

Brooke T. Paup, *Chairwoman*
Bobby Janecka, *Commissioner*
Catarina R. Gonzales, *Commissioner*
Kelly Keel, *Executive Director*



Garrett T. Arthur, *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

April 22, 2025

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

RE: **IN THE MATTER OF THE BY BARTOO READY MIX, LLC FOR
CONCRETE BATCH PLANT REGISTRATION NO. 176138
TCEQ DOCKET NO. 2025-0287-AIR**

Dear Ms. Gharis:

Enclosed for filing is the Office of Public Interest Counsel's Reply to Executive Director's Amended Response to Requests for Hearing in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script that reads "Jennifer Jamison".

Jennifer Jamison, Attorney
Assistant Public Interest Counsel

cc: Mailing List

TCEQ DOCKET NO. 2025-0287-AIR

**APPLICATION BY
BARTOO READY MIX, LLC
CONCRETE BATCH PLANT
NEVADA, COLLIN COUNTY**

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**BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S REPLY TO EXECUTIVE
DIRECTOR'S AMENDED RESPONSE
TO REQUESTS FOR HEARING**

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

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) files this Reply to Executive Director's Amended Response to Requests for Hearing in the above-referenced matter and respectfully shows the following.

I. INTRODUCTION

A. Summary of Position

Before the Commission is the application of Bartoo Ready Mix, LLC (Bartoo or Applicant) for a new Standard Permit registration under the Texas Clean Air Act (TCAA), Texas Health & Safety Code (THSC) § 382.05195. Given the proximity of requestor Laura Vargas' property to the proposed facility and the discrepancies between maps created by Applicant and the ED, OPIC respectfully recommends the Commission refer requestor Laura Vargas for an affectedness determination at the State Office of Administrative Hearings. OPIC also

respectfully recommends denial of the request for reconsideration submitted by Heather Craddock.

B. Background

Applicant seeks Registration No. 176138 to authorize construction of a new concrete batch plant that may emit air contaminants. The proposed facility would be located at 8929 County Road 591, Nevada, Collin County. Contaminants authorized under this permit include aggregate, cement, road dust, and particulate matter with diameters of 10 microns or less and 2.5 microns or less.

C. Procedural History

TCEQ received the application on April 20, 2024, and declared it administratively complete on April 23, 2024. The Consolidated Notice of Receipt of Application and Intent to Obtain Permit and Notice of Application and Preliminary Decision for this permit application was published in English on June 5, 2024, in *Wylie News*, and in Spanish on June 4, 2024 in *La Prensa Comunidad*. A public meeting was held on September 12, 2024 in Nevada, Texas. The public comment period ended on September 16, 2024. The Executive Director's (ED) Response to Comment (RTC) was mailed on December 11, 2024, and the deadline to submit a hearing request or request for reconsideration of the ED's decision on this application was January 10, 2025. Original responses to requests for hearing and requests for reconsideration were due on March 10, 2025.¹ On March 27, 2025, the ED filed a Motion to Continue the application and hearing requests

¹ OPIC notes that Applicant's response was filed late on March 24, 2025, which was the date specified for replies, and not responses.

on the application citing receipt of “new information” which prompted the ED to reconsider the recommendation made in its Response to Hearing Request. The deadline to reply to the ED’s Amended Response to Hearing Requests is April 22, 2025.

II. APPLICABLE LAW

A. Hearing Requests

This application was filed on or after September 1, 2015, and is therefore subject to the procedural rules adopted pursuant to Senate Bill 709. Tex. S.B. 709, 84th Leg., R.S. (2015).

Under Title 30, Texas Administrative Code (TAC) § 55.201(c), a hearing request by an affected person must be in writing, must be timely filed, may not be based on an issue raised solely in a public comment which has been withdrawn, and, for applications filed on or after September 1, 2015, must be based only on the affected person’s timely comments.

Section 55.201(d) states that a hearing request must substantially comply with the following:

- (1) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request;
- (2) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requestor believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the general public;
- (3) request a contested case hearing;

- (4) list all relevant and material disputed issues of fact that were raised by the requestor during the public comment period and that are the basis of the hearing request. To facilitate the Commission's determination of the number and scope of issues to be referred to hearing, the requestor should, to the extent possible, specify any of the ED's responses to the requestor's comments that the requestor disputes, the factual basis of the dispute, and list any disputed issues of law; and
- (5) provide any other information specified in the public notice of application.

For concrete batch plant registrations under the Standard Permit, THSC § 382.058(c) limits those who may be affected persons to "only those persons actually residing in a permanent residence within 440 yards of the proposed plant." 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. An interest common to members of the general public does not qualify as a personal justiciable interest. Section 55.203(c) provides relevant factors to be considered in determining whether a person is affected. These factors include:

- (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, safety, and use of property of the person.
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person.

