or the “Commission”) by Todd Carrico, Amy Burchett, John Burchett, Bobbye Fisher, and Michael Wyatt should be denied and (2) if the Commission determines that other hearing requesters are affected persons, then the issues identified by the Commission for contested case hearing should be limited as set out below, and would respectfully show the Honorable Commissioners as follows:

I. BACKGROUND

Bartoo has applied to TCEQ for Air Quality Standard Permit Registration No. 120783 (the “Permit”). When approved, the Permit will authorize the construction and operation of a permanent concrete batch plant to be located at 550 County Road 364, Melissa, Collin County, Texas. Bartoo’s application for the Permit was filed on June 16, 2014. The application was declared administratively complete on June 23, 2014. All appropriate notices have been published, including: (1) the Notice of Receipt of Intent to Obtain an Air Quality Permit

(“NORT”) on July 17, 2014, in the *Anna-Melissa Tribune*; and (2) the Notice of Application and Preliminary Decision for an Air Quality Permit (“NAPD”) on September 4, 2014, in the *Anna-Melissa Tribune*. A notice of public meeting was mailed to interested persons on September 23, 2014. A public meeting was held on October 9, 2014, in McKinney, Texas. The public comment period ended on October 9, 2014.

II. ARGUMENT AND AUTHORITIES

Pursuant to Commission rules, 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* if the request

30 TEX. ADMIN. CODE § 55.211(c) (emphasis added). 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 property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person

Id. § 55.203(a)&(c) (emphasis added).

In making the affected person determination, distance restrictions or other limitations imposed by law must be followed. *See id.* § 55.203(c)(2). The Texas 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 requirements 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. *See* TEX. HEALTH & SAFETY CODE §382.058(c). Section 382.058(c) 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.” *Id.* 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 the correspondence received by the Commission, it appears that requests for a contested case hearing were submitted by twenty-two individuals/couples, as shown on the Mailing List which accompanied the letter from TCEQ’s Office of the Chief Clerk setting this proceeding for the April 15 Commissioners’ Agenda.¹ Hearing requests were received from:

- (1) Vijaya K. Borra,
- (2) Doris Ann Brown,
- (3) Jason Broyles,
- (4) Amy and John Burchett,
- (5) Todd Carrico,
- (6) Cynthia Lee Davis,
- (7) Gary Davis,
- (8) Bobbye Fisher,
- (9) Deborah Georges,

¹ *See* Letter from Bridget C. Bohac, Chief Clerk, TCEQ, to Persons on the Attached Mailing List, re: Docket No. 2015-0041-AIR, Bartoo Ready Mix, LLC, Requests filed on Permit No. 120783 (Mar. 11. 2015).

- (10) Lisa Gay Hall,
- (11) Lisa Hall,
- (12) Jackie Lowrey,
- (13) Diane Miller,
- (14) Lisa J. Miller,
- (15) Matthew E. Nolan,
- (16) Deborah S. Norris,
- (17) Robert A. Norris,
- (18) Joanne G. Smith,
- (19) Anahi Villarreal,
- (20) Troy Walter,
- (21) Michael Wyatt, and
- (22) Bryan Zumbar.

A. The Requests for Contested Case Hearing Submitted by Todd Carrico, Amy Burchett, John Burchett, Bobbye Fisher, and Michael Wyatt Must Be Denied.

Attachment 1 is a map developed by the Information Resources Division of TCEQ at the request of TCEQ's Office of Legal Services. *See* Attachment 1. Attachment 1 identifies the location of Bartoo's proposed facility and identifies the 440-yard radius from the proposed plant site. Attachment 1 identifies the hearing requesters that are located within 440 yards of the proposed plant site. Hearing requesters shown on the map not located within the 440-yard radius include: (1) Todd Carrico, (2) Amy Burchett, (3) John Burchett, (4) Bobbye Fisher, and (5) Michael Wyatt. Because these five individuals do not reside in a permanent residence located within 440 yards of Bartoo's proposed plant, they do not qualify as affected persons pursuant to the statutory requirements of Texas Health & Safety Code Section 382.058(c), and thus their requests for contested case hearing must be denied.

B. Only Five Issues Raised by the Other Hearing Requesters 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 the other individuals and couples raise the following disputed issues:

- (1) Whether air emissions from Bartoo's proposed plant will adversely affect the hearing requesters' health.
- (2) Whether air emissions from Bartoo's proposed plant will adversely affect air quality in the area.
- (3) Whether dust discharged from the operation of Bartoo's proposed plant will result in nuisance conditions.
- (4) Whether air emissions from Bartoo's proposed plant will adversely affect domesticated animals and wildlife.
- (5) Whether operation of Bartoo's proposed plant will adversely affect quality of life as it relates to odor.
- (6) Whether the exhaust emissions from the trucks going to and from Bartoo's proposed plant will adversely affect air quality in the area.
- (7) Whether the increased truck traffic on County Road 364 will create nuisance or hazardous conditions.
- (8) Whether air emissions from Bartoo's proposed Plant will adversely affect the hearing requester's property value or ability to earn rental income from his/her property.
- (9) Whether air emissions from Bartoo's proposed plant will contaminate surface water in the area.

