

TCEQ AIR QUALITY PERMIT NUMBER 86860 / PSDTX1188  
TCEQ DOCKET NO. 2010-0280-AIR

APPLICATION BY	§	BEFORE THE
	§	
TPCO AMERICA CORPORATION	§	TEXAS COMMISSION ON
	§	
GREGORY, SAN PATRICIO COUNTY,	§	
TEXAS	§	ENVIRONMENTAL QUALITY

**EXECUTIVE DIRECTOR'S RESPONSE TO HEARING REQUESTS**

The Executive Director ("ED") of the Texas Commission on Environmental Quality ("Commission" or "TCEQ") files this response ("Response") to the requests for a contested case hearing submitted by persons listed herein. The Texas Clean Air Act ("TCAA") § 382.056(n) requires the Commission to consider hearing requests in accordance with the procedures provided in TEX. WATER CODE § 5.556.<sup>1</sup> This statute is implemented through the rules in 30 TEX. ADMIN. CODE Chapter 55, Subchapter F.

A map showing the location of the site for the proposed facility is included with this response and has been provided to all persons on the attached mailing list. A current compliance history report, technical review summary, and draft permit prepared by the ED's staff have been filed with the TCEQ's Office of Chief Clerk for the Commission's consideration. The ED's Response to Public Comments ("RTC"), which was mailed by the chief clerk to all persons on the mailing list, is on file with the chief clerk for the Commission's consideration.

**I. Application Request and Background Information**

TPCO America Corporation ("Applicant") has applied to the TCEQ for issuance of State Air Quality Permit No. 86860 and Prevention of Significant Deterioration Air Quality Permit PSDTX1188, which would authorize construction of a pipe manufacturing minimill. The proposed plant, when authorized, is to be located east of the intersection of Texas State Highway 35 and Texas State Highway 361 near Gregory, San Patricio County, Texas. Contaminants authorized under this permit include carbon monoxide, nitrogen oxides, sulfur dioxide, volatile organic compounds, particulate matter (including particulate matter less than 10 microns in diameter), lead, cadmium, chromium, mercury, manganese, nickel, silicon and zinc. As of March 15, 2010, Applicant is not delinquent on any administrative penalty payments to the TCEQ. The TCEQ Enforcement Database was searched and no enforcement activities were found that are inconsistent with the compliance history.

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<sup>1</sup> Statutes cited in this response may be viewed online at [www.capitol.state.tx.us/statutes/statutes.html](http://www.capitol.state.tx.us/statutes/statutes.html). Relevant statutes are found primarily in the Texas Health and Safety Code and the Texas Water Code. The rules in the Texas Administrative Code may be viewed online at [www.sos.state.tx.us/tac/index.shtml](http://www.sos.state.tx.us/tac/index.shtml), or follow the "Rules, Policy & Legislation" link on the TCEQ website at [www.tceq.state.tx.us](http://www.tceq.state.tx.us).

The permit application was received on November 17, 2008 and declared administratively complete on December 3, 2008. The Notice of Receipt and Intent to Obtain an Air Quality Permit (public notice) for this permit application was published on January 1, 2009 and January 8, 2009 in *The Portland News*. The Amended Notice of Application and Preliminary Decision for an Air Quality Permit (second public notice) for this permit application was published on October 29, 2009 in *The Portland News*. The public comment period ended on November 30, 2009. The ED's RTC was mailed on January 21, 2010 to all interested persons, including those who asked to be placed on the mailing list for this application and those who submitted a comment or request for a contested case hearing. The cover letter to the RTC included information about filing a response to hearing requests.<sup>2</sup> The letter also explained that hearing requesters should specify any of the ED's responses to comments they dispute and the factual basis of the dispute, in addition to listing any disputed issues of law or policy.

The TCEQ received timely hearing requests during the public comment period that were not withdrawn from the following persons: Carolyn Moon; J.M. "Mickey" Breaux, Director, District 13 of the United Steelworkers ("USW") union, on behalf of the USW; and John Williams, Researcher, Williams Research, on behalf of an unidentified group of concerned citizens.