- (6) for a hearing request on an application filed on or after September 1, 2015, whether the requestor timely submitted comments on the application that were not withdrawn; and
- (7) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

Under § 55.203(d), to determine whether a person is an affected person for the purpose of granting a hearing request for an application filed on or after September 1, 2015, the Commission may also consider the following:

- (1) the merits of the underlying application and supporting documentation in the administrative record, including whether the application meets the requirements for permit issuance;
- (2) the analysis and opinions of the ED; and
- (3) any other expert reports, affidavits, opinions, or data submitted by the ED, the applicant, or hearing requestor.

For an application filed on or after September 1, 2015, § 55.211(c)(2)(A)(ii) provides that a hearing request made by an affected person shall be granted if the request raises disputed issues of fact that were raised by the affected person during the comment period, that were not withdrawn by filing a withdrawal letter with the Chief Clerk prior to the filing of the ED's RTC, and that are relevant and material to the Commission's decision on the application.

Under § 55.211(c)(2)(B) -(D), the hearing request, to be granted, must also be timely filed with the Chief Clerk, pursuant to a right to hearing authorized by law, and comply with the requirements of § 55.201.

B. Requests for Reconsideration

Any person may file a request for reconsideration of the ED's decision under 30 (TAC) § 55.201(e). The request must be in writing and filed with the

Chief Clerk no later than 30 days after the Chief Clerk mails the ED's decision and RTC. The request must expressly state that the person is requesting reconsideration of the ED's decision and give reasons why the decision should be reconsidered.

III. ANALYSIS OF HEARING REQUESTS

A. Whether the requestors are affected persons

Texas Health and Safety Code Section 382.058(c) limits affected person status to “only those persons actually residing in a permanent residence within 440 yards of the proposed plant” authorized by a Standard Permit registration under THSC § 382.05195. Accordingly, OPIC’s analysis is restricted by the distance limitation imposed by statute.

Laura Vargas

The Commission received timely combined comments and a hearing request from Lara Vargas on June 18, 2024. In her request, Ms. Vargas expresses concern regarding potential health implications that emissions from the facility may have on her and her five children. She also states that her children currently suffer from breathing problems. In addition, Ms. Vargas expresses concern about impacts to the environment.

OPIC notes that the original map provided by ED staff reflected that the address of the permanent residence provided by Ms. Vargas was within 440 yards of Bartoo Ready Mix’s proposed facility and associated emission points. However, after reviewing Applicant’s response to hearing requests, the ED filed a Motion to Continue proceedings on this application and subsequently amended

their recommendation from granting Ms. Vargas' hearing request to denying the request -- based upon maps attached to Applicant's response. It is OPIC's understanding that the maps included in Applicant's response brief were also part of Bartoo's original application. In its original response to hearing requests, Applicant argued that the original maps prepared by ED staff erroneously measured the distance from the plant's perimeter to Ms. Vargas' property line rather than from the nearest emission point. OPIC agrees with Applicant's contention that relevant case law requires that distance measurements for standard permit concrete batch plants should be taken from the closest emission point. That said, the difference between the two maps provided in the present case puts Ms. Vargas' residence at exactly 440 yards from an emission point in the first ED maps versus approximately 583.39 yards from the nearest emission point on the updated ED maps.

When examining each of the maps used for distance determinations, OPIC notes that the ED's maps state the site location information was obtained from the Applicant. The maps further state the following disclaimer:

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.

By contrast, for concrete batch plant registrations, it must be emphasized that the 440-yard statutory distance limitation on persons who may be affected is a prescriptive and precise legal standard.

OPIC acknowledges that the maps provided by ED staff are useful in most hearing request matters where a general idea of a requestor's location relative to a regulated activity is a factor to consider in determining affected person status. These maps are also helpful in concrete batch plant matters where requestors are located at distances that are obviously far beyond the statutory distance limitation. However, for a batch plant where at least one requestor is indisputably very close, such as the present case, a requestor should not be excluded without absolute certainty that they reside beyond 440 yards from where emission sources may be located. Given the uncertainty regarding the exact location of emission sources, the proximity of Ms. Vargas' permanent residence, and the severity of the health concerns raised by Ms. Vargas, OPIC recommends this matter be referred to SOAH for an affectedness determination. If Laura Vargas is within 440 yards, OPIC finds that she would otherwise qualify as an affected person.

Alison Greene & Jane Ridgway

For OPIC's analysis of requestors Alison Greene and Jane Ridgway, please refer to our initial brief in this matter.

B. Which issues raised in the hearing request are disputed

Laura Vargas raised the following disputed issue:

1. Whether the proposed facility would be adequately protective of air quality and human health.

C. Whether the dispute involves questions of fact or of law

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. The issue raised in the request are issues of fact.