- (10) Whether operation of Bartoo's proposed plant will adversely affect quality of life as it relates to noise.
- (11) What Bartoo's source of water will be for the proposed plant.
- (12) Whether Bartoo's proposed plant will be located in a floodplain.

Only these twelve issues were raised by hearing requesters located within 440 yards of the proposed plant. All of these twelve issues were raised during the public comment period.

Only issues (1), (2), (3), (4), and (5), 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. *See* 30 TEX. ADMIN. CODE § 55.211(b)(3)(A). Issues (6) through (12) are not relevant and material to the Commission's decision on the pending application for an air quality permit.

Issue (6), whether the exhaust emissions from the trucks going to and from Bartoo's proposed plant will adversely affect air quality in the area, 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 emissions from trucks when determining whether to approve the pending application. Issue (7), whether the increased truck traffic on County Road 364 will create nuisance or hazardous conditions, is not relevant and material to this proceeding because the Commission does not have jurisdiction over traffic issues. Issue (8), whether air emissions from Bartoo's proposed plant will adversely affect the hearing requester's property value or ability to earn rental income from his/her property, is not relevant and material to this proceeding because the Commission does not have jurisdiction over questions of property value. Issue (9), whether air emissions from Bartoo's proposed plant will

contaminate surface water 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 impacts to water quality. Issue (10), whether operation of Bartoo'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. Issue (11), what Bartoo's source of water will be for the proposed plant, is not relevant and material to this proceeding because review of an air quality permit application does not include an assessment of water sources. Issue (12), whether Bartoo's proposed plant will be located in a floodplain, is not relevant and material to this proceeding because review of an air quality permit application does not include such an assessment.

Based on Commission rules, only the following five issues should be referred to contested case hearing:

- (1) Whether air emissions from Bartoo's proposed plant will adversely affect the hearing requesters' health.
- (2) Whether air emissions from Bartoo's proposed plant will adversely affect air quality in the area.
- (3) Whether dust discharged from the operation of Bartoo's proposed plant will result in nuisance conditions.
- (4) Whether air emissions from Bartoo's proposed plant will adversely affect domesticated animals and wildlife.
- (5) Whether operation of Bartoo's proposed plant will adversely affect quality of life as it relates to odor.

III. CONCLUSION AND PRAYER

For the foregoing reasons, Bartoo Ready Mix, LLC respectfully requests that the Honorable Commissioners of the Texas Commission on Environmental Quality:

- (A) Deny the requests for contested case hearing filed by (1) Todd Carrico, (2) Amy Burchett, (3) John Burchett, (4) Bobbye Fisher, and (5) Michael Wyatt because it is clear that they do not qualify pursuant to applicable law as affected persons because they do not reside in permanent residences within 440 yards of the site of the proposed plant.
- (B) If the Commission determines that other parties who filed requests for contested case hearing are affected persons, then refer the following issues for contested case hearing:
 - (1) Whether air emissions from Bartoo's proposed plant will adversely affect the hearing requesters' health.
 - (2) Whether air emissions from Bartoo's proposed plant will adversely affect air quality in the area.
 - (3) Whether dust discharged from the operation of Bartoo's proposed plant will result in nuisance conditions.
 - (4) Whether air emissions from Bartoo's proposed plant will adversely affect domesticated animals and wildlife.

- (5) Whether operation of Bartoo's proposed plant will adversely affect quality of life as it relates to odor.

Respectfully submitted,

BIRCH, BECKER & MOORMAN, LLP
4601 Spicewood Springs Road
Building 4, Suite 101
Austin, Texas 78759
Phone: (512) 349-9300
Fax: (512) 349-9303

By:



ERICH M. BIRCH
State Bar No. 02328395

ANGELA K. MOORMAN
State Bar No. 24007700

**ATTORNEYS FOR BARTOO READY MIX,
LLC**

CERTIFICATE OF SERVICE

I certify that the foregoing document has been filed with the Office of the Chief Clerk of the Texas Commission on Environmental Quality using TCEQ's eFiling system. 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:

<p>Ms. Bridget C. Bohac Office of the Chief Clerk (MC-105) Texas Commission on Environmental Quality P.O. Box 13087 Austin, Texas 78711-3087 (512) 239-3311 (Fax) http://www14.tceq.texas.gov/epic/eFiling/</p>	<p><i>For the Office of the Chief Clerk of the Texas Commission on Environmental Quality</i></p>
<p>Ms. Becky Petty Staff Attorney Environmental Law Division (MC-173) Texas Commission on Environmental Quality P.O. Box 13087 Austin, Texas 78711-3087 (512) 239-0606 (Fax)</p>	<p><i>For the Executive Director of the Texas Commission on Environmental Quality</i></p>
<p>Mr. Vic McWherter Public Interest Counsel (MC-103) Texas Commission on Environmental Quality P.O. Box 13087 Austin, Texas 78711-3087 (512) 239-6377 (Fax)</p>	<p><i>For the Office of Public Interest Counsel of the Texas Commission on Environmental Quality</i></p>
<p>Mr. Kyle Lucas Alternative Dispute Resolution (MC-222) Texas Commission on Environmental Quality P.O. Box 13087 Austin, Texas 78711-3087 (512) 239-4015 (Fax)</p>	<p><i>For Alternative Dispute Resolution, Texas Commission on Environmental Quality</i></p>
<p>Vijaya K. Borra 516 County Road 364 Melissa, Texas 75454-2004</p>	<p><i>Requester</i></p>