## II. Applicable Law

The Commission must assess the timeliness and form of the hearing requests. The form requirements are set forth in 30 TEX. ADMIN. CODE § 55.201(d):

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. If the request is made by a group or association, the request must identify one person by name, address, daytime telephone number, and, where possible, fax number, who shall be responsible for receiving all official communications and documents for the group;
- (2) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requester's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requester 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;

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<sup>2</sup> See TCEQ rules at Chapter 55, Subchapter F of Title 30 of the Texas Administrative Code. Procedural rules for public input to the permit process are found primarily in Chapters 39, 50, 55 and 80 of Title 30 of the Code.

**EXECUTIVE DIRECTOR'S RESPONSE TO HEARING REQUESTS**

TPCO America Corp., Permit No. 86860 / PSDTX1188

Page 3 of 7

- (4) list all relevant and material disputed issues of fact that were raised 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 requester should, to the extent possible, specify any of the executive director's responses to comments that the requester disputes and the factual basis of the dispute and list any disputed issues of law or policy; and
- (5) provide any other information specified in the public notice of application.

The next necessary determination is whether the requests were filed by "affected persons" as defined by TEX. WATER CODE § 5.115 and implemented in Commission rule 30 TEX. ADMIN. CODE § 55.203. Under 30 TEX. ADMIN. CODE § 55.203, 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. Local governments with authority under state law over issues raised by the application receive affected person status under 30 TEX. ADMIN. CODE § 55.203(b).

In determining whether a person is affected, 30 TEX. ADMIN. CODE § 55.203(c) requires that all factors 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; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

In addition to the requirements noted above regarding affected person status, in accordance with 30 TEX. ADMIN. CODE § 55.205(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 members of the group or association would otherwise have standing to request a hearing in their own right;
- (2) the interests the group or association seeks to protect are germane to the organization's purpose; and
- (3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

## EXECUTIVE DIRECTOR'S RESPONSE TO HEARING REQUESTS

TPCO America Corp., Permit No. 86860 / PSDTX1188

Page 4 of 7

If the Commission determines a hearing request is timely and fulfills the requirements for proper form and the hearing requester is an affected person, the Commission must apply a three-part test to the issues raised in the matter to determine if any of the issues should be referred to the State Office of Administrative Hearings for a contested case hearing. The three-part test in 30 TEX. ADMIN. CODE § 50.115(c) is as follows:

- (1) The issue must involve a disputed question of fact;
- (2) The issue must have been raised during the public comment period; and
- (3) The issue must be relevant and material to the decision on the application.

The law applicable to the proposed facility may generally be summarized as follows. A person who owns or operates a facility or facilities that will emit air contaminants is required to obtain authorization from the Commission prior to the construction and operation of the facility or facilities.<sup>3</sup> Thus, the location and operation of the proposed facility requires authorization under the TCAA. Permit conditions of general applicability must be in rules adopted by the Commission.<sup>4</sup> Those rules are found in 30 TEX. ADMIN. CODE Chapter 116. In addition, a person is prohibited from emitting air contaminants or performing any activity that violates the TCAA or any Commission rule or order or that causes or contributes to air pollution.<sup>5</sup> The relevant rules regarding air emissions are found in 30 TEX. ADMIN. CODE Chapters 101 and 111 through 118. In addition, the Commission has the authority to establish and enforce permit conditions consistent with this chapter.<sup>6</sup> The materials accompanying this response list and reference permit conditions and operational requirements and limitations applicable to this proposed facility.

### III. Analysis of Hearing Requests

#### A. Were the requests for a contested case hearing in this matter timely and in proper form?

All hearing requests were submitted during the public comment period. Pursuant to 30 TEX. ADMIN. CODE § 55.205(a)(1), in order to request a hearing, a group or association must demonstrate that one or more of its members independently has standing to request a hearing under 30 TEX. ADMIN. CODE § 55.201. The ED has determined that none of the hearing requests substantially comply with the requirements of 30 TEX. ADMIN. CODE § 55.201(d).