D. Whether the issues were raised during the public comment period

The Issue in Section III.B. was specifically raised by the requestor during the public comment period.

E. Whether the hearing request is based on issues raised solely in a withdrawn public comment

No public comments were withdrawn in this matter. Therefore, the hearing request is not based on issues raised in withdrawn public comments.

F. Whether the issues are relevant and material to the decision on the application

The hearing request raises an issue that are relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4)(B) and 55.211(c)(2)(A)(ii). To refer an issue to the State Office of Administrative Hearings (SOAH), the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny the permit. Relevant and material issues are those governed by the substantive law under which the permit is to be issued. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-51 (1986).

Human Health and Safety

Under the Texas Clean Air Act, the Commission may issue this permit only if it finds no indication that the emissions from the facility will contravene the intent of the Texas Clean Air Act, including protection of the public's health and physical property. TEX. HEALTH & SAFETY CODE § 382.0518(b)(2). Further, the

purpose of the Texas Clean Air Act is to safeguard the state's air resources from pollution by controlling or abating air pollution and emissions of air contaminants, consistent with the protection of public health, general welfare, and physical property. TEX. HEALTH & SAFETY CODE § 382.002(a). Accordingly, human health and safety and environmental concerns are relevant and material to the Commission's decision on this application.

IV. REQUEST FOR RECONSIDERATION

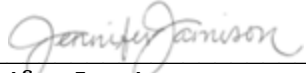
Heather Craddock submitted a timely request for reconsideration that articulated concerns about potential effects on human health. While OPIC notes that the concerns expressed are relevant and material to the Commission's decision on this application, a record establishing the evidentiary basis for reconsidering the ED's decision based on these issues would be needed to recommend that the request for reconsideration be granted. As no such record exists yet, OPIC cannot recommend the request be granted at this time.

V. CONCLUSION

OPIC respectfully recommends the Commission refer Laura Vargas to the State Office of Administrative Hearings for an affectedness determination. Should Ms. Vargas be found to be an affected person, OPIC further recommends the Commission refer the issue specified in section III B. to SOAH for a 180-day contested case hearing. Finally, OPIC recommends that the request for reconsideration be denied.

Respectfully submitted,

Garrett T. Arthur
Public Interest Counsel

By 
Jennifer Jamison
Assistant Public Interest Counsel
State Bar No. 24108979
P.O. Box 13087, MC 103
Austin, Texas 78711-3087
(512) 239-4104

CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2025 the original and true and correct copies of the Office of Public Interest Counsel's Response to Requests for Hearing was 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, electronic mail, or by deposit in the U.S. Mail.


Jennifer Jamison

MAILING LIST
BARTOO READY MIX, LLC
TCEQ DOCKET NO. 2025-0287-AIR

FOR THE APPLICANT
via electronic mail:

Chapman A. Bauerlein
Saunders Walsh & Beard
Craig Ranch Professional Plaza
6850 TPC Drive, Suite 210
McKinney, Texas 75070
chapman@saunderswalsh.com

Cary Bartoo, Owner
Bartoo Ready Mix, LLC
500 West University Drive, Suite 101
McKinney, Texas 75069
cary@bartooreadymix.com

Josh Butler
Elm Creek Environmental, LLC
611 South Highway 78, Suite 132
Wylie, Texas 75098
josh@elmcreekenv.com

FOR THE EXECUTIVE DIRECTOR
via electronic mail:

Abigail Adkins, 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
abigail.adkins@tceq.texas.gov

Alexander Hilla, Technical Staff
Texas Commission on Environmental
Quality
Air Permits Division MC-163
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-0157 Fax: 512/239-1400
alexander.hilla@tceq.texas.gov

Ryan Vise, Director
Texas Commission on Environmental
Quality
External Relations Division
Public Education Program MC-108
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-4000 Fax: 512/239-5678
pep@tceq.texas.gov

FOR ALTERNATIVE DISPUTE
RESOLUTION
via electronic mail:

Kyle Lucas, Attorney
Texas Commission on Environmental
Quality
Alternative Dispute Resolution MC-222
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-0687 Fax: 512/239-4015
kyle.lucas@tceq.texas.gov

FOR THE CHIEF CLERK
via eFiling:

Docket Clerk
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
<https://www14.tceq.texas.gov/epic/eFiling/>

REQUESTER(S):

See attached list.

REQUESTER(S)

Heather Craddock
8460 County Road 592
Nevada, TX 75173-7210

Alison Greene
302 Kerens St
Nevada, TX 75173-7116

Lisa Griffin
Lewis Living Trust
2360 County Road 722
Mckinney, TX 75069-1002

Jane E Ridgway
5754 Fm 6
Josephine, TX 75189-4000

Jane E Ridgway
Po Box 127
Caddo Mills, TX 75135-0127

Laura Vargas
9224 County Road 592
Nevada, TX 75173-7082