Mrs. Doris Ann Brown 636 County Road 364 Melissa, Texas 75454-2006	<i>Requester</i>
Mr. Jason Broyles 516 County Road 364 Melissa, Texas 75454-2004	<i>Requester</i>
Amy and John Burchett 40333 Highland Road Melissa, Texas 75454	<i>Requesters</i>
Todd Carrico 2 Shadywood Lane Melissa, Texas 75454-2121	<i>Requester</i>
Mrs. Cynthia Lee Davis 685 County Road 364 Melissa, Texas 75454-2007	<i>Requester</i>
Garry Davis 685 County Road 364 Melissa, Texas 75454-2007	<i>Requester</i>
Bobbye Fisher 4115 Highland Road Melissa, Texas 75454-2225	<i>Requester</i>
Deborah Georges 588 County Road 364 Melissa, Texas 75454-2004	<i>Requester</i>
Mrs. Lisa Gay Hall 559 County Road 364 Melissa, Texas 75454-2005	<i>Requester</i>
Lisa Hall 2600 Kennedy Drive Melissa, Texas 75454-2497	<i>Requester</i>
Jackie Lowrey 685 County Road 364 Melissa, Texas 75454-2007	<i>Requester</i>

Diane Miller P.O. Box 126 Melissa, Texas 75454-0126	<i>Requester</i>
Lisa J. Miller 559 County Road 364 Melissa, Texas 75454-2005	<i>Requester</i>
Mr. Matthew E. Nolan 559 County Road 364 Melissa, Texas 75454-2005	<i>Requester</i>
Deborah S. Norris P.O. Box 381 Melissa, Texas 75454-0381	<i>Requester</i>
Mr. Robert A. Norris P.O. Box 381 Melissa, Texas 75454-0381	<i>Requester</i>
Ms. Joanne G. Smith 571 County Road 364 Melissa, Texas 75454-2005	<i>Requester</i>
Mrs. Anahi Villarreal 720 County Road 364 Melissa, Texas 75454-2008	<i>Requester</i>
Mr. Troy Walter 571 County Road 364 Melissa, Texas 75454-2005	<i>Requester</i>
Michael Wyatt 27 Meadowcreek Drive Melissa, Texas 75454-8907	<i>Requester</i>
Bryan Zumbar 741 County Road 364 Melissa, Texas 75454-2009	<i>Requester</i>

On this the 23rd day of March, 2015,



ERICH M. BIRCH

Bartoo Ready Mix, LLC, Permit No. 120783 Hearing Requestors

Attachment I

Map Requested by TCEQ Office of Legal Services
for Commissioners' Agenda



Protecting Texas by
Reducing and
Preventing Pollution

Texas Commission on Environmental Quality
GIS Team (Mail Code 197)
P.O. Box 13087
Austin, Texas 78711-3087
Date: 3/23/2015

Proposed Facility

Requestors

Key Name

- 1 VIJAY K BORRA
- 2 DORIS ANN BROWN
- 3 JASON BROYLES
- 4 AMY BURCHETT
- 5 JOHN BURCHETT
- 6 TODD CARRICO
- 7 CYNTHIA LEE DAVIS
- 8 GARRY DAVIS
- 9 BOBBYE FISHER
- 10 DEBORAH GEORGES
- 11 NICK GEORGES
- 12 LISA GAY HALL
- 13 JACKIE LOWREY
- 14 LISA J. MILLER
- 15 MATTHEW E. NOLAN
- 16 DEBORAH NORRIS
- 17 ROBERT NORRIS
- 18 JOANNE G. SMITH
- 19 ANAHI VILLARREAL
- 20 TROY WALTER
- 21 MICHAEL WYATT
- 22 BRYAN ZUMBAR

Source: The location of the facility was provided by the TCEQ Office of Legal Services (OLS). OLS obtained the site location information from the applicant and the requestor information from the requestor. The background imagery of this map is from the current Environmental Systems Research Institute (ESRI) map service, as of the date of this map.

This map was generated by the Information Resources Division of the Texas Commission on Environmental Quality. This product is for informational purposes and may not have been prepared for or be suitable for legal, engineering, or surveying purposes. It does not represent an on-the-ground survey and represents only the approximate relative location of property boundaries. For more information concerning this map, contact the Information Resource Division at (512) 239-0800.