Carolyn Moon submitted a timely hearing request and provided a valid street address for her residence; however, Ms. Moon did not identify a justicable interest and did not indicate how she would be affected by the proposed facility in a manner not common to members of the general public, as required by 30 TEX. ADMIN. CODE § 55.201(d)(2).

<sup>3</sup> TEX. HEALTH & SAFETY CODE § 382.0518.

<sup>4</sup> *Id.* at § 382.0513.

<sup>5</sup> *Id.* at § 382.085(a)-(b).

<sup>6</sup> *Id.* at § 382.0513.

J.M. "Mickey" Breaux submitted a timely hearing request on behalf of the USW. The USW did not provide an explanation of any member's specific location and distance from the facility, did not identify any member's justiciable interest in this matter and did not indicate how any member would be affected by the proposed facility in a manner not common to members of the general public, as required by 30 TEX. ADMIN. CODE § 55.210(d)(2).

John Williams submitted a timely hearing request on behalf of an unidentified group of concerned citizens. This request failed to identify any specific member of this group, failed to provide an explanation of any member's specific location and distance from the facility, failed to identify any member's justiciable interest in this matter, and failed to indicate how any member would be affected facility in a manner not common to members of the general public, as required by 30 TEX. ADMIN. CODE § 55.210(d)(2).

The ED addressed all public comments in this matter by providing responses in the RTC. The cover letter from the Office of the Chief Clerk attached to the RTC stated that requestors should, to the extent possible, specify any of the ED's responses in the RTC that the requestors dispute, state the factual basis of the dispute and list any disputed issues of law or policy.<sup>7</sup> No letters were submitted to the TCEQ after the RTC was mailed on January 21, 2010. In the absence of a response from any of the hearing requestors or their representatives within the 30-day period after the was mailed, the ED cannot determine or speculate whether the hearing requestors continue to dispute issues of fact or whether there are any outstanding issues of law or policy. The ED nevertheless has evaluated the merits of the requests before action is taken regarding this application.

B. Are individuals who requested a contested case hearing in this matter affected persons?

None of the requestors have demonstrated that they are "affected persons" as defined in 30 TEX. ADMIN. CODE § 55.203. The threshold test of affected persons status is whether the requestor has a personal justiciable interest affected by the application, and this interest is different from the general public.<sup>8</sup> Distance from the proposed facility is one indicator as to whether there is a likely impact of the regulated activity on a person's interests, such as the health and safety of the person and on the use of personal property. The ED considers persons residing more than one mile of the proposed facility to be unlikely to be impacted differently from the general public.

As noted in Section III.A., the ED has determined that all hearing requestors failed to identify a justiciable interest. Additionally, the addresses provided for Carolyn Moon, J.M. "Mickey" Breaux (as an individual) and John Williams (as an individual) are located greater than 15 miles from the proposed facility. Because the requestors reside more than one mile from the proposed facility, they are not likely to be impacted differently than other members of the general public.

<sup>7</sup> See 30 TEX. ADMIN. CODE § 55.201(d)(4).

<sup>8</sup> *Id.* at § 55.203(a).

C. Do those groups who requested a hearing meet the group or associational standing requirements?

As discussed in Section III.A., the ED has determined that neither the USW nor the “concerned citizens” represented by John Williams have shown that one or more members of either group would have standing to request a hearing, as required by 30 TEX. ADMIN. CODE § 55.205(a)(1). Neither group identified any individual member or provided an explanation of any member’s location and proximity to the proposed facility. Further, neither group has demonstrated that the interest it seeks to protect is germane to the organization’s purposes, as required by 30 TEX. ADMIN. CODE § 55.205(a)(2). Specifically, the “concerned citizens” group has not stated any organizational purpose, and the USW is primarily a labor union, not an environmental organization (and its purported membership in the “Blue/Green Alliance” with Sierra Club does not alter the USW’s purpose).

The ED has determined that no group meets the requirements for associational standing at this time. Pursuant to 30 TEX. ADMIN. CODE § 55.205(b), the USW and/or the “concerned citizens” may provide an explanation how it meets the requirements of 30 TEX. ADMIN. CODE § 55.205(a).

D. Which issues in this matter should be referred to SOAH for hearing?

If the Commission determines any of the hearing requests in this matter are timely and in proper form, and some or all of the hearing requestors are affected persons, the Commission must apply the three-part test discussed in Section II to the issues raised in this matter to determine if any of the issues should be referred to SOAH for a contested case hearing. The three-part test asks whether the issues involve disputed questions of fact, whether the issues were raised during the public comment period and whether the issues are relevant and material to the decision on the permit application.

None of the persons requesting a hearing on this permit are affected persons, and none of the organizations requesting a hearing on this permit meet the requirements for organizational standing; therefore, there are no hearing requests that meet the necessary requirements for the Commission to consider issues for referral to SOAH.

**IV. Conclusion**

The ED has determined that none of the hearing requestors meet the standing requirements enunciated in the Commission's rules. Accordingly, the ED respectfully recommends the Commission deny the hearing requests.

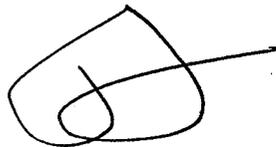
Respectfully submitted,

Texas Commission on Environmental Quality

Mark Vickery P.G.  
Executive Director

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Environmental Law Division



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Tommy Tucker Henson, Staff Attorney  
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Representing the Executive Director of the Texas  
Commission on Environmental Quality

**TPCO America Corporation**  
**Permit Nos. 86860 and PSDTX1188**  
**Map Requested by TCEQ Office of Legal Services**



Texas Commission on Environmental Quality  
 GIS Team (Mail Code 197)  
 P.O. Box 13087  
 Austin, Texas 78711-3087  
 March 11, 2010

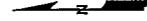


Projection: Texas Statewide Mapping System  
 (TSM5)  
 Scale 1:20,000

Legend  
 ○ Facility

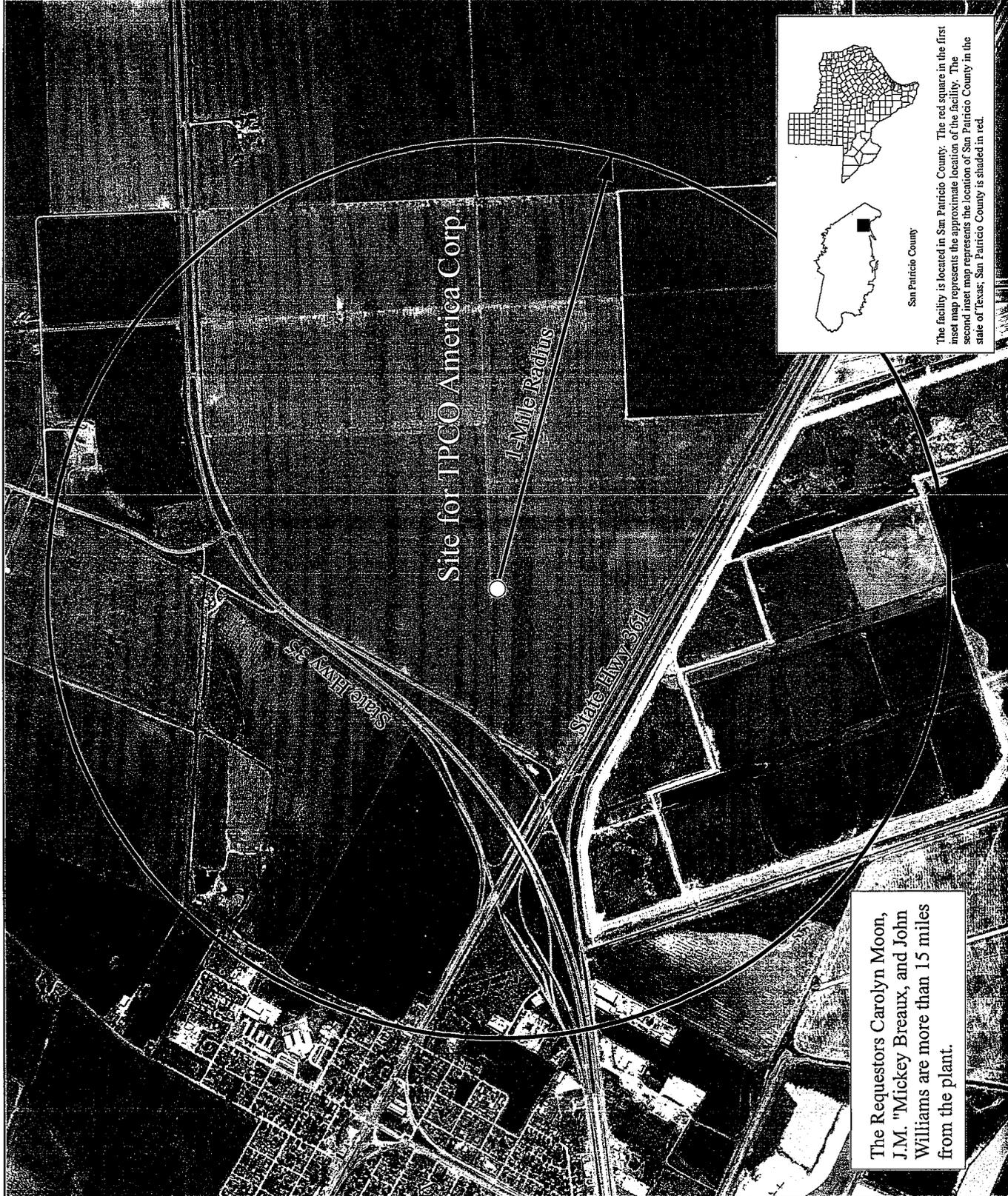
Source: The location of the facility was provided by the TCEQ Office of Legal Services (OLS). OLS obtained the site location information from the applicant and the requestor information from the 1992 TIGER/Line Data (1:100,000). The background of this map is a one-half meter photograph from the 2008 Texas Orthoimagery Project.

This map depicts the following:  
 (1) The approximate location of the facility. This is labeled "Site for TPCO America Corp".  
 (2) Circle and arrow depicting 1-mile radius. This is labeled "1-Mile Radius".



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 Resource Division at (512) 239-0800.

MapDrawn: CBE-xxxxx



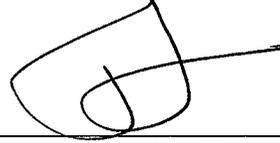
The Requestors Carolyn Moon, J.M. "Mickey" Breaux, and John Williams are more than 15 miles from the plant.

San Patricio County

The facility is located in San Patricio County. The red square in the first inset map represents the approximate location of the facility. The second inset map represents the location of San Patricio County in the state of Texas; San Patricio County is shaded in red.

**CERTIFICATE OF SERVICE**

On the 22nd day of March 2010, a true and correct copy of the foregoing instrument was served on all persons on the attached mailing list by the undersigned via deposit into the U.S. Mail, inter-agency mail, facsimile, or hand delivery.

A handwritten signature in black ink, consisting of a large, stylized capital 'T' with a horizontal line extending to the right, and a smaller capital 'H' nested within the vertical stroke of the 'T'.

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Tommy Tucker Henson II

**MAILING LIST**  
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**DOCKET NO. 2010-0280-AIR; PERMIT NO. 86860, PSDTX1188**

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